

Consent and conservation: getting the most from community protocols

A wealth of traditional crop varieties, medicinal plants and other genetic resources are under the care of indigenous people and local communities — who need legal rights to manage them. New legal backing comes from the 2010 Nagoya Protocol to the UN Convention on Biological Diversity, which requires prior informed consent for access to traditional knowledge and genetic resources, and calls for support of ‘community protocols’ that set out rules for access and benefit sharing. Community protocols are not just about indigenous rights: they clarify expectations for business and government, preserve irreplaceable biological resources, and support climate change adaptation and sustainable development. But to get these benefits, governments must back up the Nagoya Protocol with national laws and institutions, and support community-led participatory processes.

Policy pointers

- **Community protocols can** define the terms on which outsiders may access the resources and knowledge of indigenous people and local communities, and how to share the benefits.
- **The process to develop** community protocols is important in itself and can deliver good conservation outcomes, especially when community members are trained to design and facilitate the process.
- **Governments should** introduce national laws that recognise and support community protocols, and require the free, prior and informed consent (FPIC) of communities for access to their traditional knowledge and genetic resources.
- **Governments and donors** should provide flexible support for communities to develop protocols and undertake FPIC processes, and avoid imposing blueprints or time limits that can undermine community decision-making processes and participation.

Community rights to the forefront

For millennia, traditional groups around the world have managed natural assets on their lands, nurtured thousands of crops and medicinal plants, and passed down knowledge of how to use them for agriculture, food security, health and nutrition. As changes in climate hit the globe, this ‘biocultural’ heritage is already providing options that enable people to adapt.¹

In recent years, international treaties have recognised community rights related to this natural and cultural wealth, including rights to control external access and use, and to receive benefits from this use. Communities need to have a say over who can access land, resources and knowledge, and on what terms. In particular, access should depend on free prior and informed consent (FPIC; see Putting the ‘free’ in FPIC, overleaf); community resources must not be sold off ‘on the cheap’, without discussion or full understanding of the impacts on livelihoods, cultural heritage and biodiversity. And when groups agree to share assets, they also should share in the resulting benefits — from financial profits to agricultural resources. Such rewards not only represent fair compensation, but are important to encourage conservation.

The 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) requires the free, prior and informed consent of indigenous peoples for any project that

affects their lands, territories or resources, particularly in relation to the use of water, mineral or other resources. More recently, in 2010, the Nagoya Protocol on Access to Genetic Resources and Benefit-Sharing was signed under the UN Convention on Biological Diversity. The Nagoya Protocol requires countries to take measures to ensure the prior informed consent of indigenous and local communities for access to traditional knowledge and genetic resources, such as valuable plants. It also requires that signatories support indigenous and local communities in developing ‘community protocols’ for access and benefit sharing.

These international agreements reflect an emerging acceptance that access to community resources requires community consent. Likewise, in the private sector, mining, oil and forestry companies are increasingly going above the minimum standards required for FPIC in national law, in order to gain the acceptance of local communities and obtain a ‘social license to operate’. Firms as varied as the US oil exploration company Talisman Oil and the Singapore-based pulp and paper giant APRIL have made public statements endorsing FPIC.³

There is also growing appreciation of the role and value of community protocols. As well as defending rights, these protocols — based on customary rules and articulated in discussions among communities — have huge potential for improving governance and

conservation of biodiversity at the local level, and for strengthening biocultural systems for resilience to climate change.

Why community protocols matter

Community protocols reflect the orally held rules and procedures that many indigenous peoples and local communities use to regulate conduct and interactions

within their communities, with outsiders and with the territories and areas on which they depend. These protocols are often rooted in customary laws that have sustained biodiversity for

generations. But governments, researchers, companies or NGOs tend to overlook local rules and priorities when defining the terms of engagement. Thus, community protocols need to be articulated in forms that can be understood by others — often written.

Fourteen case studies of community protocol and FPIC processes, mainly in Africa, Asia and Latin America, were recently reviewed in IIED's journal *Participatory Learning and Action*. These cases show that in negotiations for access and benefit sharing, a set of written rules helps both sides of the table:

- Community protocols can set out the procedures for engaging with communities — such as whose prior informed consent is required, what information and discussion process is expected, and who is authorised to negotiate and sign an agreement if consent is granted.
- For communities, a protocol can ensure that decisions on access and benefit sharing go through the proper community processes, with full awareness of the value of resources and the environmental, social and cultural impacts of their use. Creating a protocol can also build capacity to negotiate more equitable agreements.

Community protocols need recognition and involvement from local governments

- For outsiders, such as companies seeking access to resources, community protocols can provide legal certainty and clarity, and minimise potential conflicts with and amongst communities. They can also help to build long-term partnerships — whether for access and benefit sharing, ethical biotrade, or participation in NGO projects.

- Community protocols can also establish representative organisations amongst communities to facilitate the FPIC process.

Similarly, community protocols can be used internally to improve resource management and conservation, and to avoid conflicts amongst or between communities (see *The rise of community protocols*).

Community-defined rules and incentives are an important tool for biodiversity conservation and sustainable use at the local level — and hence for meeting the broader goals of the UN Convention on Biological Diversity. Local protocols also have a role to play in local sustainable development, by linking environmental conservation, economic development and social equity objectives. For example, at the Andean Potato Park in Peru, an agreement among five indigenous Quechua communities ensures that economic revenues from the park are shared fairly — reaching the poorest and rewarding each community's biocultural contribution. It also makes sure that revenues are reinvested to sustain the resource base.

Community protocols have already helped save threatened crops and medicinal plants, from Andean potatoes to South African herbs (see *Case studies: impacts of community protocols*). By strengthening community conservation practices, traditional knowledge, and local institutions for resource management, the protocols improve food security, healthcare options and resilience to climate change. They also equip communities to defend their resources and biocultural heritage against other external threats.

National support needed

Communities can gain some of these benefits — such as fewer internal conflicts and a deepened commitment to sustainable practices — by creating charters of rules and responsibilities on their own, with assistance from local NGOs and donors. But they shouldn't have to do it on the political fringe: the Nagoya protocol requires governments to support the development of community protocols. And although indigenous and local groups are now able to point to the Nagoya Protocol and UNDRIP when advocating for their rights, community protocols will be much more effective if explicitly recognised by national law and institutions. To date, community protocols are only included in national policy on access and benefit sharing in Bhutan and in draft legislation from Malaysia and Namibia.

Communities also need laws mandating FPIC. UNDRIP is non-binding, so although FPIC has been

Putting the 'free' in FPIC

FPIC has become a fundamental part of indigenous peoples' demands for self-determination, in response to large-scale development projects, mining and forestry that have threatened indigenous land, territories and waters, and violated customary rights.

In some cases indigenous peoples have been coerced into giving their consent for these incursions. The demand for prior informed consent to be 'free' arises from these experiences.

FPIC enables communities to decide on proposed developments or projects on a case-by-case basis, based on full prior information, discussion, deliberation and agreement at the community level. Crucially, FPIC also allows communities to deny consent or veto proposals. Australia's Native Title Act granted the right to negotiate with mining companies, but not to veto development. This brought millions of dollars to indigenous people, but evidence remains mixed and ambiguous as to whether their social or economic wellbeing has improved. Not having veto power has also constrained their bargaining position.² Only with veto power can communities prevent likely impacts on their natural resources and culture.

incorporated in a few national laws and institutions, many countries still do not require it. The Nagoya Protocol's language on prior informed consent is significantly weakened by the clauses 'in accordance with domestic law' and 'as appropriate'.

In relation to genetic resources, prior informed consent is only required where communities 'have the established right to grant access'. Thus, the impact of these provisions depends to a large extent on existing national legislation, and how the Protocol is interpreted by national governments. Prior informed consent is required in many laws on access and benefit sharing in Latin America and the Caribbean, but not elsewhere.

Case studies suggest that community protocols also need the recognition and involvement of local governments. In Alto San Juan, Colombia, a community protocol aimed to defend territorial rights against illegal mining, but could not gain political traction because local government saw the instrument as a novelty. In contrast, local officials took part in development of the protocol in Tanchara, Ghana, and visited affected communities. The result was stronger institutional backing.

Getting the process right

Another key issue is not whether community protocols and FPIC are implemented, but how. Governments and donors may be tempted to adopt predefined, standardised procedures with specific timeframes to fit their ways of working and the interests of business. But top-down approaches that are based on western norms, and do not reflect the distinct and diverse cultural norms of communities, are likely to undermine customary institutions for biodiversity management. For example, the government-led procedures and structures for gaining local consent in Canada's mining projects, and for benefit sharing from mining in Australia, have made participation difficult for communities and weakened traditional structures.

On the other hand, where communities lead in designing and facilitating the process, community protocols can change people's values and practices — bringing benefits for biodiversity, and related livelihoods and resilience. Participatory processes at community level are also important to ensure fair sharing of rewards from external agreements. This maximises poverty reduction impacts, spreads incentives for conservation and prevents conflicts amongst communities.

Even if a protocol's main purpose is to communicate customary rules and rights, communities will need to push more powerful actors to honour those rules and rights. Participation builds confidence and negotiation skills — and sometimes new representation structures for negotiations.

Comparing case studies, researchers have found that communities use their completed protocols more actively in cases where community members have

The rise of community protocols

Community protocols started to gain prominence in 2008, as a community-based response to the Convention on Biological Diversity. In initiatives supported by GIZ's ABS Capacity Development Initiative⁴ and the UN Environmental Programme, local biodiversity stewards such as pastoralists and traditional healers have sought primarily to defend their resource rights. In other cases, such as the Andean Potato Park, community protocols have established internal community agreements focused on equitable benefit-sharing and sustainable resource management. More recently, with support from GIZ, community protocols have also been used to improve community links with the private sector and strengthen communities' negotiating power.

In practice, these community protocols tend to combine a focus on external engagement with attention to internal biodiversity management. They are often termed 'biocultural' community protocols because they set out cultural values and responsibilities related to biodiversity, as well customary rights.

But community protocols are not new. They have many analogues elsewhere that go by different names, including community mobilisation processes to secure customary rights; rules for devolved wildlife and forest management, and for managing scarce resources.

Case studies: impacts of community protocols

New and stronger local institutions. In Bushbuckbridge, South Africa, a community protocol fostered a sense of identity amongst dispersed healers of two different language groups, resulting in a registered healers' association with 300 members, mainly women. The healers have negotiated some access to medicinal plants in a protected area, using the protocol to convince authorities they will not overharvest. Overharvesting has been reduced owing to improved awareness of the need to apply traditional harvesting practices.

Preventing environmental and cultural harm. In Tanchara, Ghana, a community protocol process not only revitalised stewardship of biodiversity but also succeeded in postponing a mining project that threatened to destroy sacred sites and pollute drinking water. The mining company agreed to delay its plans until 2013 after an NGO-facilitated dialogue with the affected communities.

Fair economic rewards. Peru's Andean Potato Park has one of the few community protocols that is already functioning in practice to guide the distribution of benefits. Park revenues are now helping to reduce poverty and support conservation. In Bushbuckbridge, the healers' association has completed initial talks with a cosmetics company that could lead to an agreement to share collective knowledge and bring rewards to the whole group. In the Peruvian Amazon, a community protocol developed prior to a negotiation has strengthened a community-company partnership for ethical biotrade.

been trained to take the lead in their development — including in process design, research, facilitation and developing the content of the instrument. Participation and training may cost money and time, but lead to empowered, mobilised communities.

Likewise, implementing the 'spirit of FPIC' rooted in self-determination implies participation in decision making. This participation must not be 'conditional on people being able to act like western bureaucrats'.⁵ Institutions for FPIC will need the flexibility to accommodate informal processes, oral communication and egalitarian structures that are common in indigenous communities.

The bottom line is that a more inclusive process leads

Six steps to a protocol

There is no set formula for developing a community protocol — both the process and the final form should reflect and reinforce the unique local biocultural system. But case studies suggest that creating an effective protocol will usually entail certain steps:

1. Identify a local organisation and community researchers to facilitate the process — and use an FPIC process to obtain the community's consent to take part.
2. Train community researchers to conduct research on the community, its bio-resources, customary laws and institutions.
3. Support internal discussions and consultations amongst the community to identify the cultural values, roles and responsibilities of communities, customary laws and resource rights that the protocol should include. Communities can also reflect more broadly on their priority needs and the actions required to address them.
4. With the help of legal experts, research national and international laws and bylaws that support the customary rights and community priorities identified. 'Translate' legal language to make it accessible to communities.
5. Involve the community in drafting, reviewing and agreeing a protocol in the local language, to ensure a sense of ownership and hence greater impact. This may be a challenge in dispersed communities; a travelling 'roadshow' was used to reach as many people as possible in a protected area in Borneo.
6. Use the protocol for negotiation, either individually or in multi-stakeholder platforms. Build community representatives' understanding of power dynamics and how to navigate them.

to a more binding outcome. Even where community discussions do not result in a protocol, they can strengthen local institutions and reinforce conservation values.

Recommendations

Community protocols and FPIC processes are about more than indigenous rights. They provide clarity for business and government, preserve irreplaceable biological resources, help vulnerable people confront climate change, and establish systems for sustainable development. To get the full benefit of these instruments, governments should:

- Understand that community protocols are critical for implementing the Nagoya Protocol and the UN Convention on Biological Diversity at the local level.
- Recognise, require and provide support for community protocols in domestic legislation on biodiversity conservation and access and benefit sharing.
- Pass laws requiring FPIC for the use of traditional knowledge and genetic resources, and ensure those laws are implemented in practice.

- Put the 'free' in FPIC by ensuring veto power. Communities need to know they can give, refuse or withdraw their consent for a whole project or certain activities at any time. Not having the power to veto undermines capacity to negotiate and to prevent adverse impacts.
- Avoid top-down processes and rigid blueprints. When designing government structures and procedures for FPIC, involve indigenous and local communities — as well as indigenous and local styles of communication and decision making. Empower and train community facilitators to lead the development of protocols. Be sure to allow enough time and money for full, meaningful community participation.
- Understand the six steps toward a strong community protocol (see Six steps to a protocol).

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Notes

- ¹ Swiderska, K. *et al.* 2011. *Adapting Agriculture with Traditional Knowledge*. IIED Briefing. IIED, London.
- ² Ritter, D. 2012. Indigenous benefit-sharing in resource development – the Australian Native Title experience. *Participatory Learning and Action* 65, 74–80.
- ³ Colchester, M. 2010. *Free, prior and informed consent: making FPIC work for forests and people*. Research Paper 11. The Forests Dialogue, New Haven, CT.
- ⁴ The ABS Capacity Development Initiative is a multi-donor initiative implemented by GIZ (German Development Cooperation).
- ⁵ Buxton, A. 2012. The spirit of FPIC: lessons from Canada and the Philippines. *Participatory Learning and Action* 65, 67–73.

Further reading

- Swiderska, K. *et al.* (eds). 2012. Biodiversity and culture: exploring community protocols, rights and consent. Special issue of *Participatory Learning and Action*. Vol. 65.