



**NATURAL
JUSTICE**

LAWYERS FOR COMMUNITIES AND THE ENVIRONMENT

COMMUNITY PROTOCOLS IN AFRICA:

LESSONS LEARNED FOR ABS IMPLEMENTATION

THE **ABS**
CAPACITY
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RENFORCEMENT
DES CAPACITES
POUR L'**APA**

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ABBREVIATIONS

ABS	Access and Benefit-sharing
(a)TK	(Associated) Traditional Knowledge
BCP	Biocultural Community Protocol
CNA	Competent National Authority
CBD	Convention on Biological Diversity
CBO	Community Based Organization
CIKOD	Centre for Indigenous Knowledge and Organizational Development, Ghana
CESAREN	Cercle de Sauvegarde des Ressources Naturelles, Benin
DEA	Department of Environmental Affairs, South Africa
EWC	Endorois Welfare Council, Kenya
(F)PIC	(Free), Prior and Informed Consent
GR	Genetic Resources
IBR	Indigenous Biological Resources
I(P)LC	Indigenous (Peoples) and Local Communities
IREMPT	Institute for Experimentation in Medicine and Traditional Pharmacopoeia
IRDNC	Integrated Rural Development and Nature Conservation, Namibia
KWS	Kenya Wildlife Service
MAT	Mutually Agreed Terms
MET	Ministry for Environment and Tourism, Namibia
MOU	Memorandum of Understanding
NGO	Non-Governmental Organization
NKSC	National Khoi & San Council
PAGE	Programme d'Appui à la Gestion de l'Environnement, Madagascar
SARC	South African Rooibos Council
UN	United Nations
VOI	Vondron'olona Ifotony



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INTRODUCTION: COMMUNITY PROTOCOLS AND ABS



The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity is the first legally binding international framework that establishes a set of rights of indigenous peoples and local communities (IPLCs) over their genetic resources and traditional knowledge. Specifically, it requires parties to:

- Take measures to ensure the prior informed consent (PIC) or approval and involvement of indigenous and local communities (ILCs) for access to traditional knowledge (Article 7), and for access to genetic resources where they have the established right to grant access (Article 6.2)
- Set out criteria and/or processes for obtaining PIC or approval and involvement of ILCs for access to genetic resources (Article 6.3f)
- Take into consideration ILCs' customary laws, community protocols and procedures in implementing their obligations (Article 12.1)
- Support ILCs in the development of community protocols, of minimum requirements for mutually agreed terms (MAT) and of model contractual clauses for benefit-sharing (Article 12.3)

The Nagoya Protocol therefore holds significant potential for the valorization and protection of traditional knowledge, the generation of local benefits, and the recognition of the role of IPLCs as custodians of biodiversity, including through their customary laws and processes. However, the fulfilment of this promise will depend largely on how the Nagoya Protocol is implemented through national ABS frameworks, and through local processes for PIC and MAT. Experiences with past ABS cases involving communities reveal a number of challenges, for example:

- Indigenous peoples and local communities are often not well informed regarding their rights under national and international law.

- It is not always clear to outside actors (or sometimes even to the whole community) who should legitimately give PIC, or negotiate MAT, on behalf of a community or group of knowledge holders. This bears the risk for conflict within and between communities; and for the appropriation of resources and knowledge without proper consent.
- Customary laws and decision-making processes usually exist only orally, and are therefore not easily accessible or understandable to actors outside of the community.
- There are significant power imbalances in negotiations between communities and users of genetic resources and traditional knowledge.
- Benefit-sharing modalities within a community can also generate conflicts if they are not discussed in advance of ABS negotiations.
- From a community perspective, it is a challenge having to deal with separate policy frameworks regarding for instance traditional knowledge, genetic resources, conservation or land rights, since the issues are inextricably linked at the local level.



What is a Community Protocol?

The Mo'otz Kuxtal Voluntary Guidelines, adopted by the 13th Conference of the Parties of the Convention on Biological Diversity (CBD)¹, present community protocols as follows:

"Community protocols is a term that covers a broad array of expressions, articulations, rules and practices generated by communities to set out how they expect other stakeholders to engage with them. They may reference customary as well as national or international laws to affirm their rights to be approached according to a certain set of standards.

Articulating information, relevant factors, and details of customary laws and traditional authorities helps other stakeholders to better understand the community's values and customary laws.

Community protocols provide communities an opportunity to focus on their development aspirations vis-a-vis their rights and to articulate, for themselves and for users their understanding of their bio-cultural heritage and therefore on what basis they will engage with a variety of stakeholders.

By considering the interconnections of their land rights, current socio-economic situation, environmental concerns, customary laws and traditional knowledge, communities are better placed to determine for themselves how to negotiate with a variety of actors."

In the context of ABS, the terms "community protocols", "biocultural community protocols" and "biocultural protocols" are used interchangeably by different communities and organizations.



While community protocols are not a panacea, they can contribute to meeting some of the challenges of ABS implementation. Experiences with community protocols, in the context of ABS and beyond, show that the approach brings a number of advantages:

- The protocols are developed from the community perspective. This means that the community can develop its own perspective on issues such as the valorization and protection of its resources and traditional knowledge, rather than simply responding to a framework imposed from the outside.
- They define rules for access to genetic resources (GR) and associated traditional knowledge (aTK), for the granting of PIC and for benefit-sharing through a community dialogue. This can help to avoid risks such as intra-community conflict or elite capture that arise when the PIC processes only involve individuals or a sub-set of community members.
- They provide clarity and a measure of legal or political certainty for users of resources and traditional knowledge (for example bioprospectors, biotrade companies or research institutes), and help to build dialogues and long-term partnerships between users and communities.
- They are an interface between customary laws and community governance structures on one side, and national and international frameworks on the other.
- They help to define "the community" in the specific context – be it the inhabitants of a certain territory, several communities who provide the same resource or share common knowledge, or a smaller group with specific knowledge or cultural ties to an area.
- The community protocol process includes a key element of legal empowerment, where the community is informed about, and discusses their rights under national

and international law, and builds their capacity in applying these laws.

- The discussion process also triggers a community dialogue on cultural values, rights and obligations regarding the community's natural resources and traditional knowledge. This has positive impacts on the conservation of these resources and the revitalization of the community's knowledge.

Community protocols were introduced into the Nagoya Protocol to address some of the challenges mentioned above. The African Group of negotiators was instrumental in achieving this inclusion, understanding the importance of such approaches for African indigenous peoples and local communities. In the years since the adoption of the Nagoya Protocol in 2010, Natural Justice, with the support of the ABS Capacity Development Initiative and local partners, has been supporting a number of communities on the African continent to develop their community protocols. This publication seeks to draw lessons from some of these processes.



¹See CBD/COP/DEC/XIII/18, 17 December 2016

PROTOCOL OF THE DEGBE AGUINNINNOU COMMUNITY, BENIN



Community and context

The community Degbe Aguininnou, who live in the village of Agbonan in the municipality of Bonou, located in the South-West of Benin, are the historical custodians of the sacred forests Gbêvozoun (133 ha) and Gnahouizon (18 ha), as well as a sacred pond named Houèdagba. The forest Gbêvozoun houses the deity “Gbêvo”, the protecting deity of the community and cornerstone of all its cultural ceremonies. The sacred forests are very rich in biodiversity and represent a natural and cultural heritage of great value. Up to 75% of the plant species found within the village territory only exist in the sacred forests and their buffer zones. A significant number of these plants are used in traditional medicine and rituals by members of the community. A survey of traditional medicinal knowledge listed 61 diseases that are being treated with these plants, including malaria, stomach ache, anemia, ulcers and diabetes. The sacred forest also serves as an important refuge for wildlife.

The Degbe Aguininnou community is culturally distinct from the other communities around the sacred forests because they historically relocated from another area in Benin. They speak the mahi language and observe the traditional vodoun religion. Cultural taboos prohibit the consumption of several wildlife species, such as boas, doves and bats. Their main economic activities are agriculture and fishing.

Despite their importance for biodiversity and for the livelihoods and wellbeing of the community, the two forests, like most sacred forests in Benin, are not considered a priority by the forest administration. In 2012, Benin passed an Interministerial Order (No. 0121) integrating sacred forests into the national system of protected areas, which grants the resident communities and their traditional authorities the right to manage these forests. However, the implementation of this innovative legislation is unfortunately lagging. This lack of protection makes the forests vulnerable to threats such as agricultural encroachment. The threats to their sacred forests are a source of concern for the community because of the



Déyétongo Bodjrenou,
community facilitator

Through our protocol, we want to invite others to use this tool that our governments are extending to us, to reaffirm our leadership over our territories, our resources and our knowledge, to develop our potential and to finally share benefits in order to support the development of our communities. It is in our interest to take it and use it to establish a development based on our own values, our own knowledge.

long-term impacts that this degradation will have on their livelihoods, traditional knowledge, and very identity. At the same time, the traditional knowledge of the community associated with the genetic resources in the forests is not being sufficiently valorized.

National ABS framework

The National Guidelines for Access and Benefit-sharing (2016) define biocultural community protocols (BCPs) as “tools that establish a set of fundamental principles for the participation of local communities in the ABS process and describe how to acquire or use traditional knowledge and genetic resources that are held by local communities. These protocols set out procedures that uphold customary rights and emphasize the obligation of

reciprocity, involving all parties concerned.” Article 8 specifies that “The positive cultural rules of local communities or biocultural community protocols have to be respected”.

The National Guidelines were being drafted at the same time as the community of Degbe Aguininnou developed its community protocol. The two processes informed each other and the development of this pilot community protocol supported the inclusion of references to community protocols and community rules in the Guidelines.

Objectives and content of the protocol

The main objective of the community protocol is to contribute to the sustainable management of the two sacred forests and the sacred pond by affirming and recognizing the rights of the community and their history of custodianship of their sacred natural sites.

The protocol includes rules and guidance aiming at preserving the community’s culture and environment, and to secure economic and social benefits from any activities related to their natural resources – in particular the genetic resources of the sacred forests, agricultural genetic resources and the associated traditional knowledge.



Houekpoeha Hounton, initiated priestess of the sacred forest

Because it was used as a pilot site, the process has created visibility for our community. Our natural resources that are important to our community and to our traditional institutions are benefiting from the recognition by authorities at various levels in the country. We participate in fairs and workshops where we sell our products for income and we also benefit by making known what we do to other people. From now on, we have the support of the authorities of our country to enforce our protocol. Above all, we improved our knowledge of the resources of our territory.

Our practices, our ritual ceremonies formerly forbidden and abandoned are taken up again. The rules, the procedures of access to our forest are more and more respected by the members of our community and the anarchic use of our resources is reduced. From now on, the municipality and the police help us to respect the rules and the procedures of access to our forest.

The contents of the Degbe Aguininnou community protocol include:

- A description of the community, its identity, origin and characteristics
- The natural resources of the community, including a description and mapping of the sacred forest, a community biodiversity register (including both wild and domesticated / cultivated species), natural resource management practices and challenges
- Socio-cultural information including festivals, rituals, and sacred sites related to the sacred forests
- The institutional system including social structures of natural resource management, internal decision-making systems and their relation with external systems
- Legal information including customary rules and procedures for natural resource management, laws and government policies and conditions for engagement with external actors
- Economic information including the economic potential of the sacred forests, their genetic resources and associated traditional knowledge, opportunities for biotrade and bioprospecting
- Rights and demands of the community, including:
 - the legal recognition of their sacred natural sites and their management structures
 - the granting of land for a botanical garden
 - the respect of community clauses regarding the full participation of the community in decisions affecting their sacred forests or other natural resources
 - the respect of community rules for accessing genetic resources and associated traditional knowledge (free, prior and informed consent - FPIC) and for the negotiation of MAT, as spelled out in Standard Community Contractual Clauses
 - the relationship with the Competent National Authorities for ABS

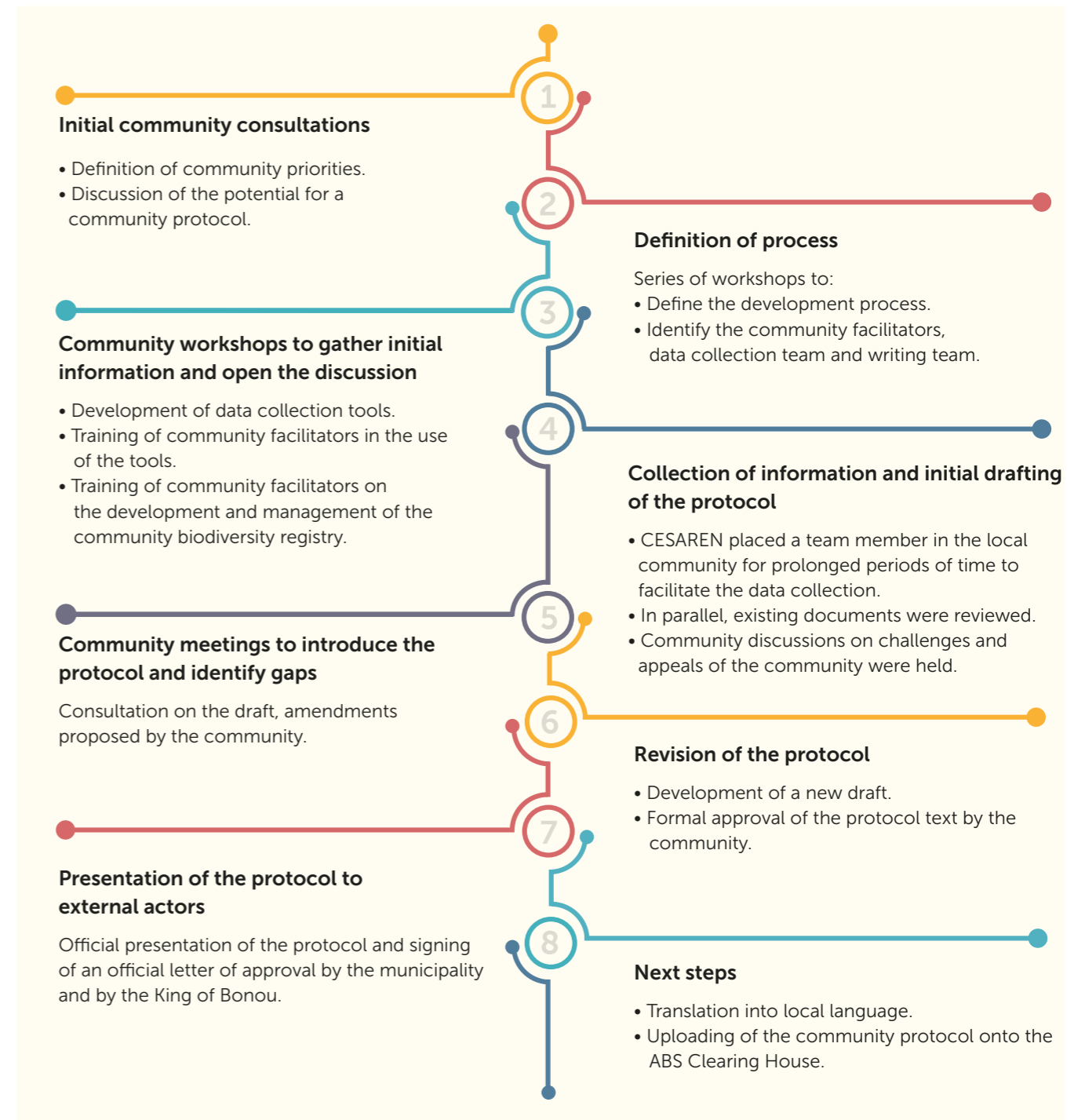




Process

The process for this community protocol was facilitated by the beninese NGO CESAREN (Cercle pour la Sauvegarde des Ressources Naturelles), with punctual support from Natural Justice. The

protocol was developed through a very in-depth process, seeking to capture as much information as possible about the community's resources, culture and customary governance. It included the following steps:



In parallel with this community process, information and capacity-building activities were being carried out by CESAREN at the national level for the benefit of the actors likely to facilitate the recognition and the integration of community protocols into the

legal framework of Benin: Members of the national ABS committee, policy makers, the scientific community and civil society organizations.

Outcomes

The documentation of traditional knowledge led to the identification of 61 traditional medicinal recipes based on the genetic resources in the sacred forest and the associated traditional knowledge of healers of the community. Three recipes were selected by IREMPT, a national research institution, for further research and utilization. A further five GR and aTK were identified as presenting opportunities or interests for the development of new medicines.

While the initial focus of the BCP process was on the sacred forests and its resources, the community later decided to broaden the scope of its protocol to include the diversity of agricultural genetic resources maintained and used by its local farmers. This increased awareness within the community of the value of their local agrobiodiversity, and broadened the range of community members actively participating in the process.

As part of the process, the community also developed a community biodiversity registry, and a community PIC document to serve as a model for agreements between the community and users of GR and aTK.

A community mapping of the sacred forests led to a better understanding of the boundaries and zoning of the forest and community lands, and the municipality donated 2ha of land to the community for a botanical garden of plants threatened with extinction.

Challenges and how they were addressed

Definition of the community:

The concept of community protocols is new in Benin. In the past, the concerns of local communities were taken into account through instruments such as participatory management plans, where the "local community" is defined as all residents that impact a resource in one way or

another. This definition has not always ensured sustainable management because it could cover people from outside of the original community that have no traditional links to the land and resources, including opportunistic groups that would leave as soon as the resources ran out. For the community protocol, there needed to be an emphasis on rights and responsibilities and on clear community rules for external actors who want to engage with the community and its territory. In the context of the sacred forests, there are groups of people who share resources and knowledge and who have common values, a common ethnicity, a joint cause and collective decision-making systems, since they are the ones who originally designated the sacred forests by housing their divinities there.

Lack of literacy:

The low level of literacy (either in local language or French as the official working language of the country) was a real obstacle to the process, and will remain so for the successful implementation of the community protocol once it is adopted. To cope with this during the development process, it was necessary to:

- Translate all information gathering tools and harmonize the understanding of terms, which took a long time and delayed the process;
- Follow the rhythm of understanding of the community and respond as soon as possible to information requests, since community members cannot take notes and have to work from memory.

For the adoption of the community protocol, a translation into local language will be necessary, and the facilitating organization is considering an additional voice recording of the text.

His Majesty Dégnon, King of Bonou

We had several reasons to develop our community protocol. Our ancestors settled in this area when there was only the forest. At that time, they established rules and prohibitions on certain areas and natural resources that all members of the community respected. These spaces were regularly animated by rituals, worship of the ancestors, and our parents told us tales every evening whose lessons invited us to fear the spirits who are in these places and we were even afraid to go to these places. All the decisions in the community were made in consultation and under the authority of our Dah, who was respected by all. For a long time, [the community] did not have many difficulties to meet their survival needs, because they lived near [the forest] and lived on the opportunities offered by the environment.

But during the revolutionary period, our parents were banned from all practices, ritual ceremonies and worship in these areas. Under pressure from the government, many of our dignitaries fled, we began to gradually abandon our rules, our prohibitions, our procedures on these places. Some of our brothers converted to Christianity and many of our members kept their attachment to Vodoun but did not have the freedom to worship. Many of our lands were sold off by the authorities for the production of oil palm and the extension of agricultural activities. It was thanks to the courage and resistance of our ancestors that our parents managed to save the forest of



Gbévo. But (...) the forest undergoes daily pressures that tend to reduce its surface and destroy the rich biological diversity that it holds. In spite of the efforts of awareness raising initiated by NGOs, we have difficulties to enforce respect for the rules and traditional prohibitions established around this forest. So when we were informed and convinced by the NGO CESAREN of the capacity of the community protocol to respond to our situation, we made the decision to elaborate our protocol.



It was thanks to the courage and resistance of our ancestors that our parents managed to save the forest of Gbévo.

PROTOCOL OF THE ENDOROIS, KENYA



Community and context

The Endorois are an indigenous minority community living in the Lake Bogoria area of Baringo County, as well as partly in Nakuru and Laikipia Counties in the Rift Valley Province of Kenya. The Endorois Community have been living around Lake Bogoria for almost 300 years and regard Mochongoi Forest and Lake Bogoria as sacred ground due to the use of these locations for key cultural and religious ceremonies. The Endorois identify themselves as both an indigenous and minority community in Kenya. They have been formally recognized as such by both the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights, and by the UN Special Rapporteur on Indigenous Rights. They are currently estimated to be about 60,000 in population, yet have never been recognized by the government as a distinct ethnic community. In 1973, the Government of Kenya forcibly evicted the community to create the Lake Bogoria Game Reserve without any prior consultation, thereby compromising their customary rights. Thereafter, the Endorois were not involved or consulted in the management and operation of the reserve. They did not receive any share in the benefits emanating from the reserve, nor were they compensated for the loss of access to grazing land for their livestock, which interfered with their pastoralist livelihoods. The community members were arrested for allegedly trespassing when they visited the reserve for cultural and religious purposes, as a result of which their spiritual and cultural survival, tied to their ancestral lands, was threatened.

In 2010, the African Commission on Human and Peoples' Rights made a determination which recognized the rights of the Endorois community over their ancestral land, and thereby allowed them unrestricted access to the reserve to graze their cattle as well as pursue their cultural and religious practices. Establishment of these rights gave them standing to get a share in any benefits arising from indigenous knowledge and resources

²Endorois Community Integrated Management Plan for Lake Bogoria Game Reserve, Kenya (draft)

originating from their ancestral lands, including benefits derived from the reserve as a tourism destination.

Earlier on in 2007, Novozymes, a Danish company, and the Kenya Wildlife Service (the Kenyan ABS focal point for wildlife areas) had entered into a five-year partnership on biodiversity research and development. This involved the collection, identification and characterization of micro-organisms from Kenya's national parks, including Lake Bogoria Reserve, and subsequent commercial use of microbial diversity. This agreement stemmed from pre-CBD collections that Novozyme received that led to the development of a commercial product called Pulpzyme. At the time of access, there was no ABS framework in place, but KWS convinced the company to enter into an agreement and to pay royalties to the community. The first benefits to the community from this agreement amounted to about 2,000,000 Kenyan Shillings, with which the community was able



Benjamin Chepkwony, Youth representative

In my view, the BCP will provide a guideline on how we can protect our environment and traditions according to custom or how the people used to do it in the past. (...) Particularly as a young person, I can speak about how traditions can help us to [protect] areas that our ancestors had set aside as important places, such as mountains and rivers that not everyone could access, places that were important for prayers and other things.

to pay school fees and to develop community projects. The company later pulled out and the only continuing benefits are the royalties, which are quite inconsistent.

More recently, further proposals to exploit the use of microbial enzymes from Lake Bogoria were submitted by a number of research institutions. These requests for access necessitate a negotiation with the community, as stakeholders to the reserve, on the sharing of benefits from these resources. For instance, an access permit was granted to a group of research institutions including Nairobi University, Moi University, Jomo Kenyatta University, Rivatex Company, KEPHIS and KIRDI by the County Government of Baringo regarding the “development of microbial biotechnology industry from Kenya’s Soda Lakes”.

In 2015, the Kenya Wildlife Service (KWS) set out to review the integrated management plan and develop a new ecosystem management plan for the Lake Bogoria Game Reserve. The project aims to involve the Endorois and to integrate aspects of access and benefit-sharing.

National ABS framework

The Constitution of Kenya, 2010, obliges the State to “protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities.” The State is also obliged to “ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits”, which includes genetic resources.

The two key statutes and regulations in Kenya are the Environmental Management and Coordination Act, Cap, 387, 1999 (EMCA) and the Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006 (ABS Regulations). There are many statutes and institutions regulating matters of ABS and the country is currently in the process of updating and harmonizing its legal and institutional frameworks.

The ABS Regulations do not elaborate to any larger extent on the rights and the role of local communities in ABS issues. However, they do provide that communities act as signatories of the PIC and MAT.

The Wildlife Conservation and Management Act, 2013, reacts to the constitutional provisions and details the procedures for any bioprospecting activity that involves Kenyan wildlife. The Kenya Wildlife Service (KWS) is requested to ensure that the interests of communities are respected and that these communities are involved in the bioprospecting activities within their territories. The community will be party to the respective ABS documents and contracts.

Kenya’s Protection of Traditional Knowledge and Cultural Expressions Act, 2016, complements these provisions. The Act includes criteria for the protection of TK and specifies the rights of its holders, reiterating the community rights stipulated in the ABS framework. Among others, the Act recognizes communities’ right to prior informed consent, their rights to govern the use of their TK according to their own rules, as well as their right to benefit-sharing including from, but not limited to, TK associated with genetic resources.

Objectives and content of the protocol

The Endorois community protocol is still at the draft stage. The community hopes that the protocol will assist them in the protection of their natural resources to ensure that future generations are able to benefit from their use. The protocol articulates community-determined values, procedures and priorities and clarifies the decision-making process of the Endorois for prior informed consent, in the context of upcoming ABS agreements and beyond.

Importantly, the community protocol will serve as an integral part of the Integrated Management Plan of Lake Bogoria Game Reserve, which will give it a level of official recognition. It is also expected that in the future, it will serve as the basis for the



participation of the Endorois in other government policy, planning and decision-making processes.

The current draft of the community protocol contains, among others, the following elements:

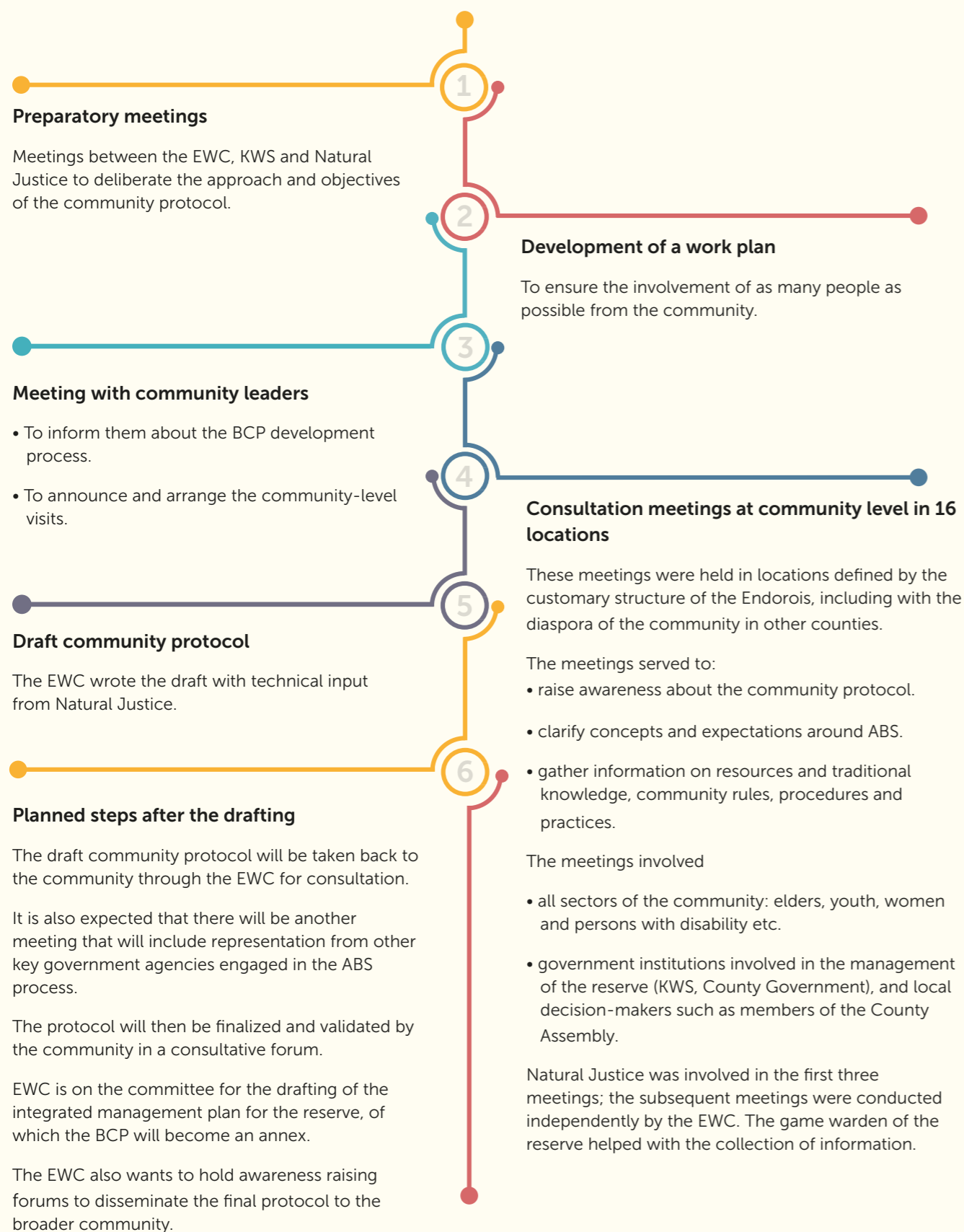
- Who the Endorois people are, and their connection with their lands around Lake Bogoria;
- Information on sacred areas;
- Their traditional knowledge;
- Their cultural practices;
- Their social organisation;
- Decision-making processes and rules regarding natural resource use;
- Community principles for:
 - Free, prior and informed consent (FPIC)
 - Access and benefit-sharing
 - Participation and representation
- Legal frameworks supporting these principles;
- Challenges and community concerns;
- Annexes with information on resources, customary use and natural resource management rules.

Process

The current governance arrangement of the Endorois involves a legally established community-based organization called the Endorois Welfare Council (EWC). The EWC was established in 1996 and officially registered in May 2007. It was founded by senior members of the Endorois indigenous minority community to pursue, among other objectives, restitution of Endorois land which was seized to create the present Lake Bogoria Game Reserve.



Natural Justice was approached in 2016 to support the Endorois community by providing technical advice for the development of their community protocol. The process is led by the EWC and included the following steps:



We realized that we do not have a policy or a law to govern the community, and that led to the development of the BCP.

**Wilson Kipsang Kipkazi,
Executive Director of EWC**

Our struggle started in 1973, when the community lost their assets when the land was turned into a national reserve. Until then it was a community cultural site with natural sites and traditional areas of prayer and areas for collecting herbs, it was a public site. In 1973, the government decided to take away the resources from us, because they realized that it was a very valuable site, and converted it into a tourist destination, a national reserve. So the community was evicted from the lake region. They were promised to be compensated, that they would be sharing the benefits from activities, and that their children would get employment opportunities. Under these conditions, the community agreed to the formation of the reserve. Unfortunately, the agreement was not respected, the government did not compensate us, they did not give us land. They only gave us a small amount of money. This was a conservation area and as a community we grew up knowing of taboos, restricted areas, curses – and these were some of the ways that the community was conserving its resources. If you are going to collect herbs, there was a way of doing it, including talking to the tree, and there are those trees that bleed when you cut them so there were ways that were used to appease them. So these were some things that we grew up seeing as a community. We knew that some medicine plants should not be cut

down because it was taboo. We also do not kill wildlife. These are some of the things that made us conservationists.

We learned that around 1984 there was a university that came to do research and found that there was [a bacterium producing] an enzyme in Lake Bogoria, which lived in warm water – the [bacterium] was called “extremophile”, which means that it survives in extreme temperatures. And enzymes were extracted and are now used to stonewash jeans. Now a company has been making millions of dollars, we learned about that through the internet and through their statements of accounts. And we realized that using this community protocol would help us to capture resources from getting lost. One [smaller] company that benefited from the enzymes brought us some royalties in 2014, which we should also have gotten from the larger company.

We realized that we do not have a policy or a law to govern the community, and that led to the development of the BCP. We believe it will help us, in fact we have signed a PIC with [a group of] learning institutions. So those are some of the results we are seeing, it will help us in terms of recognition, benefit-sharing, management and governance and resources – because we are part of Lake Bogoria [Reserve] through the management plan which we have developed with the government.

Outcomes

The Endorois community protocol is still being finalized. However, community members feel that they have already benefited from the process: they are more aware of their rights, including to benefit-sharing, and improved the level of organization in the community. The discussions also strengthened their conservation efforts and the traditional restrictions regarding resource use. The process opened opportunities for involvement and leadership for youth and women in the community. It also brought the national and county government and the community together, resulting in close collaboration regarding ABS issues.

Challenges and how they were addressed

Defining the community:

A key issue when developing a community protocol is to define who the community is, and who will be part of the community protocol process and implementation. The Endorois consider that they have the fundamental right to determine their own membership; for this reason, they have developed an "Endorois Community Membership Code". This code defines the criteria under which a person qualifies as a member of the Endorois community, including rules of descent.

Challenges to carry out extensive community consultations:

Long distances were required to travel to reach consultation venue, but the team that was collecting views and knowledge tried to reach the communities as much as possible. Time constraints also limited the extent of each community's contribution and it was hoped that in the future, there would be a little more notice and more time allocated to engage with the community. There is no proper infrastructure and road network in some parts of the community, and this limited the accessibility to the consultative

forums for some community members. Older generations were particularly disadvantaged, which posed a challenge as they are the ones who are the traditional knowledge holders. Security in some parts of the community is also an obstacle and may have limited the consultations and information gathering exercises.

Broader range of issues and concerns at community level:

The community protocol was developed in the specific context of including ABS into the management of the Lake Bogoria Reserve, and to define community governance and procedures for future ABS agreements. However, during consultations, the community brought up a number of other concerns regarding the management of natural resources, and their relationship with the Reserve. These include issues such as human-wildlife conflict, cattle rustling or infrastructure. The EWC and the community will have to strike a balance between a comprehensive reflection of the community's challenge, and the agreement on a particular focus (in this case ABS) to increase the effectiveness of the protocol process.

Skepticism in the face of a new concept and approach:

The community protocol was something new and the community members needed to know why it was important before they could begin their deliberations. It was also based on complicated international and national laws, which took time to understand. Some community members were skeptical about the process based on their earlier experiences. They would ask if someone wanted to take their land from them, like it had been done with the Lake Bogoria Reserve. A lot of care had to be taken when communicating the process and handling community dynamics.

Language barrier:

this also an issue but it helped to have educated members of the community present, who assisted the others in understanding the discussions.



Christine Chebii, EWC

The BCP has helped us as a community to protect traditional knowledge, because you find that most of the people did not know how visitors should approach access and use of their resources, or how to protect them for future generations. It assisted us so much in giving the people the information on how to protect their knowledge.

We found that the elders gave us a lot of information, some of which we had no knowledge about. So we also learned a lot. When we were on the ground, we found that most of the women are custodians of the traditional medicine, and they were the ones giving us information about the importance of plants, because they are knowledgeable. What I learned during our meetings was that we have a culture where sometimes men and women cannot interact together, so you have to interview them separately, so that they can give you some information in detail about the plants.

We are losing traditional knowledge in terms of the passing of knowledge from the elders who have passed away. The BCP has created a lot of expectations. After the information they gave us, there should be a booklet and a way that it can be used even by future generations.



We are losing traditional knowledge in terms of the passing of knowledge from the elders who have passed away. The BCP has created a lot of expectations

PROTOCOL OF THE COMMUNITIES OF MARIARANO AND BETSAKO, MADAGASCAR



Community and context

The local communities of Mariarano, a municipality in the Boeny region of Madagascar, manage one of the most biodiverse forests in the North-West of the country. The dry tropical forests of this area harbor a large number of endemic plant species, which are of high interest to scientists and commercial users, both in Madagascar and abroad. The communities' livelihoods are based on agriculture, fisheries, animal husbandry and use of forest products. Local traditions and customs still play an important role in the lives of the communities, as do the spiritual relationships with their environment. The "fady," or cultural prohibitions, are still strongly respected.

One of the plants endemic to the region is *Cinnamosma fragrans*, also known as mandravarotra or motrobe in the local language. This plant is very popular in traditional and modern medicine for its multiple therapeutic virtues. In Malagasy, mandravarotra means: "keeps evil away". All components of this plant can be used for their medicinal properties (stem, leaves, bark, fruit and roots). In traditional medicine, it is mainly used against poison, in tonics and in case of difficult deliveries. Research has confirmed the properties of the plant as: antiviral, expectorant, broad-spectrum antibacterial, antifungal and neurotonic. The *Cinnamosma* plants found in the Mariarano area stand out for their exceptional quality compared to plants sourced from other parts of the island. Every year, the local communities of the area supply *Cinnamosma* leaves to a number of different users, mostly biotrade operators who transform them into essential oil, both for the domestic and for the international market, especially in Europe.

Seven villages from the area joined forces to develop their community protocol. Six of them are located in the Mariarano municipality, the seventh is a village in the neighboring municipality of Betsako that co-manages the same forest with one of the Mariarano villages. The communities agreed

to this union because all seven villages manage and supply the same resource (*Cinnamosma fragrans*) to external actors, share the same set of challenges regarding the regulation of access and sustainable use of their resources, and share the same cultural roots and similar livelihoods. They therefore aspired to develop a common decision-making process around these issues. However, inspired by the process, several neighboring villages have asked to be included and it is foreseen that the community protocol will eventually be extended to the entire area of the two municipalities, Mariarano and Betsako.

The communities of Mariarano proposed a Malagasy translation of "community protocol": Tari-dàlana sy Vina lombonana (TVI), literally translated as "Guide and Common Vision". This translation came out of a lengthy consultation, and was chosen based on the communities' understanding of the purpose of community protocols in their context: "Tari-dàlana" or "guide" because the community protocol gives guidance on what to do, and "Vina lombonana" or "Common Vision" because it conveys messages from communities that speak with one voice and who want to have the same vision of things.

National ABS framework

Decree N ° 2017 - 066 of 31/01/2017 Regulating Access and Benefit-sharing Arising from the Use of Genetic Resources calls for the respect of customary law and opens the possibility of basing consent on community protocols. It prescribes that "for local natural resource managers and holders of associated traditional knowledge, where appropriate, consent is formalized as a convention. This convention is established in accordance with the rules of customary law, traditional values and practices prescribed in the locality and must not be contrary to the law and the regulations in force. Assuming that traditional values and practices are already documented by a tool developed by the communities, this tool must be consulted and integrated into the convention."

Objectives and content of the protocol

The protocol was developed to address the twin challenges of illegal access to the *Cinnamosma* plant and unsustainable harvesting practices, and to prepare the community in the case of future ABS negotiations. In principle, operators accessing biological resources have to request a permit with the regional forest service, which involves consultation with the local communities. However, in the past, communities were often not consulted at all, or not adequately. They also observed that certain users were operating without the appropriate permits. Moreover, the communities felt that they were at a disadvantage when negotiating prices and benefits with the users. The aim of the protocol was therefore to jointly hold the users of the communities' resources accountable and to demand responsible and ethical practices. To this end, the communities defined a joint decision-making process between the seven villages. From now on, users requesting access to the resource will have to follow the same procedures and rules, regardless of which village they plan to collect the resource in.

Elements of the Mariarano community protocol

- Decision-making structures and processes at village level and between the seven villages
- The process that commercial users, operators, researchers and others must follow to access the genetic resources and traditional knowledge of the community
- Benefit-sharing terms and conditions for purchase of plant material
- Traditional rules and values of the community
- Conflict resolution process

- Commitments of the communities to conserve their natural resources, especially the *Cinnamosma fragrans* plants
- The rights of local communities over the natural resources and associated traditional knowledge under international, national and regional law and regulations

Process

The Mariarano community protocol was initiated and proposed to the communities by the GIZ "Programme d'Appui à la Gestion de l'Environnement" (PAGE) as a pilot to test the community protocol approach in Madagascar. The process was conducted by a committee of community representatives that included village authorities, representatives of natural resource management committees and traditional knowledge holders. It was supported and facilitated by a joint team from GIZ PAGE and Natural Justice. The regional forestry administration, which is in charge of permitting and monitoring the use of plant resources, was informed at every stage of the process. The process took a little over two years in total.



Amisy, member of the VOI of Tsianikira

Previously, there was a process established by the Administration. It's not that this process was bad, but there were different improvements that needed to be made. We have always felt the existence of pressure from higher authorities. We are often the least informed about the activities of the operators. There had been several instances where operating permits with the red seal from the Administration would arrive without the communities having been notified in advance. So when we got to know about the community protocol, we were immediately interested in improving the situation.

Thanks to the protocol, the authorizations come first from us. We are well informed about the identity of the operator and the activities he or she plans to do, we give our consent first and then the government gives its authorization.

The goal is certainly not to prevent the use of resources but to ensure that there is a collaboration with benefits for everyone. Many neighboring communities would also like to join us on the community protocol approach.

We are ready to inform them about the tools and its benefits. We would like to encourage our neighboring communities to integrate our community protocol or develop their own. It's also a bit my job as a member of the community protocol committee.



The goal is certainly not to prevent the use of resources but to ensure that there is a collaboration with benefits for everyone.

PROCESS

1

Planning meeting

Following the multi-stakeholder workshop, an internal meeting with community representatives agreed on how to conduct the process and on the next steps.

A drafting committee for the protocol was chosen, consisting of two representatives from each village.

2

Development of a work plan

To ensure the involvement of as many people as possible from the community.

3

Workshop to define content

Workshop of community representatives to: decide on the main elements of the protocol, set up a committee to develop the protocol, agree on the methods for data collection and drafting.

4

Community dissemination visits

Visits to each of the seven communities to introduce the BCP process more broadly at the local level.

5

Drafting workshop and legal training

Meeting of community representatives, including:

- Training on the relevant national and international frameworks (specifically local permitting systems, resource rights and ABS).
- Drafting the content of the various elements of the protocol.

6

Data collection and consultations

Collection of information at local level on the communities, the resource, decision-making structures, customary rules and values; community meetings to consult on the main elements of the protocol.

7

Consultation with other actors

Mostly relevant administrative bodies.

8

Community consultations

Consultations on the protocol text

9

Official presentation meeting

Workshop with community representatives and local administration at which the protocol was presented, and regional authorities signed a letter of recognition.

10

Revision and finalization

Revision by the members of the drafting committee.

Verification by government administration to provide advice and ensure conformity with laws and regulations.



William Célestin Andriamalaza, president of the VOI³ of Tanteraka

The community protocol is a short written document that serves to explain to foreigners who want to access and use the natural resources that we manage about the process to follow in order to establish common benefits. The objective of the community protocol is to ensure that there is a process that avoids decisions imposed from above, but rather that it is the community which deliberates through its general meetings and gives its prior consent before taking any decision. Which means that now it is the whole community that is consulted and no longer only the area chief or me as chairman of the VOI (laughing).

I would like to encourage and invite all communities who manage natural resources, as well as knowledge holders, to develop their own community protocol. We have experienced it and we feel the usefulness of this tool. Only by developing our protocol did we become aware of the value of our resources and our knowledge. I also urge all actors who contribute to the sustainable use of natural resources, such as researchers and businesses, to consider and respect the protocols of local communities. The protocol does not limit the use activities but rather wants to establish a clear and harmonious collaboration so that there can be trust.

³The VOI (Vondron'Olona Ifotony) are local natural resource management organizations to whom the government devolves the right to manage forest and other resources based on a renewable contract under the 1996 GELOSE (Gestion Locale Sécurisée) Act.



Only by developing our protocol did we become aware of the value of our resources and our knowledge.



Outcomes

Since its adoption, written agreements based on the community protocol have been established between five different villages and the specific biotrade operators that these villages supply to. These agreements contain information on prices, purchasing terms, harvesting areas, sustainable harvesting practices, and non-monetary benefits such as infrastructure and social projects. The regional administration now requires operators to present these agreements as part of their permit applications. The operators have also signed a commitment with the regional forest service stating that if their activities, or those of their value chain partners, should become ABS-relevant in the future, they will follow the national ABS framework. The learning effect during the development of their community protocol has allowed the communities to distinguish users who are in good standing (with valid permits) from those who are not, and the procedure for dealing with cases of irregularity. With the support of officers of the regional forest administration, communities took responsibility when they were confronted with cases of unlicensed access and have halted the collection activities until the situation is solved.

Challenges and how they were addressed

Distances and accessibility of villages:

Several small villages make up the municipality of Mariarano. These villages can be quite far apart and their accessibility is not always easy. It was therefore necessary to work closely with community representatives to communicate with certain villages. It was also necessary to ensure that at least two representatives from each village were present during the community meetings. At the end of each meeting, a worksheet capturing key messages and decisions was developed with the participants to assist them in the reporting in their respective villages.

Identification and representativeness of the members of the drafting committee:

The aim was to ensure a balance between the legitimacy and competence of the members of the community protocol drafting committee. Two community representatives from each village formed the committee. The usual procedure for establishing such a committee would be for communities to designate their representatives themselves. However, it was clear that the choice

was often directed towards local elites, including those with a certain status in the villages (traditional chiefs, administrative chiefs, etc.) Individuals with some analytical capacity or other perspectives, but lower status in the community were therefore less likely to be designated. As a result, after discussion between communities and facilitators, one of the two representatives from each village was nominated by the communities on a "legitimacy" basis, the other by facilitators according to "competency" criteria (in particular, to be a good communicator, to know the context of the seven villages and to have a certain capacity for analysis).

Time for communities to think about the content of the tool:

The process to develop the community protocol was defined by the local communities with the support of the facilitators at the beginning of the process. However, during its execution, the predefined approach was systematically revised. The communities needed more time than expected for their reflections regarding the content of the protocol. There were multiple causes, such as the divergence of interests (which made it difficult for communities to reach consensus, especially on the definition of the decision-making process); and the need for more in-depth consultation of the communities on some sensitive issues (e. g. modalities of benefit-sharing). The role of the facilitator in this context was to systematically trigger the reflections of the communities through questions and practical scenarios. For this purpose, role plays and case studies were favored as learning methods.



Sagni Dolli Zozo, motrobe (Cinnamosma fragrans) leaf collector

I have been working for a long time in the harvesting of motrobe leaves. Local people have always used this plant as medicine. But since operators started buying the leaves of the plant, the villagers began to sell them. Every year, there is an operator who looks for and orders these leaves. Many of us are collectors. Like me for example, for two years now, I have been living from the collecting of motrobe leaf.

In my perception, the community protocol claims benefits for the entire population and not just for an individual. The introduction of the community protocol has led to good changes in our community. Previously, when there were operators looking for motrobe, it was often only us collectors who were aware. But now that there is the protocol, all the villagers are informed. When we reached an agreement with an operator not long ago, the protocol was used. There was a benefit-sharing agreement established. The price of the kilogram of leaves which before was 400 Ariary rose to 700 Ariary now, thanks to the protocol. This is due to the fact that we made a contract with the operator concerning the benefits to be shared, the price of motrobe leaves and that if he did not agree to establish this agreement, we could not collaborate with him. Before, there was no contract, the operator alone decided the purchase price of the leaves. It has to be said that the community protocol improves things. I encourage operators to continue to share benefits with the local communities. With these benefits, we can easily educate and raise awareness with the communities about the value of protecting the resources, because if they deteriorate, what will we have left?

PROTOCOL OF THE KHWE COMMUNITY OF BWABWATA NATIONAL PARK, NAMIBIA



Community and context

The Khwe community is one of the Namibian San historical communities living inside Bwabwata National Park, with about 6000 community members. Historically, they are a hunter-gatherer community with a deep and ancient connection to the resources and wildlife inside the Park. The Park has a history of being affected by colonial and apartheid laws and being proclaimed a national park. The Khwe are not formally recognized as a cultural community within the Namibian traditional authority framework. The community's livelihoods are intimately tied to the resources within the Park, which has led to challenges of access. Further, the intergenerational transfer of traditional knowledge is not occurring as it should, due to restricted access to their customary resources located inside the Park. There is, however, a successful community-based natural resource management model between the Park and its residents through the local Kyaramacan Association (KA). The Khwe community forms the majority of this resident population. Through KA, the community is involved in a successful benefit-sharing model with income being primarily sourced through hunting and tourism concessions. They developed their BCP to help articulate their need for improved access and use rights to their customary resources within the Park. They also see this access as a basis for stronger inter-generational transfer of traditional knowledge associated with natural resources.

The Act also includes the protection of TK, including through the recognition of customary laws in this context, by stating that "the State must recognize and protect the community intellectual property rights as they are enshrined and protected under the norms, practices and customary law found in, and recognized by, the concerned local communities, whether such law is written or not." Prior to the ABS Act, Namibia had already been following a proactive approach to the valorization of biological resources and aTK (the so-called "pipeline approach"). This approach addresses the entire value chain and strongly emphasizes the participation at the community level to create economic opportunities in a sustainable manner. Moreover, the Communal Conservancy Act of 1996 and the Forestry Act of 2000 include provisions for the sharing of benefits with local communities.



National ABS framework

The Namibian "Access to Biological and Genetic Resources and Associated Traditional Knowledge Act" (2017) defines community protocols as "a broad range of practices and procedures, both written and unwritten, developed by local communities in relation to their genetic resources and associated traditional knowledge which cover a range of matters, including how local communities expect external actors to engage with them." It foresees the development of regulations on community protocols.

Objectives and content of the community protocol

The BCP was initiated against the backdrop of the Khwe community's struggle for recognition as a cultural community in Namibia on par with other cultural communities, and the loss of their historical lands and natural resources inside Bwabwata National Park. Even with the co-management agreement in place, the community felt that there were a number of challenges that they continue to experience as a community living inside a park. They also wanted to protect and valorize their indigenous knowledge associated with the rich biodiversity located mainly inside the protected area. They decided to develop their biocultural community protocol to help address their challenges to living and practicing their cultural lifestyle, which is intimately linked to the natural resources inside of the protected area that they have limited or no access to.

The community protocol was developed by the community to describe:

- their identity as a community living inside the Park
- their intimate connection with the local resources and wildlife, including their traditional knowledge associated with these resources
- their vision and priorities
- their organization and decision-making structures, including procedures for PIC
- the barriers and challenges of living inside the Park
- their rights under national law

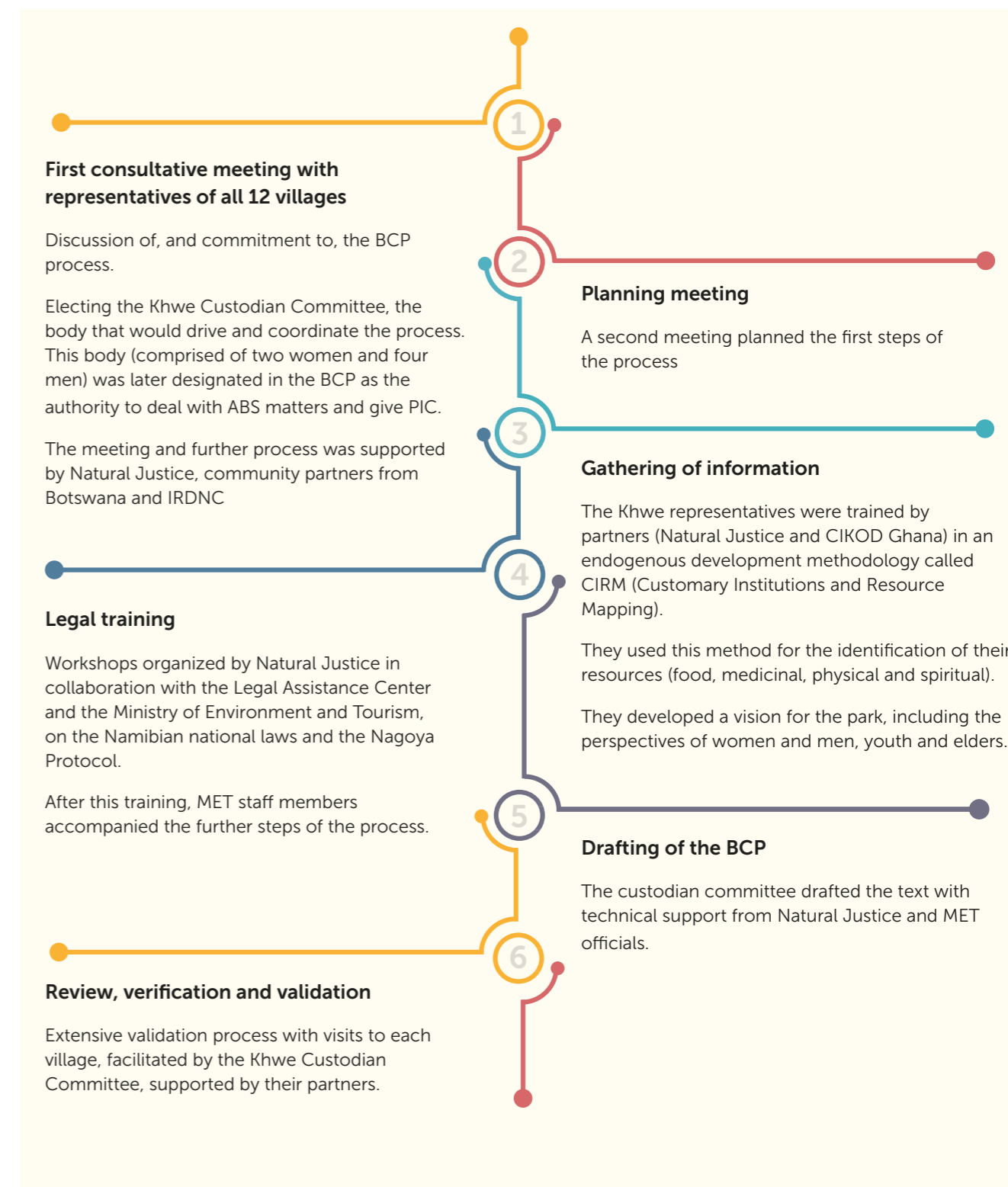
The community protocol also includes a Biodiversity register which identifies the traditional resources of the community, when they need access to them, and a community map. This was particularly important as they can currently only access 20% of the plants they traditionally used for food and medicinal purposes.



Process

The community decided to develop their biocultural community protocol in 2014. Each stage of this process was accompanied by a team of supporting organizations,

including the Namibian NGO Integrated Rural Development and Nature Conservation (IRDNC), Natural Justice and staff from the Ministry of Environment and Tourism (MET).



Interview with members of the Khwe Custodian Committee

Thadeus Chadeu, Pieter Stephanus Masiliso, Karorina John, Mbamba Felistas

Previously, before the BCP was implemented, researchers and others only consulted with MET in Windhoek, they would come and get an individual knowledge holder and collect the information that they need. But now, since the BCP is in our hands, although it is not yet legalized, people know about it. It has reduced the taking of the knowledge, now the community has awareness on the process and how it should be followed. (...) The benefit that

the BCP brought to us is to make us aware how we can give income to the community.

Previously, it was an individual person who benefited from this knowledge but today, the BCP made us unite. Today we know that these natural resources that we are preserving can still bring us income. We now have knowledge on ABS, both the community and the Custodians. The challenge that we are facing now is that the BCP is blocked while we are driving, so we don't know how to [finalize] this BCP to start driving further towards the goal or vision that we want. The BCP has taken too long [to be approved] outside of [the community], four years – but it is a community thing, why is it like that?

Outcomes

A significant outcome of the BCP process has been to unite the community. Prior to the creation of the protocol, only individuals who were approached by commercial users would benefit from the pool of traditional knowledge. But now, the community has a common understanding of their traditional knowledge as a valuable and shared resource, only to be shared with their consent.

The community also feels that the issues around land and traditional authority are an important foundation of their BCP. They reason that, without access to their customary land they will be unable to practice their traditional culture, which is deeply linked to the land. Not having access will therefore result in the loss of their traditional knowledge. They also fear that without legitimate rights to the land on which genetic resources are found, truly equitable benefit-sharing will not be realized. The community considers a positive outcome the fact that they were able to articulate these concerns, as well as their desire to be recognized as a cultural community with their own traditional leadership, for the first time in writing.

Challenges and how they were addressed

Lengthy process:

A central challenge for this BCP has been the wide geographical spread, cost and above all length

of the process, from the start in 2014 until now (2018). This has been partly due to the fact that the process was supported closely by the Namibian Ministry for Environment and Tourism and the community decided to wait until they could officially launch the BCP with the endorsement of the government. However, MET was keen to first have the national ABS framework in place, in order to be able to fit the BCP under it. The process was therefore put on hold while the ABS Bill was developed and adopted. This has led to frustrations in the Khwe community who are, until now, still waiting for the endorsement from the MET. This has resulted in a number of fears and a certain loss of confidence in the process.

Language barriers:

The diversity of actors involved in the process was an overwhelmingly positive aspect. However, it also posed its own set of difficulties. One associated issue was the language barrier throughout the process, which was partly overcome through the use of translators. However, certain concepts in Khwedam, the local language, could not be accurately translated into English or expressed in a way that would hold up in legal terms. Conversely, translating legal terms accurately into Khwedam was also a challenge. The facilitation team had to make a continuous effort, when helping to draft the BCP, not to distort the meaning of what the communities wanted to include into the BCP, while at the same time making sure that what was being written was legally sound.



Interview with members of the Khwe Custodian Committee:

Thadeus Chadeu, Pieter Stephanus Masiliso, Karorina John, Mbamba Felistas

We have medicine for diarrhoea, for strengthening a child's body, and we have many headache medicines and sometimes, when a woman is expecting to deliver, she might get stuck during delivery and we have medicines for making it easier for her to deliver... so many. (...) But most of the medicinal plants are found in the core area [of the Park], where we are restricted from getting and using them. Nowadays it is compulsory that you should have a permit. Ever since those regulations, we are very much restricted and stopped and told "you don't have access", and there is no benefit from these plants anymore.

The knowledge of the plants belongs to the Khwe, they learned it from their ancestors, who learned from their forefathers, so that is how this knowledge is passed on. (...) So, in conclusion, it is a gift from God to your forefathers and comparing nowadays with the past, all the illnesses we are suffering today, which we are running to the hospital for, were cured at home rather than in hospitals. [But] we don't have a right to access our plant resources. Even if we live in Bwabwata, having this ownership which God gave us, we are not

using it. Even if we purchase food at the store, we are not really enjoying the food. We like to eat foods from the forest... it makes us comfortable but now we are not feeling comfortable.

Hiding our knowledge sometimes also brings a challenge. You see, if you have knowledge on a specific plant, but then you hide that knowledge, and with all these regulations and so forth, you might lose hope because the plant is not serving its function anymore, and that does not make us happy. We want to pass the knowledge to the younger generation and we also want to encourage those who have the knowledge to share it, so that we can use it. If you can motivate others because one person is earning income from the traditional medicine that he knows, others might come up with different knowledge (...) until everyone is involved, and then we can progress. But these prohibitions, they are bringing us down. Those who are knowledge holders are dying with the knowledge.



Building trust between the actors:

Another obstacle was the need to build trust between the community and the MET staff involved in the facilitation, as this was a new and rather unusual role for the latter. This included the necessity to bridge cultural gaps, and to reassure the community that the role of government staff was to support the community to bring their BCP to paper, rather than to input their own ideas.

Implementation of broader community concerns:

A further obstacle was faced in terms of the scope of issues addressed in the BCP versus the narrower set of issues under the mandate of MET. While MET was an instrumental partner in developing the BCP, and is willing to help the community with the implementation of ABS-related matters, other issues lie outside of its mandate. These include issues of land rights and of recognition of traditional leadership.

A recent development has shown the limits of this potentially narrow implementation of the BCP:

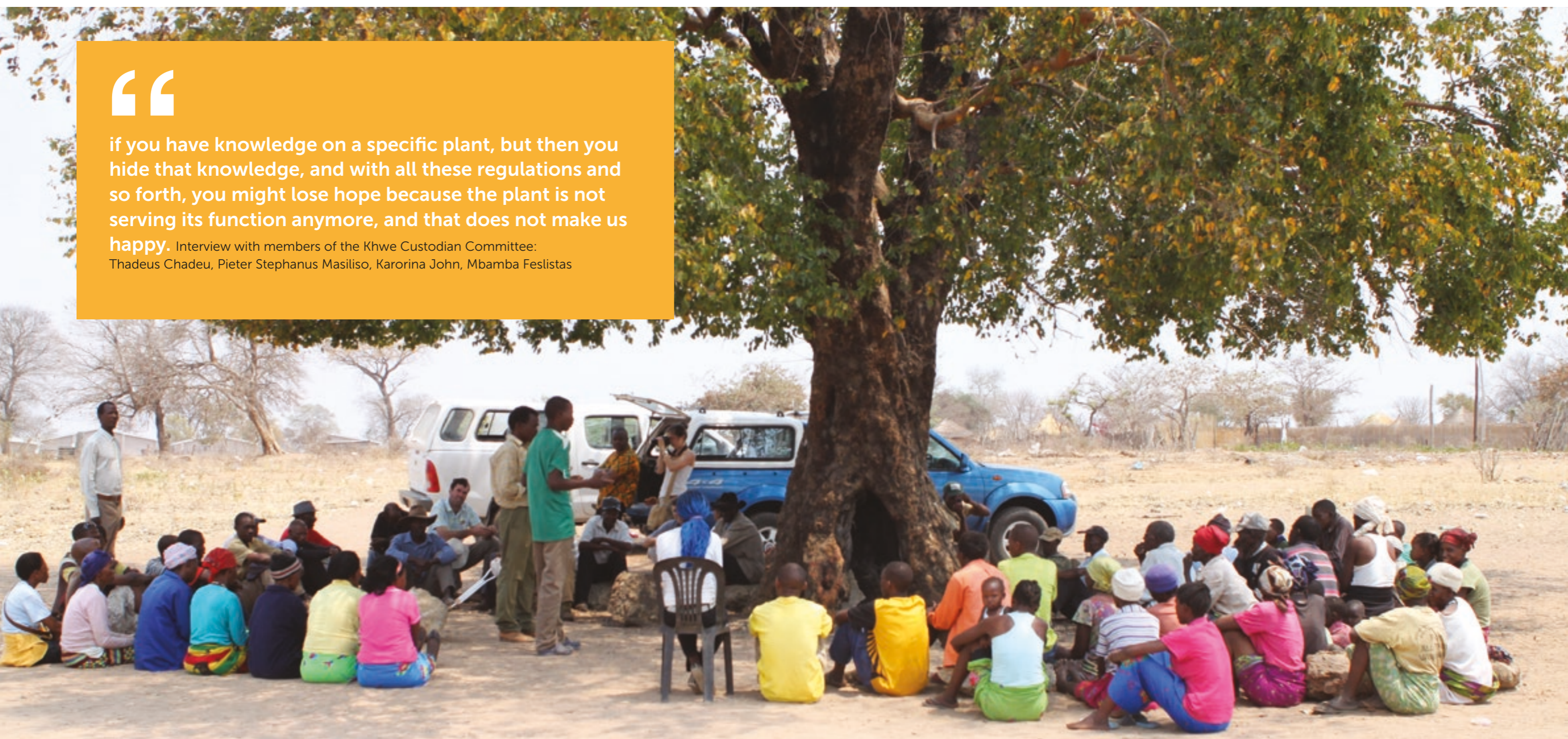
Neighboring cultural groups have been settling in Bwabwata without consultation with the Khwe. They began to clear fields in areas that held medicinal plants and traditional food sources, and to build houses in areas used for transit by the Khwe. These conflicts show the unresolved land allocation and land management issues. The

community considers that their ancestral lands, its plants and other resources were given to them by God. Their inability to access or secure these ancestral lands has deep impacts echoing legacies of colonialism.

“

if you have knowledge on a specific plant, but then you hide that knowledge, and with all these regulations and so forth, you might lose hope because the plant is not serving its function anymore, and that does not make us happy. Interview with members of the Khwe Custodian Committee:

Thadeus Chadeu, Pieter Stephanus Masiliso, Karorina John, Mbamba Feslistas



COMMUNITY PROTOCOLS OF THE KHOISAN, SOUTH AFRICA



Community and context

The National Khoi & San Council (NKSC) is composed of 30 Khoi and San leaders representing five historical Khoi and San groups across South Africa (namely the San, the Griqua, the Nama, the Cape Khoi and the Koranna). The NKSC, established in 1999 by South Africa's former President Nelson Mandela, is a body responsible for representing Khoi and San interests in the process towards formal recognition of their communities and of their customary leadership structures. It is also the body negotiating, in partnership with the South African San Council, benefit-sharing agreements for the Khoi and San communities.

The San and Khoi have been documented as African indigenous peoples in Southern Africa who traditionally were hunter-gatherers and nomadic pastoralists. These communities faced different aggressions through colonialism and apartheid, suffering a deep disruption to their culture and indigenous systems as a result.

The Khoi and San communities have a strong oral tradition, passing on a wealth of indigenous knowledge about the flora and fauna of Southern Africa from generation to generation. In the past, they have been sharing their traditional knowledge with those who desired to know and learn more about nature and their environment. However, this generosity has not been respected, resulting in over 200 years of ongoing decimation of their culture and displacement of their people from their lands in addition to a significant loss of resources. Specifically, for the Khoi and San communities, this loss of resources includes the indigenous rooibos plant, and the traditional knowledge associated with it. Rooibos is endemic to South Africa and only grows in the Cederberg mountains in the Western Cape province. As an anti-oxidant, this plant has biological properties that help with anti-ageing, anti-HIV, healing from dermatitis and allergies, as well as improvement of absorption of vitamins, healthy skin, teeth and bones. Known as "red bush" (rooi bos) in Afrikaans, this plant now forms the basis of a massive South African

and global industry, including tea, cosmetics and other rooibos-related products. The Khoi and San communities' TK was key in leading to the development of the rooibos industry and its products as we know them today. However, their knowledge has been used without their free, prior and informed consent, and since colonial times, the original knowledge holders have never benefited from the profits made from bioprospecting, including through intellectual property rights.



In 2010, a first biopiracy case connected to rooibos emerged in South Africa when the company Nestlé applied for patents to the uses of rooibos and honeybush. This was done without the consent of the provider country, South Africa. Neither were the knowledge holders consulted in this process. Natural Justice and the Swiss NGO "The Berne Declaration"⁴ ran a much publicized campaign at the time, and the patent applications were ultimately unsuccessful. This experience directly led to Nestlé's approaching South Africa and the rooibos knowledge holders in 2013 for their consent in the development of a tea product based on the rooibos plant. The goal was to run a pilot project for inclusion of rooibos tea in Nestlé's machine operation business. In 2014, a benefit-sharing agreement was developed between Nestlé, the South African San Council and the National Khoi & San Council.

⁴ The organization "The Berne Declaration" has since changed its name to "Public Eye"



As an outcome of this process, in 2014 the South African government commissioned and published a study to confirm whether the Khoi and San were in fact the knowledge holders to the uses of rooibos. The study found no reason to dispute the Khoi and San communities' claim.

The South African San Council and the NKSC entered into a 50/50 benefit-sharing partnership around four key indigenous plant species. Since then, they have been jointly negotiating key benefit-sharing agreements with users of various indigenous biological resources, the benefits of which are being shared equally as specified in their partnership.

Subsequent to the Nestlé agreement, the Khoi and San have also been negotiating a benefit-sharing agreement with the South African rooibos industry. The goal is an industry-wide agreement, including a levy on the use of traditional knowledge associated with rooibos. To the Khoi and San, these benefits represent a form of restitution, as redress for past injustices, which was part of the motivation for the development of a community protocol. For these negotiations, the NKSC also approached the historical rooibos farming communities in the Cederberg belt as a specific group of stakeholders to participate in the negotiations. This was a key turning point for the rooibos BCP process, with this larger group of concerned communities coming together, uniting

for the symbolic restoration of their most beloved resource, rooibos. Their negotiations with the South African rooibos industry are still ongoing.

National ABS framework

The Constitution of South Africa recognizes customary law and the institution, status and role of traditional leadership. The South African ABS framework provides a particularly enabling environment for ABS agreements involving IPLCs in that it:

- defines and protects the rights of TK holders through the Intellectual Property Laws Amendment Act, 2013, the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill (IK Bill), 2017, the National Environmental Management: Biodiversity Act of 2004 (NEMBA) and the Bioprospecting, Access and Benefit Sharing (BABS) Regulation, 2008 (including amendments);
- through the NEMBA and BABS, confers rights to communities both over indigenous biological resources (IBR) and associated traditional knowledge.
- includes obligations not only for international users of IBR, but also for users in South Africa.

This comprehensive approach gives IPLCs involved in ABS agreements an amount of legal certainty over their rights and enables the strategic valorization of biological resources and associated traditional knowledge, linking ABS to biotrade.

Objectives and content of the protocols

In 2012, the NKSC decided to develop a community protocol with the objective of articulating who the Khoi and San communities are as a non-recognized African cultural community in South Africa.

At the outset, the members of the NKSC identified several priority issues for their protocol, including:

- constitutional recognition,
- recognition of their indigenous language,
- land rights,
- intellectual property & ABS,
- women & youth, and
- healing & economic development.

In the course of the community protocol process, "intellectual property & ABS" became the key priority, as the negotiations for the benefit-sharing agreement with Nestlé were underway and the Khoi and San sought to be recognized as traditional knowledge holders on rooibos. This process took precedence over the further development of the broader community protocol, which was put on hold.

With the negotiation around rooibos evolving, and the Cederberg rooibos farming communities coming on board as beneficiaries, a strategic decision was made to develop a specific protocol relating only to rooibos. This protocol is being developed by the 40 Khoi communities under the NKSC, as well as the three Cederberg belt's rooibos farming communities (Wupperthal, Niewouldtville

and Suid Bokkeveld), who play a distinct role as the traditional custodians of the resource

The rooibos community protocol will, among others:

- set out the relationship of these communities with the rooibos plant, in their role as traditional knowledge holders
- explain their organization and their process for free, prior and informed consent
- designate the Khoi Benefit Sharing Trust, which is currently under development, as the mechanism for benefit-sharing between the communities

The San communities chose, instead of developing a community protocol on rooibos, to engage with the government's National Recordal System⁵ to articulate and protect their traditional knowledge. Whether the first, "political" NKSC community protocol will still be finalized is dependent on funding.

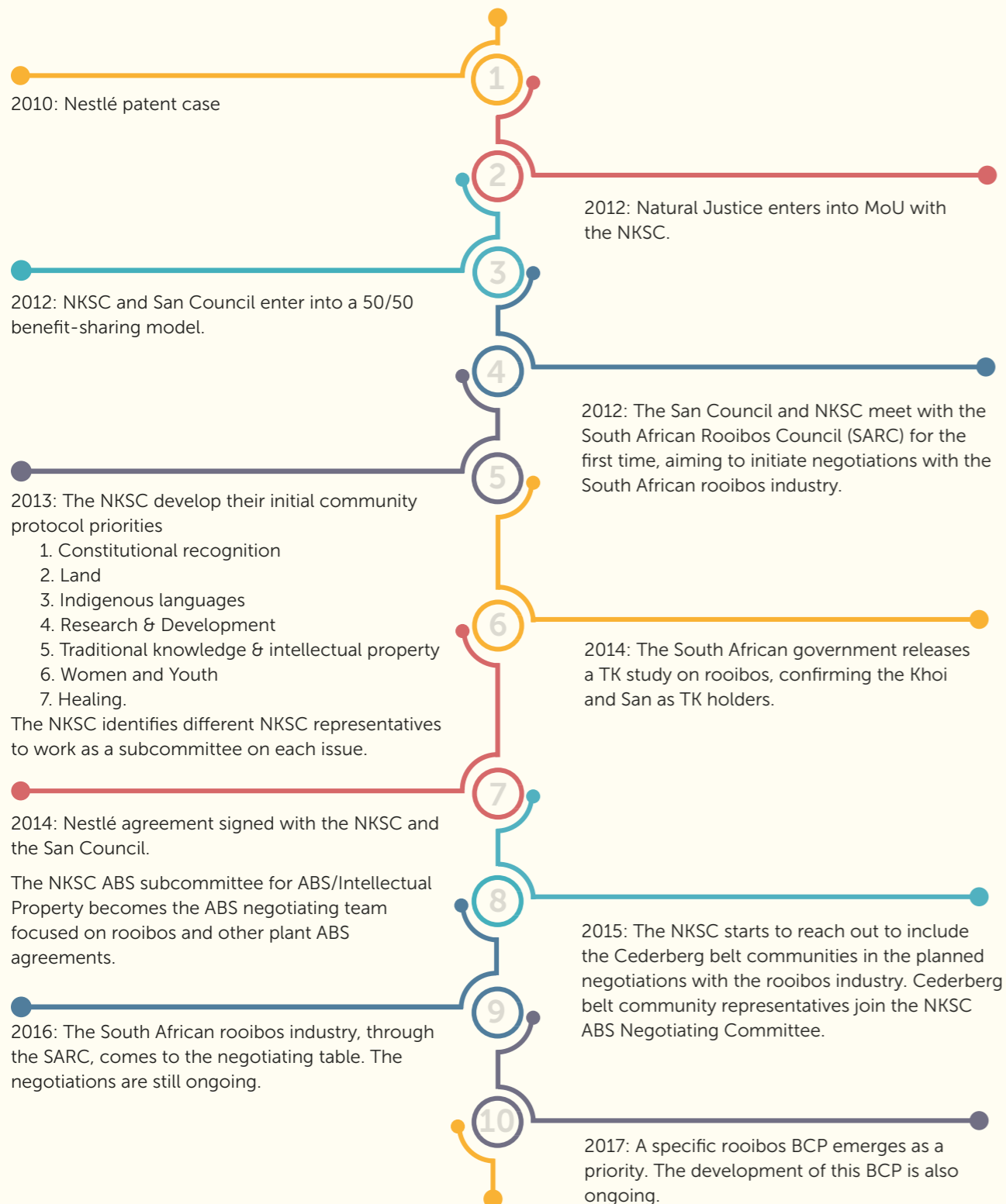


⁵The South African National Recordal System works with communities to document, record and store indigenous knowledge in a digital management system, where confidential TK can only be accessed with authorization by the knowledge holders.

Process

This community protocol process was facilitated by the NGO Natural Justice, based on a Memorandum of Understanding (MoU) concluded in 2013 with the NKSC and a set of key resource persons. As indicated above, the development of the community protocol supported and evolved in parallel with several ABS negotiations, namely around rooibos, which are still ongoing today.

The Khoi and San continue to struggle for their recognition and inclusion as an African indigenous community in South Africa, and the original, broader community protocol process served to articulate this struggle. However, the Nestlé rooibos case came to the fore during this time and forced the NKSC to prioritize their advocacy efforts on rooibos. The parallel processes unfolded as follows:



Chief Jeremia Van Wyk

If we look nowadays, in the time that we are living, we find that there is awareness of cultural history, there is an awareness that people have a status in terms of indigenous rights and people rights. There is also a status in terms of their own knowledge about their own environment. South Africa has signed the Nagoya Protocol and the Declaration on the Rights of Indigenous Peoples. If you look at how indigenous people can protect themselves, you need to take into consideration international law. You need to take into consideration how your own government is working to honor those principles. But also you have to look at your

own situation as a tribe or an indigenous grouping: what do you do to protect those rights? And when you get to the core of how,

as a group, you protect yourself, then you have to align with international law and processes and you cannot do it any other way than putting together your own BCP document. And by putting that in place, it does not give you 100% protection, but it brings you in line with international law so that in the end, you can apply it for the immediate situation of science and business.



You need to take into consideration how your own government is working to honor those principles. But also you have to look at your own situation as a tribe or an indigenous grouping: what do you do to protect those rights?



Barend Salomo, Wupperthal

Rooibos, especially the wild rooibos, is found specifically in the area of Wupperthal. The rooibos started with our ancestors, here in this area. The Khoi and the San are the traditional knowledge holders of rooibos. In fact, a study was done, I think it was in 2014, by the Department of Environmental Affairs. The outcome of the study confirmed that the Khoi and the San are the TK holders. As far as I am concerned, these are the facts. Traditionally, we own the knowledge of rooibos and since it is being commercialized, it just spread all over and they forget about the original knowledge that we have. What [others] do now with rooibos is more innovation built on the original knowledge of rooibos. My father taught me how to harvest the wild rooibos, and my mother taught me how to process it. My culture connects me with rooibos, it is unthinkable to have a culture without rooibos involved in it. And what is upsetting now is that they use the oldest traditional reel dance of the Khoi and they put it on the boxes to market the tea as the tea of the Khoisan, but they don't want to admit that we are the TK holders of the tea; that is strange for me. At this stage, we only sell bulk tea and the clients on the other side do their own packaging, in their own boxes to give the image of their company. There is sometimes a little note referring to small farmers in South Africa, but for example, they don't even use our logo.



The Khoi and the San are the traditional knowledge holders of rooibos.

The BCP is very important to the Wupperthal community because it gives protection to the community against all other people who want to come in and just want to benefit from our knowledge and in the process, we lose out and we lose everything. I am so excited because if these [ABS] negotiations and the BCP were not there, there could have been no recognition of the knowledge that we have on rooibos that we can share with our kids and with the generations to come. You know, during these discussions, I came under the impression that if we can reach an agreement, it will be a major milestone because if the people are being recognized as the TK holders of rooibos that has been commercialized... that means, for me, that it brings something back. Something that I lost because nobody takes note of the knowledge that I have. They own it as if it is their own knowledge. So if they recognize it, it brings back some dignity to the people. The people can be proud of that because they can share the knowledge with the rest of the world within the specific policies that are in the BCP. I believe that everybody will be excited about that.

Outcomes

Even if the originally planned community protocol has not yet been finalized, through the community protocol consultations the NKSC was able to organize itself sufficiently to negotiate several benefit-sharing agreements for the use of their traditional knowledge and indigenous biological resources.

In addition to the agreements mentioned above, in 2013 Cape Kingdom, a private pharmaceutical company based in Paarl, South Africa, entered into a benefit-sharing agreement with the South African San Council and the NKSC in order to acquire, process, market and sell products derived from the buchu plant. Buchu is traditionally used by the Khoi and San for its medicinal properties. The abovementioned agreement with Nestlé (2014) on rooibos resulted in bi-annual payments (two so far) made to the Bioprospecting Trust Fund managed by the Department of Environmental Affairs. The Khoi and San share those benefits equally. The NKSC has not distributed these benefits yet, as they are in the process of developing a Khoi Benefit Sharing Trust. In this trust they will, in consultation with the broader communities, determine how to do justice to 40 Khoi communities and the Cederberg belt farming communities.

Another result was the official recognition of the Khoi and San by the government as TK holders to a range of high-value indigenous plant species in South Africa. Apart from rooibos, this also includes buchu, honeybush, aloe, hoodia and devil's claw. Importantly, this further initiated a form of recognition of the Khoi and San as a cultural community that needs to be included for consultation in developmental matters. With this, the Khoi and San have managed to take a large step towards achieving the initial objective of their community protocol process.

Challenges and how they were addressed

Responding to the different roles and needs of certain subgroups within the community:

A particular challenge with this process came from the decision of the NKSC to include the rooibos grower communities into the process, as a particular group of actors who are part of the larger community of TK holders, but also play a specific role as the custodians of the resource. The farming communities and the NKSC did not necessarily know each other before the process. The grower communities initially treated the NKSC with suspicion, and the parties had to learn to trust each other. The South African Government, through the Department of Environmental Affairs, was instrumental in this regard. The grower communities were completely uninformed on issues of traditional knowledge and ABS. A lot of ground work was needed to understand the difference between the farming of the resource and the traditional knowledge passed down through generations, and this was made possible through DEA's supportive role. It remains a continuous challenge to explain why the community protocol and the negotiations are in the interest of the entire traditional knowledge holder community, and not specific groups involved in rooibos cultivation.

Wide geographical dispersal:

An added challenge is the wide geographical dispersal of the communities, which makes it difficult to diffuse the information to reach all community members. An attempted solution was to conduct larger community meetings in order to gather as many people as possible in one place. However, this proved insufficient as not all community members understood the issues immediately. The different levels of understanding created an obstacle as it became necessary to discuss with people one-on-one to help them understand what their rights within the protocol are.

LESSONS LEARNED



Content and focus

Every community protocol is distinct due to the unique circumstances and the biological and cultural diversity held by the people that develop them. However, community protocols tend to include the following elements:

- A definition of the community;
- A description of its leadership and decision-making processes;
- A description of community-based natural resource management systems, traditional knowledge, innovations, and practices regarding natural resources, including genetic resources;
- Ways of life, including the links between culture, spirituality, and customary laws and values;
- Rights, responsibilities, and duties of the community according to customary, national, and international law;
- Conditions set out by the community for granting access to their lands, resources and knowledge, such as procedures for free, prior and informed consent (FPIC), and for negotiating mutually agreed terms (MAT);
- Challenges faced by the community and calls to various stakeholders to engage on specific issues.

Address issues from the community perspective and in a holistic manner

The issues to include into a community protocol should not be dictated or constrained from the outside. A key strength of community protocols is that they seek to capture a holistic set of community values, practices and aspirations. The main challenges and aspirations of the community regarding their land and resources, traditional knowledge and customary governance should

be discussed. For instance, genetic resources and traditional knowledge should not be discussed solely in an ABS context, but in terms of their importance for the community more broadly. Traditional knowledge has a significance that goes beyond issues of commercialization and benefit-sharing, as it is intimately linked to a community's heritage and sense of identity. In the same manner, issues of rights and access to resources are always linked to broader concerns regarding rights to land.

Identify a main objective and clarify expectations

At the same time, identifying at least one main challenge or aspiration of the community at the beginning is vital for a sustained and successful community protocol process. Focusing on a specific goal, such as the protection of traditional knowledge and/or the definition of community procedures for PIC and MAT, is important to maintain momentum and avoid unrealistic expectations.

Respond to real opportunities or challenges

Ideally, a community protocol in an ABS context should be developed in response to a specific opportunity or identified challenge regarding the genetic resources or traditional knowledge of the community. This could be a current application for access by a user, the desire to improve an existing ABS value chain, or the defense against a specific threat of misappropriation of the community's traditional knowledge. While there are real advantages to have a community protocol in place before a user applies for access, it is difficult to trigger and sustain a community-led process if there is no concrete aspiration or threat on the horizon.

It is, however, possible to develop a protocol to prepare the negotiation of potential ABS agreements in the future, provided that the protocol also addresses other, current concerns of the community. This could, for example, include existing economic activities around natural resources, or the conservation of knowledge,

resources or natural areas such as, for instance, a sacred forest.

Broaden the discussion from ABS to other opportunities

In any case, it has proven valuable to broaden the discussion from strict ABS matters to the valorization and protection of the community's resources and knowledge more generally. This ensures an added value of the community protocol in the short term. For example, if a community is already a provider of plant material for biotrade value chains, then existing challenges associated with this activity have to be included – such as procedures and demands regarding collecting permits, price negotiations etc. Or if the community sees opportunities for the protection and valorization of their traditional knowledge in a national context, then provisions for PIC and MAT should be complemented with procedures for the development of products for the national market, for example procedures for market approval for traditional medicines.

Process

Let the community define the process

A key feature of community protocols is that their process should be designed and implemented by the community. Not only the content of the protocol, but its process as well should reflect the values, governance structures and decision-making practices of the community. This also means that every community protocol process will be different, according to the community, the issues at hand, and the time and resources available. It will also help to ensure that the process of using and implementing the protocol will continue beyond the time-frame of support through external organization.

Include a variety of community voices

This being said, an essential part of a good community protocol process is the input of the broadest sample of community members. As

much as possible within the local culture and situation, the protocol should strive to include the full spectrum of perspectives, especially those of women, youth, the elderly and others who are often excluded from decision-making processes. As far as possible, the entire community should be included in the validation and approval of the final community protocol.

Involve customary authorities

It is also crucial to involve the customary or other community decision-making institutions in the process. In places where newer community groups, such as associations, have been created to manage natural resources, these groups can of course play a key role. However, this should be balanced with the participation of customary bodies, traditional leadership and – especially important in the ABS context – traditional knowledge holders.

Make governance a central element of the discussion

A comprehensive discussion about governance structures should be strongly featured in the protocol process. Where customary governance structures and decision-making processes are still in place, the community protocol should reflect these. Community protocols can revitalize customary rules and institutions through discussion and by capturing them in writing. New processes might also have to be developed for new areas of decision-making, such as the granting of access to genetic resources, and the negotiation and sharing of benefits. Finally, some communities are taking the opportunity of their community protocol process to update and develop their decision-making institutions to include broader sections of the community, including women and youth. Under no circumstances should the protocol process be used as a means to create divisions or to advance the political power of certain groups within the community. Above all, it should instil a sense of unity and common vision.

Ensure representativity

Ensuring community ownership requires a balance of direct engagement through large-scale meetings and the more sustained involvement of community members able to represent community values and concerns. These representatives can be directly selected by the larger community as part of the community protocol process, they can be drawn from customary leadership, and/or be members of an established representative body. Essentially, these representatives have to be considered as legitimate by the community and be able to understand and articulate the inputs of the larger community.

Ensure clarity about who constitutes the community

Above all, the community must define itself and determine how to address external issues. Various examples have also shown that the definition of "community" may vary, depending on the objective of the community protocol – in some cases, protocols were developed by groups with a specific role, such as traditional healers; in others, several distinct communities came together to face a common threat.

Let the community set the pace

There is no set rule or formula for how long it takes to develop a community protocol. The timeframe for the whole process of documenting, developing, using and reflecting upon a protocol will vary widely depending on the local context. As far as possible, the timeframe should be determined by the local situation and by the community's priorities and capacities. Although practical considerations such as available funds and human resources must be taken into account, timeframes should not be determined primarily by external interests or donor requirements.

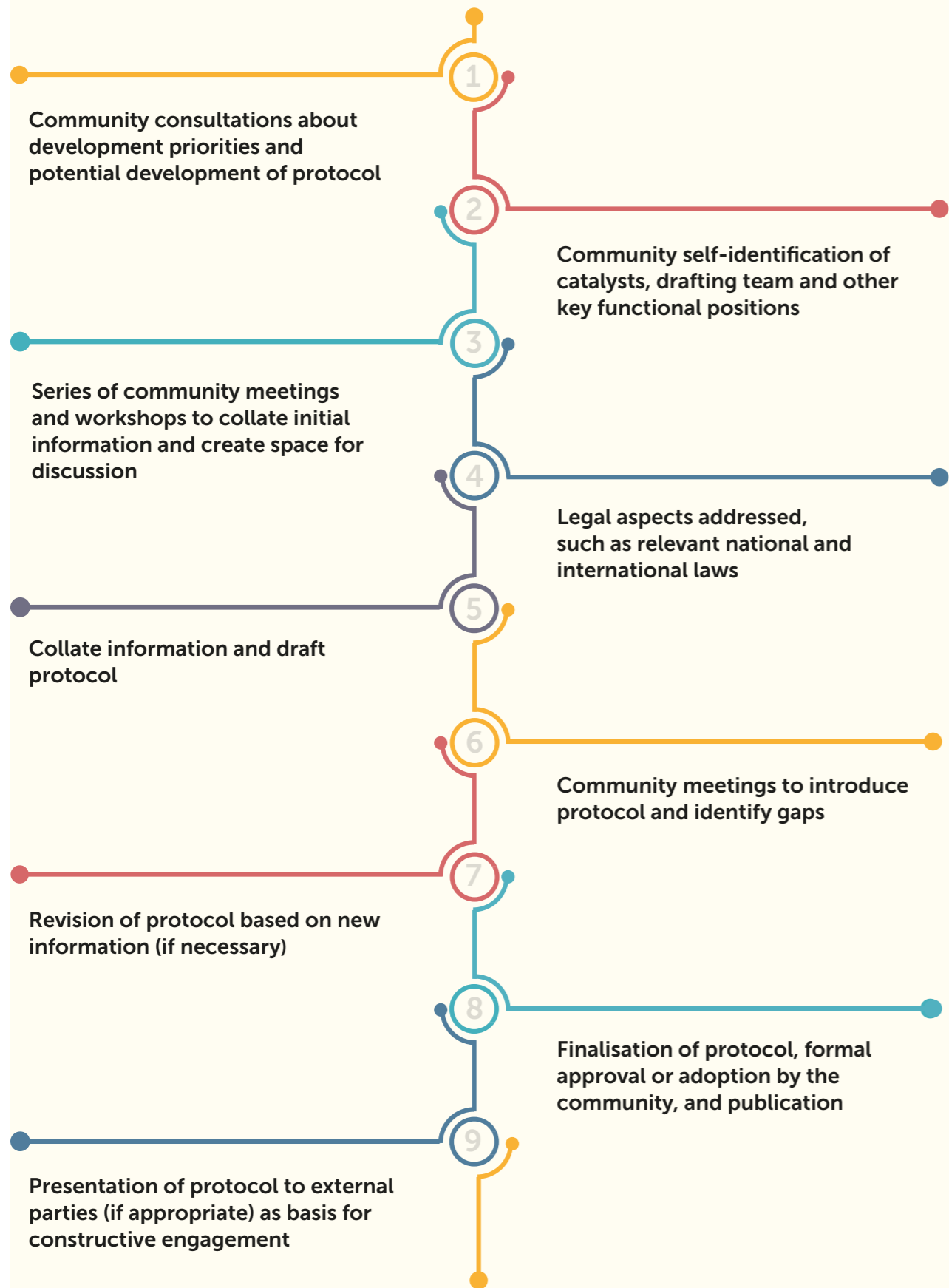
The process is as important as the product

Robust community protocol processes strengthen community confidence through their focus on identifying traditional values and practices that have and continue to positively ground and guide decisions. Encouraging communities to articulate these values and practices, and their significance, underscores their positive aspects and can reaffirm their value against the pressure to adopt external practices. Through these strengths of empowerment and self-discovery, the process can even be valuable in grounding and strengthening community members in engaging with external actors before the BCP is released.



Due to these considerations, every community protocol process will be different. However, it should begin with open discussions within the community as to whether or not a community protocol is needed in the first place, how the

community wants to go about it, and what kind of support is needed and available. If they decide to undertake a protocol process, the next steps can include the following (among others, and not necessarily in this order):



Outside support to the community process

NGOs, CBOs and other support organizations often play an important role in facilitating community processes, providing technical input, and assisting the community with the drafting of their protocol. However, one of the key outcomes of a community protocol process should be the empowerment of the community. This means that supporting organizations should not simply take over tasks such as drafting the protocol document, but rather work with community members to enable them to develop their protocol and later use it in their interactions with outside actors.

Facilitation

As facilitators, supporting organizations can ensure the contribution of a broad, representative group of community members. A degree of detachment from direct community dynamics and ability to observe them can be an asset in targeting a broader segment of the community. At the same time, the supporting organization should ideally have meaningful experiences and connections with the community. The trust derived from these connections enables community members to feel comfortable in sharing their values, practices, aspirations and concerns. It also increases the likelihood that the organization can identify and be guided by representative community leadership.

Information and training

Access and benefit-sharing is a relatively new and complex framework. A certain amount of information and training will therefore be necessary regarding the functioning of bioprospecting and ABS, with a focus on the role and rights of communities.

Legal support

Relating community values and customary law to the larger legal framework is an important element of a meaningful community protocol. Legal support is therefore important in two areas: legal training and legal assistance.

Legal training in a community protocol process includes support in identifying relevant legal instruments, including local, national and international laws and policies that affirm community rights, translating them into easily understood language, and training community members in the use of these instruments.

Legal assistance can include support specifically in the drafting of community protocol sections that outline these laws. At a later stage, legal assistance might also be needed in the application of the community protocol, including the negotiation of ABS agreements. In this context, it becomes important to link the community with national legal counsel, including expertise in contract law.

Drafting

In many cases, communities will require help in the actual writing of the text of the protocol, especially when literacy rates are low. Supporting organizations can help to put the community's ideas to paper. They can also give some technical input and guidance; however, it is important that the content of the protocol should come directly from the community. The drafting should be done as much as possible in presence of the community representatives, and any subsequent revisions should be thoroughly discussed and agreed upon.

The role of government agencies

Involve government agencies and stakeholders early on

Experience has shown that informing and involving key government institutions early on is essential to ensure buy-in, and facilitate official recognition. This includes the Competent National Authorities (CNAs), but also relevant local and sub-national authorities. The latter is key, especially where decentralization is increasingly devolving authority over natural resource management to lower-level administrative bodies. However, in many cases these decentralized bodies still lack the sufficient information or capacity regarding emerging ABS

frameworks, and might therefore be reluctant to become involved. Supporting organizations and CNAs can both play a role in informing these bodies and raising their awareness of the rights and roles of IPLCs regarding access to GR and aTK.

Direct government support

Government agencies such as the CNA can also support some of the above-mentioned roles, if there is a sufficient level of trust between the community and the staff of the agency. If this is the case, it is especially important to recall that the role is one of support and facilitation, and at no point should the agency try to influence or restrict the process and content of the protocol. Government bodies can and should also play a role in supporting the community with the implementation of their community protocol, specifically by ensuring the respect of PIC procedures, and fair process for the negotiation of MAT.

Maintain community ownership and flexibility

A core feature of a BCP is that it is a document developed by the community itself, according to its own priorities and processes. As governments start recognizing community protocols as a basis for PIC processes and benefit-sharing, reflections are initiated regarding national criteria or guidance for community protocols. However, it is absolutely crucial that the local ownership and flexibility of each protocol is maintained to avoid “blueprint” models that do not correspond to local realities. Restricting or unifying the process and form of community protocols would defeat the very purpose of the instrument.

Legal recognition of community protocols

National legal recognition

In developing national frameworks to implement the Nagoya Protocol, a number of countries are now including the recognition of community

protocols, or references to communities’ customary laws and procedures. This is the case for the recently enacted ABS frameworks cited in the examples of Benin, Namibia and Madagascar.

Recognition at sub-national level

Explicit inclusion in national ABS frameworks is of course the most straightforward way for legal recognition of community protocols. However, even in countries where this is not the case, or where ABS frameworks are still being developed, there are ways to give community protocols official recognition and status. In several cases, local or sub-national authorities have recognized community protocols by, for example, signing official letters of recognition. In some countries, it is possible to register customary laws as official by-laws, which can be a way to give protocols a legal status.

Local processes informing national frameworks

In several of the examples mentioned in this publication, ABS frameworks were being discussed and drafted at the same time as the pilot community protocols. This has allowed the two processes – national and local – to inform each other and has contributed to clarifying the role of community protocols and customary laws, as well as procedures for PIC, in national ABS systems. The discussions to develop a community protocol, if they are fed back regularly to the national policy level, can contribute important information on the customary laws and decision-making systems of IPLCs, and on good process for PIC and MAT.

Community protocols alone are not enough

However, it must also be noted that community protocols cannot replace clear and effective procedures for obtaining the PIC of communities at the national level. The community protocol clarifies the decision-making, governance structures and procedures at the level of the community, and makes the link to the rights of the community under national and international law. It therefore serves as an interface between the

community and national procedures for access and benefit-sharing.

Further, for communities to be able to clearly determine their rights and procedures regarding access to their traditional knowledge, a national framework for TK protection should be in place – as part of an ABS law or as a stand-alone legislation. Without such protection, communities cannot have the certainty that their customary rights and rules on TK will be respected once the TK is accessed. Additionally, communities should develop their own local traditional knowledge documentation systems.

Importance of broad, strategic ABS frameworks

Finally, the implementation of ABS is made much more meaningful for communities if it takes a broad and strategic view: by giving communities rights over their genetic resources, including obligations for national users in their national ABS frameworks, and linking ABS with biotrade and with options for local and national valorization. From a community perspective, the distinctions of what constitutes utilization in the narrow sense of the Nagoya Protocol, and the separation of aTK from the use of the resources that it is associated with, can be very artificial. A narrow restriction of community rights to TK associated with GR, utilized abroad, can exclude communities from a large share of potential benefits. Countries in Africa have been aware of this challenge and are developing various measures to involve communities in benefit-sharing not only on aTK, but also, at the minimum, genetic resources provided by them.



REMAINING CHALLENGES AND OPEN QUESTIONS



As the examples in this publication show, community protocol processes are not without challenges. Some of these challenges are inherent to the community protocol approach, while some are common to all truly participatory community processes. Others stem more specifically from the complexities of ABS implementation.

Since ABS frameworks are still being developed, and the first post-Nagoya benefit-sharing agreements with communities are only now emerging, a number of open questions also remain, which will have to be further explored in the future.

Timeframe of the community protocol process

The process of developing the protocol will depend on the context, including factors such as the size and geographical spread of the community, the presence or absence of organised community institutions, and the complexity of the issues at hand. An in-depth, community-led process can take time. This is especially true if the process seeks to not only produce a document (the community protocol) but also empower the community to use this protocol to defend their rights and enter into dialogue and negotiations. It is tempting for supporting organizations to streamline the process by taking over functions such as drafting the protocol, but this always comes at the cost of true ownership of the results. This is a challenge when, for example, a user wants to obtain access to the community's GR and/or aTK in a timely fashion. As mentioned above, such an emerging ABS case can serve as a good starting point for a community protocol process. However, the realities of operating in the market, or of time-bound research projects, will often put a user under time constraints, which will, as a consequence, also affect the community process. One possible way of approaching this dilemma is to include dialogue between the community and the user earlier in the process, i.e. to not necessarily wait until the community protocol is completely finalized. If the community has been

well informed and has had the time to debate on key issues of decision-making for granting their PIC and negotiating MAT, then it may be possible to take first steps in parallel with the community protocol development process.

Shared resources and traditional knowledge

This challenge is not limited to community protocols, but concerns the negotiation of PIC and MAT on shared genetic resources and traditional knowledge in general. Many resources are not confined to the territory of one community, and a significant amount of aTK is also shared between different groups.

So far, pilot ABS value chains are often built with a first provider community, or a group of communities, for pragmatic reasons. However, further down the line, especially when benefits are being shared, it might become necessary to involve a larger group of communities, who would also like to become providers of a resource, or who share the same TK. It is of course possible to extend a community protocol beyond one community, as examples have shown; it should therefore also be feasible to include "new" communities down the line, as long as there is agreement on rules for decision-making and benefit-sharing. What such a process of "extension" of a community protocol would look like remains to be explored.

Need for outside support and funding

Community protocol processes will usually require some level of outside facilitation and input, for example on ABS and the legal framework. In some cases, local organizations who are already working with the community, in partnership with the CNA or decentralised government structures, might be able to provide this support. Where this is not possible, outside expertise might be needed. In any case, organising a range of community meetings will involve costs. This raises the question of who will finance these processes if there isn't



any project funding involved, as has been the case for most of the pilot community protocols so far. Can there be funding made available through government budgets? Can the user finance part of the process? What implications would this have regarding power dynamics and the necessary neutrality of the organizations facilitating the process?

Literacy and language issues

This is a common challenge for communities especially in more remote areas, and communities whose local language does not exist in written form. For the facilitation of the process, solutions can be found to overcome language barriers and discuss issues mostly verbally. However, it can be difficult for community members to embrace, and continue to adhere to, a community protocol in the form of a document whose content is inaccessible to them. At the same time, a written document is necessary so that other actors can readily access the information.

It is easy, and indeed common, to produce a document that contains the text of the community protocol in several languages, as long as the local language can be written. If the latter is not the case, or if the larger issue is one of literacy in the community, other solutions have to be found. Communities and supporting organizations have been experimenting with multi-media solutions such as photo stories, or the distribution of information as audio files on cell phones.

CHAPTER TEN

CONCLUSION: THE WAY FORWARD



Since the adoption of the Nagoya Protocol (and in some cases even before), communities in Africa and elsewhere around the world have been developing their community protocols. They are using them to defend their rights over resources and knowledge, document their processes for FPIC and decision-making, and enter into dialogue and negotiations with a range of outside actors. In the ABS context these processes have, across the board, led to greater clarity on community processes and greater awareness regarding ABS and the importance of protecting traditional knowledge and resources. In several cases, communities have already used their protocols to negotiate benefits.

We hope that the examples in this publication and the lessons learned can inspire and serve as guidance to other communities who wish to develop their own protocols, to organizations who want to support them, and not least to national governments who are seeking for effective ways to fulfil their obligations under Article 12.3 of the Nagoya Protocol to “endeavor to support, as appropriate, the development by indigenous and local communities, including women within these 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 utilization of such knowledge.”

Many parties to the Nagoya Protocol are currently developing or reforming their national ABS frameworks. At the same time, concrete ABS negotiations are increasing with the implementation of the Nagoya Protocol. It is therefore useful to look ahead at how community protocols should be integrated into these advances.

As discussed throughout this publication, the key to a genuine and successful community protocol is that it is an instrument developed by the community itself, informed by the community’s own values, procedures and institutions, as well as by national and international law. This means that community protocols have to remain flexible and tailored to the local context. It also means that the community defines and implements the process

for the development of their community protocol, with outside assistance where necessary.

The main task ahead is therefore to further recognize, and mainstream, community protocols, without sacrificing the essential aspects of this instrument.

Governments can work towards this by:

- Recognizing communities’ customary laws, community protocols and procedures in national ABS laws, requiring users to take them into account when accessing a community’s GR and/or aTK.
- Developing regulations or guidance that further define the recognition and support to community protocols.
- At the same time, avoiding restrictions on process and content of community protocols. While it might be valuable to establish certain standards for good process, and even a few key elements of content, it is crucial that there should be no standard formats or one-size-fits-all approaches.
- Leaving the control over the development of their protocols in the hands of the communities themselves, i.e. not making their recognition contingent on the input or approval of content by government institutions. The latter is often the case with other instruments such as resource management plans, which often leads to a lack of ownership and agency of the community.
- Instead, providing guidance and support for good process – the examples and lessons in this document can serve as an orientation.
- Actively supporting communities in developing their protocols when possible, and when asked for by the community. This can include financial support, or technical support through facilitation or legal input, but should never entail the imposition of

process or content. The support can also be channeled through appropriate NGOs with the approval of the community.

- Training existing community-based organizations, indigenous peoples’ organizations, and/or community lawyers (i.e. lawyers who already work to support communities regarding their rights to resources, land or participation) on ABS and community protocols.

- Developing the capacities of decentralized government institutions regarding ABS and community protocols.
- Encouraging users to approach ABS value chains as long-term partnerships with the provider communities, based on their customary laws, community protocols and procedures.
- Developing effective national frameworks for the protection of traditional knowledge.



