

# BENELEX Policy Brief No 1: Fair and equitable benefit-sharing – what role for community protocols?

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## Executive Summary and key messages

Community protocols are documents created by local communities to record and communicate their values and priorities to external actors. They can – among other things – provide locally appropriate detail to achieve fair and equitable benefit-sharing under certain conditions. This policy brief identifies some common challenges in developing and using community protocols drawn from 5 case studies carried out in 4 different regions of the world.

- Community protocols can help shape local interactions with different institutions by: defining monetary and non-monetary, long -and short-term benefits in line with communities' worldviews.
- Community protocols can clarify 'red lines' that communities are not willing to compromise on, details of local decision-making processes that outsiders should respect
- Community protocols can emphasize that benefits, decision-making processes and red lines may change over time
- Community protocols based on inclusive and open discussions are more likely to reflect a position shared by all the members of a community. These discussions require time and need to be driven by communities themselves.
- Groups providing funds and other support for community protocols, as well as outsiders seeking to begin a dialogue with communities, need to respect that dialogue will take time and be driven by communities themselves. Like community protocols, dialogues should be thought of as ongoing and subject to adjustments over time as each party's aims, wishes or needs evolve.
- Dialogues between communities and outsiders, whether community protocols are in place or not, are aided where clear and effective policies and laws exist on community consultation, environmental impact assessments, free, prior and informed consent, benefit-sharing and access to effective remedies (for further information see the BeneLex policy brief on Extractives).

## Introduction

Community protocols have been proposed as useful tools to answer questions raised in discussions of fair and equitable benefit-sharing, particularly what exactly benefits are and how they should be shared in fair and equitable ways. As documents developed by local communities to record information on their practices, institutions, customary laws, rights, visions of development, and other information, community protocols can provide locally specific information to help answer these questions in particular contexts for external actors. They may act as an initial translation of a community's position to allow a dialogue that could lead to shared understanding. This is important since many researchers argue that environmental policies are shaped by deep-rooted ideas that are not shared by many local communities. This difference in outlook can result in a breakdown, or failure to begin, a meaningful dialogue between local communities and other actors. In sum, community protocols may provide a basis for beginning a dialogue by providing a space for communities to express their views and thus address powerful actors at the local, national and international levels. Examples of communities discussing benefit-sharing and community protocols were compared to investigate these possibilities.

## Community Protocols examined

The basis for our examination of community protocols and benefit sharing is a series of five original case studies exploring issues around benefit-sharing and community protocols in five states located in four regions of the world, and in different sectors:

- traditional medicine in South Africa;
- agriculture of a traditional rice variety in Malaysia;

- traditional pastoralism in Greece;
- traditional wildlife and fire management in Namibia; and
- lithium mining on traditional lands in Argentina.

A comparison of these cases, supplemented with legal research, highlighted the following common issues.

The potential for community protocols to express matters of importance to local communities is clear, but exploiting this potential is tricky. Community protocols need to be drafted in inclusive ways, but must also be effective in communicating with actors outside the community. They thus need to strike a balance between the content and expressions valued by the community, and making sure that the result is an effective basis for any dialogue with outsiders. Community protocols also need to be adapted periodically to reflect changing needs and understandings within communities.

- Inclusive processes for drafting community protocols are crucial to fulfil their potential. Without inclusive processes, the resulting document may not be supported or accepted by all members of a community, since it may not be a true expression of jointly defined wishes and aims. This can be a challenging process, though by bringing a community together to discuss and decide its wishes and aims, it may prove to be the main purpose of the exercise.
- To fulfil their potential for communication with external actors to achieve fair and equitable benefit-sharing, community protocols that included information on a number of points appeared to be more effective. These points are: discussions of monetary and non-monetary benefits in light of community worldviews in both long and short term views, including the specification that these ideas are likely to evolve over time; any issues that the community is not willing to negotiate, and; information on the ways that communities take decisions, and how, to whom, in what format, when and from what sources to provide information when seeking community consent.
- Community protocols need to be treated as ‘living’ documents that are amended as required over time to reflect the changing wishes, aims and needs of local communities.

Working to achieve this balance seems to be worth it - the cases we investigated showed that those local communities that had drafted a community protocol and made it available to external actors were taking steps to build relationships with wider ranges of actors, and were able to communicate their aims and needs in a unified way despite problems encountered along the way. They also gained in visibility vis-à-vis central or other authorities, enabling their recognition (including potential legal recognition) as legitimate stakeholders and rights-holders. Local communities that had not reached this stage of sharing a community protocol were less successful in beginning dialogues with other actors they hoped to communicate with.

As the effectiveness of community protocols relies in part on their being freely chosen by a local community as a model for collective action, it is inadvisable to oblige communities to adopt community protocols. Community protocols are one available method for collective action, and a local community may prefer to use another form. In this vein, the content of one community protocols should never be assumed to apply to any other community, even where the community concerned can be described as similar to the community that authored the protocol.

## Digging deeper

### 1) What are benefits?

How to define benefits was one issue of great importance across the case studies. Benefits are often defined by those seeking access to a community’s land, natural resources or knowledge, yet the communities we investigated defined benefit in a wide range of ways (see Box for examples). Benefits can be defined as long-term, short-term, monetary or non-monetary. In addition, community definitions of benefits change over time in response to changing needs. It is important to note that this suggests that community protocols developed as a response to a single issue may risk defining communities’ priorities, definitions of benefits and other matters in too circumscribed a manner. Community protocols should ideally allow a community to think in the widest possible terms about what benefits are.

**BOX 1. Example of benefits as defined by a community**

In one case study, a tripartite agricultural agreement was struck between a community association, a regional authority, and a private company to provide farming services to boost production of a local variety of rice and share monetary benefits with local landowners. As time passed, community members began to identify other kinds of non-monetary benefits that were important to a continued way of life. These 'non-monetary' benefits were linked to traditional farming practices (use of water and chemicals, calendar of harvests, creation of plant nurseries, etc). These benefits were also a crucial component in environmental protection.

**2) Recognition, recognition, and more recognition**

A key condition for all of the communities was the need for recognition – both from various authorities in the more common legal and procedural senses of the term, but also as valid participants in the definition of benefits. Recognition in this sense meant treating communities as equal partners in dialogue, with valid and valuable worldviews. Community protocols allowed communities to articulate this need in addition to information about benefits in locally specific terms.

A related point was the desire among the communities to communicate an outlook or worldview believed to be different to that held by powerful actors, and leading to different ideas about benefits and other wider concepts such as development. Communities often expressed views that external actors acted on the basis of different norms, and that this meant they were likely to dismiss community views as irrelevant. In a related point, communities felt that outside actors tended to seek a single leader or representative of 'the community' without appreciating the diversity of opinion within communities, or the need to hold wider consultations. Using community protocols to outline community institutions and consultation procedures was also seen as important as a result.

**BOX 2. Example of recognition in a community protocol**

A community protocol used to outline the process to be respected in consultations is the *Kachi Yupi* community protocol developed by 33 communities of Salinas Grandes and Laguna de Guallatayoc in Argentina. This community protocol adds locally specific detail to processes described in international law by describing an ideal consultation process, likened to the timing of a natural salt formation cycle in local salt planes.

**3) Supporting Communities**

The case studies made it very clear that developing a community protocol can be a long process, and that once a protocol is adopted it will need to be reviewed and adapted over time. These processes require large investments of both time and resources by communities. Combined with points about engaging with law and policy, communities thus often seek outside support for community protocols. The awareness of supporting actors, which may be NGOs, academic researchers or others, about the complexities of community protocols is therefore important. They should provide support without interfering in community ownership. This implies avoiding pressuring communities, facilitating inclusive discussions and access to resources and information, providing guidance as and when requested, and engaging with communities in a long term perspective rather than through short term projects. Many of these points and others are detailed in the [Mo'otz Kuxtal Guidelines](#) on prior informed consent adopted by the Convention on Biological Diversity in 2016.

**BOX 3. Example of supporting communities in a community protocol**

In another case, a community protocol was developed by a group of traditional health practitioners. This group spanned many ethnicities and language groups, and the process of defining their shared needs and aims took some time. As the community association moved forward, their needs and aims changed as relationships with outside actors developed. A process for revising their community protocol was begun to clarify new aims and wishes, and to address the group's developing organisational form.

**4) Community Protocols and the Law**

Community protocols also exist to translate the information a community wishes to convey to a range of actors that may vary from the global to the national and local level. It can be useful for community protocols to make areas of customary law clear, and positions on national and international laws explicit. This in turn depends on access to neutral and accessible information in line with the points made earlier. This also highlights the role and

importance of support from outside actors to provide information and legal support. In a broader view, community protocols need to take account of legal and political contexts to be effective – by positioning community views in light of current law and policy and demonstrating a community’s knowledge of various rights from local, national and international law, a community protocol lays out a basis for clear, open and respectful dialogue. In the same line of reasoning, the presence of clear and properly implemented national law and policy on community protocols, fair and equitable benefit-sharing and related issues including community consultation, environmental impact assessment, free, prior and informed consent and access to remedies, may add to this. Clear legal and policy frameworks can provide a positive basis for dialogues where all actors are aware of their respective duties, and communities can rely on legal force from clear frameworks - if the laws are accepted and implementation is effective.

**BOX 4. Example of linking a community protocol to the law**

The *Kachi Yupi* community protocol linked the communities’ own view of a culturally appropriate consultation process with elements of international, national and local law. This served to recall relevant international obligations in the context of a national legal framework characterized by inconsistencies between the mining and environmental legislation, and gaps with regard to who should carry out environmental impact assessments and consultations and how.

**Recommendations**

**International, national and local policies and laws should**




- provide a legal status and recognition to community protocols without obliging, recommending or otherwise pushing local communities to produce community protocols;
- clarify that communities themselves are the drivers and authors of community protocols, not any other actor external to the community;
- provide a supportive framework for communities choosing to develop community protocols, including by making a variety of practical support available including legal support.

**International, national and local policymakers should**

- note that local communities are best served by a supportive, clear and properly implemented legal framework on consultation, environmental impact assessments, free, prior and informed consent, fair and equitable benefit-sharing and access to effective remedies;
- ensure that such a legal frameworks be communicated effectively to actors that engage with communities in order that they be aware of their responsibilities, including engaging in ongoing and open dialogues with communities over time.

**Funders should** take into account that community protocols and open dialogues on fair and equitable benefit-sharing are long-term processes, when considering funding models to support communities.

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	<p>The BeneLex project, based at the Strathclyde Centre for Environmental Law and Governance, aims to investigate the conceptual and practical dimensions of benefit-sharing. To assign in equity the advantages from the conservation and sustainable use of natural resources among different stakeholders.</p>	<p>The Strathclyde Centre for Environmental Law and Governance, based at the University of Strathclyde Law School in Glasgow, Scotland, carries out globally impactful research, in a wide range of interconnected areas and across scales. The Centre aims to identify and shape emerging areas of legal research in environmental governance with a strong development focus, including through collaborations with global practitioners.</p>
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