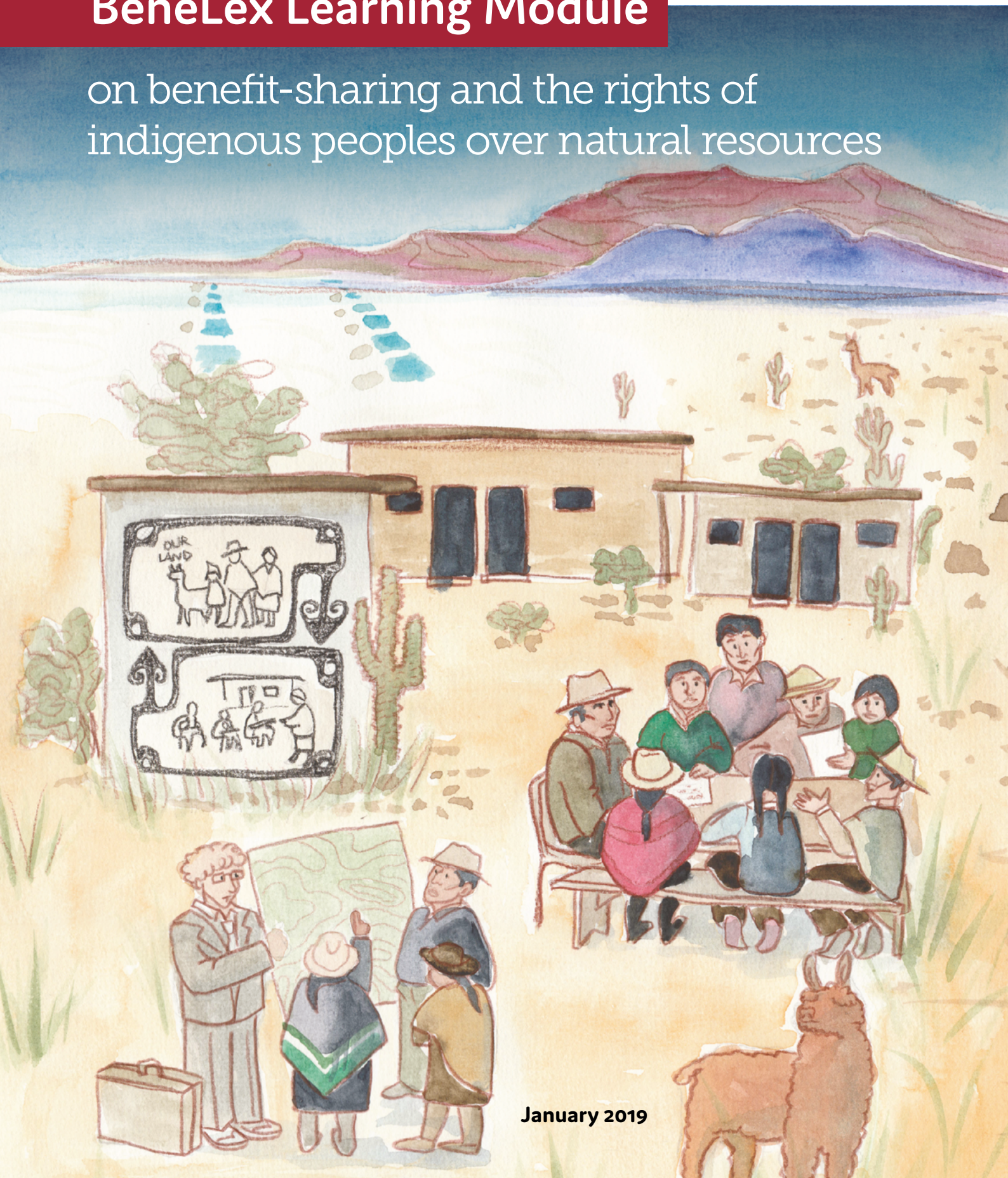
BeneLex

European Research Council

UNIVERSITY of STRATHCLYDE
CENTRE FOR
ENVIRONMENTAL LAW
AND GOVERNANCE

BeneLex Learning Module

on benefit-sharing and the rights of indigenous peoples over natural resources



January 2019

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1 Introduction

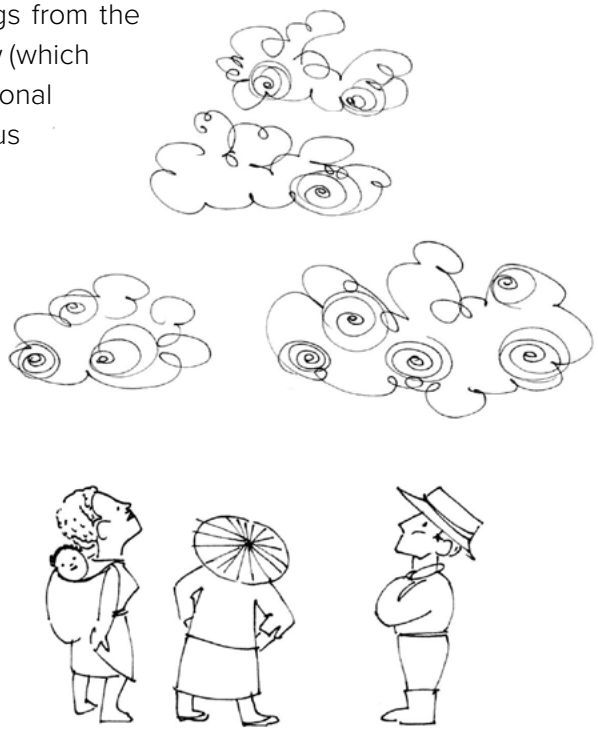
THE BENELEX RESEARCH

Background: BeneLex is an academic project funded by the European Research Council (2013-2018) and is led by Professor Elisa Morgera of the University of Strathclyde, Glasgow, UK. The project focuses on the legal concept of **"fair and equitable benefit-sharing",** which is understood as the **good-faith, iterative dialogue aimed at building equitable partnerships in identifying and allocating economic, socio-cultural and environmental benefits among State and non-State actors.** The project explores different ways in which fair and equitable benefit-sharing is understood and put into practice in various contexts. By understanding benefit-sharing in different contexts, the project seeks to clarify how law can help realize the potential of benefit-sharing to create fair and long-term partnerships between communities and other users of natural resources. To this end the project in particular builds on "mutually supportive" interpretations of international biodiversity law and international human rights law. In short, this means reading international biodiversity law and international human rights law together to clarify how they each can help realize the objectives of the other.

The **targeted users** of this learning module are indigenous peoples and local communities' representatives, and human rights and environmental advocates.

This learning module seeks to enable users (either individually or as part of a group) to rely on key research findings from the **BeneLex** project on international environmental law (which includes international biodiversity law) and international human rights law concerning the rights of indigenous peoples over natural resources when:

- Environmental impact assessments are conducted prior to authorizing a natural resource development or conservation project;
- Consultations are conducted and free, prior informed consent is sought;
- Benefit-sharing agreements are negotiated;
- Communities negotiate with governments, as well as with private companies.



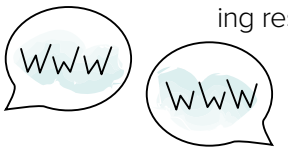
TARGETED USERS

The **Learning objectives** of this module are to enable community representatives and advocates to utilize proactively international benefit-sharing standards to:

- Expand the scope and methodologies of environmental assessments and consultation/consent practices in order to move beyond a pre-determined set of development options and "make room" for indigenous peoples' worldviews in natural resource decision-making; and
- Enhance indigenous peoples' agency, control and capabilities for the full realization of their rights to natural resources, rather than only "limit damage" to their territories, lands and resources, with the cooperation of governments and private companies.

This module is part of a series of 3 learning modules (the other two will focus on farmers' rights and on the rights of traditional knowledge holders). Other outputs of the **BeneLex** project include:

- **Working papers** and academic publications analysing international legal developments related to fair and equitable benefit-sharing and relating research findings to broader academic debates in international law;



- **Blog posts** providing real-time, accessible analysis of new international legal developments related to fair and equitable benefit-sharing;
- **Policy briefs** distilling in a succinct and action-oriented way the main project findings for specific groups of end-users: international negotiators, the private sector, NGOs and bilateral donors. They will be available in English, French and Spanish.

Go deeper

All **BeneLex** outputs are available on the project website and, upon request (email benelex@strath.ac.uk) in memory sticks that will be mailed to you.

Authors

This module was prepared by Professor Elisa Morgera and Thierry Berger and benefited from comments and review by members of the **BeneLex** team including Margherita Brunori, Louisa Parks, Wim Peters and Elsa Tsioumani. Margherita Brunori prepared the visuals and Yoge designed the layout. The module draws on Elisa Morgera, 'Under the Radar: Fair and Equitable Benefit-sharing from Extractives and Conservation in light of International Biodiversity and Human Rights Law,' **BeneLex Working Paper No. 10 Rev** (SSRN, 2018) and sources cited in it.

See also **BeneLex** Policy Brief No. 2 "Fair and equitable benefit-sharing and indigenous peoples' rights over natural resources" (2018).

2 Why is this learning module needed?

Scenario: A community of indigenous peoples hears that the government is about to authorize a new mining project in their traditional lands. The community was involved in a prior environmental impact assessment and had raised concerns about the environmental impact of the proposed mine, in particular with regard to potential use and pollution of freshwater in a semi-arid area. The community, however, is unclear as to whether their views had been taken into account in the final outcome of the assessment and the authorization process that followed. They are also unclear about which options the government had considered before authorizing the mine to go ahead, including a separate proposal from the government to create a protected area, and how much attention had been paid to other impacts on the community's traditional activities. Only some community members had been approached by the company directly to provide their consent to the mine, and obtained money and jobs at the mine. Many other members, instead, actively opposed the mine and had difficulty establishing a useful dialogue with the government or the company. Most members in the community did not consider that the benefits promised by the company were sufficient compared to what the company would gain, and were unaware of any measures that the company would put in place to protect freshwater resources.

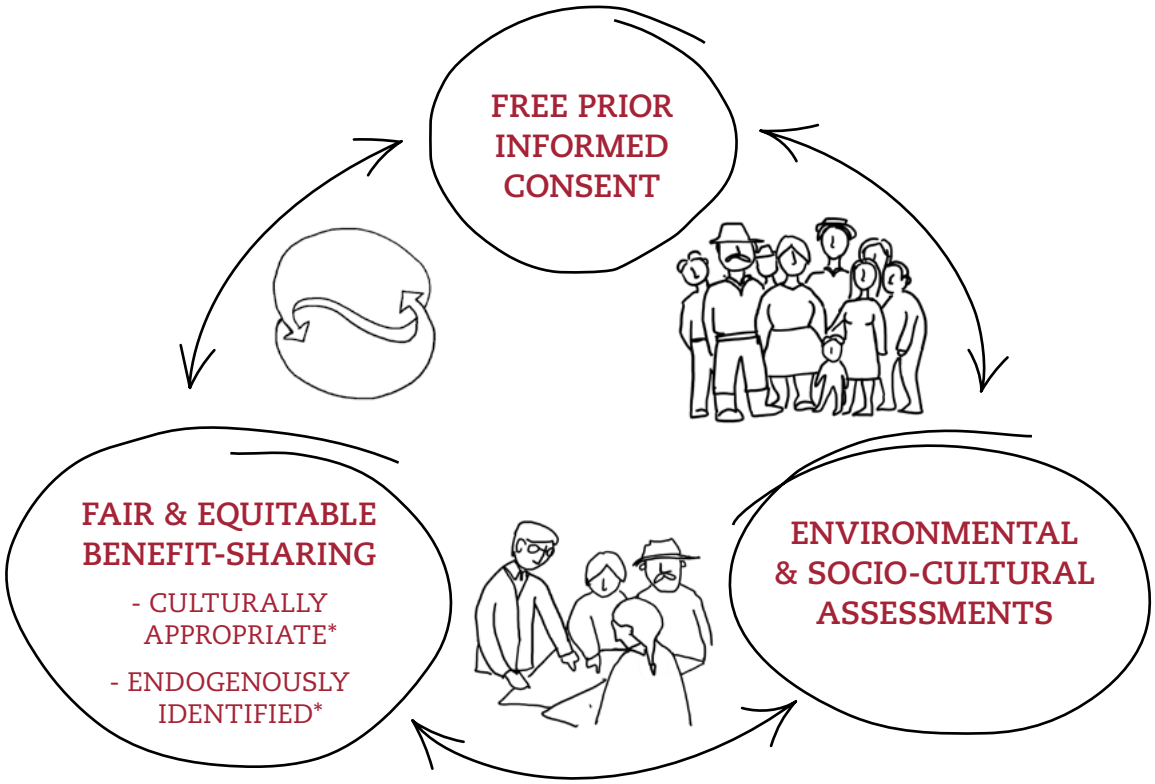
If you were to advise the community in this scenario,

- What kind of role should they have had in the assessment and what issues should it have included?
- Could they still say no to the mining development?
- What kind of benefits are they entitled to? Who is required to provide such benefits and what could the community do if they are not provided?
- If the government decides to go ahead with the creation of a protected area in the communities' traditional territories, does the community have any rights?

This module will, first, highlight opportunities to protect the natural resources of indigenous peoples by relying on both international environmental law and international human rights law. It will then discuss various ways in which the rights of indigenous peoples to natural resources can be protected looking in turn at the obligations of the government and of private companies. Finally, it will conclude by returning to the scenario above to give you an opportunity to apply what you have learnt.

The below diagram maps various sources and concepts relevant to indigenous peoples' rights to natural resources that will be referred to throughout the module, shows how they relate to each other and highlights the steps indigenous peoples can take to protect their rights.

Module map. International human rights and biodiversity sources and concepts relevant to indigenous peoples' rights to natural resources



Human Rights

Inter-American Court
2007 Saramaka, 2008 Saramaka, 2015 Kaliña and Lokono, 2015 Garifuna Triunfo de la Cruz, 2015 Garifuna de Punta Piedra

African Commission
2009 Endorois

African Court
2017 Ogiek

UN S. Rapporteur on Human Rights & Environment
A/HRC/37/59 (2017), A/HRC/37/59 (2018)

UNPFII E/C.19/2005/3, E/C.19/2013/15

UN Expert Mechanism
Advice no. 4 (2012)

CERD CERD/C/SUR/CO/13-15 (2015)

Business responsibility

UN S. Rapporteur on Indigenous Peoples' Rights: A/HRC/15/37; A/HRC/24/41; A/66/288; A/HRC/21/47

UN S. Rapporteur on Human Rights & Environment:
A/HRC/37/59 (2017)

IFC Performance Standards
(2012)

OECD-FAO Guidance on Responsible Agricultural Investment (2016)

Biodiversity

Convention on Biological Diversity

Ecosystem Approach

Akwé: Kon Guidelines on Socio-Cultural & Environmental Impact Assessments

Addis Ababa Guidelines on Sustainable Use

Work Programme on Forest Biodiversity

Work programme on protected areas

Work programme on mountain biodiversity

Mo'otz kuxtal Guidelines

A. Why is fair and equitable benefit-sharing addressed under both international environmental law and international human rights law?

INTERNATIONAL ENVIRONMENTAL LAW

INTERNATIONAL HUMAN RIGHTS LAW

Fair and equitable benefit-sharing obligations in relation to the rights of indigenous peoples over natural resources have emerged both under international environmental law (particularly international biodiversity law) and international human rights law. There is, however, still little understanding of how these two areas of law can, taken together, support the rights of indigenous peoples. This is because:

- The Convention on Biological Diversity (CBD) makes no explicit reference to human rights standards. Therefore benefit-sharing provisions **do not clarify** the minimum content of international obligations, in order to limit the discretion of governments when balancing different interests in relation to natural resource development and conservation;

- International human rights law tends to be **quite abstract**, and thus does not provide specific guidelines on how to put its standards into practice in the complex landscape of natural resource management (impact assessments, licensing, etc); and

- Interpretative guidance on how these two areas of law can be complementary **is still limited**, although it is growing (see Box 1 below). In particular, guidelines adopted by consensus by 196 State Parties to the CBD have been recognised as an authoritative source to interpret indigenous peoples' human rights by a variety of international human rights bodies (see Box 2 below).

Box 1. UN Framework Principles on Human Rights and the Environment (2018): obligations owed to indigenous peoples and traditional communities

Framework Principle 15

States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities, including by:

a. Recognizing and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used;

b. Consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources;

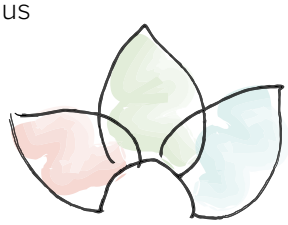
c. Respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources;

d. Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.

The **BeneLex** project has sought to clarify the extent to which international biodiversity law and international human rights law have already been read together with regard to benefit-sharing from the use and conservation of natural resources traditionally owned or occupied by indigenous peoples. In addition, the project has further developed such a complementary interpretation on the basis of other related international materials with regard to fair and equitable benefit-sharing and:

- Environmental impact assessment (EIA);
- Free, prior and informed consent (FPIC); and
- Compensation.

Benefit-sharing, EIA, FPIC and compensation are generally seen in isolation from one another and in a sequence. **BeneLex**, instead, has identified strategic opportunities to rely on the interplay among them, not only to protect indigenous peoples' rights (as a safeguard) but also to support their full realization (proactive use). And this is relevant both to clarify governments' obligations, and business responsibility to protect indigenous peoples' human rights.

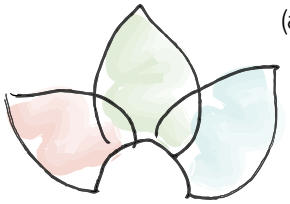


B. Key sources

The emergence of fair and equitable benefit-sharing obligations in relation to the rights of indigenous peoples over natural resources is mainly supported by **authoritative interpretation** of relevant international treaties. This means that even if there are not sufficiently clear textual references in legally binding international treaties, these instruments can be understood in broader ways than their language would suggest. We will thus introduce relevant international treaties here in turn, as invoking a specific international legal instrument can contribute to make a stronger argument about the protection of the rights of indigenous peoples over natural resources and to challenge obstacles that may have emerged at the national level. We will then explain how international case law and intergovernmental guidelines can also be relied upon to support the proposed interpretation.

a) International biodiversity law

The CBD's objectives are the conservation of biodiversity, the sustainable use of biological resources and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources (art. 1). The CBD contains an obligation to protect and encourage indigenous peoples' and local communities' customary use of biological resources in accordance with their traditional cultural practices that are compatible with conservation or sustainable use requirements (art. 10(c)). This obligation, which refers to traditional uses of living resources, implies protection from the negative impacts of the use of non-living resources on traditional practices. This should be read in conjunction with another obligation to promote the wider application of indigenous peoples' traditional knowledge with their approval and involvement and to encourage the equitable sharing of the benefits arising from the utilization of such knowledge (art. 8(j)). According to **BeneLex** research, it is the intrinsic connection between these communities' knowledge (including their customary rules) and their natural resources – the development and transmission of traditional knowledge through the management of traditionally used natural resources – that explains the relevance of these obligations in the natural resource development context, in addition to the conservation context.



Voluntary guidelines have been adopted under the CBD by its State Parties to clarify how the CBD general obligations can be put into practice with a significant level of detail. These guidelines apply to States, as well as businesses. The following guidelines in particular are relevant to the rights of indigenous peoples over natural resources:

- **Akwé: Kon Guidelines** for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities (the CBD Akwé: Kon Guidelines). Several international human rights bodies have underscored the relevance of the CBD Akwé: Kon Guidelines to protect the rights of indigenous peoples over natural resources in connection with FPIC and benefit-sharing (as reflected in the UN Framework on Human Rights and the Environment, Principle 14);

- **The Work Programme on Protected Areas,** which provides that States should assess the economic and socio-cultural costs, benefits and impacts arising from the establishment and maintenance of protected areas, particularly for indigenous and local communities. It also calls upon States to adjust policies to avoid and mitigate negative impacts, and where appropriate compensate costs and equitably share benefits in accordance with national legislation. The Work Programme was referred to by the Expert Mechanism on the Rights of Indigenous Peoples with regard to indigenous peoples' right to participate in decision-making;

- **Mo'otz Kuxtal Voluntary Guidelines** for the development of mechanisms and to ensure the "prior and informed consent", "free, prior and informed consent" or "approval and involvement", depending on national circumstances, of indigenous peoples and local communities for accessing their traditional knowledge, for fair and equitable sharing of benefits arising from the use of their knowledge relevant for the conservation and sustainable use of biodiversity, and for reporting and preventing unlawful appropriation of their knowledge (the CBD Mo'otz Kuxtal Guidelines);

- **Addis Ababa Principles and Guidelines on the Sustainable Use of Biodiversity**, which call for reflecting the needs of indigenous and local communities who live with and are affected by the use and conservation of biodiversity, along with their contributions to its conservation and sustainable use, in the equitable distribution of the benefits from the use of those resources (Practical Principle 12).

b) International human rights law

Indigenous and Tribal Peoples Convention (No. 169) (ILO 169) is the only international treaty that refers explicitly to benefit-sharing in relation to indigenous and tribal peoples' rights over the natural resources pertaining to their lands. ILO 169 clarifies that this includes the **right to participate** in the use, management and conservation of natural resources and to participate in the benefits arising from use, management and conservation, even when the State retains the ownership or other rights to these resources (arts. 15.1 and 15.2). Another international legally binding treaty, with a much larger number of parties (179), is the **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).** Its Committee on the Elimination of Racial Discrimination (CERD) has clarified

that ICERD protects the rights of indigenous and tribal peoples over natural resources through FPIC and benefit-sharing, even if the ICERD does not mention these concepts specifically.

Regional human rights treaties are also relevant. The **Inter-American Court on Human Rights**, as well as the **African Commission and the African Court on Human and Peoples' Rights**, have contributed to provide authoritative interpretations on the rights of indigenous and tribal peoples over natural resources through FPIC and benefit-sharing in the following decisions (see Box 2).

Box 2. Key international human rights decisions

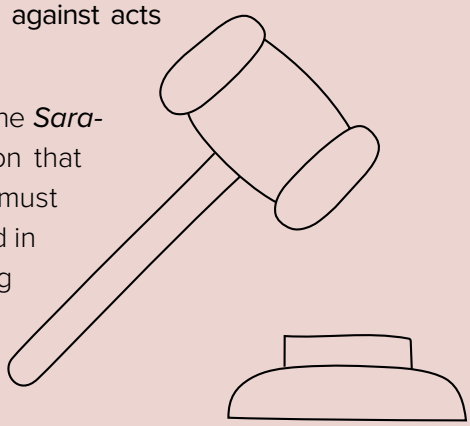
The Inter-American Court of Human Rights (IACtHR), in the *Saramaka* case, held that benefit-sharing, FPIC and EIA are three safeguards that States must comply with prior to authorizing extractive activities in territories, land and resources traditionally owned or occupied by indigenous and tribal peoples. These safeguards serve to protect their right to freely dispose of their natural resources. It also pointed to the CBD Akwé: Kon Guidelines as relevant guidance.

The IACtHR, in the *Kaliña and Lokono* case, made a specific reference to decisions adopted by the Conference of the Parties (COP) to the CBD to identify "the criteria of a) effective participation [of indigenous and tribal peoples], b) access and use of their traditional territories, and c) the possibility of receiving benefits from conservation — ... provided that they are compatible with protection and sustainable use...".

In both *Saramaka* and *Kaliña and Lokono*, the IACtHR highlighted the need for States to adopt legislative, administrative and other measures necessary to recognise and ensure the right of indigenous peoples to:

- Be effectively consulted;
- Give or withhold their FPIC, in relation to projects that may affect their territory;
- Share the benefits of such projects;
- Provide them with adequate and effective recourses against acts that violate their rights.

In the *Endorois* case, the African Commission recalled the *Saramaka* decision, as well as the CERD's recommendation that "not only that the prior informed consent of communities must be sought when major exploitation activities are planned in indigenous territories but also that the equitable sharing of benefits to be derived from such exploitation be ensured."



While these cases concern specific regions, their findings have been reiterated by global human rights processes, such as:

- The UN Permanent Forum on Indigenous Issues (UNPFII);
- The UN Expert Mechanism on the Rights of Indigenous Peoples; and
- The former UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, in several reports.

All these bodies have agreed that the **UN Declaration on the Rights of Indigenous Peoples (UNDRIP)**, which does not explicitly mention benefit-sharing, can be interpreted as including a benefit-sharing requirement as part of indigenous peoples' rights to natural resources (arts. 31 and 32). The CERD has also relied on the IACtHR's decisions relating to FPIC and benefit-sharing (e.g. CERD 2015).

The global relevance of regional interpretations of indigenous peoples' rights over natural resources is now also confirmed in the **2018 UN Framework Principles on Human Rights and the Environment** prepared by John Knox, former UN Special Rapporteur on Human Rights and the Environment, which were welcomed by the Human Rights Council (see Box 1 above). The UN Framework Principles set out the main human rights obligations relating to the environment and reflect actual or emerging international human rights law. These Principles "at a bare minimum" should be considered "best practices that [States] should move to adopt as expeditiously as possible". The United Nations Environment Programme is supporting governments, business entities, civil society and vulnerable communities in the implementation of those obligations ("Environmental Rights Initiative" – see UNEP (n.d.a) and (n.d.b)). While more clarity has now been achieved on how to protect the rights of indigenous peoples to natural resources by reading international human rights and biodiversity law together, there still are questions that remain to be clarified, such as who else is entitled to similar protection (see Box 3 below).

Box 3. Which groups are entitled to benefit-sharing obligations?

It is currently not clear which groups are entitled to benefit-sharing obligations. The CBD and its decisions, including the CBD Akwé: Kon Guidelines on environmental and socio-cultural assessments, use the term "indigenous and local communities." In 2012 CBD Parties agreed to refer to "indigenous peoples and local communities" in future decisions and secondary documents under the CBD (CBD Decision XII/12, section F para. 1). In addition, CBD Parties will consider adopting a glossary of relevant key terms and concepts within the context of art. 8(j) including "indigenous peoples and local communities" in due course.

Other instruments, however, use different terminologies. For instance, UNDRIP refers to "indigenous individuals and peoples" and "indigenous peoples," while ILO 169 concerns "indigenous and tribal peoples." The Framework Principles on

Human Rights and the Environment refers to "indigenous peoples and members of traditional communities".

Former UN Special Rapporteur John Knox indicated that international benefit-sharing obligations are currently clearer for indigenous peoples than for local communities, and referred to "indigenous peoples and members of traditional communities" in the 2018 UN Framework Principles (see Box 1 above).

The UN Declaration on the Rights of Peasants and Other People Working in Rural Areas includes provisions on benefit-sharing for "peasants and other people working in rural area". The declaration also applies to "indigenous peoples and local communities working on the land".

Groups other than indigenous peoples may be entitled to benefit-sharing obligations on the basis of international rights such as the right to food and the right to culture, including farmers (see **BeneLex** Learning module on Benefit-sharing and farmers' rights).

Key messages

- **International human rights law and international biodiversity law both support the protection of the rights of indigenous peoples and other communities to natural resources through EIA, FPIC and fair and equitable benefit-sharing.**
- **Amongst the available binding human rights treaties, it may be tactically advantageous to rely on the ICERD given that it is the most widely applicable in countries which are not party to the Inter-American or African regional treaties and that have expressed reservations in relation to their implementation of UNDRIP.**

In practice...

A community learnt that mining companies were interested in extracting minerals on their land. However, the companies failed to consult the communities about their project and the community was unable to find out whether EIA had been carried out. In the absence of clear national legislation on these points, the community decided to bring a case against the government for not having ensured that the company sought their consent, ensured benefit-sharing and involved them in the EIA. As the country was not a party to ILO 169, the community based its claims on ICERD and UNDRIP. Furthermore, the community decided to take a series of measures to raise awareness about their traditional use of their territories: they held a food festival to showcase their use of surrounding land and started community mapping projects.

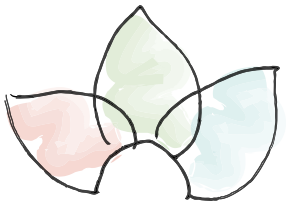
3 Opportunity to use benefit-sharing proactively for the full realisation of human rights

A. Fair and equitable benefit-sharing

As summarised in the 2018 UN Framework Principles on Human Rights and the Environment, benefit-sharing obligations arise from natural resource extraction on indigenous peoples' and traditional communities' lands that:

- Are traditionally owned, occupied or used;
- Include those to which they have had access for their subsistence and traditional activities;
- May not have formal recognition of property rights or delimitation and demarcation of boundaries (paras. 48 and 53).

Equally, benefit-sharing has been considered **as a safeguard** in the case of proposed conservation activities, such as the establishment of protected areas, in indigenous lands. In this case, benefit-sharing operates together with FPIC and indigenous peoples' effective participation in management and monitoring of traditional territories, including continued access and use that are compatible with environmental protection (*Endorois* and *Kaliña and Lokono*).

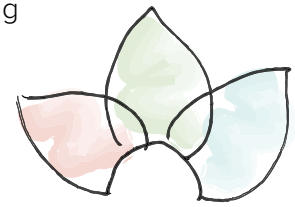


The 2018 UN Framework Principles on Human Rights and the Environment also recall that benefit-sharing should be consistent with indigenous peoples' and traditional communities' own priorities. There are, however, few other indications of what sharing benefits means in international law. **BeneLex** research has pieced together interpretative guidance to clarify the procedural and substantive content of benefit-sharing obligations.

a) Procedural obligations for States

International legal sources make reference to benefit-sharing as a process to build a "partnership" (see e.g. reports from former Special Rapporteur Anaya, UN Expert Mechanism 2012 and UNDRIP). In addition, it has been argued that the term "share" or "participate" in benefits (rather than to "receive" benefits or "benefit") serves to emphasize the agency of beneficiaries (in the context of the Universal Declaration of Human Rights: Mancisidor (2015)). This emphasizes that indigenous peoples should be actively part of the discussion about what should be considered a benefit in a specific case and how it should be allocated. In other words, benefit-sharing is not a unilateral or top-down flow of benefits that is passively enjoyed by beneficiaries. **Partnership-building** and **community agency** thus appear as **preconditions** for ensuring that benefit-sharing is in accordance with indigenous peoples' and traditional communities' own priorities. The CBD Mo'otz Kuxtal Guidelines also underscore the need for continuous dialogue on benefit-sharing.

BeneLex research thus argues that fair and equitable benefit-sharing is not a one-off, top-down process, but a continuous good-faith engagement whereby various actors engage in a genuine dialogue with one another to develop a shared understanding of a proposed activity and its benefits. This would allow for different worldviews of



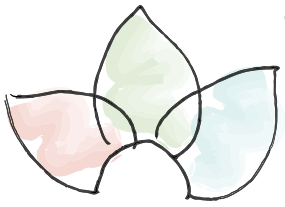
the environment, natural resource use, development, sustainable use and conservation to be expressed, so that indigenous communities can contribute to set the terms of the decision-making process. The same understanding is also emerging for environmental assessments and FPIC (see below), as the three safeguards work in synergy one with the other.

In practice...

A community affected by an extractive project was concerned that a sum of money had been given to a local leader in return for a permission to mine. This money did not translate into any of the benefits some residents of the village felt were important – including promises of local employment and a clear plan about the future of the area once mining ceased. The community brought a complaint against the company, claiming that several international law sources support their right to play a role in determining benefits in light of their priorities and views of development, and in retaining the right to negotiate them over time as their needs change.

b) Substantive obligations for States

So far only the African Commission in *Endorois* has clearly highlighted the substantive dimension of benefit-sharing in light of the right to development, with references to "choice" and "capabilities". Other international human rights actors have made reference to wellbeing and empowerment. These distinctions resonate with the types of benefits that have been identified in international biodiversity law. **BeneLex** research thus suggests distinguishing two types of benefits: control-benefits (relating to choice) and support-benefits (relating to capabilities), rather than focusing only on monetary and non-monetary benefits. The distinction between monetary and non-monetary benefits may, in all events, be misleading because 1) non-monetary benefits also have financial value and costs and 2) there is a tendency to focus on monetary benefits (Parks (2017)) and sideline other important concerns for the protection and realisation of the rights of indigenous peoples (notably, the protection of traditional knowledge, including conditions for cultural reproduction).



Control-benefits provide or enhance indigenous peoples' control over resources for the realisation of their own worldviews. Examples include, for instance:

- Management of natural resources by indigenous peoples;
- Joint ventures when the skills or technology of third parties may be required;
- Incorporation of traditional knowledge in natural resource management planning;
- Employment opportunities in natural resource project management.

In practice...

A community concluded an agreement with an agricultural company, with the support of the government, to continue traditional agricultural practices in areas where community members were aging or preferred to engage in eco-tourism. The community identified as relevant benefits not only a share of crop production, but also other non-monetary benefits that were essential to protect other aspects of their way of life. These additional benefits included the company's commitment to protect the unique variety of crop they were producing with a seed nursery, to respect the traditional planting cycle to avoid damaging the soil, and to avoid using pesticides in order to prevent negative impacts on nearby traditional aquaculture activities.

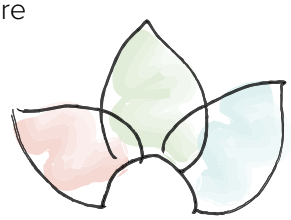
Support-benefits. These consist in providing opportunities to enhance the capacities or the enabling conditions for indigenous peoples – whether individually or as groups – to effectively exercise control and therefore freely pursue their chosen way of life and wellbeing. Examples of support-benefits include fostering indigenous peoples' own enterprises by:

- Providing direct investment options;
- Facilitating access to markets;
- Giving opportunities to diversify sources of income;
- Providing capacity building and technical support.

In practice...

The community concluding an agreement with an agricultural company also identified as relevant benefits support from the government to obtain a certificate of geographic indication for its agricultural products to facilitate access to international markets, as well as training opportunities to engage in bio-based innovation.

According to **BeneLex** research both control and support-benefits are needed for the protection and realisation of indigenous peoples' rights: any attempts to offer one instead of the other (e.g. offering high-level jobs to external experts as opposed to community members; or supporting other local economic activities that can be at the initiative of communities) would not be in line with relevant human rights standards.



c) Ensuring the justiciability of fair and equitable benefit-sharing obligations

As part of the protection and realisation of indigenous peoples' rights, international benefit-sharing obligations need to be reflected **in national legislation**, as well as implementation and **enforcement practices** (see e.g. *Saramaka* and *Kaliña and Lokono*) as follows:

- National legislation needs to spell out the duties and rights deriving from international benefit-sharing obligations at the national level (otherwise it will be more difficult for indigenous peoples' representatives and advocates to hold other actors accountable);
- National legislation and State monitoring activities also need to target the conduct of private companies, who often negotiate directly with indigenous peoples (in particular to address issues of unequal bargaining power);
- The State needs to put in place effective measures to control the conduct of private companies with indigenous peoples, including through inspections and supervision;
- The State needs to ensure that indigenous peoples have access to courts against private companies, and that relevant decisions are enforced.

In addition to national laws and government procedures, additional procedural guarantees should be in place for benefit-sharing agreements to be **justiciable** (see e.g. *Kaliña and Lokono*, UN Expert Mechanism 2012 and UNPFII 2013), as follows:

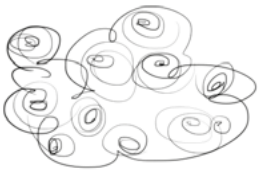
- They should be formally recorded, in a legally binding agreement which encompasses a meaningful FPIC process (see below) respecting the worldviews of indigenous peoples, and includes proper safeguards in the event the FPIC process is not complied with;
- They should go through a third-party verification process;
- Their functioning should be reviewed periodically, jointly with indigenous peoples.

In practice...

A community facing mining in its traditional territories was only offered as benefits some low-level jobs in the mine and a very small percentage of profits. The community was situated in a country that had ratified ILO 169 and the CBD, but only included in national legislation requirements for FPIC, not for benefit-sharing. In light of the difficulties faced by the community to protect its entitlement to benefit-sharing on the basis of international law alone, the country's national human rights ombudsman recommended legal reforms to fully reflect the international requirements of ILO 169. In addition, the national human rights ombudsman developed, as an immediate measure, guidelines for local governments and business enterprises to engage in fair and equitable benefit-sharing negotiations in light of international standards.

Key messages

- **Sharing benefits fairly and equitably implies that communities should co-determine benefits in light of their views of development and their needs;**
- **Benefits should both enhance communities' control of natural resources, as well as provide them support to exercise such control effectively;**
- **National law should include specific provisions on fair and equitable benefit-sharing to ensure its justiciability.**



d) Business responsibility with regard to fair and equitable benefit-sharing

As clarified in the UN Guiding Principles on Business and Human Rights (the UN Guiding Principles), business enterprises have the responsibility to respect human rights in light of international law. To do so, businesses are expected to carry out human rights due diligence, including in relation to indigenous peoples' human rights (see Box 4 below).

Box 4. Due diligence in the Guiding Principles on Business and Human Rights

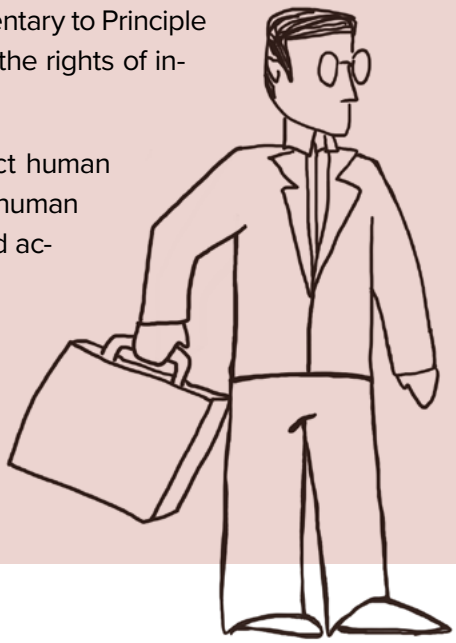
Under the Guiding Principles on Business and Human Rights business enterprises have the responsibility to respect human rights by carrying out human rights due diligence. Key provisions include the following:

Principle 11. "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."

Principles 12. "The responsibility of business enterprises to respect human rights refers to internationally recognized human rights [...]." Commentary to Principle 12: "United Nations instruments have elaborated further on the rights of indigenous peoples [...]"

Principle 15. "In order to meet their responsibility to respect human rights, business enterprises should have in place [...] (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human right [...]"

Principles 17. "In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts,



integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. [...]"

Principle 29. "To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted."

Former Special Rapporteur James Anaya has clarified the content of **business due diligence** vis-à-vis indigenous peoples' human rights to natural resources by specifically referring to the CBD. He confirmed that the responsibility of business enterprises in extractive industries includes:

- Allowing indigenous peoples' access to information about potential financial benefits, even when companies consider that such information is proprietary since it could be shared on a confidential basis;
- Agreeing on benefit-sharing independently of compensation;
- Not treating benefit-sharing as a charitable award or as a favour granted by the company to secure social support for a project or minimize potential conflicts;
- Considering benefit-sharing as a mechanism that creates genuine partnerships with indigenous peoples in order to strengthen their capacity to establish and pursue their own development priorities and make their own decision-making mechanisms and institutions more effective;
- Making sure indigenous peoples participate in management decisions and share in their profits (for instance, through a minority ownership interest in the extractive operations).

In practice...

A community requested information in an accessible format from a company planning to engage in mining activities near traditional lands. When the company responded that information was confidential, the community insisted that partial information not covered by commercial confidentiality should be shared. In addition, the community indicated that as part of due diligence, the company was expected to communicate how it assessed possible impacts on indigenous peoples' human rights.

International guidance on business responsibility to respect indigenous peoples' rights is also relevant for other private sector activities that may not be considered extractives, such as agricultural production and conservation (see Box 5 below.)

Box 5: Business responsibility to respect indigenous peoples' rights in agriculture and conservation

OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016)

The OECD-FAO Guidance sets out a model enterprise policy for responsible agricultural supply chains following international standards that enterprises are expected to observe. Concerning benefit-sharing, the model enterprise policy states:

"We will ensure that our operations contribute to sustainable and inclusive rural development, including, as appropriate, through promoting fair and equitable sharing of monetary and non-monetary benefits with affected communities on mutually agreed terms, in accordance with international treaties, where applicable for parties to such treaties, e.g. when using genetic resources for food and agriculture."

UN Special Rapporteur on Human Rights and Environment's Report on Biodiversity (2017) (A/HRC/34/49)

In his Report on Human Rights and Biodiversity, former UN Special Rapporteur John Knox recommended that:

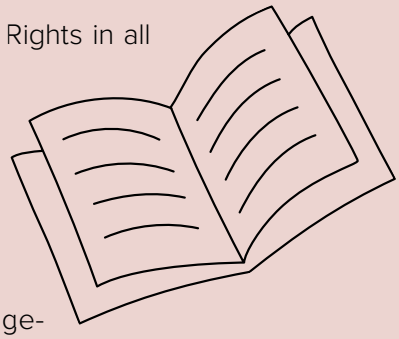
"Businesses should respect human rights in their biodiversity-related actions, including by:

a. Complying with the Guiding Principles on Business and Human Rights in all actions that may affect biodiversity and ecosystems;

b. Following the [CBD] Akwé: Kon Guidelines;

c. Implementing the recommendations of the Special Rapporteur on the rights of indigenous peoples with respect to extractive activities (A/HRC/24/41);

d. Not seeking or exploiting concessions in protected areas or [Indigenous and Community Conserved Areas]" (para. 72).



Key messages

- **Private companies are also expected to share fairly and equitably monetary and non-monetary benefits arising from (extractives or conservation) activities on or affecting indigenous peoples' lands.**
- **Private companies are expected to make decisions on the project together with indigenous peoples when carrying out projects on their lands.**

B. Environmental assessments

a) Benefit-sharing obligations for States in the context of environmental assessments

The Inter-American Court of Human Rights has indicated that **comprehensive prior assessments** of environmental and socio-cultural impact are a key safeguard for protecting indigenous peoples' rights and must:

- Be prepared by an independent, technically qualified entity;
- Be undertaken with the active participation of affected indigenous communities;
- Respect indigenous peoples' traditions and cultures;
- Contribute to the realisation of the rights of indigenous peoples to participate in public affairs.

In practice...

Although national legislation required provincial governments to undertake EIAs prior to authorizing natural resource extraction projects, the provincial government did not have sufficient resources to carry out its own assessments or to verify the quality of assessments carried out by private-sector developers. Communities in the province did not trust a mining company's assessment of the impacts on their lands, noting that the assessment did not address issues related to freshwater (although the area was quite arid) and did not address any cultural issues related to traditional uses of the lands by indigenous peoples. The community requested the national human rights ombudsman to reach out to the federal government and request that the impact assessment be undertaken anew with the direct involvement of communities and independent experts to assess comprehensively environmental, as well as socio-cultural issues.

Several international human rights bodies (as reflected in the UN Framework on Human Rights and the Environment, Principle 14), have indicated that the CBD Akwé: Kon Guidelines provide detailed guidance in this connection. As the Guidelines specifically refer to benefit-sharing, **BeneLex** research has identified strategic opportunities to use the interplay between environmental assessments and benefit-sharing to:

"Open up" environmental assessments to different worldviews to take into account, in an integrated manner, indigenous peoples' rights over lands and waters traditionally occupied or used by them and associated biodiversity, as well as the following cultural aspects:

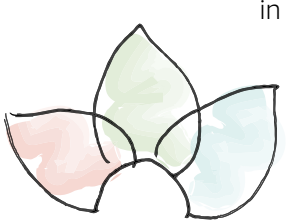
- beliefs systems;
- languages and customs;
- traditional systems of natural resource use;
- the maintenance of genetic diversity through indigenous customary management;
- the exercise of customary laws regarding land tenure and distribution of resources; and
- transgenerational aspects, including opportunities for elders to pass on their knowledge to youth.

Move away from an exclusive focus on "damage control" in order to consider not only negative impacts (such as potential damage to ways of life, livelihoods, well-being, and traditional knowledge) of proposed developments, but also possible positive implications from indigenous peoples' perspectives, such as:

- food;
- health;
- environmental sustainability;
- community well-being, vitality and viability (employment levels and opportunities, welfare, education, and availability and standards of housing, infrastructure, services).

The CBD Akwé: Kon Guidelines also make important recommendations on how impact assessments should be conducted, calling upon States to:

- Establish processes for recording indigenous communities' views including when they are unable to attend public meetings because of remoteness or poor health, as well as in other forms than written ones;
- Provide sufficient human, financial, technical and legal resources to support indigenous expertise, in proportion with the scale of the proposed development;
- Ensure involvement of indigenous communities in the financial auditing processes of the development so that the resources invested are used effectively;
- Address risks of elite capture, by ensuring that "particular individuals or groups are not unjustly advantaged or disadvantaged to the detriment of the community as a result of the development," and benefit-sharing targets the "affected community and its people as a whole."

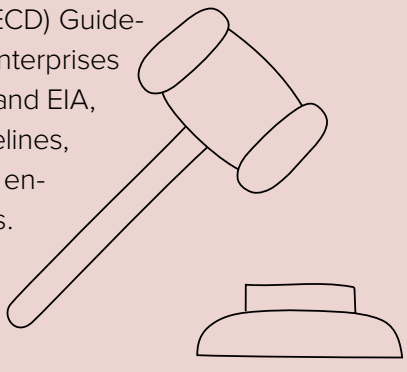


Finally, **BeneLex** research suggests including indigenous peoples' rights not only in impact assessment (that are carried out at the project level) but also in strategic environmental assessments (SEAs) that are carried out at the policy and planning level. While SEAs have not been addressed by international human rights bodies, they are required under the CBD (art. 14.1(b)). SEAs can help protect indigenous peoples' rights at a higher level of decision-making that pre-set conditions for EIAs down the line.

b) Business responsibility in the context of environmental assessment

The responsibility of business enterprises to respect human rights in the extractives and conservation sectors means that companies must exercise due diligence. This includes conducting impact studies in accordance with the CBD Akwé: Kon Guidelines, which are also addressed to businesses, and can imply significant changes in current practices, as in the example in Box 6 below.

Box 6. Business responsibility to respect human rights – the Vedanta case



The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (OECD Guidelines) state that enterprises should respect human rights and include provisions on consultation and EIA, among other things. Countries that have adhered to the OECD Guidelines, including the UK, have established National Contact Points (NCPs) to ensure multinational enterprises promote and implement the Guidelines.

In 2009, the UK NCP issued a decision concerning a complaint brought by an NGO against a UK mining company – Vedanta –

alleging that it had failed to consult an indigenous group in respect of its operations in India. The UK NCP held that that the company failed to comply with the rights and freedoms of the indigenous group in accordance with India's commitments under a number of international instruments, including the CBD and UNDRIP. The NCP in particular relied on the CBD Akwé: Kon Guidelines to recommend that the company:

- Employ the local language or means of communication other than the written form for consultations with communities with very high rates of illiteracy;
- Ensure the participation of the maximum number of their representatives in the consultation;
- Include in the assessment impacts of the mind on communities' access to the area affected by the project, ways to secure traditional livelihoods, and alternative arrangements (other than re-settlement) for affected families.

Source: Morgera (2013)

Key messages

- **Environmental assessments concerning projects in or impacting on indigenous peoples' lands should also include early consideration of belief systems, customary tenure and use, and potential benefits (not just negative impacts) from indigenous peoples' perspectives, whether these assessments are carried out by States or by private companies;**
- **Environmental assessments should involve indigenous peoples and local communities in their conduct, including by utilizing indigenous methodologies, as well as in financial auditing processes; and**
- **Strategic environmental assessments at the policy and planning level should equally include consideration of indigenous peoples' belief systems and customs, as well as potential benefits from their perspective.**

C. FPIC: when to say "no"?

a) Benefit-sharing and FPIC obligations for States

ILO 169 and UNDRIP require FPIC in cases of relocation of indigenous peoples from their lands. In addition, UNDRIP and the UN Framework Principles on Human Rights and the Environment (see Box 1 above) clarify that international human rights law requires good-faith consultation with indigenous peoples in order to obtain FPIC before States can adopt legislative or administrative measures that may affect them, or proposed developments that may affect their lands and resources.

According to international human rights law, **consent** should be:

- Given freely (that is, without coercion, intimidation or manipulation);
- Provided with sufficient time for internal discussion within the community;
- Sought prior to all stages of the development of the project.

As a result, FPIC is a **"constant process of dialogue"** (*Kaliña and Lokono*, Joint Concurring Opinion of Judges Sierra Porto and Ferrer Mac-Gregor Poisot). This is reflected in guidance adopted under the CBD: for instance, the CBD Mo'otz Kuxtal Guidelines clarified that FPIC means a continual process of building mutually beneficial, ongoing arrangements that should be free from expectations or timelines that are externally imposed. Note that that this goes beyond a strict understanding of "coercion". Further, as FPIC is an ongoing process, indigenous peoples can withdraw from a project at any point.

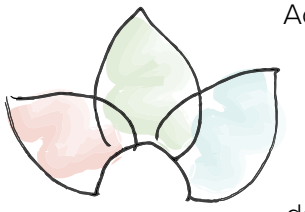
According to **BeneLex** research,

FPIC and benefit-sharing should be considered as intertwined processes for continuous, good-faith dialogue;

Both FPIC and benefit-sharing can serve the protection and the realisation of the rights of indigenous peoples over natural resources; and

The interplay between benefit-sharing and FPIC can clarify when indigenous peoples should say no to proposed developments.

The last suggestion is important because there are currently debates going on as to whether FPIC amounts to a veto power for indigenous peoples (that is, an absolute right to say no). For instance, former Special Rapporteur James Anaya suggested that UNDRIP does not provide a general power to veto decisions that may affect them. Instead it requires consultations (the shape of which depend on the nature of the right or interest at stake) to be carried out in good faith with the objective to reach a mutually acceptable agreement. Because any decision on natural resources would need to balance the human rights of indigenous peoples to natural resources with other applicable human rights of the broader society and, under certain circumstances, other public policy objectives, the question is rather when indigenous peoples would legitimately be entitled to say no to a proposed development.



According to **BeneLex** research, the complete disregard or lack of serious consideration of benefits (positive implications, in addition to only potential damage) from the perspective of indigenous peoples' worldviews in a consultation process would legitimately entitle them to say no. In other words, a State has not respected international standards for the protection of indigenous peoples' rights if:

- No early, genuine and culturally appropriate identification and discussion of benefits has been carried out according to the worldviews of indigenous peoples;
- Such discussion has not had any effect on the final outcome and there are no adequate reasons to justify such an outcome; and
- The proposed project impacts traditionally owned or used resources, or might adversely affect traditionally used resources threatening the cultural and physical survival of indigenous peoples.

In practice...

A community was offered a benefit-sharing agreement from a company proposing a mining operation in its territory that included employment opportunities in catering and security services, and 0.03% of profits from future mineral sales. The community refused to consent to the development because the company did not ask for communities' views on the possible benefits of the proposed development, or gave any consideration to the community's belief system and customs in designing the project.

b) Business responsibility in the context of FPIC

Business responsibility to respect human rights in the extractives and conservation sectors means companies must exercise due diligence which includes supporting government efforts in consulting indigenous peoples.

Former Special Rapporteur James Anaya has clarified that companies should:

- Not proceed with a project if the State has neglected to hold prior consultations with the affected indigenous communities (or assume that such consultations have taken place);
- Not hold consultations that purport to replace the State's obligation to consult with indigenous peoples;
- In all events respect the right of indigenous peoples to participate in decisions concerning measures that affect them, independently of the State's obligation to consult;
- Not treat benefit-sharing as a favour granted by the company to secure social support for the project (see also Box 6 above on the Vedanta case).

In practice...

A mining company requests a community to accept or refuse a benefit-sharing agreement related to a proposed mine in their traditional territories within a week. The community refused to consent to the development because the company did not give any consideration to the community's customs with regard to timeframes for internal consultations.

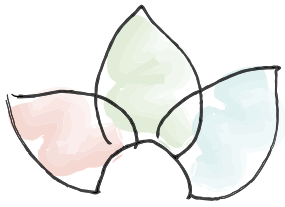
Key messages

- **FPIC is an ongoing process of good faith engagement that is intertwined with benefit-sharing, so communities are entitled to say no if they are not asked (or if there is no serious consideration of) whether they consider that there will be any benefits, on the basis of their belief system, from a project (in addition to providing views on possible negative impacts).**
- **Companies need to engage in a good-faith dialogue to understand what would be considered a benefit from an indigenous community's perspective and in accordance with community's customs as part of the process of seeking consent.**

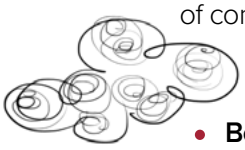
D. Difference with Compensation

Often, benefit-sharing and compensation are mentioned together in international human rights materials and the difference between the two is not yet clear. For instance, former Special Rapporteur Anaya stated that the duty to share benefits with indigenous peoples is "independent of compensation measures" but "responds in part to the concept of fair compensation for deprivation or limitation of the rights of the communities concerned, in particular their right of communal ownership of lands, territories and natural resources."

BeneLex research suggests that benefit-sharing is part of a general and permanent obligation to protect human rights connected to natural resources. Compensation, on the other hand, is an obligation that is dependent on, and proportionate to, a violation of human rights. While this point has not been clarified in international case law as such, it can be derived from what one of the judges indicated in the *Kaliña and Lokono* case. He underscored that compensation by setting up a fund for indigenous peoples is "in addition to any other present or future benefit that might correspond to the [indigenous] peoples as a result of the State's general development obligations" (see also *2015 Garifuna Triunfo de la Cruz* and *2015 Garifuna de Punta Piedra*).



Benefit-sharing can thus, arguably, be distinguished from compensation that is expected to make up for lost control over resources and income-generation opportunities. Benefit-sharing combines new opportunities for income generation and continued, or possibly enhanced, control over the use of the lands and resources affected by the development. This is in line with the previous **BeneLex** finding that benefit-sharing is understood as a proactive tool for the full realization of human rights connected to natural resources in light of communities' worldviews, and should include both support- and control-benefits.



Key message

- **Benefit-sharing is always due to indigenous peoples, even when their rights are not going to be violated by a proposed development (and thus differs from compensation).**

4 Self-evaluation

Back to the initial scenario: A community of indigenous peoples hears that the government is about to authorize a new mining project in their traditional lands. The community was involved in a prior environmental impact assessment and had raised concerns about the environmental impact of the proposed mine, in particular with regard to potential use and pollution of freshwater in a semi-arid area. The community, however, is unclear as to whether their views had been taken into account in the final outcome of the assessment and the authorization process that followed. They are also unclear about which options the government had considered before authorizing the mine to go ahead, including a separate proposal from the government to create a protected area, and how much attention had been paid to other impacts on their traditional activities on the land. Only some community members had been approached by the company directly to provide their consent to the mine, and obtained money and jobs at the mine. Many other members, instead, actively opposed the mine and had difficulty establishing a useful dialogue with the government or the company. Most members in the community did not consider that the benefits promised by the company were sufficient compared to what the company would gain, and were unaware of any measures that the company would put in place to protect freshwater resources.

If you were to advise the community in this scenario,

- What kind of role should they have had in the assessment and what issues should it have included?
- Could they still say no to the mining development?
- What kind of benefits are they entitled to? Who is required to provide such benefits and what could the community do if they are not provided?
- If the government decides to go ahead with the creation of a protected area in the communities' traditional territories, does the community have any rights?

Solutions

- In order to determine their role and contest the outcome of the EIA, they can rely on **both international biodiversity law and international human rights** law to strengthen their arguments about the protection of their rights over their natural resources and to challenge the obstacles that they have encountered at the national level. International human rights law and international biodiversity law both support the protection of their rights through EIAs, FPIC and fair and equitable benefit-sharing.
    - The key international treaties are the CBD with its guidelines (notably the CBD Akwé: Kon Guidelines), ILO 169 and ICERD, which can support the implementation of UNDRIP.
- To determine the kind of **role they should they have had in the assessment**, they should refer to the CBD Akwé: Kon Guidelines, which recommend that States:
    - Establish processes for recording indigenous communities' views including when they are unable to attend public meetings because of remoteness or poor health, as well as in other forms than written ones;
    - Provide sufficient human, financial, technical and legal resources to support indigenous expertise, proportionally to the scale of the proposed development;
    - Ensure involvement of indigenous communities in the financial auditing processes of the development so that the resources invested are used effectively;
    - Prevent particular individuals or groups from being unjustly advantaged or disadvantaged to the detriment of the community as a whole from the development.

- As regards the **issues that the EIA should have included**, it should have taken into account not only negative impacts, but also possible benefits according to indigenous peoples' worldviews, giving consideration to their rights over lands and waters traditionally occupied or used by them and associated biodiversity (including wildlife), as well as the following cultural aspects:
    - beliefs systems;
    - languages and customs;
    - traditional systems of natural resource use;
    - the maintenance of genetic diversity through indigenous customary management;
    - the exercise of customary laws regarding land tenure and distribution of resources; and
    - transgenerational aspects, including opportunities for elders to pass on their knowledge to youth.
- The community would be **entitled to say no** if it was not asked (or if there was no serious consideration of) whether it considers that there would be any benefits, on the basis of their belief system, from the project (in addition to providing views

on possible negative impacts). As FPIC is an ongoing process, communities can withdraw from it at any point.

- Concerning the **benefits the community would be entitled to**, sharing benefits fairly and equitably implies that the community should co-determine benefits in light of its views of development and its needs. Further benefits should both enhance control of natural resources by the community (community-based management, co-management, joint ventures, incorporation of traditional knowledge in resource management planning), as well as provide its members support to exercise such control effectively (direct investment options, facilitated access to markets, opportunities to diversify sources of income, capacity building). In any event benefit-sharing is always due to the community, even when the rights of its members are not going to be violated by a proposed development (and thus differs from compensation).
- The international benefit-sharing obligation falls not only on States but also businesses. **Private companies** are also expected to share fairly and equitably monetary and non-monetary benefits arising from (extractives or conservation) activities on indigenous peoples' lands. Private companies also are expected to make decisions on the project together with indigenous peoples when carrying out projects in or impacting on their lands. National law should include specific provisions on fair and equitable benefit-sharing as an entitlement for communities and clarify its justiciability. This means that the community should be able to bring a claim before the national courts in the event the benefit-sharing obligation is not respected by a public authority or private companies.
- Even if the government decides to establish a protected area instead of a mine on indigenous peoples' lands, the community is still entitled to FPIC and benefit-sharing to ensure effective participation in management and monitoring of traditional territories, including continued access and use that are compatible with environmental protection.

5 References

A. Acronyms

CBD	Convention on Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
COP	Conference of the Parties
EIA	Environmental impact assessment
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free, prior informed consent
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IACtHR	Inter-American Court of Human Rights
ILO	International Labour Organization
ILO 169	Indigenous and Tribal Peoples Convention (No. 169)
NCPs	National Contact Points
NGOs	Non-governmental Organisation
OECD	Organisation for Economic Co-operation and Development
SEA	Strategic environmental assessments
UN	United Nations
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNEP	UN Environment Programme
UNPFII	UN Permanent Forum on Indigenous Issues

B. List of boxes

C. List of international sources

i) International treaties

- International Convention on the Elimination of All Forms of Racial Discrimination (1966)
- ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (1989)
- Convention on Biological Diversity (1992)

ii) CBD decisions

- CBD Addis Ababa Principles and Guidelines on the Sustainable Use of Biodiversity, CBD Decision VII/12 (2004), Annex II
- CBD Akwé: Kon Voluntary Guidelines on socio-cultural and environmental impact assessments, CBD Decision VII/16F (2004), Annex
- CBD work programme on protected areas (CBD Decision VII/28 (2004), Annex
- CBD Mo'otz Kuxtal voluntary guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the "prior and informed consent", "free, prior and informed consent" or "approval and involvement", depending on national circumstances, of indigenous peoples and local communities for accessing their knowledge, innovations and practices, for fair and equitable sharing of benefits arising from the use of their knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity, and for reporting and preventing unlawful appropriation of traditional knowledge, CBD Decision XIII/18 (2016), Annex

iii) Other international human rights instruments

- Universal Declaration of Human Rights (1948)
- UN Declaration on the Rights of Indigenous Peoples, UNGA Res. 61/295, (2007)

iv) Human rights reports and studies

- Special Rapporteur Anaya (2010), Report on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/HRC/15/37
- Special Rapporteur Anaya (2011), Report on the rights of indigenous peoples, UN Doc. A/HRC/66/288
- Special Rapporteur Anaya (2012), Progress report on extractive industries, UN Doc. A/HRC/21/47
- UN Expert Mechanism, Advice no. 4 (2012): Follow-up report on indigenous peoples and the right to participate in decision- making, with a focus on extractive industries, UN Doc. A/HRC/21/55
- Special Rapporteur Anaya (2013), Study on Extractive Industries and Indigenous Peoples, UN Doc. A/HRC/24/41
- UN Permanent Forum on Indigenous Issues (2013), Review of World Bank operational policies, Document E /C.19/2013/15
- CERD, Concluding observations on the combined thirteenth to fifteenth periodic reports of Suriname, UN Doc. CERD/C/SUR/CO/13-15 (2015)
- UN Special Rapporteur on Human Rights and Environment (2017), Report on Biodiversity, UN Doc. A/HRC/34/49
- UN Framework Principles on Human Rights and the Environment (2018)

v) Human rights cases

- African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (4 February 2010), Case 276/2003
- IACtHR, *Case of the Saramaka People v. Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 November 2007
- IACtHR, *Case of the Saramaka People v. Suriname*, Judgment (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs), 12 August 2008
- IACtHR, *Case of the Garífuna de Punta Piedra Community and its members v. Honduras*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 8 October 2015
- IACtHR, *Case of the Community Garifuna Triunfo de la Cruz and its members v. Honduras*, Judgment (Merits, Reparations and Costs), 8 October 2015
- IACtHR, *Case of Kaliña and Lokono Peoples v Suriname*, Judgment (Merits, Reparations and Costs), 25 November 2015

D. Additional sources

Mancisidor, M., 2015, 'Is There Such a Thing as a Human Right to Science in International Law?', 4 *ESIL Reflections* 1, https://esil-sedi.eu/post_name-132/.

Morgera, E., 2013, 'From Corporate Social Responsibility to Accountability Mechanisms' in P.M. Dupuy and J.E. Viñuales (eds) *Harnessing Foreign Investment to Promote Environmental Protection Incentives and Safeguards,* Cambridge, Cambridge University Press.

Morgera, E., 2014, The Legacy of UN Special Rapporteur Anaya on Indigenous Peoples and Benefit-Sharing, **BeneLex** Blog, https://benelexblog.wordpress.com/2014/05/29/the-legacy-of-un-special-rapporteur-anaya-on-indigenous-peoples-and-benefit-sharing/.

Morgera, E., 2018, A Reflection on Benefit-Sharing as a Framework Principle on Human Rights and the Environment proposed by UN Special Rapporteur John Knox (Part I), **BeneLex** Blog, https://benelexblog.wordpress.com/2018/04/08/a-reflection-on-benefit-sharing-as-a-framework-principle-on-human-rights-and-the-environment-proposed-by-un-special-rapporteur-john-knox-part-i/.

Morgera, E., 2018, A Reflection on Benefit-Sharing as a Framework Principle on Human Rights and the Environment proposed by UN Special Rapporteur John Knox (Part II: Right-holders and duty-bearers), **BeneLex** Blog, https://benelexblog.wordpress.com/2018/04/08/a-reflection-on-benefit-sharing-as-a-framework-principle-on-human-rights-and-the-environment-proposed-by-un-special-rapporteur-john-knox-part-ii-right-holders-and-duty-bearers/.

Morgera, E., 2018, Fair and Equitable Benefit-Sharing and Indigenous Peoples' Rights over Natural Resources, **BeneLex** Policy Brief No. 2.

Parks, L., 2017, Challenging Power Asymmetries from the Bottom up? Community Protocols and the Convention on Biological Diversity at the Global/Local Crossroads, **BeneLex** Working Paper N. 11, http://eprints.lincoln.ac.uk/27544/1/SSRN-id2884965.pdf.

UNEP, n.d.a, Environmental Protection nearer to the People, https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights.

UNEP, n.d.b, The Environmental Rights Initiative, https://wedocs.unep.org/bitstream/handle/20.500.11822/25366/Environmental%20Rights%20Initiative%20Fact%20Sheet.pdf?sequence=1&isAllowed=y.

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