



2011 SEED Winner Kenya Organic

South Africa – Natural Justice and the Bio-cultural Community Protocols (2009)

Overview

Indigenous and local communities' consent is often not taken when their local resources and traditional knowledge are developed for research and market purposes, nor do they receive a share of the benefits that arise from such development. Bio-cultural protocols (BCPs) are tools that facilitate culturally-rooted participatory decision-making processes within communities with the aim of asserting their rights to their communally managed lands and knowledge (see box at right). The concept of BCPs was advanced by Natural Justice an international not-for-profit social enterprise with offices in South Africa, Malaysia, India and the United States. Natural Justice received the SEED Award in 2009 in order to further develop and disseminate the BCP approach.

Origins

Natural Justice: Lawyers for Communities and the Environment (NJ) is a non-profit organisation, registered in South Africa in 2007. It was founded by two environmental lawyers Kabir Bavikatte and Harry Jones united by a belief that biodiversity loss can only be stemmed by protecting the rights of community stewards of local ecosystems to govern and manage their territories and resources. At the outset, NJ had no financial resources, but was fuelled by two core aims:

- **to work at the local level to empower communities** to be able to ensure that the implementation of environmental law is undertaken in accordance with their values and customary laws and guarantees their rights to the customary use of natural resources; and
- **to work at the international and national levels to develop laws** that put communities at the heart of their implementation, securing communities' rights to sustainably manage their bio-cultural heritage (Bavikatte & Jonas, 2010).

Within its first two years of operation, NJ already began to experience a strong demand for its services, due in part to the impending deadline for the Convention on Biodiversity (CBD) to finalize negotiations on an international framework for Access and Benefits Sharing (see box on the following page). The experience that NJ was able to accumulate by working with communities on laws relating to the CBD and at the national and international levels led the enterprise to focus their work on developing 'Bio-cultural Community Protocols'. In 2009 the

What are Bio-cultural Community Protocols?

'Bio-cultural Community Protocols' (BCPs) provide a legal framework for communities to advocate for their environmental, social, economic, cultural, and other rights.

BCPs set out clear terms and conditions to the private and research sectors, as well as to governments for accessing community resources and engaging communities. They facilitate conservation and sustainable use of biodiversity by ensuring that decisions regarding communally managed resources rest firmly with the communities who have served as stewards over many generations.

enterprise made a successful bid to be recognised by the SEED Award. Besides a financial contribution, SEED helped to raise the profile of NJ and provided it with some key contacts, as well as guidance for developing a strategic plan through to 2014.

How it has grown/current status/future prospects

The Nagoya Protocol on ABS



The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Utilization (ABS) is a supplementary agreement to the Convention on Biological Diversity (CBD) aiming to contribute to the conservation and sustainable use of biodiversity. It was adopted on 29 October 2010 during the 10th Meeting of the Conference of the Parties (COP) to the CBD in Nagoya, Japan.

The Nagoya Protocol refers to community protocols, and this served to raise the profile of BCPs in international law.

Photo above: COP 10 delegates finalizing the adoption of the Nagoya Protocol (Source: ENB, 2010).

NJ co-founder Kabir Bavikatte reports that BCPs have now ‘gone viral’... “Many people (NGOs, Community organisations, etc.) have taken it up and are running with it themselves”. Over the past few years, BCPs covering a wide range of issues have been established by diverse organisations in several countries around the globe.

The rapid up take of BCPs has brought about significant changes for NJ. The enterprise has expanded its staff and geographic scope considerably, from 2 staff members based in Cape Town working mostly in Africa, to 13 staff and a number of associates and fellows working collaboratively across a much wider extended network encompassing Africa, Asia, Latin America and Europe. In 2010 NJ set up a regional office in Asia. In order to better accommodate for growth while still being loyal to its vision and mission, in 2011 the founders decided to step down from their role as co-directors and restructured the enterprise as a “collective” (NJ 2010-11 annual report).

NJ’s work has also shifted its focus of activities. According to Bavikatte, at the time of winning the SEED Award NJ was more involved in the development of BCPs – now it focuses mostly on providing services so that the BCP can be entirely community run.. “Now, for most part, we don’t directly get involved in BCP development itself besides running capacity development workshops/meetings and providing BCP related legal support... we try to focus on providing information to the organisations that will provide support to the communities. We support local NGOs and local offices”. In 2010, NJ set as its top social target, to facilitate the development of best practice examples of BCPs in Africa and other parts of the world. According to Bavikatte, this target has been met, and NJ is now focussed on sustaining and improving on these best practices and disseminating the lessons from them. “The number of direct beneficiaries has grown so much that now we support eight or nine different communities just in Southern Africa – it is now hard to track”.

NJ and BCPs have also figured prominently at the national and international levels. The enterprise’s top environmental targets in 2010 were to: (1) ensure the recognition of BCPs in the International Regime on ABS (achieved in the adoption of the Nagoya Protocol in October 2010); and (2) achieve the recognition of BCPs in the national laws and/or policies. NJ has made much progress on the endorsement of BCPs in the national laws and policies of countries like India, South Africa, Namibia, Bhutan, and Malaysia.

NJ’s top business target was to achieve core funding and thereby avoid working “from hand to mouth”. NJ has achieved this goal through a combination of donor funding and consultancies, and at the end of last year it had enough money to continue for close to a year (Bavikatte, 2012).

Current and planned growth: NJ has secured funding and resource support from the ABS Capacity Development Initiative for Africa from 2011-2012 to establish the African Initiative on BCPs with partner organisations. It has also begun to deepen an exploration of biocultural *rights* and it is currently writing two books on the topic, tentatively titled: “Stewarding the Earth: Rethinking Property and Biocultural Rights”, and “Exploring Biocultural Rights in Asia: Political Ecology, Jurisprudence, Resistance and Engagement”. Further, NJ has begun to extend outreach of the BCP approach to the private sector through an informal partnership with Union for Ethical Biotrading, which has stressed a need for Bio-cultural *Dialogues*. The enterprise looks forward to intense engagement at the international level between now and 2014 within the CBD and the United Nations Framework Convention on Climate Change (UNFCCC) as well as the forthcoming World Conservation Congress (September 2012) and World Parks Congress in 2014.

Social, environmental and economic benefits and outcomes

BCPs establish a framework and baseline to begin assessing and negotiating the use of resources and traditional knowledge. The social, environmental and economic benefits provided by BCPs are initially intangible and therefore difficult to enumerate or measure. However, an overall snapshot of the benefits can be summarized as:

- a. Social:** provision of a space and time where local communities can assess their biocultural resources, bio-cultural heritage and how they wish to portray this and engage with external interests, which can result in improving community empowerment.
- b. Environmental:** Once communities have considered their biocultural resources, whether traditional knowledge or the natural environment, this can result in improving and ensuring responsible stewardship of natural resources, by both the community and external agents wanting to utilise those resources.
- c. Economic:** Once the rights to their natural resources and traditional knowledge have been secured by the community, the community can engage in bio-trade or other benefit sharing agreements, that, in turn, can contribute income to the community. Such agreements can also help to avoid livelihood loss if the natural environment is preserved.

The development of BCPs constitutes a process of bio-cultural and legal empowerment within a community and provides space and time for collective thinking about new issues or emerging legal frameworks. The protocol itself puts other stakeholders on notice that the community knows its rights, has already self-determined the future management of its natural resources and traditional knowledge and is willing, or not, to engage with those stakeholders on certain conditions.

Once instated, bio-cultural protocols can lead to livelihood improvement by securing communities' rights to their natural resources and traditional knowledge. This provides them the basis upon which to use their natural resources for their own purposes, engage in bio-trade or enter into benefit sharing agreements.

BCPs are starting to show results, for example, the community of Deraniyagala, Sri Lanka, together with local NGO, has successfully protected their watershed through the sustainable use of forest products.

NJ's Business model and primary stakeholders

As a non-profit social enterprise, NJ finances its work through a balanced mix of fundraising and consulting services. During the 2010-11 financial year, consultancies provided the bulk of the enterprise's income (49%) supplemented by a substantial portion coming in from a combination of donations and grants (39%). NJ's consultancy work comprises technical advice, reporting on international meetings, and organizing and hosting workshops for community based organisations and governments nationally and internationally. The support received from funders ranges from core funding to funding for specific projects and activities. After the ratification of the Nagoya Protocol on ABS, NJ foresees governments and potential users of community resources to finance bio-cultural protocols, in compliance to the new regime (NJ 2010-11 annual report).

Stakeholder mapping of NJ is complex because most of the collaborative work it carries out is through informal agreements. Co-founder Kabir Bavikatte describes its partners and beneficiaries as "a massive networks of organisations". He also explains that NJ's key partners have varied: "It's like a web of different nodes that light up at certain times".

Why BCPs in ABS?



The CBD provides a framework for national governments to implement ABS mechanisms to regulate and protect knowledge and genetic resources in order to facilitate access and ensure the fair and equitable sharing of benefits. However, there is a disconnect between National policy frameworks and the community. BCPs serve as an interface between the community and national policy framework basing themselves on local governance arrangements. (Source: Interview with Babara Lassen, ABS Initiative)

Photo above: Kabir Bavikatte, co-founder of Natural Justice, presents a case on biopiracy during the COP 10 of the CBD (Source: ENB, 2010)

Table 6. Attempt at mapping NJs (and its product, BCPs) stakeholders:

Type of stakeholder	Organisation name/quantity
Funders	7 organisations, including: CD Trust; The Christensen Fund Deutsche Gesellschaft für Internationale Zusammenarbeit; Open Society Initiative for Southern Africa; Shuttleworth Foundation; United Nations Environment Programme (UNEP); United Nations University ² Institute of Advanced Studies
Implementation partners	Key partners include the ABS Capacity Development Initiative for Africa at the level of implementation. Another major partner is Indigenous and Community Conserved Areas (ICCA) Consortium (Natural Justice is a Consortium member).
Network of organisations working with BCPs	More than 25 organisations, including international organisations such as UNESCO, IIED, IUCN, UEBT
Beneficiaries (Called “main partners” by NJ)	19 community based organisations and local conservation NGOs throughout the regions of Africa, Asia, Latin America and Europe
Users	These are companies that are engaging in access and benefits sharing with local communities. NJ does not currently work with companies, but is exploring, together with UEBT, the types of services and facilitation that it could provide users (e.g. helping to establish value chains through Biocultural “dialogues”).

Success factors

The BCP approach has become widely known and applied in a relatively short amount of time. There are three key ingredients that have made the recipe for success.

- a. **BCPs fill a need:** The success of BCPs is rooted in their ability to respond to the opportunities created by emerging international and national environmental law, and the recognition by local communities that they need to be able to articulate their rights (Bavikatte & Harris, 2010). BCPs serve as needed device for bridging the gaps between customary, national and international law (Salter and Von Braun, 2011).
- b. **International endorsement:** The profile of BCPs was raised by the 2010 adoption of the Nagoya Protocol on Access and Benefit Sharing, which made reference to “community protocols”. Article 12 of the Nagoya Protocol requires parties to take the customary laws, protocols and procedures of indigenous people and local communities into consideration and to work with indigenous people and local communities in order to ensure equitable sharing of the benefits from traditional knowledge. “As a result of the value of community protocols being acknowledged in international law, it is likely furthering the use of BCPs to resolve future conflicts over biocultural rights” (Salter and Von Braun, 2011).
- c. **NJ’s organisational strategy and style:** The enterprise places a high value on its staff and the organisation’s goals. According to Bavikatte, “It all comes down to people. We have never tried to hire the best for the job, we just try to create a great working environment and facilitate people to be the best they can be. Money is a threshold motivator. But cross that and create motivational opportunities. Get strong personalities and people that are driven. The work is fun”. Bavikatte also cites the ability to network and loose-style organisation. “We are small and able to respond faster to opportunities”.
- d. **The importance of research and development:** NJ emphasizes an adaptive learning and continuous improvement cycle for BCPs: developing the theoretical construct, testing it in practice, diffusing it through networks, and incorporating lessons from implementation.

Challenges and how they have been met

- a. **Acquiring financial support:** Initially, the work NJ did to support the development and dissemination of the BCPs was dependent on individual consulting contracts and small grants. Currently, this is no longer an issue because NJ has managed to receive enough core operating funds to cover their yearly expenses with a buffering period of nearly a year. This has been accomplished through networking. However, the issue remains regarding the costs of establishing BCPs at the community level. As a way of meeting this challenge, NJ has helped some communities to find funding for their establishing

Research and development of BCPs in theory and practice

NJ invests considerable time and resources toward researching, documenting and improving both the theory and practice of BCPs. It does this through an internship research programme in the enterprise and dissemination of material on the Community Protocols Website and NJ website, as well as through networks, conferences and workshops. Materials include a range of publications, case stories and a facilitator’s toolkit training multipliers.

BCPs. Further, during international consultations of the CBD working group, parties were urged to request the allocation of funds to support the mechanisms for to indigenous communities to organize themselves, including community protocols (ENB, 2011).

- b. Managing scale up of the enterprise and sustaining the scale up of BCPs:** For NJ, according to Bavikatte (2012), the past year “was a steep learning curve” in terms of organisational management, specifically, in gaining an understanding of how to sustain growth without losing the sensitivity that comes from small organisations. This has been addressed through restructuring as a collective –an extended team. It is an ongoing challenge of trial and error, “but we are getting there”. According to NJ’s 2010-11 annual report, “It became clear in 2009 that adopting an ad hoc approach to assisting communities to develop community protocols had its limitations. At the same time, we realized that the methodologies that we had applied in the first few BCPs could be improved upon. To resolve this it was decided that: 1) we should develop regional programmes that provide focused and long-term support and lesson-sharing among specific communities; and 2) to ensure their success, we would require considered fundraising strategies for the programmes”.
- c. Diminishing potential weaknesses and dangers of BCPs:** Several potential weaknesses and dangers of BCPs have been highlighted through working with participants on the ground (e.g. the process of developing a protocol could be abused by certain parties either from outside or from within the community; such processes may further entrench or perpetuate existing power asymmetries at the local level such as the exclusion of women and youth in decision-making mechanisms.) NJ has dealt with this by discussing the potential pitfalls of BCPs with its partners/beneficiaries. Some of the Asian partners have proposed to develop a programme of work that deepens the understanding of community protocols and broadens their effectiveness across communities in Asia. (NJ Annual Report, 2010-11; and Community Protocols website). NJ has also listed and discussed these concerns on a page titled, “Core Concerns” on its Community Protocols website.
- d. Ensuring the quality of BCPs:** This is a challenge related to that listed immediately above and relates to how to make the BCP process a toolkit that can be useful broadly without becoming too diluted. All interviewees cited this challenge. The question is whether a “standardized BCP” would be warranted. The tension is between ensuring quality and key elements of the BCP is are maintained, while at the same time making sure that it is not prescriptive and that it captures the diversity and participation of the community. These issues are being dealt with through discussion with regional partners.
- e. Engaging with the private sector:** Finding the right approach for entering into dialogue with the private sector, and in particular with companies that are interested in fair trade. They need the guidelines and the tools. According to Maria Julia Oliva, UEFT, “BCPs have a defensive and aspirational aspect. Communities can defend themselves against breach of their rights but they can also inspire companies to act.... It’s critical to work with the commercial sector and that’s where there are opportunities, but there are also challenges. This needs to be thought through very carefully before simply offering it to companies”. NJ and UEFT have begun to tackle this barrier by testing the field in 3 pilot projects – working with companies to guide them in collaborating with communities in order to discuss their biocultural wealth.
- f. BCPs – lengthy process:** According to Barbara Lassen of the ABS Initiative, BCPs themselves are not just about the document in the end – it’s about the process – and a good process stakes time. Most companies have the challenge of not having the time to go through the community process. In order to address this challenge, NJ and its network partners are testing a biocultural “dialogue” approach. “This dialogues approach attempts to find something feasible without losing the spirit of the BCP”. One of the conclusions is that wherever possible, companies and communities should try to complete the full BCP process. At a minimum, companies should see if there is already a BCP in place – or a similar community experience that they could base it on or any similar document they have drawn up (Lassen, 2012).

Current needs/types of support the enterprise requires now

With growth and success, the organisation is becoming increasingly complex. Guidance on institutional governance is needed.

Lessons Learned from NJ's experience with BCPs

BCPs have proven that by developing appropriate protocols, communities can leverage the law to assert control over their resources and knowledge. This case also provides valuable insight into SMMEs that focus specifically on influencing international and national policy. The integration of academic research with community-based practical action, coupled with the mechanisms employed to disseminate learning and spread the BCP approach are key to the scale up and replication that this initiative has enjoyed. Networking at local, national-international levels and participation in important events has also been a key success strategy.

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Interviews

- Kabir Bavikatte – Co-founder, Natural Justice
- Maria Julia Oliva – Senior Adviser on access and benefit sharing, Union for Ethical Bio Trade (UEBT)
- Barbara Lassen – Programme Officer, Access and Benefits Sharing Capacity Development Initiative for Africa