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BIOCULTURAL COMMUNITY PROTOCOLS AND THE ETHIC OF STEWARDSHIP

The Sovereign Stewards of Biodiversity

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Introduction

BCPs and the Western Ontological Matrix

Since the late 1980s onwards, countless declarations, reports, and scholarly works have underlined the crucial role of indigenous peoples and local communities (IPLCs) in conserving biodiversity. In parallel with the rise of the concept of biocultural diversity,[2] IPLCs are increasingly featured as *guardians* or *stewards* of rich landscapes and vital ecosystems. The Brundtland Report (Brundtland & World Commission on Environment and Development, 1987, para. 74) described these communities as "[…] the repositories of vast accumulations of traditional knowledge and experience that links humanity with its ancient origins". One year later, the Declaration of Belém (1988), under the lead of the anthropologist Darrell A. Posey, forcefully stated that "native peoples have been stewards of 99 percent of the world's genetic resources". Posey, and his team of lawyers, anthropologists, and indigenous activists (Graham Dutfield, Kristina Plenderleith, Addison Eugênio da Costa e Silva, and Alejandro Argumedo to name a few), played a considerable role in mainstreaming the "integrated rights approach" (Posey & Dutfield, 1996) as one of the progressive ways to synergistically advance the human rights of IPLCs and what they called "the right to development and environmental conservation" (Posey & Dutfield, 1996, p. 95). They emphasised biodiversity conservation with a strong and innovative focus on mutual adaptations and co-evolution between human cultures, languages, and the environment (Maffi & Woodley, 2010, p. 5). But the crux of their proposal was the maintenance of identity for IPLCs. More critical for Posey was the defence of indigenous peoples and the belief that better protection of their language and identity necessarily implied recognising the holistic nature of their community

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life. This inevitably endowed IPLCs with a "bundle of rights" which comprised the "control over cultural, scientific, and intellectual property". Posey dubbed this "bundle", "traditional resource rights" and set as a fundamental prerequisite for its achievement the "rights to land and territory" (Posey, 2004, p. 163; Posey & Dutfield, 1996). Posey's inspirational work (Bavikatte, 2014, pp. 234–235) has paved the way for subsequent insightful "integrated" approaches to help IPLCs secure their ways of life.

International environmental and human rights lawyers Sanjay Bavikatte and Harry Jonas pushed further ahead with this concept by referring to IPLCs *as stewards* of nature. Through their theoretical work and grass-roots involvement, they succeeded in effectively harnessing the open-textured (see Posey, 2004, 163) language of Articles 8(j) and 10(c) of the Convention on Biological Diversity (CBD) (apparently intended by their main initiators – see Halewood, 1999), in light of the progressive provisions of the Agenda 21 and the Rio Declaration. The bundle of "biocultural rights"[3] – as they were to be conceptualised by Sanjay Bavikatte and colleagues – closely resembles the concept of "traditional resource rights". This bundle encompasses the rights to land, territory, and natural resources, the right to self-determination, i.e. self-government (Anaya, 2004), and the rights to culture and cultural heritage. Most importantly, biocultural rights are built upon two cornerstones: one relates to the direct interests of IPLCs (a group rights approach), while the other pertains to a more general interest of humankind (or the biotic community at large) in the conservation of the environment. Therefore, the recognition of biocultural rights does not take as its point of departure the right of a group or community to flourish, but rather the ethic of stewardship, i.e. the ethic entrenched in the role of IPLCs as conservationists or custodians of local ecosystems.

One of the core assumptions of biocultural jurisprudence is that much of this role of guardianship/stewardship of biodiversity is underwritten by an "ethic of stewardship", itself embodied in "a way of life" and rooted "within a moral universe" (Bavikatte, 2014, pp. 168–169). The last IPBES' report (IPBES, 2019, p. 42) leaves no doubt that it is through this idea of "stewardship of biodiversity" that IPLCs have recently gained a more substantial status in the international regime for the conservation of biodiversity. An important point to make is the recent reinforcement of the underlying theoretical canvas: both the Tkarihwaié:ri Code of Ethical Conduct[4] and the Atrato River case of the Constitutional Court of Colombia[5] (Macpherson et al., 2020) – one of the first decisions to formally recognise "biocultural rights" – make it clear that the ethic of stewardship touches upon the "holistic interconnectedness of humanity with ecosystems and obligations and responsibilities of indigenous and local communities".[6] Emphasis on possible different worldviews, ontologies, and epistemologies naturally produces deep philosophical tension when faced with "Euro-modernity" or "Western-modernity".

In the Access and Benefit-Sharing (ABS) regime, these theoretical changes have gone hand in hand with the advent and the consolidation of the concept of "biocultural diversity" (Maffi, 2001).[7] The ethic of stewardship has opened new avenues to "protect" IPLCs' "customary use of biological resources" and

"knowledge, innovations and practices" within the meaning of Articles 8(j) and 10(c) of the CBD. Some have continued to explore the possibility of *sui generis* intellectual property rights (IPRs) vested in IPLCs (see Brush & Stabinsky, 1996; Greaves, 1996). The negotiation, adoption, and entry into force of the Nagoya Protocol, however, have given hope to all those who advocate holistic approaches and do not believe that IPRs and the attendant transformation of genetic resources and knowledge tradable on global markets would do any good to the communities concerned. Ongoing work on the interpretation of the relevant provisions of the CBD and Articles 5, 6, and 7 of the Nagoya Protocol is still encumbered by a significant level of uncertainty, but a great deal of hope has been pinned on community protocols – referred to here as Biocultural Community Protocols (BCPs) – as now enshrined in the Nagoya Protocol.[8] In particular, seen within a dynamic policy and advocacy context around "territories and areas conserved by indigenous peoples and local communities" (ICCAs),[9] Indigenous Biocultural Territories (Argumedo & Pimbert, 2008), rights of nature (Iorns Magallanes, 2019; Kotzé & Villavicencio Calzadilla, 2017; Tănăsescu, 2020), and biocultural rights (Bavikatte, 2014; Girard, 2019; Sajeva, 2018), BCPs have been heralded as able to solve the ABS conundrum for IPLCs. They ensure communities' rights to development, while supporting their role in biodiversity conservation and maintenance (Posey & Dutfield, 1996, p. 95), without letting their unique livelihoods and ways of life be shattered by the unfettered extension of disembedded markets and the language of trade.

There is no intention here to walk away from the "win-win" approach[10] at the core of ABS; the commodification of traditional and indigenous seeds and traditional knowledge (TK) is still believed to open new opportunities to development, thereby strengthening IPLCs' effectiveness in conservation. However, what is new is the procedural framework that goes along with BCPs, which is thought to give IPLCs more substantial control over their resources and TK. This control occurs through the right to say "no" and to set out the conditions of negotiations. It also enables IPLCs to uphold the market-inalienability (*extra commercium* quality) of certain aspects of their heritage – land, sacred sites, seeds, and language – on which communities depend for their survival, well-being, and to thrive (Bavikatte et al., 2010, p. 298).

It remains to be seen whether a more significant transformation can be expected from tools so far initiated and facilitated by NGOs within the constraints set by the States and international organisation funders (Parks, 2019, p. 82). They inevitably accept strong linkages between what are still mainly "moral economies" and disembedded global markets, without really pondering over the disruptive impact that the irruption of the market-oriented and instrumental rationality may have on many communities in the medium run (see Gudeman, 2001, pp. 27–29, 2012, p. 29).[11] At the very least, BCPs may help rebalance centuries-old asymmetrical relationships between IPLCs and (mainly) North-based bioprospectors, *extra commercium* things and tradable properties, and reinforce local or community prior and informed consent (PIC) procedures or support

their recognition in domestic legislation where they are still lacking. As many BCPs included in our case study illustrate, BCPs may also be used as tools for the vindication of rights on land, territories, and resources. Finally, some believe that BCPs, insofar as they are undergirded by a new ethic of stewardship, can be used as "space opening" tools (Mulrennan & Bussières, 2020) to alternative, non-naturalistic ontologies. In this, BCPs would stand as standard-bearers in the struggle for making room for IPLCs' identities.

BCPs and Ecological Scripts: Eco-Governmentality, Counter-Narratives, and New Subjectivity

Is not such a reading excessively naïve? For such fundamental changes to take place, there would first have to be profound transformations in Western/European legal constructs and in their naturalistic underpinnings. The seven BCPs that this chapter analyses show that, even where a domestic legislation enshrines a local PIC procedure and further strengthens its application through the express recognition of BCPs (see Table 11.1, Annex), there is no apparent shift away from what Mario Blaser calls the Western or European "ontological matrix" (Blaser, 2009). The way this naturalistic "ontological matrix" unfolds in several of the BCPs under consideration, the interlacing of narratives and representations around biodiversity conservation, their apparent strategic reversals, together with references to the ethic of stewardship, are invitations to consider further what BCPs offer in terms of strategic use of hegemonic categories.

For this purpose, two central concepts will be used: scripts and eco-governmentality. The seven BCPs included in our case study were examined together with background documentation, and our analysis is informed by the extensive statutory and regulatory framework in which each was developed. These protocols were analysed as incorporating "scripts". Scripts partake in the "institutional and regulatory spaces in which the knowledges and practices are encoded, negotiated, and contested" (Peet & Watts, 1996, p. 11). They are involved in the construction of social practices and identities. We posit that scripts need to be grasped at the ontological level, which means that they reach into radical assumptions about what kinds of things do or exist, their conditions of existence, relationships, attachments, and connectivity (Blaser, 2009). To understand precisely what is at stake, let us follow the path of a script. Ontologies express something about the *real*, the "conditions of possibility we live with" (Mol, 1999); and for this reason, they are never given, "out there", ready to be picked up, but are the result of practices and "dynamic relations of hybrid assemblages" (Blaser, 2013, p. 552). They are always "in the making" (ibid.), "open and contested" (Mol, 1999, p. 75). They "manifest as 'stories'" or narratives and through non-discursive aspects (Blaser, 2009, p. 877). Discursive (e.g. texts and policies) and non-discursive elements (e.g. objects, conducts, and institutions) rest upon theoretical knowledge, a "body of doctrine" made of concepts, ideologies, and axioms. In European/Western ontologies, there is an ontological matrix

(Blaser, 2009) or meta-ontology (Blaser, 2013, p. 544) which is built along the "nature-culture divide". More importantly, storied practices (narratives) and theoretical knowledge stabilise into performative interpretations (Bonneuil, 2019, p. 9) of the world, which we define as "scripts" or "scenarios". As they are interpreting what is "out there", they necessarily take part in the enactment of what they narrate (Blaser, 2013, p. 552). This allows them to produce, in turn, "social practices and relationships of power" (Ulloa, 2005, p. 5). This is what is meant by eco-governmentality. Following Agrawal's Foucauldian-inspired analytic, eco-governmentality is defined as the variety of "knowledge-making apparatuses" (Brosius, 1999, n. 6) used to shape "[…] the conduct of specific persons and groups, including the mechanisms that such persons and groups use on themselves" (Agrawal, 2005a, n. 3). Eco-governmentality relies on the "techniques of the self" used (along with a State's regulatory strategies) to forge new practices and new links of political influence (e.g. the creation of a new local council, a division of space, or a provisioning of new crop varieties). The typology of these "techniques of the self" is not explored in the following paragraphs. What matters to our analysis are their outcomes: the effects of the regimes of power and the "intimate government" (Agrawal, 2005b). These techniques show what scripts

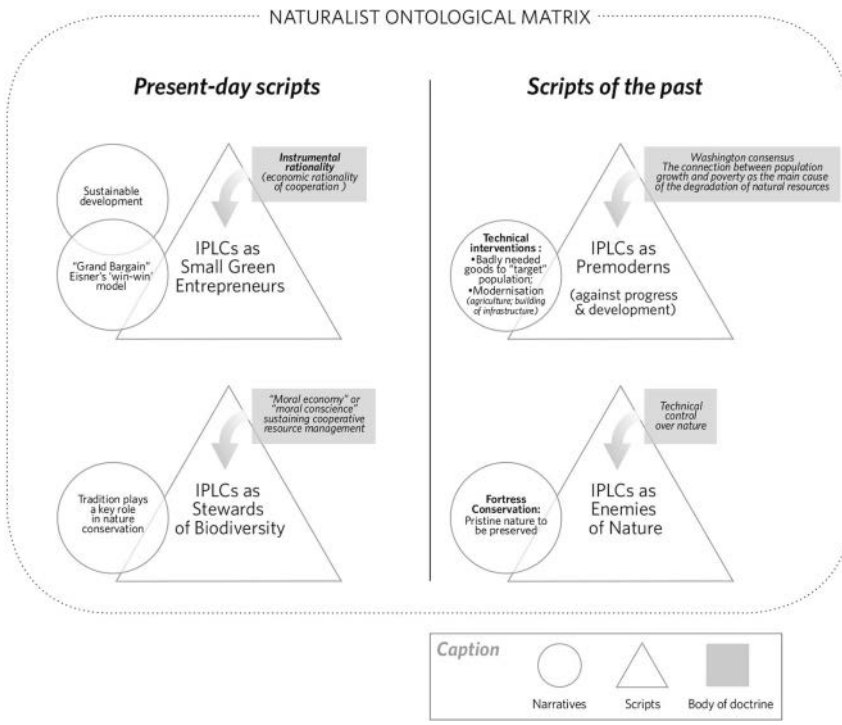

FIGURE 11.1 Naturalist scripts and narratives (Fabien Girard, original material for the book)

do, namely that they invade the political imagination and make local "subjects" pursue "goals that they imagine as their own" (Agrawal, 2005a, p. 179).

Four scripts were identified through the corpus of BCPs studied. We believe that they can all be related somehow to the "all-encompassing modernity" (or the naturalist ontological matrix) – and its series of foundational and oppositional pairs: nature/culture, non-humans/humans, non-moderns/moderns, objects/subjects, past/present (Blaser, 2013). Two of the scripts are present-day scripts, and the "steward of biodiversity" script is relied upon in all the BCPs under consideration. The other two scripts, those of the past, are mostly inherited from colonial occupation. These scenarios still have a bearing on development projects and environmental politics in several countries. Some of our case study BCPs illustrate this, though they are not used to defend IPLCs' claims.

In light of this, we first investigate what BCPs tell us of the kind of scripts, relations of power, and the specific eco-governmentality that IPLCs face in the international regime for biodiversity. Suppose scripts can "define actors" (Akrich, 1992, p. 207), allocate roles and tasks, and enrol and "enscript". In that case, this begs the question of the extent to which BCPs, despite all good intentions and promises, are deployed in domestic politics or international fora as a means to replace political negotiation with managerial efficiency (Brosius, 1999). Our second line of enquiry is that environmental policies and their scripts should not be seen as unrelenting machinery operating seamlessly on the undifferentiated mass of local actors. Supporting this argument is taking the risk of "ignoring the social relations through which technologies of control are formed, exercised, contested, and critiqued" (Cepek, 2011, pp. 544–545; also see Valdivia, 2015, p. 474; Peet & Watts, 1996, p. 16).

This is especially true of the "steward of biodiversity" script, a dominant script, which certainly has much to do with the "noble ecological savage" myth (Raymond, 2007; Redford, 1991), but which also distinctively hinges upon a new ethic capable of sustaining new representations and counter-discourses and thereby of creating cracks in the European-centred matrix. As we are reminded by Mario Blaser (2013, p. 558) and Sylvie Poirier (Poirier, 2008, p. 83),[12] indigenous peoples may at times outwardly indulge themselves in modern naturalist categories and use available "symbols of alterity" (e.g. the steward and caretaker of the environment), while making in fact great inroads into the nature-culture divide and opening the "door to the consideration of other ontologies as plausible and alternatives to the modern" ones (Blaser, 2013, p. 556). This opens our last line of thought, namely that as offshoots of the biocultural jurisprudence and the concept of "biocultural diversity" (in its political articulation: Brosius & Hitchner, 2010), and against the backdrop of ongoing legal innovations around "natural entities" and IPLCs' territories and heritage, BCPs have the potential to make room for "non-modern" worlds. In particular, through a strategic partnership with academics and civil society organisations and via the support of transnational networks, community protocols may contribute to unravelling the

ontological threads of modernity and negotiating spaces for the advent of a new form of legal subjectivity. This is a subjectivity that would not be grounded in the aptitude of monadic agent to exert her dominion over inanimate nature. Instead, it would be based on the entanglements between plants, microorganisms, ecosystems, and a "person-in-community" (Gudeman, 1992) such as a carer, steward, custodian of a place where identities unfold. The result, it is argued, would be to open up space for IPLCs to sustain their identities by shrinking the reach of the naturalistic matrix.

These questions are addressed in the following sections of this chapter. We start with a critical appraisal of a string of BCPs developed in Africa and Latin America. We investigate the kind of scripts that are played out in their drafting and implementation. We analyse the type of counter-narratives and counter-hegemonic discursive practices that they may contain and deploy as an antidote. The chapter then moves on to examine the effects of entrenching BCPs in "stewardship", "custodian", "caretaker" representations and narratives on tradition, asking in particular whether the associated script is not *subjecting* peoples to new forms of eco-power (Brosius, 1999, p. 37). Finally, the chapter replaces BCPs and the "ethic stewardship" within the context of IPLCs' political struggle aimed at opening up space within Western ontologies. It is argued, in particular, that the use of the ethic of stewardship, together with bonds with transnational coalitions and networks, helps unveil and anchor a new form of legal subjectivity.

Unravelling the Imaginaries Bound Up with Environmental Scripts

The BCPs that we have examined bear testimony to the kind of ontological politics (Mol, 1999) that is now played out around the ABS regime and IPLCs. There are seven BCPs included in the scope of this study, covering both Africa (Benin, Kenya, Madagascar) and Latin America (Mexico, Panama). These BCPs offer a wide diversity of ABS regimes, legislative and regulatory frameworks on IPLCs' rights, experiences of colonialism, and socioeconomic and environmental conditions. The full list is provided in the Annex (see Table 11.1), which also contains a brief account of domestic legal regimes regarding local or community PIC and BCPs.

In what follows, we will examine BCPs through the lens of ontology and eco-power and pay attention to the discourses and narratives that unfold, understood as many performative scripts on IPLCs and the environment. The narratives and scripts that our chapter unveils are summarised in Figure 11.1. All these scripts are embedded in the Western or European "ontological matrix" (Blaser, 2009), but the two present-day scripts are much more important and therefore receive the greatest attention in the following pages for two reasons. First, the "stewardship of biodiversity" script is the dominant script, in the sense that it is pervasively present within the BCPs under study

and beyond (see examples in Delgado, 2016). While our study illustrates how this script opens a new chapter in the history of the "[…] shift from the management of non-human nature to the management of people" (Roach et al., 2006, p. 60; also see Bavington, 2002), we endeavour to show that it also harbours new intellectual influences – first and foremost the "ethic of stewardship" – offering a promising potential to sustain IPLCs' identities. Second, the "small green entrepreneur" script holds a special position in biodiversity conservation, as it dates from the early days of the United Nations Conference on Environment and Development (UNCED) and the CBD, and is still the bedrock of community-based natural resource management (CBNRM) as an ample literature now illustrates.[13]

Two interrelated master narratives support the small green entrepreneur script: "sustainable development" and the "Grand Bargain"; they warrant a few comments. Sustainable development, which is enshrined in the 1987 Brundtland Report (Brundtland & World Commission on Environment and Development, 1987), means that conservation is based on utilisation, i.e. conservation cannot be separated from the idea of "economic and social development and poverty eradication" that are thought of as "the first and overriding priorities of developing countries" (CBD, Preamble). As could be read in an early draft version of the Rio Declaration outlining the headings to be included in the text,[14] the aim is to preserve biodiversity while reaching "optimum sustainable yield" or "optimum sustainable productivity" (Robinson, 1992, p. ci), what Ostrom will later coin as "long-term economic viability" (Ostrom, 1990, p. 31). The concept of the "Grand Bargain" (Boisvert & Vivien, 2012) is seen as the key to solve the conundrum of economic development within the confines of the carrying capacity of ecosystems. The ABS process is conceived of as a win/win situation (see Eisner, 1989)[15]: the "gene-poor" North retains its access to the remarkable bounty of genetic resources mainly located in the tropics. At the same time, the Global South captures part of the benefits arising out of IPRs on "biodiscovery". Or it can benefit directly as well from new ("environmentally sound") technologies through "technology-for-nature swaps".[16] In this, the Global South is deemed better equipped to tackle biodiversity erosion.[17] Of paramount importance in this model is the framing of ABS as a form of inducement-producing policy – together with a blend of measures known as institutional incentives (North, 1990) – to change how humans, understood as rational agents, "interact with their environment and how they use natural resources".[18]

In the next section of this chapter, we begin with an analysis of this script. We then move on to study the "enemies of nature" and "premoderns" scripts. These two scripts are never explicitly mentioned in the protocols but are still active as background influence in the development of certain BCPs and against which IPLCs are compelled to fight. Finally, we investigate the "stewardship of biodiversity" script. As this is the dominant script, we evaluate the BCPs according to its inclusion.

The "Small Green Entrepreneur" Script

In four out of seven BCPs studied, the main thrust of the community-based enterprise was to align farming communities and indigenous peoples with the "Grand Bargain" (Wynberg & Laird, 2009) and sustainable development narratives. Translated and stabilised in the "small green entrepreneurs" script, which owes much, as will be seen, to Ostrom's work and the Bloomington school of political economy, the two narratives inject certain assumptions about the local "agents" (tastes, competences, motives, aspirations – Akrich, 1992, pp. 207–208) and define their role within a set "framework of action" (ibid.) mainly geared towards incentivising biodiversity conservation.

The script is clearly discernible in the BCPs developed in Madagascar[19] and Benin within the framework of the Darwin Initiative-funded project on the "Mutually supportive implementation of the Nagoya Protocol and Plant Treaty".[20] This should not come as a surprise, as there is a blueprint laid out in the ABS framework of each country to connect BCPs with the intra-state benefit-sharing mechanism,[21] making clearly the instruments part of the strategy to foster both economic development and biodiversity conservation through bioprospection.

As much in the reports submitted by Bioversity International to the funding agency as in the contract holder's work (Halewood et al., 2021), several references are made to plant genetic resources as "new commons" (Halewood, 2013). The theoretical underpinnings have now a long pedigree in studies on plant genetic resources for food and agriculture (PGRFA) in particular. They can be summarised as follows: with their twofold economic attributes of low excludability and high rivalry, genetic resources embodied in seeds managed by farmers and IPLCs yield positive externalities, but which are hardly appropriated at the local level (Cooper et al., 1994; Swanson et al., 1994). Consequently, for farmers and local communities not to forgo their conservation practices for more lucrative activities (e.g. conversion to elite varieties and monoculture), incentives need to be developed (Bioversity International, 2018; Correa, 1999). BCPs, in setting up the conditions for ABS agreements with commercial partners (industry, researchers), stand as appropriate tools for influencing IPLCs' behaviour in biodiversity conservation. They are meant to show IPLCs that conserving genetic resources can pay off. BCPs entrenched in the script of "small green entrepreneurs" remain, of course, mostly unconcerned with the aspects of biocultural heritage and hardly touch upon the issue of the ethic of stewardship.

The BCP of the farming communities of Analavory (Madagascar), the BCP of Ampangalastary (Madagascar), and the BCP of the Municipality of Tori-Bossito (Benin) alike are prime examples of protocols instrumentally tailored to attract bioprospectors by giving them clear guidance about how to negotiate ABS agreements and the kind of benefits sought by the communities. They also set out the procedure whereby the communities can access genetic materials through the Multilateral System (MLS) of the International Treaty on

Plant Genetic Resources for Food and Agriculture (ITPGRFA). In the case of Analavory (pp. 7–9)[22] and Tori-Bossito (pp. 11–12), specific procedural rules are laid down to include landraces in the MLS, should the communities voluntarily decide to make materials that they hold available to the international community. To our knowledge, this linkage between a BCP and the ITPGRFA is unprecedented and warrants two observations. The first is that the communities of Analavory and Tori-Bossito are being located in low diversity areas[23]; the prospect of attracting bioprospectors is low.[24] The BCPs could not, therefore, entirely be articulated around the ABS framework, and much effort was invested in deploying an incentive framework for communities to engage in transnational germplasm transfers, test new cultivars through participatory plant breeding, and adopt new varieties (Halewood et al., 2021).

This brings us to our second observation: attempts at turning IPLCs into small entrepreneurs are always risky undertakings, especially where there are serious doubts about the kind of resources and knowledge that can attract the interest of researchers and bioprospectors. In this context, BCPs create expectations that they cannot deliver. Dashed hopes bring disappointment and frustration, a point already stressed by Pierre du Plessis some years ago, who stated that the "[t]he cost implications of pre-emptive ABS protocols are not worth it" (IIED et al., 2012, p. 4). Admittedly, the process of developing BCPs is an empowering process in itself. It contributes to raising the community's awareness about its values, resources, customs, and institutional organisations, thereby increasing its aptitude to manage its biocultural heritage and engage with third parties with greater bargaining power (Parks, 2019; Rutert, 2020). But these benefits can be wiped out by the state's posture of defiance vis-à-vis IPLCs. Significantly in the cases of Analavory and Ampangalastary, preliminary policy documents, field reports, and workshop reports frequently indulge in the colonial script of local communities as "enemies of nature". These documents stress in several sections how poverty and demography increase the anthropogenic pressure on watersheds. At times, they blame inappropriate agricultural practices (such as "[b]ush fires and irrational exploitation of the mountains […]") for siltation, soil degradation, and water erosion (MAEP et al., 2017). Against this narrative, BCPs are necessarily less about capacity-building, empowerment, self-determination, and life plans, but rather about controlling how IPLCs interact with "nature" on the grounds they need to change and be forward-looking.

Of Two Scripts of the Past: IPLCs as "Enemies of Nature" or "Premoderns"

The previous point brings us to discuss age-old (but constantly repeated) scripts, among which that of IPLCs as "enemies of nature" is still pervasive in Africa.[25] This often coexists and merges with another script from the past, namely that IPLCs are "premodern", i.e. against progress and development or that they live

at the mercy of nature.[26] The two scripts are generally deployed in postcolonial contexts to deny indigenous peoples rights to their ancestral lands or to justify forced displacements or encroachments upon indigenous territories and lands in the name of economic development.

Of particular interest here is the way some BCPs display alternative narratives and representations to refute any of those scripts. Kenya offers two such cases with the Ogiek BCP and the Lamu County BCP. The Ogiek people and the indigenous communities of Lamu County are facing different challenges. For decades, the Ogiek people have been seeking redress for the violent evictions from their ancestral homeland in the Mau Forest Complex. The BCP, whose second version was released in 2015, was part of a broader political campaign and a legal and judicial strategy that saw a landmark victory in the African Court on Human and Peoples' Rights in 2017. For their part, the five communities of the Lamu County – the Bajun, the Swahili, the Sanye, the Aweer (more commonly known as the Boni), and the Orma – are grappling with several development projects planned in the region (notably the Kenya Government's "LAPSSET project", including, among other things, a railway line, a 32-berth port, a motorway, a regional international airport). All these components of the project are a significant matter of concern to the indigenous communities living in the area. Their grievances range from crime and alcoholism, harm to the environment, dilution of the indigenous culture, to harm to national monuments, conflicts over scarce natural resources, and the marginalisation of indigenous communities; this is a context of still unaddressed historical injustice and endemic land insecurity.

These protocols, nevertheless, allow communities to cast themselves as champions of an alternative model of economic development, this time in tune with "nature", thereby dispelling competing images of backward-looking communities, allegedly hung on to retrogressive ideas about life. The Lamu County BCP expresses, in "sustainable development" terms, that the communities' vision is "[t]o build a culturally, socio-economically, and politically empowered community, striving to secure [their] natural resources and sustain a green environment" (p. 59). The protocol also insists on the "promotion of sustainable development" through "nature-based livelihoods", "small-scale industry", and "market for nature-based products" (p. 63). It also opposes the construction of the coal plant since "there are other means of generating electricity, some of which are clean and from renewable sources […]" (p. 47). Similar rhetoric is deployed throughout the Ogiek BCP, where it refers to the allegedly "'more sustainable' economic livelihoods systems such as arable cultivation and livestock keeping" that the Ogiek have been forced to adopt, set against "sustainable development activities including beekeeping, commercial tree farming, grazing and tourism" (p. 22). The document links the ABS regime to the natural resources found on the Ogiek's ancestral lands, supporting strategies to target livelihood improvement, poverty alleviation, and sustainable development (p. 22). In the Ogiek case, a further challenge relates

to the fact that the Kenyan government had grounded its decision to evict indigenous communities upon the alleged need to protect the Mau Forest Complex, an important water catchment. The African Court on Human and Peoples' Rights[27] explicitly ruled out this argument as unsubstantiated. The Ogiek's BCP strives to dispel the government's portrayal of Ogiek communities as "enemies of nature" by using a counter-narrative underlying their "vital role as guardians and conservators of biological diversity in Mau Forest Complex" (p. iv). The BCP also recalls that the "[…] word Ogiek means 'caretaker of all' plants and animals, or scientifically the flora and fauna", and that Ogiek communities "have always been among the most responsible stewards of forests owing to [their] historical links and attachment to it" (p. 3).

The interest of these two Kenyan cases is twofold. The first is to show that the IPLCs themselves can strategically use the scripts to defuse the most damaging representations, particularly those supported by narratives about pristine nature and the need to oust inhabitants from their biodiversity-rich territories (Doolittle, 2007). The second is that the modern scripts make up a repertoire of counter-narratives that can be drawn upon selectively depending on the script of the past to challenge. The choice is dictated by a principle of line symmetry that creates two different mirror images allowing narratives to move (i) either from "enemies of nature" to "stewards of biodiversity" (e.g. "'caretaker of all' plants and animals"); (ii) or from "premoderns" to "small green entrepreneurs" (e.g. "promotion of sustainable development"). This is due to the fact that each pair of "mirroring scripts" sits on the same

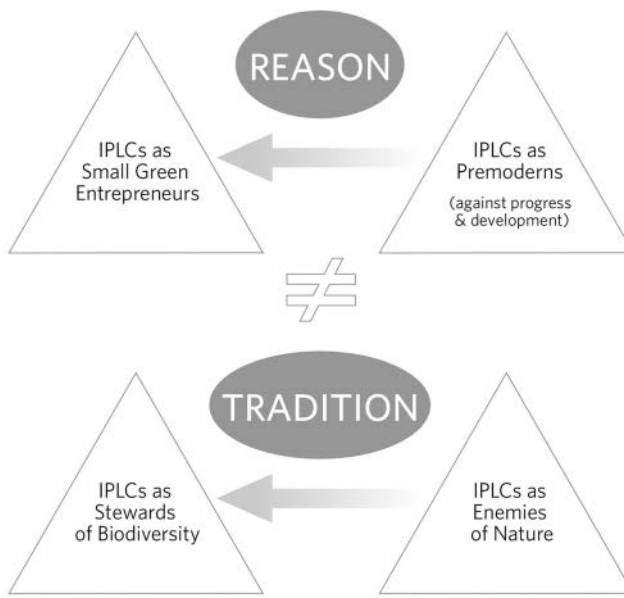

FIGURE 11.2 Mirroring scripts (Fabien Girard, original material for the book)

continuum of basic assumptions about IPLCs (inherently "traditional" in (i); and potentially "rational" in (ii) – on the pervasiveness of "reason" in the "premoderns" script – see Peet and Watts (1996, pp. 5–6)). Any other move is doomed to wield less discursive force and fell short of counteracting harmful scripts (see Figure 11.2). This can explain why the Ogiek's BCP, after several mentions to the ABS regime as a way to improve livelihood, moves on to articulate the people's relationship towards "nature" in terms of stewardship. It is to this script that we now turn our attention.

A Dominant Script: IPLCs as Stewards of Biodiversity

The scripts of IPLCs as "stewards" or "custodians" of ecosystems are found across almost all BCPs under study. This occurs where communities have to fight back antagonistic representations – such as "enemy of nature"– but also every time the communities are faced with assaults from outsiders on their lands or vindicate rights over their territories, genetic resources, and/or TK. What does this pervasive reference mean?

If it cannot be disputed that the "small green entrepreneur" script fits well within the international regime on ABS imbued with ideas about sustainable development, the same does not hold for the "stewardship of nature" script whose centrality in the BCPs is far more intriguing. In reality, this is precisely at this point where the intellectual ferment of the biocultural jurisprudence on BCPs appears most clearly (Bavikatte & Bennett, 2015; Bavikatte & Jonas, 2009; Bavikatte et al., 2015). And this is precisely where one may argue that BCPs hold out promises for IPLCs in terms of greater control over genetic resources/TK and land claims, and perhaps in terms of negotiating spaces for "non-modern" worlds to exist.

In light of the latter, it is little wonder that this script is heavily used in BCPs mainly concerned with land claims and tenure security. Stewardship practices are distinctively grounded in a sort of "land ethic" shaped by age-old links and "attachments" to the territory.[28] Admittedly, and particularly in the African context, a significant emphasis is fixed on cultural rights, given that "under international law, the connection between cultural rights and land rights for indigenous peoples forms a very important part of the international human rights legal framework" (Gilbert, 2016; Gilbert & Sena, 2018, p. 204). Thus, the Ogiek BCP forcefully stresses that: "We have a special relationship with our land and the natural resources in it. This relationship has special importance to our culture and spiritual values and ultimately for our continued existence as distinct peoples" (p. 3). The Lamu County BCP underlines in like manner: "We are the guardians of our environment. We have utilized and conserved our natural resources acknowledging their importance for future generations. Indeed, our cultural identity depends on it" (p. 11).

But in general, what singles out BCPs developed in a land claim context is the foregrounding of a holistic way of life, i.e. the substantial stress established

on the inextricable links between the ecosystem, the land, the resources, and the knowledge, culture, and livelihoods of the communities. This is what the Lamu County BCP terms "bio-culture" (p. 45) and the BCP of the community of Degbe Aguinninnou (Benin) "bio cultural heritage <*héritage*>" (p. 18). In Benin, for example, despite it being mainly focused on the ABS process, the Degbe Aguinninnou BCP unveils a struggle for greater control over their sacred forests (Gbèvozoun and Gnanhouizoun) and the recognition of their traditional "social structures". In preliminary documents, "community rules and procedures for managing" their resources and forests (p. 18) were, indeed, the main concerns of this indigenous community.[29] The BCP registers a strong holistic approach revolving around what the community calls "areas of ancestral and cultural heritage". These are the "[…] the sacred forests 'Gbèvozoun' and 'Gnahouizou' and the sacred lake 'Houèdagba'", whose cultural, socioeconomic, and ecological roles and impact on the well-being of the community and the traditional healers are highlighted several times (pp. 10–11).[30]

The most glaring example of this holistic approach is the BCP of Capulálpam de Méndez, Oaxaca, developed by the Zapotec indigenous community, located in the Sierra Juárez (state of Oaxaca). Because of alleged past experiences of biopiracy, an important part of the BCP is about spelling out local ABS procedure (local PIC, mutually agreed terms – MAT – and benefit-sharing) based on customary law. It resembles the Ek Balam BCP, another Mexican protocol developed with the support of the same partners. There is, however, a substantial difference between the two. In the case of Capulálpam, the indigenous community is in dispute with the Mexican state and two neighbouring communities over the limits of their territory and communal land.[31] Thus, it emphasises the protection of ancestral territory as a precondition for their collective identity, sustenance, and survival; and the interconnection of the elements that populate it. As the community states,[32] we "have historically developed our life and our cosmovision around our territory and everything that coexists there" (p. 42).

This echoes the biocultural dimension ascribed to Mexican indigenous peoples' territories (Martínez Coria & Haro Encinas, 2015).[33] We should not, however, overlook the specific sociocultural situation of Capulálpam de Méndez. Capulálpam de Méndez is a town located in Oaxaca, a state accounting for the largest number of indigenous peoples in Mexico. Oaxaca's constitution recognised in 1995 the system of "*usos y costumbres*" (usages and customs) for local elections.[34] The constitutional amendment bears testimony to the local and subaltern struggles for greater territorial autonomy (akin to the nationwide Zapatista project that has grown into autonomous territories and practices of local governments) and more broadly for self-determination (Juan Martínez, 2013, pp. 136–137) within the state. The term "*usos y costumbres*" refers to an alternative system to the national electoral regime based on competition between political parties (ibid., p. 144). But this is also a system "in which civil life mingles with and is incorporated into religious practices. This system is rooted in a

worldview according to which the individual forms a part of the community and has particular duties and rights", and covers community life in its civic, judicial, and territorial dimensions (Polo & Danielson, 2013, 170; also see Juan Martínez, 2013, 141).

The "*usos y costumbres*" system is used in Capulálpam de Méndez, but with a distinctive feature. The town comprises one single nucleus of human settlement,[35] i.e. one community only. This means that the town and the agrarian community[36] are governed, respectively, by a local assembly of citizens ("*asamblea general de ciudadanos*") and a community assembly governing the agrarian community ("*asamblea comunitaria*").[37] But both institutions are entrenched in the *cargos* system and *tequio* (unpaid work to benefit the community) as embodiments of the local *"usos y costumbres*".

Cargos are a system of rotating civic and religious responsibilities among community members (citizens for the municipality and *comuneros* for the agrarian community) based "on merit accumulated by service in a rising hierarchy of civic positions" (Antinori & Rausser, 2003, p. 5). Even if the cargo system originated in the colonial period, it is often considered a pre-Hispanic institution – mainly "indigenous" – that needs to be revived or reconstituted where it has disappeared (Blanco, 2012). This is of course part of political project geared towards territorial rights and political autonomy that goes along with attempts at giving an ethico-political foundation and tools for resistance to communities through such concepts as "communality" ("*comunalidad*")[38] that underlines a human's belonging to the land (Martinez Luna, 2010) and an individual's embeddedness in the community (Polo & Danielson, 2013).

In summary, most protocols under consideration in this chapter draw heavily on the idea that IPLCs are "stewards" of their lands, territories, and resources. This is less true for the Mexican protocols, where different philosophical foundations give greater weight to the land and acknowledge a foundational dimension for community life and cosmovision. All the other BCPs in this study state that the communities are "guardians" of their environment, "conservators of biodiversity", and at the very least that they have managed "traditionally" and "sustainably" their environment from generation to generation. In most instances, and it is where all the protocols can be said to coalesce, the "stewardship" role is described as stemming from historical, spiritual, and sociocultural attachments to the land, which translates into customary rules and institutional arrangements that regulate, and at times prohibit,[39] access to, and use of, resources and knowledge. Ultimately, these BCPs tell of a "natural conservationist" representation stressing that IPLCs have obligations and responsibilities towards their land, biocultural heritage, and future generations. The presence of this representation is no accident: it conveys that which makes IPLCs unique. It also eschews attempts to deprive IPLCs of history, culture, and agency – while at the same time opening spaces for discussing ontologically what is needed to support their distinctive identities and worlds.

BCPs and "Stewardship of Biodiversity": Eco-Power and Subject-Making

Studying BCPs through the lens of political ontology uncovers how IPLCs are torn between different environmental scripts. There is a prevalence of the present-day scripts ("stewardship of biodiversity" and "small green entrepreneur") which share the premise that IPLCs are key *actors* in biodiversity conservation and seek to distribute roles and responsibilities accordingly. This can be seen as the ideological attraction of most protocols. While this is mostly true, there are substantial differences between the BCPs that, in turn, inform their potential political and ontological reach.

The philosophical underpinnings of the "small green entrepreneur" representation hinge upon instrumental rationality. The rationality of "rational choice theory" in "commons" theory (Lara, 2015) is the building block of neoclassical economics. This theory posits that economic agents, though "fallible, norm-adopting individuals who pursue contingent strategies in complex and uncertain environments" (Ostrom, 1990, p. 185, Singleton, 2017), can *voluntarily* develop co-operative social norms, thereby successfully managing common-pool resources. As *adaptable*, *resilient*, and *robust* institutions depend on a complex "grammar of institutions" (Crawford & Ostrom, 1995; Ostrom, 2009), there needs to be a mix of institutional interventions and incentives. These incentives are vital to "achieve co-operative equilibrium outcomes" (Mosse, 1997, p. 469) among users of the common-pool resources.

Part of the same theoretical framing pervades the second modern script, that of the IPLCs as "stewards of biodiversity", which can at times coalesce into a mixed script. But references to "nature", "native", and "tradition", which feature prominently in international discourses and environmental laws, change the way communities are perceived and necessarily how they may perceive themselves. This is because they change the kind of expectations placed on IPLCs and the reasons for potential biodiversity local management failure (see Mosse, 1997, pp. 468–469). In this situation, IPLCs must not progress or develop or be connected to the global market; they are expected to "remain the same and not change" (Ulloa, 2005, p. 206). This may imply other types of managerial interventions, such as harnessing traditions and traditional ways of life, reviving them[40] when they are on the verge of decline or even, upon occasions, re-inventing and upholding them "by the force of law" (Mosse, 1997, p. 469).

These interventions are well-accounted for in the literature on CBNRM (Brosius et al., 1998; Mosse, 1997) and are likely to be replicated in BCP development since both rely on a people-centred approach of conservation. The involvement of local populations is primarily instrumental as they have a greater interest in the management of resources than the State or distant managers. IPLCs have profound knowledge of local ecological processes; use cost-effective methods, and have a stronger social acceptance of bottom-up conservation activities.

The international NGO and UN communities are aware of the intricate links between environmental degradation and social inequity, and therefore a concern for social justice for IPLCs exists (Brosius et al., 1998, p. 158). This is especially true of BCPs, which are also part of a process towards a greater recognition of IPLCs' rights over their genetic resources and TK, and are thus likely to meet several "justice challenges" associated with genetic resources and TK (see Deplazes-Zemp, 2019).

The above paragraph is proof of how politicised biodiversity conservation has become (Brosius & Hitchner, 2010, p. 146) and the consequences it has on people-centred conservation and BCPs ("who the people are" is a political question – see Peet & Watts, 1996, p. 27). Attention, therefore, needs to be paid to the way the "stewardship of biodiversity" script and its attendant narrative (the centrality of "tradition") may be used by multilateral lending agencies, donor institutions, and conservation organisations as a "disciplinary tool for national and regional planning" (Brosius et al., 1998, p. 163). In this section, we consider the concrete operation of the script and how actors are being recruited into it (Lewis & Mosse, 2006, p. 13). We also determine to what extent this script, through concepts such as tradition, stewardship, and nature, is involved in community-level changes that multilateral agencies, development institutions, NGOs, and facilitators may prompt (even inadvertently) through their dealing with a community. Framed in more radical terms, the problem that we wish to raise is whether BCPs, through the hypostasis of tradition, stewardship, and nature, are not a conduit for control dynamics and the reification of communities (Roach et al., 2006, p. 60).

At this point in our chapter, we could be accused of adopting a one-sided stance. We will, however, critically examine the political potential of the "ethic of stewardship" in the closing section of this chapter. From the maze of this complex script, we advance that there is a new form of legal subjectivity that BCPs have created; and that this legal subjectivity is more in tune with the worlds of the IPLCs.

Co-Opting Tradition, Managing Differences

At this juncture, it should come as no surprise that much of the cases making up our corpus show pervasive references to "tradition", together with appeals to territory, indigeneity (or autochthony as in Kenya),[41] and "communality" (see above in Mexico). These references are undoubtedly aimed at building "[…] images of coherent, long-standing, localized sources of authority tied to what are assumed to be intrinsically sustainable resources management regimes. They are also used to legitimize, and to render attractive […]" (Brosius et al., 1998, pp. 164–165).

The BCPs of the community of Degbe Aguinninnou (p. 16) and of the Municipality of Tori-Bossito (p. 4) stress what they call "traditional management" of territories and natural resources. In the Biocultural Protocol of

the community El Piro, this is referred to as the "traditional management of knowledge and the main species of fauna and plants" (p. 10).

The same general patterns are discernible across a large number of BCPs: traditional practices and TK of biodiversity conservation have been translated into traditional institutions (e.g. "traditional chief" in Ampangalatsary (p. 3) and El Piro (p. 9), "traditional authority" in the community of Degbe Aguinninnou (p. 16)), customs (also referred to as "traditions" – BCP of Ampangalatsary (p. 16)) and taboos and prohibitions (e.g. the prohibition to kill the boa, the taro, the turtledove, and the bat within the community of the Degbe Aguinninnou (p. 9), or to kill the jaguar and the *tepezcuincle* – paca – in Ek Balam (p. 35)). These institutions are meant to regulate the use of the resources and ensure their long-term survival.

This diversity of semantic beacons tends to be subsumed under the umbrella term (or genetic signifier) of a "traditional way of life". The "traditional" lifestyles, at times tied to specific worldviews ("*cosmovisión indígena*"/"indigenous worldview" in El Piro (p. 14), "*comunalidad*" in Capulálpam de Méndez)[42] or to distinctive cultural practices ("traditional dances" and "traditional dress" again in El Piro (p. 9)), constitute the ethical foundation in which conservation practices are rooted and from which they are projected onto real-life experiences and thus into the present. Traditional ways of life, however deeply they are embedded in specific relationships between humans and non-humans, are barely called upon in their own right, but for their instrumental ability to ethically sustain conservation practices that are deemed relevant to the *present* time.

This is unquestionably an effect of the "politics of difference" – which is also a "politics of the subjects" (Agrawal, 2005a, p. 164) – whereby "[…] the constitution of oneself as an 'authentic'[…]" self is "[…] conflated with specific ahistorical assumptions concerning the nature of indigeneity […]" or of a local community (Barcham, 2000, p. 138). It goes through a process wherein practices are progressively segregated, roles redistributed, and competencies rearranged (Agrawal, 1995, 2002). Unsurprisingly, the pivot of the process is the polarity between "tradition" and "modernity", allowing the shift of certain practices from the first category to the second. This process is often almost invisible: alleged unsustainable practices that need to be abandoned are simply passed off as "modern" agricultural practices.

The first step generally involves pitting "modernity" against "tradition", the former acting as the malign force driving the dissolution of the latter. In this respect, the siren voices of modern life ("Western academic training" or urban migration) are usually blamed for the youth's disinterest in TK and practices related to biodiversity (BCP, Comunidad El Piro, p. 10). For example, the increasing use of Western medicine is denounced as the reason for the decline in "traditional medicine" in El Piro (Ibid.). Some BCPs also state that "landraces" and "traditional knowledge" are put at risk by cash crops (pineapple, teak wood farming, firewood production, orchards) (BCP Tori-Bossito, p. 9), a hallmark of modern agriculture.

As a second step, authenticated tradition needs to be strengthened or revived. In the BCP for the community of El Piro, for example, a strong emphasis is anchored on "initiatives for the recovery of indigenous knowledge, biological resources associated with genetic resources", an inventory of the community's biological resources, genetic resources and TK, and the rolling out of an "environmental education programme based on traditional rules and practices" (p. 11). Along the same lines, four BCPs developed as part of the Darwin Project (Tori-Bossito, Degbe Aguinninnou, Analavory, and Ampangalatsary) include a section on Community Biodiversity Registers, set up as "repository of the community's past" (BCP of Degbe Aguinninnou, p. 25). They also have a section on community seed banks that preserve "traditional" varieties and farmers' landraces – especially those on the verge of extinction – and help reintroduce lost varieties.

The final step is to abandon all those practices that cannot qualify as "traditional" by accepted standards as they display too close a proximity with the Western world. In general, the process takes on a very subtle form. Targeted "traditional" practices are not pigeonholed – and therefore not disqualified – as "modern". Instead, they are left unlabelled and presented alongside impugned modern practices. This projects them instantaneously into a sphere of illegitimacy. In Tori-Bossito, for instance, shifting cultivation and bush fires are lumped together with industrial crops (p. 9) and placed under the heading of problematic practices.

There is certainly some unfairness in this broad-strokes account and one-sided criticism of protocols. While the relevance of some traditional practices to biodiversity conservation is indisputable, some others probably need to be challenged and, if needed, abandoned. There remains a problem of form, which reverberates further through every aspect of IPLCs' identities: creating the illusion that "tradition" is a vital lifeline for IPLCs, while at the same time doing away with practices (such as slash-and-burn or bush fires)[43] which may be deeply ingrained in cosmovisions and play a role in sustaining traditional institutions and livelihoods (Reyes-García et al., 2021; Whyte, 2013). This is at best a dangerous practice. Just as labelling communities "traditional" cannot be used to chain IPLCs to a romanticised past (Berkes, 2008, p. 239; Holt, 2005, p. 209),[44] so too it cannot be used for a sleight of hand to conceal managerial interventions and eco-power on subaltern groups.

Triggering Institutional Changes: Fixing Social Regularities, Rendering Legible

Through a sort of "cherry-picking" process, some BCPs tend to selectively retain as "traditional" only these practices that fit the funders' or facilitators' purposes or the vision of nature conservation embedded in global environmental agendas. This, it can be argued, is a tool for States and international institutions to conciliate the Western dream of *managing* biodiversity and the need to deal with differences.

Our corpus clearly confirms how this conciliation further relies on patterns already in use during colonial time to mediate relationship between coloniser and colonised, namely textualisation and codification (Pels & Salemink, 2000, p. 28). This pattern resurfaced with CBNRM, as to decentralise resource management which was felt to be an unacceptable loss in power by States that they could not bring themselves to accept without imposing "some degree of statutory uniformity for purposes of legal recognition" (Brosius et al., 1998, p. 166). In both cases, the ultimate goal is the same: fixing "regularities of social practices" and turning them "into the essence of local social order" (Pels & Salemink, 2000, p. 28).

The most sophisticated form of "statutory uniformization" is the imposition of new institutions or governance systems that replace customary authorities or community-based institutions. There are many well-researched accounts of this process in the context of CBNRM (Almeida, 2017, p. 9). Some BCPs included in our case study fit the same pattern, but what is worth highlighting is the way how strong references to tradition are used to conceal the magnitude of the institutional change or hold it out as small adjustments in the traditional governance structure. In Bonou (Benin), the BCP describes in detail the community's "internal decision-making system", which is a "college" made up of the king of Bonou, the "Gbévonon" (the chief of the community, also the guarantor of the divinity of the sacred forest "Gbévo"), the heads of families, and the guarantor of other deities. A consultative body, attached to the college, and made up of 16 young community's members, is tasked with monitoring and controlling the management of resources, especially those of the sacred forests (p. 17). Surprisingly enough, Section 8.3 of the BCP then goes on to describe the "management body" of the community, also called the "local committee", whose composition mostly departs from that of the "college" described above. It comprises the king of Bonou, three representatives of the community (also acting as the manager of the sacred forest), two landowners, and one representative of the village of Sotinkanmè.[45] The "local committee" is headed by a "bureau" made up of the king, a secretary, a treasurer, and two officers, respectively, tasked with planning and biodiversity management and cultural and religious activities. This "bureau" acts as the "community competent authority" on ABS (p. 28). Another striking feature emerges upon closer inspection: the "local committee" is modelled upon the committee referred to in Articles 41–44 of the Inter-ministerial Decree of 16 November 2012. It lays down the conditions for the sustainable management of the sacred forest in the Republic of Benin.[46] This text sets out the procedure for the transfer of sacred forest management to village communities, which implies a request for legal recognition of the sacred forest being submitted to the local authority by a village community, together with a local by-law passed by the commune establishing the "Sacred Forests Management Committee". Upon completing the complicated proceedings set up by the Inter-ministerial Order, the sacred forest is normally included in

the communal forest estate by way of an Inter-ministerial Order of two ministers. To our knowledge, proceedings have never reached this last stage, but this account calls for some comments. First, a seemingly stable and diverse customary body, with a fairly broad social base, has been replaced by a small committee giving the king of Bonou broad powers over genetic resources – a typical "power over" situation (see Bannister, 2004, p. 3). Second, from the State's point of view, relationships with the community are significantly simplified, given that the governance structure is now clearly defined and regulated by a legal text. It also provides a template to be duplicated throughout the region. This example confirms that statutory uniformity is rarely sought through institutions created from scratch, but rather through the instrumental use of existing governance structures that can claim a "local pedigree" or be described as a "traditional community".

A more radical strategy consists of promoting institutions with all the trappings of "tradition", but which are traditional in name only. One of the two Malagasy BCPs was developed in the *fokontany* Ampangalatsary where, following Law No. 96-025 regarding the local management of renewable natural resources[47] (the so-called "GELOSE law"), management rights of the Iaroka Antavolobe forest were transferred by contract to a local natural resource management group, the VOI Firaisankina (in Malagasy *Vondron'Olona Ifotony* (VOI), or "Basic Community").[48] VOI are a perfect blend of instruments from modern law and traditionally inspired structures. For example, the "Basic Community" is endowed with legal personality,[49] and both the establishment and the operation of the body are stringently regulated by the GELOSE law of 1996 (see Pollini & Lassoie, 2011). This community is presented as an offshoot of an age-old traditional institution, the *fokon'olona*, which is a community whose members share a common kinship and a common territory.[50] This community is governed by a form of a "social contract" – *dina* – laying down rules for the main dimensions of economic and social lives. These customary rules are implemented by a traditional chief backed by an assembly of elders. The VOI tries to imitate the traditional *fokon'olona* and thus to maintain the illusion that there is a continuity between "restricted group of individuals willing to adopt management rules designed by the state and its partners" and communities (*fokon'olona*) that *de facto* manage the resources according to rules and institutions that have a long history (Pollini & Lassoie, 2011, p. 823).

A Final Note on the Ethic of Stewardship: Legal Subjectivation for Emancipation

The previous sections of this chapter have shown that BCPs can be taken as receptables revealing an array of scripts – all built on the modern naturalist matrix – that circulate within the international regime on biodiversity conservation and ABS. Furthermore, they show how these scripts, as "storied performativity", both recount and enact the relations between "agents/subjects" (humans

and non-humans) and reach into practices of cultural belonging, i.e. identities. This script diffusion is unmistakable in the operation of the "steward of biodiversity" script which partakes in the construction and institutionalisation of what Astrid Ulloa calls the "ecological native" or "political-ecological agent" (Ulloa, 2005). This is exactly the dual phenomenon of institutionalising an ecological identity and this identity's anchoring in tradition that tends to crush the agency and historicity of IPLCs. It also conceals that these peoples are perfectly connected to, and influenced by, global socioecological and political changes. This is because it homogenises, naturalises, and reifies diverse cultural practices (Brosius & Hitchner, 2010, p. 146) that remain mediated by the evolving and adapting social sphere of values.

To counteract this opinion is Ulloa's observation: "Despite all the many negative connotations and implications of ecological native representations, indigenous peoples' movements are using them to transform non-indigenous peoples' ideas of their identities not only within the nation-state, but also in transnational arenas" (Ulloa, 2005, p. 215). It is this thought of Ulloa's that we would like to explore briefly in this last section. To do this, we place the question of the steward of nature or native ecological in the political ontology debate opened in the introduction. Is the mobilisation of "the ethic of stewardship" in particular likely to advance the cause of IPLCs, notably by severing the link with tradition? Is this ethic able to contribute forging a new ethical and political status as a crucial step towards the delineation of a new legal subjectivity for the holders of biocultural rights? What is this likely to yield in terms of space opening for discrete IPLCs' identities? Is a new process of legal subjectivation a potential antidote to the subject-making power of scripts?

The ethic of stewardship that can be traced back to Posey's (1999) work and environmental ethicists' breakthroughs, such as Callicott's (1994), has been mainstreamed in the scientific literature on property rights and biodiversity conservation and recently found its way into policy documents. The best example of this is undoubtedly the Tkarihwaié:ri Code of Ethical Conduct, which now includes the definition of "Traditional guardianship/custodianship", stressing the "holistic interconnectedness of humanity with ecosystems" and making the case that

> Indigenous and local communities may also view certain species of plants and animals as sacred and, as custodians of biological diversity, have responsibilities for their well-being and sustainability, and this should be respected and taken into account in all activities/interactions.[51]

While the risk that this ethic be construed in a way that would impose a "duty of stewardship" on IPLCs cannot be wiped out with a stroke of a pen,[52] we would like to bring forward a different interpretation. As both the Tkarihwaié:ri Code of Ethical Conduct and the Colombian Constitutional Court's decision in the

Atrato River case demonstrate,[53] references to duties remain too ambiguous, and there is no definitive conclusion that IPLCs are the bearers of a (legally enforceable) duty of stewardship. The Code of Ethical Conduct states that "[t]he traditional stewardship/custody **recognizes the obligations and responsibilities of indigenous and local communities** to protect and conserve their traditional role as stewards and guardians […]".[54] Furthermore, the Constitutional Court of Colombia states that "[biocultural rights] imply that communities **must maintain their distinctive cultural heritage** [...]" ("*estos derechos implican que las comunidades deben* ***mantener su herencia cultural distintiva***").[55] We instead contend that both the Code of Ethical Conduct and the Atrato River case are to be understood as an obligation on States to take all steps necessary to enable IPLCs to sustain what is seen as their distinctive ethics, beyond the naturalistic infrastructure.

In reality, the reference to ethic of stewardship is a first way out of the game of "contiguous and oppositional concepts" (Grear, 2015, p. 83). The concepts subject/object, mind/body, and nature/culture have provided matrix for modern law and, above all, the basis for modern legal subjectivity. As we have seen, a pair of "oppositional concepts" that are particularly structuring for BCPs is the "modern/traditional" typology. The interest of the ethic of stewardship is to move beyond negativity in which the "modern/traditional" dyad maintains IPLCs.

The ethic of stewardship makes it possible to give shape and substance to those who can never be apprehended by the "modern", those who cannot be understood without being immediately referred to by its antithesis – namely the "traditional"; this "traditional" without which the "modern" cannot exist, but which quite ironically also directly threatens its existence and must be kept "at bay" (Blaser, 2009, p. 888). Let us put it this way: the "traditional" can only exist as an *indeterminate* and *reifying* category, inevitably destined to remain under the control of the "modern".

The whole point of using the "ethic of stewardship" and its power as a concept is to move away from the indeterminacy and reification of the "traditional" category. It is also more than that; it reinjects positivity and in so doing helps to clarify the "peoplehood" of "biocultural communities" (Bavikatte & Robinson, 2011). This additional step in the construction of biocultural jurisprudence is essential. It reemphasises the importance of placing BCPs within a broader theoretical and legal context. Focusing on the bundle of biocultural rights shifts the attention to legal subjectivation. It brings the debate back to its point of departure. In its wake comes the central question of what it is like to be, act, dwell, and dream as an indigenous people and a local community, i.e. on what it is like to be – positively – a subject of biocultural rights.

That the issue arises when the epistemic frameworks of modern law are being discussed with precedents such as the Atrato and the Whanganui Rivers cases (Tănăsescu, 2020) should come as no surprise. Just as in the 16th century, when

on the Old Continent, profound socioeconomic and geopolitical upheavals had led, through a return to the debate on "man", the State, sovereignty, and property, to give rise to the rights of individuals ("*subjective rights*") and the *subject* of modern law; today, too, the entry into the Anthropocene ushers in a new "political ontology of the subject".

The link between the two periods cannot be overstated. Parallel to the installation of the modern subject, which forms its extremity, European/Western law has deployed an ontological matrix that has silenced nature and indigenous epistemologies and submerged "the agency and full ethical significance of all 'others' to the 'rational' master-subject" (Grear, 2015, pp. 86–87).

This lengthy process stretching from the 16th to the 18th centuries is worth remembering, if only briefly. During this period, humanity asserted its new dignity, or *dignitas hominis*, of which Pico Della Mirandola expressed the first requirement: that "man's own liberty to make of himself what he is" (Zarka, 1999, p. 245). Having emancipated himself from nature following a significant anthropological change, man (humankind) becomes more simply "naturally endowed with rights" (Zarka, 1999, p. 246). Furthermore, these new rights, which Grotius helped to define as "a moral quality of a person" (Grotius, 2012, bk. I, I, 4), form the embryo of what are now called subjective rights (Zarka: 247–8). The status of the person (*persona*) to whom the right as a moral quality relates remained to be defined. What was at stake then was the constitution of the *natural person* as a self (*ego*), the only one capable of rights and obligations, and who thus became the template of the *subject of law* (Zarka, 1999).

Here, we can see the crucial shift, whereby the legal person and the subject of law merge, as evidenced (but the examples are innumerable) in this formula written by Smith (1928, p. 283): "To be a legal person is to be the subject of rights and duties". There is a co-determination: the legal person is the subject of rights, i.e. the subject tailored to collect those specific rights defined as *moral qualities*. As such, the legal subject can hardly be anything other than the very person the law has constructed by recognising new rights (see Kurki, 2019, p. 121). Within the conceptual nexus that unfailingly ties new rights to a new way of seeing humans and culture – a new anthropology; the notion of legal personhood "acquires a sense of a sovereign, reflective subject, a being with his own self-determining personality" (Davies & Naffine, 2001, p. 57).

Nevertheless, two fault lines remain in modern law. The first is that there are still right-holders (like animals), i.e. legal subjects, which are not necessarily legal persons (Grear, 2010, p. 46; Kurki, 2019, pp. 122–124). The second fault line, and a much more important one, is that the "legal person" remains a construct (Grear, 2010, p. 51), even though it has been "naturalized" and "depoliticized" by a deep legal anthropomorphism that is so ingrained that it has ended up contaminating even the notion of legal subjectivity (Grear, 2010, p. 217, n. 35).

It is undoubtedly too difficult (or premature) to try to detach the legal personality from the matrix of the rational, sovereign "man" and, above all, from the attendant concept of private property (Davies, 2012). As Davis and Naffine forcefully note, modern legal personhood has been defined and constructed through property: "[t]o be a person is to be a proprietor and also to be property – the property of oneself" (Davies & Naffine, 2001, p. 5, n. 37; also see Grear, 2010, p. 51). The model of personhood remains that of Macpherson's "possessive individual" (Davies & Naffine, 2001, p. 56; Grear, 2010, p. 52; Naffine, 2003, p. 360) – one of the pillars of modern law which it seems premature to tackle head-on.

One can, however, break the link between "subject of law" and "legal person" (Kurki, 2019, p. 123; Pietrzykowski, 2017) and thus unleash the process of legal subjectivation. The precedent set by the constitution of the modern legal person in Europe between the 16th and 18th centuries shows that the pivotal moment is when, through the attribution of new rights, a new politico-legal identity can express itself. It is, therefore, necessary to follow the path that stretches from rights to identity to the new subject of law, according to a sequence that Yves Charles Zarka has already described: "The invention of the subject of the law does not precede the modern definition of natural law but follows it" (Zarka, 1999, p. 261). Of crucial interest is that while legal subjectivation is a "process triggered by legal norms", it "ultimately occurs outside the realm of law" (Urueña, 2012, p. 35). It therefore leaves open the debate, informed by insights from those concerned, the anthropology, the critical theory, on what is needed to sustain the pluralism of practices of belonging and the expression of polyphonic identities.

Returning to our thesis and conclusion, biocultural rights and the ethic of stewardship allow a strategic reversal from alienating subject-making practices to a new emancipatory process of legal subjectivation. At the very least, by prompting an investigation into the ethical-political status of the subject (the *persona communis*) to whom the new (biocultural) rights are granted, it fuels a process of critical reflection on how to find a way for non-naturalist ontologies in the international regime of biodiversity and international human rights laws.

As privileged inhabitants of the Global North, we feel a sense of unease when asked to specify what the ethic of stewardship and the ethical-political status should look like. But simple intuition won't prejudge any further avenues to be opened: the reversal mentioned above probably takes us back to an old tradition where the subject is a "sovereign" (*subjectum*) rather than a subservient subject or "*assujetti*" (*subjectus*) (Balibar, 2017). It therefore paves the way for IPLCs to be seen as "sovereign" over their territories, lands and resources, agents of their own past, present and future life, and able to forcefully express "claims for alternatives to modernity" (Blaser: 882–3). The *sovereign stewards of biodiversity* could be the missing link between environmental law and human rights law.

Annex

TABLE 11.1 BCPs covered by the study with insights into domestic legislation on local PIC procedures and BCPs

Country	*Biocultural community protocol*	*Local/community PIC (with domestic texts and materials)*	*Legal recognition of BCP*	*Source*
Benin	BPC of the Municipality of Tori-Bossito	Yes (but the scope of the local PIC is unclear) Relevant texts and materials: Decree No. 2018–405 of 7 September 2018 on national guidelines for Access and Benefit-Sharing arising from the use of genetic resources and associated traditional knowledge in the Republic of Benin (Articles 6 & 8)	Yes	https://www.bioversityinternational.org/fileadmin/user_upload/research/research_portfolio/policies_for_crop/BCP_ToriBossito_Benin_2018.pdf (French version).
	BCP of the community of Degbe Aguinninnou			https://www.bioversityinternational.org/fileadmin/user_upload/research/research_portfolio/policies_for_crop/BCP_Bonou_Benin_2018.pdf (French version).

Country	*Biocultural community protocol*	*Local/community PIC (with domestic texts and materials)*	*Legal recognition of BCP*	*Source*
Kenya	Ogiek Bio-Cultural Community Protocol The Lamu County Biocultural Community Protocol	Partially Relevant texts and materials: • Constitution of Kenya, 2010, ss. 11(1) & 11(2); s. 11(3)(a); s. 69(1)(c) • The Environmental Management and Coordination Act No. 8 (1999) (EMCA) • The Environmental Management and Co-ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations (2006) (s. 9(1)), s. 9(2), Part III 2.0(g)) ★(Medaglia, Perron-Welch, & Phillips, 2014, 94–95) • Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (No. 33 of 2016), s. 7, s. 10, ss. 18(1) & 18(2), s. 22(1), 25(3)(a), ss. 12 & 27 →*Modelled upon the Swakopmund Protocol for the Protection of Traditional Knowledge and Expressions of Folklore (Adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) on 9 August 2010 and amended on 6 December 2016.* ★(Mwangi, 2019; Nwauche, 2017; Nzomo, 2015)	Partially	https://www.ogiekpeoples.org/images/downloads/Ogiek-Bio-Cultural-Protocol.pdf (English version). https://naturaljustice.org/wp-content/uploads/2019/04/Lamu-County-BCP-2018.pdf (English version).

(*Continued*)

Country	*Biocultural community protocol*	*Local/community PIC (with domestic texts and materials)*	*Legal recognition of BCP*	*Source*
Madagascar	BPC of Ampangalastary BPC of the farming communities of Analavory	Yes Relevant texts and materials: • Decree No. 2017–066 from 31 January 2017 on the regulation of Access and Benefit-Sharing arising out of the utilisation of genetic resources (Articles 9, 12 & 14) • Draft inter-ministerial order N°.../2019 laying down implementing rules for Decree N°2017–066 of 31 January 2017, Article 14, 22, 23 & Annex III	Yes	Not officially published Not officially published
Mexico	BCP of Capulálpam de Méndez, Oaxaca	No Relevant texts and materials: • The Political Constitution of the United Mexican States, Article 27, para. 1, 4 & 6, Art. 27.VII Article 2.A.VI, - to declare that the Nation has the direct dominion over natural resources is tantamount to saying that it has full ownership over them. • General Law on National Asset, Art. 6, para. I • Agrarian Law, DOF 25–06–2018 • National Water Law, DOF 06-01-2020, and also include the General Law of Sustainable Fishing and Aquaculture, DOF 24-04-2018	No	https://absch.cbd.int/api/v2013/documents/4D03DAC0-33C3-0F01-8370-A093EAABCE69/attachments/PCB%20Capula%CC%81lpam%20de%20Me%CC%81ndez%20pliego.pdf (Spanish version).

Country	*Biocultural community protocol*	*Local/community PIC (with domestic texts and materials)*	*Legal recognition of BCP*	*Source*
	Ek Balam BCP	• General Law of Ecological Balance and Environmental Protection, DOF 05–06–2018 • General Wildlife Law, DOF 19-01-2018 • General Law of Sustainable Forestry Development, DOF 5–06–2018, Article 2, XIII, Article 5, Art. 102 ⋆(López Bárcenas, 2016, p. 42; Morineau & Morineau, 1997, p. 200 ; López Bárcenas & Espinoza Sauceda, 2006) Draft General Law on Biodiversity ("*Proyecto de Ley General de Biodiversidad*"), October 2016, introduced in Senate by the Senator Ninfa Salinas Sada and endorsed by the Ministry of Environment and Natural Resources (Semarnat).		https://absch.cbd.int/api/v2013/documents/4D03DAC0-33C3-0F01-8370-A093EAABCE69/attachments/PCB%20Capula%CC%81lpam%20de%20Me%CC%81ndez%20pliego.pdf (Spanish version).
Panama	Biocultural Protocol « Protection of the indigenous knowledge associated with genetic resources », El Piro Community, Ngäbe – Bugle Region, Panama	Yes Relevant texts and materials: • Constitution, Art. 127: "*comarca*". (Goodman, 2013; also see Herrera, 2015). • Ngäbe-Buglé: Law No. 10 of 7 March 1997, on the establishment of the Ngobe-Bugle comarca and other measures, *Gaceta Oficial* No. 23242, (11 March 1997), Art. 102, Art. 48, Art. 99 ⋆(Wickstrom, 2003, p. 45). • Ngäbe-Buglé: Law No. 11 of 26 March 2012, which establishes a special regime for the protection of mineral resources, water and environmental resources in the Ngäbe-Buglé *comarca*, *Gaceta Oficial* N° 27001, (26 March 2012) • Law No. 41 of 1 July 1998, General Law of the Environment, Art. 100, Art. 104, art. 105	Yes	https://absch.cbd.int/api/v2013/documents/3B1A585E-DEE9-17F6-7840-14EFA8C10794/attachments/2017_Protocolo%20Biocultural%20Comunidad%20El%20Piro.pdf (Spanish version).

(*Continued*)

Country	*Biocultural community protocol*	*Local/community PIC (with domestic texts and materials)*	*Legal recognition of BCP*	*Source*
	Panama	• Law No. 20 of 26 June 2000, on the special intellectual property regime upon collective rights of indigenous communities, for the protection of their cultural identities and traditional knowledge, and whereby set forth other provisions, Art. 1, Art. 2, Art. 3, 4, 5 & 6) *(Romero, 2005, p. 321). Executive Decree No. 12 of 20 March 2001, Regulating Law No. 20 of 26 June 2000, Art. 3 *(Tonye, 2003, p. 171); *(International Institute for Environment and Development, n.d.). *(see De Obaldia, 2005 for a comprehensive study; also see Lixinski, 2013, p. 123). • Law No. 7 of 22 June 2016 Establishing the Protection of Knowledge of Indigenous Traditional Medicine, Art. 16; also see Art. 18; Art. 20; Art. 13; Art. 26 protects; Art. 23; Art. 22; Art. 20) • Executive Decree No. 19 of 24 March 2019 Regulating Access to and Control of the Use of Biological and Genetic Resources in the Republic of Panama		

Notes

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2 See Chapter 1 of this book.

3 This is examined at length in Giulia Sajeva's Chapter 6 of this book.

4 CDB, COP 10, Decision X/42. The Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities, Nagoya, UNEP/CBD/COP/DEC/X/42, 29 October 2010, para. 20 (hereinafter: The Tkarihwaié:ri Code).

5 Corte Constitucional de Colombia, *Sentencia de revisión de tutela* T-622/16 (2016) (hereinafter, Atrato River case (2016)).

6 The Tkarihwaié:ri Code, para. 20.

7 Also see Chapter 1 of this book.

8 On the history of BCP negotiations, please refer to Chapter 1 of this book.

9 The term ICCA does not refer to a specific category of lands and territories. It is a generic term used by the ICCA consortium, but now also by the IUCN and CBD, to encompass a wide variety of lands, areas, and territories that share a number of common characteristics (Kothari et al., 2012, p. 16). According to Recommendation WPC Rec 5.26, these are "natural and modified ecosystems, including significant biodiversity, ecological services and cultural values, voluntarily conserved by indigenous and local communities through customary laws or other effective means" (IUCN & The World Conservation Union, 2005). Also see RES 3.049 Community Conserved Areas (IUCN & World Conservation Congress, 2005) and RES 4.049 & 4.050 (IUCN & World Conservation Congress, 2009). ICCAs are now supported by the COP of the CBD: COP, CBD, Decision X/31. Protected areas, UNEP/CBD/COP/DEC/X/31, 27 October 2010; Decision XI/24, UNEP/CBD/COP/DEC/XI/24, 5 December 2012, para. 1, e; Decision XIII/2. Progress towards the achievement of Aichi Biodiversity Targets 11 and 12, CBD/COP/DEC/XIII/2, 12 December 2016, para. 7; Decision 14/8, Protected areas and other effective area-based conservation measures, CBD/COP/DEC/14/8, Annex II. Also see the ongoing work on "other effective area-based conservation measures" (CBD/COP/DEC/14/, para. 2) (IUCN & World Commission on Protected Areas (WCPA), 2019).

10 This is elaborated below.

11 As the shadow of Manicheism looms large on these issues, it should be said that even (high) market economies hinge on what Gudeman calls the dialectic of trade and mutuality (Gudeman, 2012, p. 14). Admittedly, as Comaroff and Comarrof convincingly have shown, the irruption of commerce cannot straightforwardly be likened to "alienation-by-abstraction", "corrosion-by-commodification" (Comaroff & Comaroff, 2010, p. 25). From the perspective of the "agents" of moral economies, penetration of market economies, the emergence of "ethno-preneurialism" (Comaroff & Comaroff, 2010, p. 27; Rutert, 2020, p. 286) may also have a productive effect. In addition, Strathern made the important point that if market "disembeds what is usable", "the thrust of the indigenous IPR movement is to re-embed, re-contextualise, indigenous ownership in indigenous traditional culture" (Strathern, 1996, p. 22). That said, what is stressed here is the effect of "reification, cascading, and debasement" that may follow submersion of the "mutual realm" by the "market realm" (Gudeman, 2012, p. 57). In sum, if the conclusion of this chapter probably takes us closer to Comarrof and Comaroff's analysis than to Gudeman's, the disruptive effects of the "language of trade" on the "house economy" and the "base" (Gudeman, 2001, p. 5) must not be overlooked.

12 Sylvie Poirier (2008, p. 83) insists that this "[…] is a form of symbolic violence that is imposed on indigenous people"
13 See below.
14 UN Doc. A/CONF.151/PC/78 of 26 July 1991.
15 UNEP/Bio. Div. 3/12, 13 August 1990, para. 7.
16 UNEP/Bio.Div.3/6 20 June 1990, para. 9 – drawn from UNEP/Bio.Div.3/Inf.4, para. 40.
17 UNEP, Governing Council, Decision 15/34 of 25 May 1989, (A/44/25), p. 161.
18 UNEP/CBD/COP/3/7, para. 7.
19 Refer to Chapter 10 in this book.
20 The programme was funded by the Darwin Initiative, the UK government grants scheme focusing on biodiversity protection. Bioversity International was the contract holder, with funding covering a period of three years (1/04/2015-31/03/2018). It is further described in Chapter 10 of this book.
21 For these two countries, see Chapter 10 (this book) and Annex of this chapter. In Kenya, see the Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (No. 33 of 2016) (also see the Annex of this chapter).
22 For the sake of brevity, only the page referred to in each BCP is kept between brackets. Further information about each BCP is provided in the Annex of this chapter.
23 See Chapter 10 (this book).
24 Semi-directed interview, Bioversity International, Project Leader, 23/05/2019.
25 And more broadly when it comes to mitigation projects funded in the context of climate finance (Special Rapporteur on the rights of indigenous peoples & Human Rights Council, 2017).
26 See, for instance, *Simion Swakey Ole Kaapei & Others v Commissioner of Lands & Others* [2014] eKLR (Ole Kaapei), para. 33, where the High Court of Kenya at Nakuru alludes to the need to protect a community of pastoralists from "the vagaries of nature by ensuring pastoralist venture or way of life does not condemn the pastoralist to a life entirely subjected to nature".
27 *African Commission on Human and Peoples' Rights* v Kenya, App 006/2012, (006/2012) [2017] AfCHPR 28; (26 May 2017), para 130.
28 See the direct reference to "attachment to the land" under the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (2018), Art. 1.1.
29 See below.
30 The notion of sacred spaces can be strategically used by IPLCs and their advocates (Borman, 2017), as natural sacred sites enjoy a certain level of protection under international human rights law, notably through the right to freedom of religion. This is especially true in the African human rights system (Gilbert, 2018, pp. 138–141).
31 The community claims an area of about 8,000 Ha following the "primordial titles" (pre-existent or historic rights) granted in 1599, and recognising their *bienes comunales*, i.e. their communal property system. The community therefore disputes those land rights recognised through agrarian reform in 1952, and ratified through the so-called "partial titling" of 1995 which transferred only 3,843 Ha of land (*Tribunal unitario agrario* no. 21, 1995 - Consejo Municipal de Desarrollo Rural Sustentable & Morales Santiago, 2009, p. 38). The 1952 reform was revoked in August 1952 on appeal filed by the neighbouring communities of Yotao and Tepanzacoalco. The same judgment ordered the application for titling to be filed again and the case reconsidered for the purpose of solving the conflict over boundaries. The title deed issued in 1995 is said to be "partial" as the communities are still in dispute over the border area (López Bárcenas, 2016, pp. 105–106). The community has also been fighting since 2015 with private companies over mining operations on its lands, and seeks the termination of all mining concessions.
32 There are two forms of communal land tenure in Mexico, also referred to as "social" forms of property (as against private or public property). The agrarian reform of 1917 established the *Ejidos* (as in the community of Ek Balam) and the

"agrarian communities" ("*comunidad agraria*" as in Capulálpam de Méndez). There is an important difference between the two: agrarian communities

> are based on the recognition, restitution, confirmation, or a combination of these factors of the property rights of population centers – *núcleos de población or pueblos* – that have communally possessed land, water, and forest since precolonial times; their members – *comuneros* – have presumably had possession since immemorial times, and have followed customs and communal practices often recognized by the Spanish crown in colonial times [...]. Land recognition, confirmation, or restitution was often made upon submission of colonial land titles so called *títulos primordiales*
>
> *(Gutiérrez-Zamora & Hernández Estrada, 2020, n. 1)*

Landless peasants or *núcleos de población* (nuclei of settlements) unable to prove their possession were granted land through the *ejido* system. Both *ejidos* and agrarian communities are legal entities with legal personality, types of land endowments (in the former, it is a *dotación*, in the latter a *restitución*), land-tenure arrangements, and institutional organisations. On the institutional side, *ejidos* and agrarian communities alike have a general assembly as its highest level of governance, and the executive bodies are, respectively, the commissary *ejidal* – designated by the *ejidatarios* – and the commissary of communal goods – designed by the *comuneros* (each executive organ comprises a president, a secretary, and a treasurer). Their work is supervised by a vigilance committee. Until 1992, the property regime of both *ejidos* and agrarian communities was a sort of *usufructus* (collectively or individually held property depending on whether it applied to areas for collective use or to surfaces under cultivation that were parcelled out). As a consequence, lands could not be sold, rented, used as collaterals for loans, or subjected to any market transactions. Following the new Agrarian Law of 1992 (The Political Constitution of the United Mexican States, Art. 27, § VII; *Ley Agraria* D.O.F., 26-02-1992), a liberal-inspired counter-reform, land redistribution to landless communities was discontinued. Furthermore, the rights to *ejido* members were extended. Now, *ejidatarios* can rent or even sell their land to other persons in the *ejido*. Plots assigned for housing in the *ejido* are allotted as a private property. Finally, the individual *ejidatarios* may grant as security the usufruct of the lands for common use and of their parcels of land for cultivation (Kelly, 1993, p. 563). Currently, the only practical difference that exists between *ejidos* and agrarian communities is that in the latter, farming plots are never granted personally (whether or not they are farmed individually) and *comuneros* cannot sell their lands. Nevertheless, following a vote of the assembly, *comuneros* can choose to shift to the *ejido* system and "thus gain access to individual plots and, even, to their later sale if it is decided by a qualified assembly" (Morett-Sánchez & Cosío-Ruiz, 2017).

33 In Mexico, indigenous peoples are not subjects of public law, but "entities of public interest" ("*entidades de interés público*") (Constitution, para. A(VIII) of article 2). A limited consultation process is now included in Art. 2, para. B(IX) of the constitution (amended DOF 29-01-2016), which obliges authorities to "[c]onsult indigenous peoples in the preparation of the National Development Plan and the plans of the federative entities, municipalities and, where appropriate, the boroughs of Mexico City; and, where appropriate, to incorporate the recommendations and proposals they make". Significant progress was nevertheless achieved recently. For instance, the *Ley General de Desarrollo Forestal Sustentable* (General Law for Sustainable Forest Development), 5 June 2018 (*Nueva Ley DOF 05-06-2018*), recently amended by Decree 26 April 2021 (*Decreto por el que se reforman diversas disposiciones de la Ley General de Desarrollo Forestal Sustentable*, D.O.F. 25-04-21, Art. 93), which states: "In the case of land located in indigenous territories, the authorisation for change of land use must be accompanied by measures of prior, free, informed, culturally-appropriate and *bona fide* consultation, subject to the terms of the

applicable legislation". The weakness of the text lies in the absence of said "applicable legislation" – either in the constitution, federal law, or state law – in respect of free, prior and informed consent (FPIC). Some federative entities already offer a more robust protection – e.g. San Luis Potosí, Durango, and Oaxaca, or Chihuahua, Hidalgo, and Morelos: https://infosen.senado.gob.mx/sgsp/gaceta/64/3/2020-12-03-1/assets/documentos/Inic_PAN_Sen_Xochitl_art_5_expide_ley_federal_de_consulta_indigena.pdf). In recognition of these fundamental weaknesses, Senator Xóchitl Gálvez Ruiz (Partido Acción Nacional - PAN) has presented a draft *Ley Federal de Consulta a los Pueblos y Comunidades Indigenas y Afromexicanas* (General Law of Consultation of Indigenous and Afro-Mexican Peoples and Communities) on 26 November 2020, adopted by the House of Deputies (*cámara de diputados*) on 20 April 2021. The bill is currently before the Senate for review and voting.

34 In 1998, following the Law on the Rights of Indigenous Peoples and Communities, it came to be known as the "*normas de derecho consuetudinario*", i.e. norms of customary law.

35 As a matter of practice, municipalities generally consist of various population centres (Juan Martínez, 2013, p. 150).

36 On which see n. (32) above.

37 Called the "*Assemblea General de comuneros*".

38 The concept was coined by two indigenous Oaxaca intellectuals, Floriberto Díaz, a member of the Mixe indigenous community, and Jaime Martínez Luna, a Zapotec. It is said to be built on four foundational principles: communal territory, governance through communally appointed leadership roles (*cargos*), communal labour, and enjoyment (*fiesta*). They are undergirded by respect and reciprocity (Esteva, 2012; Martinez Luna, 2010). See n. (42) below on the importance of *comunalidad* for the community of Capulálpam de Méndez.

39 See below.

40 Interestingly enough, the Ek Balam BCP stresses that

> [d]uring the last decades the community of Ek Balam has taken up again traditional Mayan ritual practices such as the *Ch'a Cháak* or rainmaking ritual, the *Hanal Pixán* which is the festivity dedicated to the dead and the *Looj Ka Ta* or rite of protection against bad winds.
>
> *(p. 27)*

41 See Lynch (2012).

42 On the importance of this concept in the Oaxaca State, see n. (38). In Capulálpam de Méndez, *comunalidad* refers to three fundamental components: a *mode of social organisation* that orders and develops in a *residential structure* (the community itself) and that stems from a *collective mindset*. *Comualidad* is pitted against "individualism" as a counteracting force and is struggling against forms of "internal colonialism, characterized as a totalitarian system that refuses dialogue with the diverse" (p. 18). Elsewhere, the emphasis is put on festivities that are linked to agricultural and hydrological cycles and that aim at "asking and thanking God for food, rain, crops, to avoid natural disasters, droughts" (p. 29).

43 Fires are a multifaceted phenomenon in Madagascar (Kull, 2002) and provide an excellent example of the point in hand. Swidden agriculture (*tavy*), for instance, is still commonly referred to by state agents to explain deforestation. In tune with the "premodern" script, it is believed to be driven by population growth and poverty. Yet, it has repeatedly been shown that *tavy*, whose impact on the deforestation on the Great Red Island won't be discussed here, ensures basic food provision and is deeply engrained in the "Malagasy ethos of growth" (Keller, 2008, p. 652), and therefore cannot boil down to overly simplistic factors. *Tavy* certainly ought not to be outlawed and discarded without accounting for its social, economic, and cultural role and without a deep understanding of the drivers behind conversion of forests into other forms of land cover (Scales, 2014).

44 An example of one such distortion is provided by *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010:

> Accordingly, in my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place.

Inversely, there are other cases acknowledging that "traditional" activities are not frozen; see *Ilmari Länsman et al. v Finland*, Comm No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994), para. 9.3; *Apirana Mahuika v New Zealand,* Comm No 547/1993, UN Doc CCPR/C/70/D/547/1993 (27 October 2000), para. 9.4. *African Commission on Human and Peoples' Rights v Kenya*, App 006/2012, (006/2012) [2017] AfCHPR 28; (26 May 2017), para. 185.

45 Sotinkanmè is one of the 34 villages that make up the commune of Bonou (the commune is itself divided into five districts (Gouvernement de la République du Bénin & PNUD, 2015).

46 Arrêté interministériel N° 0121/MEHU/MDGLAAT/DC/SGM/DGFRN/ SA du 16/11/2012 *fixant les conditions de gestion durable de la forêt sacrée en République du Bénin*.

47 Loi nº 96-025 *relative à la gestion locale des ressources naturelles renouvelables*.

48 GELOSE contracts are concluded between the community, the rural municipality it belongs to, and a decentralised state service (for instance, water and forest administration) (Pollini & Lassoie, 2011, p. 817).

49 GELOSE Law no. 96-025, Article 3.

50 On which see Chapter 10 of this book.

51 The Tkarihwaié:ri Code, para. 20.

52 See also Chapter 6 of this book, by Giulia Sajeva.

53 Atrato River case, see above n. (5).

54 The Tkarihwaié:ri Code, para. 20 (our emphasis).

55 Atrato River case, para. 5.14 (with the Court's emphasis).

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