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Legal Options to Secure Community-Based Property Rights.

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Abstract

Governments are increasingly recognizing Indigenous Peoples and Local Communities rights to land and resources. Nevertheless, despite increased recognition, there are several criticisms of the legal frameworks through which governments formally recognize community-based property rights. Building on consultations with legal experts on community rights, recent literature and the review of over 200 national legal instruments, this paper proposes a framework of analysis to systematically classify and evaluate legal options to recognize community-based property rights. The framework considers five key elements common to legislations recognizing community-based rights and that help determine the way these rights can be exercised and implemented in practice and three common legislative entry points through which legal recognition can happen.

Furthermore, to illustrate the variety of legal options (and potential advantages and limitations of each) that have been used by national legislators to recognize community tenure rights, the paper also applies, this framework to the legal frameworks (or tenure "regimes") included in Rights and Resources Initiative's legal tenure rights database. It concludes that although legal recognition in national systems has advanced in the past decades, it is far from ideal, even in the best cases.

Key Words: Tenure Rights, Indigenous, Communities, Legal Recognition

1. Introduction

In the last decade, the importance of recognizing Indigenous Peoples' and local communities' tenure rights has been emphasized on an international level. In 2007, the UN General Assembly approved the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007). In 2012, the FAO adopted the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests. More recently, the G8 and the World Bank explicitly recognized the importance of land tenure security in promoting development goals (Global Donor Platform for Rural Development, 2013).

Similarly, on a national level, many countries' legal systems recognize some set of property rights for Indigenous Peoples and local communities. In the particular case of forest, a study conducted by Rights and Resources Initiative (RRI) found that while at least one third of the 27 countries surveyed did not have legally binding frameworks formally recognizing community tenure rights to forest in 2002; all of these countries did to some extent by 2012, either nationally or sub-nationally (RRI, 2012; RRI 2014a).

Several countries, particularly those in Africa, are now in the process of further reforming their national land and forest laws. Recognition of community-based property rights is a central aspect of these legal reform processes. This is the case, for example, in Kenya, where a draft Community Bill is currently being discussed, and Liberia, which has already drafted a land rights law with substantial sections defining communities' rights. If passed and implemented, a considerable portion of Liberia's land has the potential to formally become community-owned land (De Wit, 2012).

Despite increased recognition, there are several criticisms of the frameworks through which governments formally recognize community-based property rights. These frameworks are often considered to be limited in scope and duration, conflict with or weaken customary rights, and to be difficult to implement in practice. In spite of these criticisms, there seems to be a general consensus that formal recognition is better than no recognition at all.

The fact that governments are increasingly recognizing community rights to land and resources, both nationally and internationally, highlights the need to better understand the instruments that already exist and to carefully monitor those currently in discussion.

Building on consultations with global and national legal experts on community rights[1], recent literature and the review of national legal instruments, this paper proposes a framework of analysis to systematically classify and evaluate legal options to recognize community-based property rights.

2. Why community-based rights recognition?

Before presenting a framework to analyze community-based property rights recognition, it is important to restate why this recognition is important. Community-based property rights systems regulate access to and use of vital resources of at least 1.5 billion people, out of which at least half a billion are in sub-Sahara Africa. These systems also cover at least 65 percent of the global land area, most of which is not recognized by governments (Wily, 2011; RRI, 2014a). Legal recognition of these rights can increase tenure security for these 1.5 billion people and contribute to several development goals, such as the reduction of poverty, conflict, and deforestation, throughout these vast areas of land.

The positive connections between secure property rights and increased economic development has been widely tested empirically (Kerekes & Williamson, 2008; Scully, 1988; Boettke, 1994; Besley, 1995; Besley, 1995; Knack & Keefer, 1995; Leblang, 1996; Hall & Jones, 1999; Acemoglu & Johnson, 2005). Furthermore, studies have shown that in order to provide communities with stronger tenure security, it is better to recognize their rights in collective terms. Research demonstrates that individual titling efforts in areas with strong community-based tenure systems presented several problems that can actually undermine tenure security, including elite capture (Binswanger, Deininger & Feder, 1993; Lastaria-Cornhiel, 1997; Platteau, 2000, as cited in Toulmin & Quan, 2000; McAuslan, 1998; Okoth-Ogendo, 2000, as cited in Toulmin & Quan, 2000), generating new land conflicts (Fitzpatrick, 1997; Knetsch & Trebilcock, 1981; Lavigne-Delville, 2000 as cited in Toulmin, & Quan, 2000b; Toulmin & Quan, 2000a; Toulmin & Quan, 2000b), and introducing another layer of rights uncertainty regarding the ownership of land and resources (Platteau, 1996; Toulmin, Delville & Traoré, 2002).

Moreover, the recognition of community-based property systems secures poor communities' access to the resources that are essential to their livelihoods. Customarily-administered tenure systems often enable overlapping land uses and rights to specific resources, systems that increase the communities' resilience to environmental or economic shocks that would

[1] In October 2012 and November 2013, a group of world-renowned international legal experts met to discuss this topic at a workshop named "Legal Options to Secure Community Property Rights", organized by RRI and the Ateneo School of Government.

otherwise critically undermine food security (Falconer & Arnold, 1989; Scoones, Melnyk & Pretty, 1992; Kerkhof, 2000; Bennett, 2000). While secure land tenure increases this resilience, insecure tenure, can drastically increase vulnerability. Land titling efforts that have not taken these complex tenure systems into account, have often backfired, actually reducing poor people's security of land tenure (Meinzen-Dick, 2009; Meinzen-Dick & Pradhan, 2002).

Finally, recent literature is conclusive in what regards the positive role Indigenous Peoples and local communities with recognized community-based tenure rights can have in the conservation of natural resources, in particular forests (WRI & RRI, 2014; Nelson & Chomitz, 2011; Pfaff, Robalino, Lima, Sandoval, & Herrera, 2013; World Bank, 2013; Ostrom, & Nagendra, 2006, as cited in Sandbrook, Nelson, Adams & Agrawal, 2010).

3. Analytical Framework to evaluate Community-Based Property Rights Recognition

Drawing from the analysis of over 200 hundred legal documents in 31 countries, this paper presents a framework to evaluate these different formats for statutory recognition of community-based tenure rights. The framework considers five key elements common to legislations and that help determine the way they rights can be exercised and implemented on the ground. The elements identified are 1) the definition of rights holder, 2) the procedure of rights allocation, 3) the bundle of rights, 4) governance structures, and 5) resource coverage.

Furthermore, the framework also considers the type of legislation or legislative entry points. Legal recognition can happen through different types of legislation and the format, depth and state intervention on community internal affairs of communities vary largely depending on the legislative entry point of formal legal recognition. Identifying legislative entry points facilitates mapping community-based tenure rights in a particular country, allows for greater understanding of the political context in which these rights were recognized and of how rights established through different contexts relate to each other.

This study identified three common legislative entry points for legal instruments formally recognizing community tenure regimes, which are as follows**:** 1) legal provisions aimed at recognizing customary rights of Indigenous Peoples and local customary communities; 2) legal provisions aimed at regulating the conservation of natural resources and; 3) legal provisions aimed at regulating the use and exploitation of land and resources. Both the elements and legislative category are described with further detail bellow.

Table 1: Analytical Framework

4. Elements to evaluate legal recognition of community-based tenure rights:

Establishing criteria to systematically assess legal instruments, either in force or in the process of being drafted, helps to identify in each of these legal instruments what can be improved, promoted or reviewed in terms of securing community-based property rights. The five evaluation criteria used in this paper are described below:

4.1.*Definition of Rights Holder*:

The exact legal definition of what constitutes a "community" or who are identified as "Indigenous Peoples" in terms of benefiting from formal recognition of community-based rights has direct implications on the implementation of laws recognizing these rights. Depending on how Indigenous Peoples and local communities are legally defined, the law may discriminate against particular groups by imposing requirements of time (the need to exist as a community prior to a particular date) or size (the need to be have a particular number of members or more), among other arbitrary constraints. Laws may also establish a definition of "community" or "Indigenous Peoples" that does not reflect their self-identity.

Furthermore, legal instruments can also mandate that communities incorporate into a legal entity to enjoy the rights recognized under the law (Fitzpatrick, 2005; Fitzpatrick, 2010; Clarke, 2009). In many cases this is done through procedures that are so complex, expensive, and foreign to communities that rights are not implemented in practice.

Evaluating legal instruments in terms of how they define *rights holders* from the point of view of Indigenous Peoples and local communities should consider at least two dimensions of rights (1) substantive rights and (2) procedural rights.

In what concerns their substantive rights, the principle of self-determination[2] and self-identity (UNDRIP art. 33) should serve as guidance. These principles guarantee Indigenous Peoples and customary communities the rights to define themselves according to their own notion of identity. Therefore, any legal definition of Indigenous Peoples or local customary communities should consider the rights to self-determination and identity as an essential component. Providing a broad definition of, or not defining, terms such as "Indigenous Peoples" and "communities", "traditional population", etc. within national laws allows space for this principle to be incorporated to practice. Indeed, efforts by International Organizations, such as the UN (Cobo, 1986), ILO (Convention No. 169 art. 1) and World Bank (The World Bank, 2005) to define Indigenous Peoples at the international level have been seen as contrary

[2]See UN Human Rights declaration and conventions, particularly the UNDRIP. See also FAO's Voluntary Guidelines on responsible governance of tenure of land, fisheries and forests in the context of national food security.

to the principle of self-determination (Simpson, 1997 pp. 22-23). Some national legislators have followed this strategy of enabling self-determination as the criteria. For example, in Brazil, laws incorporating rights of communities into the Brazilian conservation system have included "traditional populations" as right holders without providing a legal definition of what the term means so it would not exclude prospective communities (Benatti, 1999).

One possible disadvantage of defining *rights holder* broadly is that the formal rights may overlap in areas occupied by more than one Indigenous or local communities. Depending on the nature of the relevant laws, this could lead to competition, if the legal framework can somehow only recognize one legitimate rights-holder (as a community) or if it can recognize multiple rights-holding groups. In practice, these overlapping occupation and use rights have often been integrated within, local, customary tenure norms and conflict resolution mechanisms, though these institutions and norms may not always operate in a way that is equitable or in compliance with national or international human rights norms. However, these systems are often the most relevant to local land use arrangements and accessible to local populations.

Another aspect to consider is the procedural dimension of defining rights holders. This dimension is related to the formal steps Indigenous Peoples and local communities need to take to be eligible to access their rights in practice. For example, in order to access rights formally recognized, national legislations often require communities to incorporate themselves as a legal identity. This is the case of most countries in Latin America, Guatemala being an exception. There, Indigenous Peoples or Peasant Communities with rights recognized under Communal Lands (Tierras Communales) are not required to acquire legal entity status (Forest Law of Guatemala arts. and 27).

Complying with requirements to prove eligibility as a rights-holder is usually the first step of the *procedure of rights' allocation,* discussed below. The discussion on how to evaluate the procedural dimension of defining "rights holder" is similar to the one related to the *procedure of rights' allocation* therefore, considerations elaborated below should also serve as reference to the procedural dimension of defining *rights holders* within national legislations recognizing the rights of Indigenous Peoples and local communities. In a nutshell, this paper recommends that there should be no procedural requirements for a particular customary community to access their rights. The law should automatically recognize self-defined communities and offer the option for communities to acquire status as a legal entity (if they whish to) and ensure the security of communities' rights regardless of this status. Some communities may choose to incorporate, because by doing so they can celebrate contracts

with third parties, or for other reasons. In these cases, legal procedures should be as simple, affordable, and expeditious as possible.

4.2. Procedure of rights' allocation:

Mapping the procedural steps under each community-based tenure regime is fundamental to evaluating a community's capacity to achieve legal implementation, without which, no benefits can be enjoyed. Procedural requirements are often beyond communities' financial and technical capacities. They include land delimitation processes, mapping requirements, and the need to provide 'evidence of traditional use', for example. If they are too onerous, procedural requirements can serve as barriers that prevent communities from benefiting from recognized rights in practice.

From the point of view of the communities, it is possible to argue that formal procedures and documentation can increase security of the tenure claim against third parties, as they provide legal proof of the right to own, manage or use resources over specific, delimited areas. But this delimitation may also effectively prevent their future expansion as the community grows. From the point of view of the State, establishing formal procedures of allocation of recognized tenure rights can be used to monitor implementation of these rights and the effect they may have on other third parties' rights. Nevertheless, as stated above, these procedures are more often then not beyond communities reach.

A legal solution for this apparent dilemma is the format chosen by legislators from, countries such as Mozambique (Land Law of 1997), Tanzania (Act and Village Land Act of 1999) and the Philippines (The Indigenous Peoples Rights Act of 1997). In those countries, the law automatically recognizes customary tenure rights and provides communities with the option to formally register their land if they wish to do so. In this way, the right itself is safeguarded and can even be protected in case of dispute, regardless of whether the land is formally registered or titled. In the case a particular community understands that formal certification is necessary, be it to prevent against future territorial disputes or encroachment or to enter into contracts with third parties (sale or lease of rights to land or resources), communities still have the option to do so.

In order to avoid excessive procedural burdens, there are ways in which laws and policies can better reflect communities' realities and allow communities to adapt these procedures to their local conditions. For example, in the case of isolated communities, or communities with little integration within the national economy, they should be able to comply with the requirements of the law by presenting oral statements and/or documents in their own language. Because of

the high levels of poverty in these communities, the costs of legal compliance should be deflected as much as possible from the communities themselves, so as to avoid excluding the poorest communities from secure rights.

4.3. Resource coverage:

Legislation may have a broad reach and recognize rights over all natural resources within the land formally allocated to Indigenous Peoples and local communities (normally restricted to above-soil rights) or can have a specific reach and recognize only a particular type of resource, such as forest, waters or pastures. The law may also recognize the rights to the land under the forest, but not the trees.

The type of resource covered under a particular tenure regime affects the potential area in which this regime can be recognized on the ground. For example, tenure regimes established by forest laws have their implementation restricted to areas defined as forests. Furthermore, the type of resource covered by a formal tenure regime can also define the limits of the right to exclude third parties. For example, in some community-based tenure regimes, communities are only allowed to exploit non-timber products and the government is left with the right to allocate timber rights to third parties within an area customarily claimed by communities.[3] This can greatly undermine the security of community rights.

More importantly, when considering the resources recognized under a certain legal instrument, the importance of the relationship of Indigenous Peoples and local customary communities to land cannot be overstated. Their relationship with their traditional lands and territories is a core part of their identity and spirituality and is deeply rooted in their culture and history (United Nations Permanent Forum on Indigenous Issues, 2007). The right of Indigenous Peoples and local communities to maintain their customary relationships to the land as part of the exercise of their broader human rights, such as religious and cultural rights has also been restated in several times by international courts.[4] All legal instruments recognizing community-based rights should corroborate this relationship.

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[3] Within Community Concessions in Guatemala, there are concession overlaps, as the State can grant usufruct rights to other interests within a community concession area, allowing the harvesting of non-timber resources such as Xate and bubble gum. See Government of Guatemala, Gum Law, Decree N° 99/1996.

[4] See for example the following cases: Inter-American Court of Human Rights. 2001. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*; Inter-American Court of Human Rights. 2005. *Moiwana Village v. Suriname*; Inter-American Court of Human Rights. 2012. *Saramaka People v. Suriname, Sarayaku v. Ecuador*. African Commission on Human and Peoples' Rights. 2001. *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria,* African Commission on Human and Peoples' Rights. 2003. *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) V. Kenya*.

The way the Indigenous Peoples Rights Act of 1997 defines Ancestral Lands in the Philippines is a good example. According to this act, Ancestral Lands are:

> "lands, inland waters, coastal areas, and the natural resources therein, held under a claim of ownership, occupied or possessed by the Indigenous Peoples communities, themselves or through their ancestors, communally or individually since time immemorial, continuously to the present (...). It shall include ancestral lands, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by Indigenous Cultural Communities and Indigenous Peoples but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of Indigenous Cultural Communities and Indigenous Peoples who are still nomadic and/or shifting cultivators" (Indigenous Peoples Rights Act of 1997, Section 3a.)

However, most of the legal instruments analyzed include some form of restriction on the types of resources over which communities can legally exercise their recognized tenure rights. Even in the cases of legislation that recognize rights to a broad range of resources, such as in the case of Indigenous Territories in Brazil and Native Lands in Peru, sub-soil resources are excluded from formal legal protection. This exception is source of conflicts in many parts of the world, including the examples cited above. In Brazil, the law allows the state to grant mining permits in Indigenous Territories. As of 2005, there were at least 4,220 requested mining permits within the boundaries of the 152 Indigenous Territories in the Amazon. These permit requests cover over 90% of the entire Indigenous Territory in 32 cases (Ricardo & Rolla, 2005). Similarly in Peru, the government has allocated extractive concessions over almost all statutorily recognized indigenous territories (Benevides & Instituto del Bien Común, 2009).

India is one of the few cases where communities' rights to subsoil resources are recognized. There it happened only after recourse to India's national courts. In this case, laws recognizing property rights of traditional communities were interpreted considering broader human rights, such as the right to culture and religion. This groundbreaking supreme court ruling decided, that the Ministry of the Environment must respect the decisions of the Gram Sabha (the assembly of all village adults) about the allocation of mining rights to external actors, because the authority to preserve and protect the religious and cultural rights of the community ultimately lies with the Gram Sabha (*Orissa Mining Corporation vs. Ministry of Environment*

and Forest & Others, 2013). Following this decision, the Village assemblies in 12 villages that would have been affected by the mining project unanimously rejected the mining proposals (Sarin, 2013).

In conclusion, from the point of view of Indigenous Peoples and communities, legislation recognizing their community-based property rights should acknowledge their spiritual and cultural relationship to the land, including all its resources, a position that is also reflected in International Law (Lynch, 2011).

4.4 Bundle of Rights:

The laws recognizing the tenure rights of Indigenous Peoples and local communities typically do not recognize the same set of rights within or between countries. For example, while some regimes allow communities to commercially exploit and manage natural resources within their land, others allow communities only to use resources for subsistence purposes. The choice of rights to be recognized directly affects the benefits community can enjoy through legal recognition and of the extent of their legal ability to secure their tenure rights. To evaluate the "bundle of rights", this paper proposes to use the framework presented in RRI (2012 and 2014a). In that analysis, based on classic common-property scholarship (Schlager & Ostrom, 1992; Barry & Meinzen-Dick, 2008), property is understood as a bundle including seven rights: Access, Withdrawal, Management, Exclusion, and Alienation; as well as those of Duration and the Right to Due Process and Compensation, which was termed "Extinguishability" (RRI, 2012; RRI, 2014a).

To evaluate the combination of rights within the bundle, rights can be divided into two groups: those that enable Indigenous Peoples and local communities to secure their livelihoods and ways of life; and those that provide security to their tenure claim. The first group of rights can be referred to as "livelihoods rights", and includes rights of access, withdrawal and management. The second group can be referred to as "tenure security rights" and includes the rights to exclude, the duration of the rights and the right to due process and compensation in case the state decides to revoke one or more of the rights. These are rights considered to be essential in evaluating whether a law confers ownership of land and resources to Indigenous peoples and local communities (RRI, 2014a).[5]

Livelihoods Rights: Legal management rights are essential to ensure that Indigenous peoples and local communities' can develop sustainable livelihoods, fulfill their economic aspirations,

[5] Ownership, as defined in RRI. (2014a).

and to maintain their traditional ways of life. They provide communities with the means to legally access, modify, regulate the use, of and trade resources. They are not enough on their own, but they provide a basis from which communities can, at the very least, maintain their ways of life. UNDRIP and other instruments of International Law, such as UN Human Rights Conventions, recognize the importance of these rights and call upon States to recognize them in their national legislations.

In order to empower communities with the most options to use their resources, communities must have the rights to access, use, benefit from, and decide land and resource use for commercial purposes. In actual legal frameworks, there are several variations in recognition and constraint of these rights. For example, withdrawal rights may be restricted to subsistence use or communities may extract non-timber forest products, but are unable to withdraw timber. Also communities may be compelled by these laws to participate in a management body that oversees the resources, rather than being the sole decision makers about resource use. Given the importance of these rights for communities' livelihoods, it is recommended that laws recognize the maximum combination of rights to protect and promote Indigenous peoples and local communities livelihoods. Nevertheless, even when these rights are fully recognized in law, many regulatory barriers may still exist and industries may exclude small scale producers from formal markets.

Securing formal ownership**:** Based on the distribution of the rights contained in the "expanded bundle", RRI classified these tenure regimes into different categories: a) land owned by Indigenous Peoples and local communities, b) land designated by governments for Indigenous peoples and local communities and c) land administered by governments, but with limited recognition of community rights (RRI, 2014a).

Within these categories, three rights from the bundle are considered to be fundamental for tenure security and ownership: 1) the right to exclude outsiders from encroaching on community resources, 2) rights are recognized for an unlimited period of time, and 3) that communities have the right to due process and compensation in the face of state attempts to extinguish some or all recognized rights. Areas regulated under tenure regimes conferring at least this combination of rights is classified as " land owned by Indigenous Peoples and local communities." Most of the regimes with this combination of rights have also been found to recognize management rights independent of government bodies and a high level of recognition of commercial withdrawal rights to timber, NTFPs, and both (RRI, 2014a).

Among these three rights, the right to exclude may present some controversies. When applied

to a concrete case, the allocation of the right to exclude to one group may generate more insecurity to another group; especially in cases where there are multiple overlapping or mobile land-use systems, where there are conflicts related to communities' membership or boundaries of community's land (Hall, Hirsh & Li, 2011). In these cases, before allocating the right to exclude, conflicting parties should have access to local dispute resolution mechanism and given the possibility to co-exercise this right if that is an acceptable solution to the parties of the conflict.

In spite of these controversies, this paper defends the position that the best outcome of legal recognition from the perspective of Indigenous Peoples and local communities is that the law guarantees all three rights to confer full ownership of land and resources. In cases Indigenous Peoples and local communities may wish not to exercise the right to exclude, the law may still provide a framework within which they can make that choice.

The right to alienate is not included in any of these groups. This is perhaps the most contentious right within the bundle of rights. It can be perceived as the ultimate test of ownership in western systems of property (de Soto, 2000; de Soto, 1989; Feder & Feeny 1991); and for many traditional groups and communities the idea of exchanging their land for monetary compensation may conflict with their understanding of their relationship with the land.

Proponents of the right to alienate understand that formalization of customary land rights through transferable titles has the potential to "unlock" the wealth contained in these resources for the world's poor's as this would allow them to use their land as collateral to access credits (de Soto, 2000; de Soto, 1989; Feder & Feeny 1991). Others see the recognition of individual or collective rights to alienate as a threat to these communities because alienating traditional land may destroy group bonds or even serve as means for dispossession (Mwangi & Dohrn, 2006). In these contexts the lack of right to alienate may also be seen as a legal guarantee against *de jure* or *de facto* threats for the integrity of a particular Indigenous group or customary community. Ultimately, deciding whether recognizing Indigenous Peoples and local communities' prerogative to alienate land and resources is to their benefit, is closely related to their local context and level of insertion in the national economy.

4.5 *Governance Structures*:

Governance refers to who has the authority, responsibility and can be called accountable for key decisions related to land and natural resources (Graham, Amos & Plumptre, 2003, as

cited in Borrini-Feyerabend, Dudley, Jaeger, Lassen, Broome, Philips, & Sandwith, 2013).[6] Considering *governance structures* within this framework means an evaluation of how formal governance structures imposed by the law contrast to those established by customs and the implications for affected communities.

Community-based governance systems are diverse and complex. Different groups of Indigenous Peoples or local communities may be in charge of the same area at different time of the year, or of different resources within the same area. Land can be collectively managed, but individuals or specific clans within a community may be in charge of particular resources. Nevertheless, regardless of this complexity, customary institutions haven proven to function effectively, guarantee the basic needs for the poor (Graham et tal, 2003, as cited in Borrini-Feyerabend et tal, 2013, footnote 11) and make important contributions to conservation (Graham et tal, 2003, as cited in Borrini-Feyerabend et al, 2013, footnote 13; Kothari, Anuradha, Pathak & Taneja, 1998; Borrini-Feyerabend et al, 2010) .

A wide body of historical experience has shown that the imposition of entirely new governance systems over customarily administered lands and communities has been profoundly disruptive to local politics and livelihoods and has often been a root cause of local conflicts. These new governance structures often create institutional confusion, or are used in unintended ways by communities. Furthermore, Cotula et al. explain that, the "implementation (of legal instruments mandating the establishment of new institutions or governing bodies under a law) may be constrained by lack of human and financial resources to set up these bodies and by problems concerning the perceived legitimacy of such bodies compared to existing customary/local institutions." Rather, "building on existing structures, whether customary authorities, community-based institutions, local governments or other bodies, may be less costly and more effective where such institutions are solid and considered as legitimate by the local population" (Cotula, Toulmin & Hesse, 2004, as cited in Knight, 2010).

Legal instruments recognizing the rights of Indigenous Peoples and local communities to land and natural resource should therefore aim to make laws flexible enough to reflect the realities of existing governance systems. While doing so, the law should consider the complexity of customary institutions and take measures to avoid *Clientage pattern* (Willy, 2013) or a *Custodian Model* (Clark, 2009) where the control and ownership of land is solely vested in a

[6] For example, Graham, J., Amos, B. & Plumptre, T. (2003) define governance as: "the interactions among structures, processes and traditions that determine how power and responsibilities are exercised, how decisions are taken and how citizens or other stakeholders have their say."

chief who can decide about the future of their communities' resources at will. Legal instruments incorporating Clientage pattern or Custodian Model has reportedly lead to abuses of power and undermined tenure security in Sub-Sahara Africa (Ayine, 2008; Oomen, 2005; Knight, 2010).

In some cases, however, legislation recognizing the rights of community can be used as instruments to increase decision-making power of minorities and vulnerable groups (women in particular) by introducing more inclusive and democratic governance systems. This should however, be done with caution. Studies have suggested that promoting change of custom through formal legislation is only effective provided that: a) the State has strong implementation and enforcement capacity and, b) that reforms are accompanied by actions at the community level to increase awareness by all parties so that the change can be accepted by the community (Ayine, 2008; Oomen, 2005; Knight, 2010). For example, in the particular case of women, attempts to empower women through legislation without a corresponding sensitization of men have been linked to increased gender-based violence (Budlender & Alma, 2011; Sikar, 2014; Brook, Maris, Mitchell & Morao, 2012).

5. Different legislative entry-points to recognize Indigenous Peoples and communities rights:

This study identified three common legislative entry points for legal instruments formally recognizing community-based property rights tenure regimes. These were legal provisions aimed at recognizing: a) customary rights of Indigenous Peoples and local communities; b) regulating the conservation of natural resources; c) regulating the use and exploitation of land and natural resources.

Understanding the type of legal provision recognizing community-based tenure rights is useful to map the recognition of community-based property rights within a specific country and to understand the political context in which communities are having or have had their rights recognized. For example, legal reforms explicitly recognizing Indigenous Peoples and local communities' customary property rights are often the product of long, and even, violent struggles. On the other hand, although rights recognized by legal instruments regulating the use of natural resources tend to be more limited in terms of the security of tenure and the rights to control and benefit, these instruments are generally established under less politically contentious contexts and can be enacted by legislative instruments that are less complex than laws, which are faster to be approved. Finally, the recognition of community rights through laws regulating the conservation of natural resources can present a strategic opportunity for

communities to protect traditional lands against commercial pressures in the absence of other political openings for the legal recognition of their rights.

Furthermore, from a pragmatic point of view of advancing legal recognition of community property rights, the political opportunities and challenges are also very different depending on the government organism or sector of civil society sponsoring/supporting a particular piece of legislation. For example, while Ministries dealing with land issues normally sponsor land laws, conservation laws fall under the authority of Environment Ministries. Depending on the specific country's political context, it might be more effective to work closely with one political authority or the other to promote the legal recognition of community-based property rights.

Nevertheless, while classifying legal instruments recognizing community-based property rights in this way is useful from an analytical point of view, in practice they are intertwined. For example, Indigenous Peoples' territories can also have a conservation focus, to the extent that these territories can be included as one of the International Union for Conservation of Nature (IUCN)'s protected area governance types (IUCN, 2008).[7] Indigenous Peoples rights can also be restated in laws regulating national conservation systems. Furthermore, communities within customary land areas are often legally allowed to benefit economically from exploitation of natural resources within their lands. Also, laws regulating the exploitation of natural resources, such as community forestry initiatives, can be established under customary premises. Finally, it is also important to note that some legal instruments relevant to the recognition of tenure rights of Indigenous and local communities, for example, human rights and decentralization laws, cannot be classified in any of these categories.

In spite of these limitations, this classification is useful to evaluate legal options to secure community tenure rights. Below this paper presents a more detailed description of each one of these classifications:

5.1. Legal provisions aimed at recognizing customary rights of Indigenous peoples and other customary communities - These provisions focus is to legitimate, in formal legal systems, the way of life and customary system of law of Indigenous Peoples and other customary

[7] IUCN uses typology of governance types that are applied within their management categories. Governance types is a description of who holds authority and responsibility for the protected area. Protected areas can be governed by government, can have shared governance, private governance or be governed by Indigenous peoples and local communities.

communities. They are often inserted in countries constitutions, land laws or specific regulations concerning the rights of Indigenous Peoples and local communities.

The formal recognition of community-based rights of Indigenous Peoples in national legal frameworks has predominantly taken place in Latin America. This can be attributed to broader political reforms, following democratization movements that took place following a series of conservative dictatorships in the 1980s and 1990s. As part of the general opposition to mobilize for democratic reforms, a space was created for social and political mobilization around indigenous ethnic identities, effective alliances between indigenous movements and other civil society sectors (such as the Catholic Church, peasant, and conservation movements). These mobilizations and alliances allowed for the formalization of Indigenous tenure rights in constitutional and land law reforms in that continent (Yashar, 1998). This was the case, for example, in Brazil, Peru, Guatemala and Venezuela.

However, the recognition of Indigenous Peoples' rights is not limited to Latin America. Some countries in Asia have also recognized the rights of Indigenous Peoples. For example, the 1987 Constitution of the Philippines recognized ancestral domains of its Indigenous Peoples, and Cambodia's Land Law of 2001 recognized some Indigenous communities' land rights. In Africa, The Republic of the Congo was the first country to approve a law providing specific legal protection for Indigenous Peoples (Act No. 5-2011 On the Promotion and Protection of Indigenous Populations). The Democratic Republic of Congo (DRC) is now considering a draft law based on its neighbor's law and the Central African Republic (CAR) became the first African country to ratify the ILO Convention 169 on the Rights of Indigenous and Tribal Peoples in 2010.

In addition to Indigenous Peoples, other resource-dependent communities have claimed ownership of land and natural resources on a customary basis. These claims are increasingly gaining international recognition, in particular with the recent adoption of FAO's Voluntary Guidelines. Owen Lynch goes further and argues that International Law mandates recognition of the rights of not only Indigenous Peoples, but also of other rural long-term-occupant local communities (Lynch, 2011). Communities claiming ownership on the basis of custom, include, for example, most of rural Africa (Wiley, 2011a; Wiley, 2011b); afro-descendent, extractive workers and peasant communities in Latin America; as well as forest communities in several Asian countries, such as Nepal and Indonesia. Since customary rights are at the foundation of formal rights' recognition in both cases, this paper discusses them jointly.

This is the strongest preferred legislative entry point in terms of the five elements described above. Nevertheless, historically, legal recognition on customary grounds has happened as part of larger reform contexts and opportunities that are not always present. These include, for example, restoration of democracy, constitutional reforms and the aftermath of a civil conflict. Indigenous Peoples, communities and supporters of the cause around the globe should be attentive to these historic opportunities and use them to advance the recognition of community-based property rights.

5.2. Legal provisions aimed at regulating the conservation of natural resources – these provisions regulate the rights to natural resources of Indigenous peoples and local communities in and around conservation units. They are often inserted in national parks laws, conservation laws, and other laws regulating the conservation of natural resources.

Some claim that there is a new paradigm of the relationship of protected area and peoples depending on its resources emerging (Stevens, 2014). This new paradigm shifts away from the dominant perception that Indigenous Peoples and local communities are a threat to the environment and therefore should be excluded from protected areas, to recognize that in most cases, they have successfully protected natural resources within their traditional lands, often better than the government (WRI & RRI, 2014).

Reflecting this shift, some countries have enacted legislations recognizing Indigenous Peoples' and local communities' rights to reside within and/or participate in the management of protected areas, provided that they comply with the areas' environmental regulations. In these cases, formal recognition emanated from conservation or protected areas laws, instead of land laws or specific legislation recognizing the rights of Indigenous Peoples or local communities. This shows that legislation dealing with environmental policies can also be used to advance the recognition of communities' property rights when there is lack of political spaces in other domains.

The recognition of rights through conservation laws comes with a cost, however, as requirements to comply with environmental regulations may constrain "the potential range of livelihood activities and limit the extent to which communities can use their resources to fulfill their own development aspirations" (Nelson, forthcoming). Therefore, a point of caution is the need to guarantee that the state, when recognizing community tenure rights within protected areas, incorporates traditional techniques of natural resources management into an area's management plans and environmental regulations.

Furthermore, a recent analysis of protected area laws of twenty one countries rich in biodiversity, concluded that "although some progress has been made in the past decade, national laws still fall far short of guaranteeing respect for customary rights in protected areas. Although the co-management of protected areas is a globally popular approach, communities have restricted access and use rights to resources in the majority of protected-area types and can only exercise resource ownership in areas classified as protected areas (should they wish to) in very specific circumstances" (RRI, forthcoming).

In addition to providing another space to secure legal recognition, this type of legislative entry point also represents an opportunity to introduce redress mechanisms to those communities expelled from protected areas in the past decades. It is today well know that many communities around the world were displaced from their land or from the sources of their livelihoods due to the creation of protected areas (Dowie, 2009). Mechanisms of redress include, for example, establishing legal means to allow the state to transfer back land traditionally owned by communities and classified as strict use conservation units under previous laws. This is the case of the law and regulations establishing the Brazilian National System of conservation units (Law N° 9985/2000 Art. 7-12).

Furthermore, given the recent history of displacement, environmental and conservation laws can also serve to reinforce, in the context of national conservation systems, the rights of traditional communities recognized through other types of legal instruments. This is the case of for example the law establishing Philippines' national integrated protected areas systems, which demands recognition of "Ancestral lands and customary rights" and prohibits the environmental authority to evict or resettle Indigenous communities without their consent ((Republic Act No. 7586; National Integrated Protected Areas System (NIPAS) Act of 1992 Section 13).

5.3. Legal provisions aimed at regulating the use and exploitation of land and resources – this is a residual category and include those legal provisions that regulate set of rights of Indigenous Peoples and local communities to resources, but do not have an explicit aim of recognizing customary rights or regulating the protection of the environment.

Tenure rights recognized through legal provisions that fall under this residual category are those that recognize local communities' rights to use and benefit, in most cases commercially, of a particular natural resource. In these cases, although existing customary claims might be behind the reason why a particular right is legally recognized in the first place, there is no explicit recognition of customary rights. These legal instruments tend to include fewer rights

than those with a customary or a conservation focus and are typically allocated in a temporary fashion in the form of contracts or management agreements between the government and communities. Some examples are legal instruments establishing community forest concessions in the DRC (Forest Code of 2002) or Mozambique (Forestry and Wildlife Act of 1999; Forestry Act Regulations of 2002) and Joint Management Agreements in Guyana and Zambia.

Securing legal recognition of community rights using resource use laws tends to present several limitations for rights-holders. Rights tend to be limited and the role of the state in governing the resources within areas customarily claimed by communities is very strong. Yet, resource exploitation tenure regimes can be used as an *interim* solution, as they are often established under less politically controversial contexts or even by lower ranked legislative instruments than laws, which are faster to be approved. Using resource-focused regimes as *interim* solutions, does present the risk of jeopardizing stronger recognition initiatives. For example, in India, rights can be recognized by FRA in 2006, which follow under customary focused regimes category and devolves a greater bundle of rights to communities and individuals, or by Joint Forest Management schemes, established through a non-legally binding circular in 1990 (Circular Concerning Joint Forest Management No. 6-21/89-P.P), which follows under resource exploitation focused regimes. Today, forest areas classified under JFM far exceed those recognized as belonging to tribal peoples under the FRA 2006, and continue to grow at a faster pace (RRI, 2014a).

6. Applying the framework

The framework is designed to be applied to evaluate a concrete law or draft law from the point of view of the tenure security they provide for Indigenous Peoples and communities. For example, it can be used to evaluate in detail legal provisions regulating Village Forest Reserves in Tanzania or Community Land Use Permits in Thailand. To illustrate the variety of legal options (and potential advantages and limitations of each) that have been used by national legislators to recognize community tenure rights, the paper has applied, in general terms, this framework to the legal frameworks (or tenure "regimes") included in RRI's legal tenure rights database (RRI, 2012; RRI, 2014a; RRI, 2014b). Some conclusions of this analysis are presented below.

6.1 Overview

RRI's legal tenure rights database covers 28 countries and represent about 75% of forest in Low and Middle Income Countries. The countries are:

- **Africa:** Cameroon, Republic of Congo, Democratic Republic of the Congo (DRC), Gabon, Kenya, Liberia, Mozambique, Nigeria, Tanzania, and Zambia.
- **Asia:** Cambodia, China, India, Indonesia, Malaysia, Nepal, Papua New Guinea, Philippines, Thailand and Vietnam; and
- **Latin America:** Bolivia, Brazil, Colombia, Guatemala, Guyana, Mexico, Peru and Venezuela.

In total, RRI (RRI, 2014a; RRI, 2014b) identified 64 community tenure regimes applying to forest areas by 2014. From these, 47 percent (30 of 64) are customary-focused; 39 percent (25 of 64) are resource-focused regimes and 16 percent (9 of 64) are conservation-focused regimes. About half of the customary-focused regimes are in Latin America. Resource-focused regimes represent roughly half of regimes identified in both Africa and Asia and conservation-focused regimes are evenly distributed across the three regions.

6.2 Customary-Focused Tenure Regimes

Table 2: Customary-Focused Tenure Regimes

Definition of Rights-Holder

About half (14 of 29) of the tenure regimes established by legal provisions aimed at recognizing customary rights recognize the rights of Indigenous Peoples specifically; from these six recognize simultaneously the rights of other, mostly peasant, local communities, primarily in Latin America. Two regimes (Quilombola Land in Brazil and Afro-Colombian Community Lands) explicitly recognize the rights of Afro-descendant communities. The remaining thirteen regimes, recognizes the rights of "communities" or "population". These terms are often followed by another adjective, such as "local" (Mozambican DUAT, Constitutional Community Rights in Thailand) "customary" (Adat Forest in Indonesia), "traditional" (all conservation-focused regimes in Brazil) etc.

On the one hand, this shows a reluctance to recognize rights of Indigenous Peoples in some parts of the world, particularly in African and Asian countries. On the other hand, it also signals that while Indigenous Peoples represent a distinct population, with specific legal protections defined in International law and norms; some of these legal protections are being extended to customary communities that do not necessarily identify themselves as Indigenous.

Furthermore, the majority of legal provisions aimed at recognizing customary rights provide some legal definition of the terms "Indigenous Peoples", "community", "customary owners" etc.. These terms were defined in terms of communities' cultural or ethnic unity (Cambodia

Land Law of 2001 art. 23; Kenya Constitution of 2010 art. 63), of their difference to the other groups of society (Congo Act No. 5-2011 art. 1; Colombia Law N° 70/1993 art. 2[5]), their specific governance systems (Reglamento Específico Para Reconocimiento Y Declaración De Tierras Comunales de 2009), among many other criteria. In one way or another, there could be restriction to the exercise of recognized rights by communities that would not fall under these legal definitions. For example, in Congo, Indigenous Populations are defined as "populations who are different from the national population in terms of their cultural identity, lifestyle and extreme vulnerability" (Congo Act N° 5/2011 art. 1). In theory, Indigenous Populations that manage to overcome the condition of extreme vulnerability could lose the special protection under the law.

The case of the Amerindian Act in Guyana is illustrative of the problematic nature of overly precise definitions. Guyanese law only recognizes Amerindian communities in existence for more than 25 years and comprised of at least 150 persons (Guyana Amerindian Act of 2006 Section 30). Because of these limitations, the UN Committee for the Elimination of Racial Discrimination (CERD) has judged this stipulation to be "discriminatory" (CERD, 2006).

Furthermore, at least one third of customary focused tenure regimes require that Indigenous and local communities acquire a legal identity. This is the case, for example, for the Territorio Indígena Originario Campesino in Bolivia (Bolivian Constitution of 2009 art. 403; Law N° 1.715/1996; Law N° 3545/2006) and Tierras de Comunidades Nativas (Peruvian Constitution of 1993 art. 55, 66 and 89; Law-Decree N° 22175/1978) in Peru. This can be a long and complex procedure for Indigenous groups, but are typically established to provide for legal security of transactions between these communities and third parties. In both cases quoted above, communities are allowed to and have often contracted with third parties regarding the exploitation of natural resources within their lands.

Only in a few cases has the law been explicit in extending legal recognition both to communities with or without demarcation and titling. This is the case for example, of Tanzania's Village lands, Guatemala's Communal Lands (Reglamento Específico Para Reconocimiento Y Declaración De Tierras Comunales de 2009) or DUATs in Mozambique (Mozambique Land Law 0f 2007 art. 13). However, in some of these cases explored below, communities still have the option of formally registering their land.

Procedure of Rights Allocation

Implementation of community-based recognition of customary rights to land and natural resources does not generally happen automatically. Most legal systems establish a specific

procedure to allocate rights in practice that is implemented on a case-by-case basis. Every community needs to complete this process before formal rights' recognition is concluded. This can take several years.

There are some exceptions to this rule. Papua New Guinea (PNG)'s constitution automatically recognizes customary systems over all land, and, as a consequence, about 97% of PNG is governed by customary law (Winn, 2012). Similarly, customary rights within DUATs (meaning "right to use and benefit from the land" in Portuguese) in Mozambique, do not need to be formalized nor proven to be effective; they exist within the law. Communities may choose to formalize these rights through a process of community land delimitation which culminates in the issuance of a certificate provided by the state, or through a request by a community to the state for a Community Land Title, a process which involves demarcation (Mozambique Land Law 0f 2007 art. 13).

One common feature of the procedures to allocate rights is a requirement for a formal description of the area customarily used by communities and the rights that they have exercised over them. For example, in the Philippines, the Indigenous Peoples' Rights Act requires Indigenous communities to present written accounts of their customs, traditions and political structure, survey plans and sketch maps of the area customarily occupied, along with anthropological data and genealogical surveys, and other additional requirements (Philippines Indigenous Peoples' Rights Act of 1997). Since customary rights are fluid and adaptable over time, and are often not documented through written accounts, requirements to produce written accounts of Indigenous Peoples' customs, can consume a great deal of time and resources. These procedures also run the risk of making it more difficult for customary laws and practices to adapt to changing economic, demographic and political conditions. While local practices and laws may change, unless there are mechanisms built to also change the statutory recognition of customary rights, these future adaptations may be not-recognized or may even be criminalized.

Furthermore, in the case of tenure regimes specifically recognizing Indigenous Peoples' rights, the procedures to allocate rights to land and resources often fall under a special government body responsible for dealing exclusively with Indigenous or tribal matters and not under national land cadasters. For instance, in India, the implementation and application of the Forest Rights Act of 2006 is the responsibility of the Minister of Tribal Affairs. Similarly, in Australia, the Native Title Register is responsible for allocation of Native Titles to Australian Aborigines. On the one hand, establishing a specialized institution can contribute to agility in applying the process due to knowledge specialization, as well as a

more transparent tracking of legal implementation. On the other hand, the segregation of institutions can politicize the process of the recognition of rights, and create difficulties when attempting to harmonize with other land-use allocations and tenure arrangements, which can greatly affect the length of recognition processes.

Resource Coverage

The legal recognition of customary rights usually covers all types of land and above-soil natural resources, as long as the land and resources have been customarily used. Exceptions include Indonesian *Adat* Forests and Indian Scheduled Tribes and Other Traditional Forest Dwellers' Land, established respectively by the Indonesia Constitution (art. 18b) and Forest Law (Law N° 41/1999) and the Indian Forest Rights Act (FRA) of 2006, where customary recognition is specific to forests. In the case of India, the specificity of the customary recognition in law to one resource has problematically neglected the claims of nomadic pastoralists communities. Furthermore, some tenure regimes recognize right to important cultural and religious sites of a particular community only. This recognition is generally limited to a small area of land and rights are quite limited (Mozambique Forestry and Wildlife Act of 1999 art. 13; Nepal Forest Act of 1993 Chapter 7; Nepal Forest Regulation of 1995 Chapter VI).

Rights to sub-soil natural resources, on the other hand, are rarely guaranteed. For example, the same constitution that recognized the rights of Indigenous Peoples in Brazil, allows for mining activities to happen in Indigenous Territory as long as the allocation of mining rights follows the due process (Brazilian Constitution of 1988). Similarly, the Amerindian Act in Guyana allows mining activities within Amerindian Land (Guyana Amerindian Act of 2006 Section 50; Guyana Mining Act of 1989 Art. 110-114). A recent Supreme Court decision in Guyana confirmed that external actors' mining rights supersede Amerindian rights within statutorily recognized Amerindian lands (First Peoples Worldwide, 2013a; Bulkan & Palmer, Forthcoming).

As discussed in session 3.1.3 of this paper, this disconnect between local "surface" rights and the absence of rights to sub-soil resources has been the source of several conflicts around the globe (First Peoples Worldwide, 2013b; Prachvuthy, 2011; The Munden Project, 2013). One response to address these conflicts has been to promote the Free, Prior and Informed Consent (FPIC) principle as guaranteed by UNDRIP and ILO Convention 169. Recent judicial decisions and legal instruments have advanced in defining this principle within national contexts. For example, in Peru, following a very controversial debate on the draft of a new forest law and allocation of several oil exploration licenses in the Amazon, a new law and its

regulating decree established the content, principles and procedure regarding the right to prior consultation with Indigenous or Native Peoples (Forests and Wildlife Law of 2011; Peruvian Supreme Decree N°001/2012-MC).

To respect the principle of FPIC is not enough, however. Formal recognition should embrace and incorporate the notion that land and natural resources are core elements to Indigenous Peoples and other customary communities identity, culture and spirituality.

Bundle of Rights

Customary-focused regimes recognize a relatively strong bundle of rights. About sixty percent (18 of 30) of customary-focused tenure regimes recognize all livelihood rights and confer ownership of land and resources to Indigenous Peoples and local communities.

Regarding livelihood rights, over ninety percent of identified customary-focused regimes recognize the rights of Indigenous Peoples and local communities to exploit some timber (27 of 30) and NTFPs (29 of 30). More than eighty percent of these regimes allow communities to exploit timber (22 of 27) and NTFPs (24 of 29) resources for commercial purposes. In all cases where commercial exploitation is allowed the exercise of the rights are conditioned to management plans and/or licenses. Furthermore, seventy-seven percent (24 of 30) of the regimes recognize communities' right to manage their resources.

Regarding the rights of legal security, sixty percent (18 of 30) of customary-focus regimes recognize the right to exclude. In the majority of the cases where exclusion right is not recognized, the state retains some power to decide over who is allowed or not to access land and resources. Over ninety percent (28 of 30) of the customary-focus regimes recognize rights for an unlimited period of time and in eighty-three percent (25 of 30) of the regimes, the government is required to follow due process and compensate the community if it wishes to extinguish the exercise of legal recognized rights.

Furthermore, national laws specifically protecting the rights of Indigenous Peoples tend to recognize a fairly strong set of rights when compared to other tenure regimes that do not specify whether the rights are recognized for Indigenous Peoples only or other local communities. According to UNDRIP, the minimum set of rights that must be incorporated within a specific regime include the rights to access, withdraw and exclude[8] for an unlimited period of time (United Nations, 2007b art. 8.2, 10, 26.1, 26.2 and 28.1). Eighty-two percent of

[8] In RRI (2012, 2014a) the right to exclude does not account for sub-soil rights.

the surveyed customary-focused regimes specifically recognizing rights of Indigenous Peoples (14 of 17) comply with this minimal set of rights proposed by UNIDRIP. Among the three exceptions to this is the Indigenous rights law in the Republic of the Congo, where conservation areas can be created by the state on Indigenous Land.

If one were to apply the same principles from UNDRIP to the recognition of community-based rights not exclusively related to Indigenous Peoples, only twenty three percent (3 of 13) of the surveyed regimes reflect these minimal requirements. This suggests that communities that are not recognized in law as "Indigenous" tend to enjoy weaker bundles of statutory rights. The primary source of difference is that many of these non-indigenous community tenure regimes do not recognize these communities' right to exclude outsiders. Some of the regimes that lack this specific protection for customary, cultural and religious sites include Zones with Historical and Cultural Use and Value in Mozambique (Mozambique Forestry and Wildlife Act of 1999 art. 13) and Religious Forests in Nepal (Nepal Forest Act of 1993 Chapter 7; Nepal Forest Regulation of 1995 Chapter VI) as well as customary use rights of forests in Gabon (Gabonese Forest Code of 2001 art. 14 and 252-261; Gabonese Decree N° 692 of 2004 setting the Conditions for the Exercise of Customary Use Rights on Forests, Wildlife, Hunting and Fishing).

Governance Structures

Most of the legal instruments recognizing customary rights to land are not explicit in terms of requiring the establishment of specific governance structures, but instead typically recognize customary governance structures.

However, there are some exceptions. For example, the Guyanese Amerindian Act of 2006 describes in detail the structure and internal procedures of the Village Council, the body responsible for administering village land. These include, for example, the number of members in each village council and its function. Under the Amerindian Act there are no specific provisions guaranteeing representation of minorities or vulnerable groups within the Council (Guyana Amerindian Act of 2006 Part III, art. 20-43). In Mexico, Ejidos need to follow similar requirements. Each Ejido shall have an assembly including all members of the Ejido (men and women) and consisting of a commission, which is the executive body, and a monitoring council. Ejidos must also follow specific administrative procedures, such as the establishment of written internal rules and periodic assembly meetings (Ley de reforma agraria of 1992 art. 21-42).

4.3 Conservation Focused Tenure Regimes

Table 3: Conservation Focused Tenure Regimes

Definition of Rights-Holder

Under conservation tenure regimes, rights holders are often defined in terms of their location in relation to a protected area. For example, in the Brazilian National Forests (FLONA), traditional populations living in a FLONA at the time of its creation are entitled to rights recognized within the legislation (Brazilian SNUC Law N° 9985/2000 art. 17.2). Similarly, only communities residing within or adjacent to a Protected Area can have rights recognized under a Community Protected Area in Cambodia (Cambodia Protected Area Law of 2008 art. 25). Neither of these mechanisms allow for communities to create their own protected areas.

In the case of regimes under which rights are allocated through a contract between the state and communities, communities may be required to form legal entities. In two of the three Brazilian conservation-focused regimes, namely the Extractive Reserves and the Sustainable Development Reserves, communities are required to register with the Instituto Chico Mendes (ICMBio), the body of the Ministry of Environment responsible for administering protected areas (Brazil ICMBio Normative Instruction N° 3 of 2007 art. 17). In Kenya, communities wishing to receive permission to participate in the Conservation and Management of a State or Local Authority Forest, are required to register under the Societies Act (Forest Act of 2005 Section 45). There, because of the complexity of registering under Societies Act, many communities living next to the forest have not been able to participate in Conservation and Management of State and Local forest (RRI, 2012: Kenya case study).

Resource Coverage

When legal instruments related to conservation of natural resources establish conservation-focused tenure regimes, the type of protected area in which regimes are established generally defines the resource coverage. For example, Extractive Reserves in Brazil can be established to protect any ecosystem such as forest, marine or mangrove. The type of extractive reserve will define the limits of communities' rights within that area. Within a marine reserve, for example, communities will be allowed to fish and conduct other sea-faring related activities.

A distinct feature of conservation-focused tenure regimes is the need to comply with stricter environmental conditions to use resources within the protected area, as compared to customary and resource exploitation tenure regimes. On one hand, these conditions place limitations on communities' traditional use of natural resources and limit the ways natural resources within protected areas can contribute to their livelihoods. On the other hand, these restrictions also apply to third parties, and in some cases, having customary rights recognized through conservation schemes provides a shield against the exploitation of sub-soil resources

within their lands by external actors, since mining activities would (typically) also need to comply with the same environmental restrictions or may even be forbidden. For example, mining activities are explicitly forbidden within Extractive Reserves in Brazil (SNUC Law N° 9985/2000 art. 18).

Procedure of Rights Allocation

Generally, rights under conservation-focused regimes are allocated through a contract or agreement between the government body responsible for the overall management of national parks and communities. This is the case, for example, in Brazil (Brazilian SNUC Law N° 9985/2000; Brazilian tenure regimes: Extractive Reserves, Sustainable Development Reserves and National Forests), Gabon (Law N° 003/2007; Tenure regime: Contract for the Management of National Park Landon National Parks) and Cambodia (Protected Area Law of 2008; Tenure regime: Community Protected Areas). The form of rights allocation may explain why none of the 9 identified conservation-focused regimes recognize communities with ownership of land and natural resources, here understood as having simultaneously the right to exclude and to due process and compensation, for an unlimited period of time.

Bundle of Rights

The "bundle of rights" recognized under conservation-focused tenure regimes is relatively limited compared to the bundles in the other categories. Only one tenure regime – Communal Reserves in Peru – recognize communities all legal management rights, namely, the rights to access, withdrawal and manage resources commercially. Furthermore, as state above, none of the identified conservation-focused regimes recognize communities' rights to own the land and natural resources.

Concerning livelihood rights, the majority of regimes allow communities to commercially exploit forest products provided they comply with management plans and licenses. In some cases, conditions can be very restrictive. Recently the procedures to commercially exploit timber products within Brazilian's RESEXes and Development Reserves were regulated. According to the this new regulation, communities must, among other requirements, obtain a previous authorization, have a sustainable forest management plan and an annual operational plan developed and approved, obtain an authorization to explore and present a detailed annual report of the activities developed in the previous year (Brazil ICMBio Normative Instruction N° 16 of 2011 art. 27). In three cases, such as Community Protected Area in the Philippines, communities have indirect management rights (the right to participate in management bodies).

Regimes with a conservation focus rarely recognize communities' rights to exclude outsiders and rights may only be recognized for a limited period of time. From the nice identified conservation-focused regime, only one, Buffer Zone Community Forest in Nepal, recognize communities' rights to exclude and only three recognize rights for an unlimited period of time. More to the point, none of the regimes under this category confer ownership rights. The predominant role of the state in administrating protected areas combined with the fact the rights under these regimes are normally allocated through contracts/agreements between communities and governments may explain why that is the case.

It is important to note, that conservation-focused regimes do not include those cases where Indigenous Peoples or local communities willingly decide to formally insert their traditional land or territory into the national conservation system. In those cases, the law would continue to recognize the ownership of land and resources, but the recognition of the communities' rights was not premised on the basis of conservation.

Governance Structures

As mentioned above, many of the conservation-based regimes are implemented through agreements between governments and communities. As a consequence, at the level of internal governance of communities, they are required to be incorporated into a legal entity, such as cooperatives and associations. In these cases, the law may request that communities establish new governance structures imposed by these laws, such as forming general assemblies and executive bodies.

At the level of protected-area governance, communities are often required to share the decision-making process with government agencies. For example in Brazilian Extractive and Sustainable Development Reserves, protected areas are governed by a Conselho Deliberativo (Advisory Board) presided by ICMBio, the branch of the Ministry of Environment responsible for the national protected area system. Traditional populations have a seat on the Conselho, but cannot unilaterally decide on how the resources are governed (SNUC Law N° 9985/2000 art. 18 and 20). In Kenya, communities do not even have any say in the decision making process of how to manage and allocate resource, they are only allowed some controlled withdrawal rights.

In these cases, Borrini-Feyerabend et al. proposes a useful framework for assessing and evaluating governance of individual protected areas. It includes an assessment of the history and culture of the population living within and affected by the protected area, identification of traditional rights-holders and stakeholders, and governance institutions and processes already

in place. Additionally, said framework presents five principle of good governance for protected areas, namely: legitimacy and voice, direction, performance and accountability (Borrini-Feyerabend et al., 2013 p. 59) This assessment provides important inputs in evaluating whether protected areas' governance structures are both equitable and effective (Borrini-Feyerabend et al., 2013 p. 59).

6.4 Resource Use and Exploitation Rights Focused Tenure Regimes

Table 4: Resource Use and Exploitation Rights Focused Tenure Regimes

Resource exploitation focused tenure regimes can include community property rights to several types of natural resources such as forest, water and pastures. The regimes identified by RRI (RRI, 2012) were restricted to community forest tenure regimes. For this reason, the discussion bellows uses forest as a proxy for other natural resource tenure regimes.

Definition of Rights-Holder

Most resource-exploitation focused regimes are implemented in the form of a concession, management agreements or contracts where the state authorizes communities to commercially exploit a natural resource formally administered by the state. In order to legally enter into a contract with the government, communities are required to acquire a legal identity or form associations and cooperatives. Some examples of this include the Sustainable Development Projects regime in Brazil (INCRA Ordinance N° 477 of 1999 art. 1-2), Community Forests in Gabon (Forestry Code Law N° 16 of 2001 art. 156), and Rural or Community Forests in Indonesia (Ministry of Forestry Regulation N° 23 of 2007 art. 14).

Additionally, the definition of the rights-holder is often made in terms of customary rights. For example, in the case of Locally Based Associations in Bolivia, only associations composed of traditional users, peasant communities or Indigenous Peoples can benefit from forest concessions as a Locally Based Association (Supreme Decree 24453 of 1996 art. 1). These types of associations have priority over other legal entities to exploit non-timber forest products (Forest Law of 1996 art. 31). This is also the case of Community Forests in Cambodia, where the Minister of Agriculture, Forestry and Fisheries can allocate any part of a Permanent Forest Reserve to a community through the issuance of a Community Forest Agreement. The stated purpose of this document is d to ensure the local communities' customary user rights (Law On Forestry of 2002 art. 41-42).

Procedure of Rights Allocation

As stated above, resource exploitation focused regimes usually take the form of a bilateral agreement between communities and the state, such as in forest concession contracts and joint

management agreements. Thus, in many cases, communities have to follow similar procedures as private firms to access rights to resources. This is the case of forest concessions in Mozambique. There, although theoretically local communities may also apply for forest concessions, the requirements set by such contracts are usually beyond the financial and technical capacities of communities. As a consequence, communities need to rely on external assistance. In Mozambique, the only community that has successfully applied for a forest concession to date is in the province of Zambezia. There, the community was only able to do so because it depended on the help of Associação Rural de Ajuda Mútua (ORAM) and funds from the European Union (Mackenzi & Ribeiro, 2009).

Furthermore, concluding the negotiation of contracts or agreements with the government generally does not automatically give communities the right to exploit products. They also need to comply with the area's management plan and acquire any additional necessary permits.

A common controversial issue is determining how communities and the state share the benefits of resources exploitation. In the case of Zambia, local communities have not been very enthusiastic about Joint Forest Management Agreements because the law does not address cost-benefit mechanisms (RRI, 2012: Zambia case study). Establishing benefit-sharing mechanism might require additional regulations and, in the meantime, communities' access to these may be left at the discretion of the state. In Cameroon, for example, even though community forests were established in 1994, it wasn't until 2013 that an executive order established that 100 percent of the revenue coming from the exploitation of community forests belonged to the community (Executive Order 076/MINFI/MINATD/MINFOF of 2013).

Resource Coverage

Many of these regimes are established by legal instrument regulating a particular type of resource (e.g. forest or land laws) therefore, the resource coverage of regimes with a resource exploitation focus is often limited.

Additionally, the law, or agreement between communities and the state regarding resource use, tends to be more specific in defining which resources (type of trees, total area, etc.) within a particular area that communities are allowed to exploit. For example, in Cameroon, communities must respect a maximum area of 5,000 ha to exploit timber (Supreme Decree N° 531 of 1995. Art. 27.4). and 2,500 ha for *vente de coupe* (standing volume) within community forests, provided they acquire a permit (Law nº 01 of 1994 art. 37.5, 54, 55 and 61).

Furthermore, many of the identified regimes can only be implemented in areas classified under a restricted land category, which imposes limits in the total area where communities may have rights recognized. For example, in Indonesia, Hutan Tanaman Rakyat can only be established degraded production forest (The Ministry of Forestry Regulation N° 23/2007). Similarly in Cambodia, Community Forests can only be established within Cambodia's Permanent Forest Reserve (Law on Forestry of 2002 art. 4).

Bundle of Rights

While about 60 percent of resource exploitation focus regimes (15 of 25) recognize all livelihood rights, only eight percent (2 of 25) recognize enough rights to confer legal ownership of communities. This can be explained by the focus of the this type of regime, which is rather to provide communities with the legal means to use and exploit resources, but not to recognize their ancestral rights to land. About eight percent of resource exploitation focused regimes recognize communities' right to exploit NTFP (21 of 25) and timber (20 of 25) commercially and about 70 percent allow communities to manage resources (18 of 25).

In most cases these rights recognized under these regimes are limited in duration. In these cases, when the terms of the contract/ agreement/concession end, it is up to the state to decide whether the rights shall be extinguished or renewed. This can have negative impact in the sustainable use of resources. The duration of allocated rights plays a significant role in communities' resource-use decisions. Communities with rights allocated for a short period of time have more incentive to maximize benefit in the short term and use resources in an unsustainable way.

Governance Structures

In most resource exploitation tenure regimes, communities are required to form associations, cooperatives or to acquire legal identity to participate in official contracts or agreements through which communities access rights. As a consequence, they are required to comply with the requirements of specific laws regulating how decisions are taken within these institutions. Furthermore, the state often has a strong role in the governance of areas covered by resource exploitation regimes, in particular in the case of Joint Management schemes. This suggests that this legal entry point does not support traditional governance structures.

Applying the proposed framework to the tenure regimes identified in RRI's legal tenure rights' database allowed some important considerations, as described above. In a nutshell, this analysis has demonstrated that **legal recognition in national systems has advanced,**

however it is far from ideal. Legal instruments recognizing Indigenous Peoples and local communities' rights to land and natural resources present several limitations when considering all five proposed elements.

5. Conclusions and Recommendations

Recognition of community-based property rights is important to advance several development goals, including the reduction of poverty and deforestation. In recent years, the need to recognize these rights has been emphasized internationally and nationally.

The format and extent of legal recognition vary considerable across legal instruments recognizing tenure rights of Indigenous Peoples and communities. This paper proposes a framework composed of five elements and three legislative categories to assess these options.

The five elements are criteria for evaluating the quality of community-based rights recognized formally recognize, namely 1) Definition of the Rights Holder; 2) Procedures for Rights Allocation; 3) Resource Coverage; 4) Depth of Rights and 5) Governance Structures. Legislation recognizing community-based property rights will be drafted according to local realities and political contexts. In as much as these local realities will be determinant to evaluate what the best outcome should be, this paper recommends that:

- Right-holders should be broadly defined in order to avoid discrimination against communities that may not be classified under the legal definition and respect their fundamental right of self-determination, as enshrined in International Law and norms
- Legal recognition should automatically recognize community-based property rights, irrespectively of compliance with bureaucratic procedures to allocate rights (including the requirement for communities to be incorporated into a legal entity) and provide communities with the option to have their rights officially certified through a collective land title or other mechanisms. In those cases, bureaucratic procedures should be simple and to the extent possible adapt to local realities. The state, and not the communities, should bear the cost of complying with such procedures.
- Respecting International Law, legislation should incorporate the notion that land and all its resources, including sub-soil ones, are a core element of Indigenous Peoples and customary communities identity, culture and spirituality.
- The bundle of rights recognized under the law should include all legal management rights essential to communities' livelihood (the right to access, withdraw and manage resources for commercial purposes), and all rights essential to guarantee minimal tenure security (rights are recognized for unlimited period of time, communities have

the right to exclude, and the state may not extinguish rights without following due process and paying compensation).

- Considering the diversity and complexity of traditional governance systems, legislation should incorporate these systems and avoid the creation of new governance structures. National legislation intended to increase the decision-making power of minorities and vulnerable groups should be supported by strong implementation and enforcement capacities and actions at the community level so that they are accepted and implemented in practice.

Furthermore, it is useful to identify types of legislation that may introduce legal recognition of community-based rights in order to understand the different entry points available to advance legal recognition, map rights already recognized within a particular national context, and understand the context in which rights were recognized in the first place.

As part of the proposed framework, this paper identified at least three legislative entry points for securing legal recognition of community property rights, namely: a) legal provisions aimed at recognizing customary rights of Indigenous Peoples and other customary communities; b) legal provisions aimed at regulating the conservation of natural resources and; c) legal provisions aimed at regulating the use and exploitation of land and natural resources. Although these legislative entry-points are not mutually exclusive, there are advantages and disadvantages of each legal entry point that should be strategically considered when advancing legal recognition of community-based property rights:

- Legal provisions aimed at recognizing customary rights of Indigenous Peoples and other customary communities tend to recognize a stronger set of rights. Under these regimes, rights are typically recognized for an unlimited period of time and the state has fewer prerogatives to intervene in internal matters of the communities. As a consequence, traditional governance systems and natural resource management practices are less restricted. Furthermore, customary tenure regimes benefit from broad international protection, stemming from both treaties and customary international law.

  Nevertheless it seems that momentum to approve this type of legislation happen only in few historical moments. The majority of these types of legal instruments were approved as result of broader reforms, such as constitutional reforms, democratization and peace processes.

- As Indigenous Peoples and local communities are increasingly recognized by policy makers as conservation actors instead of threats to the environment, legal instruments aimed at regulating the environment and national conservation systems can also represent important legal entry points to secure community property rights. Under these legislations, communities generally face more restrictions to commercial use of natural resources and may have their traditional livelihood practices limited by stronger environmental restrictions. Nevertheless, communities may have a higher degree of protection against exploitation of sub-soil and other resources from third parties, as these activities are often restricted or even forbidden within protected areas.

  Additionally, legal provisions aimed at regulating the conservation of natural resources represents an opportunity to introduce redress mechanisms, such as legal possibilities to transfer back or compensate communities that were removed from protected areas in the past. Finally they may also serve as a space to reiterate customary rights recognized by other legal instruments within the context of national conservation systems.

- Securing legal recognition of community rights through legal provisions aimed at regulating the use and exploitation of land and natural resources present several limitations. Rights are limited, customary laws and practices are not always taken into account and the role of the state in governing land and resources is very strong. Yet, resource exploitation tenure regimes can be used as a temporary solution, as they are often established under less politically controversial contexts or even by lower ranked legislative instruments than laws, which are faster to be approved. Nevertheless doing so may deviate support and postpone more comprehensive legal recognition under other types of legal provisions.

Finally, using this framework to evaluate 64 community-based tenure regimes identified in RRI's legal tenure rights' database made clear that although legal recognition in national systems have advanced in the past decades, it is far from ideal, even in the best cases.

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Annex 1 – List of national and international legal instruments relevant to Indigenous Peoples and local communities tenure rights recognition.

Tables

Table 1: Analytical framework

Element of analysis / Legislative entry points	Definition of Rights Holders	Procedure of Rights Allocation	Depth of Rights	Resource Coverage	Governance Structures
Customary Focus					
Conservation Focus					
Resource Exploitation Focus					

Table 2: Customary-focused tenure regimes

Country	Tenure Regime
Bolivia	Original Peasant Indigenous Territory
	Communal Property
	Communal Titles for Agricultural-Extractivist Communities in the Northern Amazonian Region
Brazil	Quilombola Lands
	Indigenous Lands
Cambodia	Indigenous Communities Land
Colombia	Indigenous Reserves

	Afro-Colombian Community Lands
Congo (Brazzaville)	Indigenous Populations' Land
Gabon	Customary Use Rights
Guatemala	Communal Lands
Guyana	Titled Amerindian Village Land
India	Scheduled Tribes and Other Traditional Forest Dwellers Land
Indonesia	Adat Forest (Customary Law Forest)
Kenya	Community Lands
Mexico	Ejidos Located on Forestlands
	Comunidades (Communities)
Mozambique	Zones of Historical and Cultural Use and Value
	Community DUATs Within Multiple Use Areas
Nepal	Religious Forests Transferred to a Community
Papua New Guinea	Common Customary Land
Peru	Native Community Forest Lands Suitable for Forestry
	Peasant Community Forestlands Suitable for Forestry
	Indigenous Reserves
Philippines	Ancestral Domains/Lands
Tanzania	(Non-reserved) Forests on village lands
	Village Land Forest Reserve (VLFR)
	Community Forest Reserves
Thailand	Constitutional Community Rights
Venezuela	Indigenous in Special Administration Regime

Source: RRI, 2014a

Table 3: Conservation- focused tenure regimes

Country	Tenure Regime
Brazil	Extractive Reserve (RESEX)
	Sustainable Development Reserves)
	National Forests (FLONA)
Cambodia	Community Protected Areas
Gabon	Management Contract with Local National Parks Administration

Nepal	Buffer Zone Community Forest
	Buffer Zone Religious Forest Transferred to a Community
Peru	Communal reserves in Forest Land
Philippines	Community Based Protected Areas

Source: RRI, 2014a

Table 4: Resource use and exploitation rights focused tenure regimes

Country	Tenure Regime
Bolivia	Location-Based Social Associations
Brazil	Agro-Extractivist Settlement Project
	Forest Settlement Projects (Unique to the northern region)
	Sustainable Development Projects
Cambodia	Community Forests
Cameroon	Community Forests
China	Collective Ownership to Forestland
DRC	Local Community Forest Concessions (LCFC)
Gabon	Community Forests
Guatemala	Community Concessions
Guyana	Community Forest Management Agreement (CFMA)
Indonesia	Hutan Kemasyarakatan (Rural or Community Forest)
	Kemitraan (Partnership)
	Hutan Tanaman Rakyat (People Plantation or People Plant Forest)
Kenya	Community Permission to Participate in the Conservation and Management of a State Forest or Local Authority Forest
Liberia	Communal Forests
	Community Forests
Mozambique	Forest Concessions to Communities
Nepal	Community Forest
	Community Leasehold Forest Granted to Communities
Philippines	Community Based Forest Management
Tanzania	Joint Forest Management (JFM)
Thailand	Community Land Use Permit
Vietnam	Forestland Allocated to Communities
Zambia	Joint Forest Management Area (JFMA)

Source: RRI, 2014a

Table 5: Legislation Consulted

Country	Legal Instruments	Year Enacted (Revised/Amended)
Bolivia	Constitución Política del Estado de Bolivia de 2009	2009
	Ley Forestal No. 1700 - Ley de 12 de julio de 1996	1996
	Ley No. 1.715 del Servicio Nacional de Reforma Agraria de 1996	1997
	Ley No. 3545 - Ley de 28 de noviembre de 2006 - Modificación de la Ley No. 1715 Reconducción de la Reforma Agraria	2006
	Ley No. 031 - Ley Marco de Autonomías y Decentralización 'Andrés Ibáñez'	2010
	Ley No. 71 - Ley de derechos de la madre tierra	2010
	Ley No. 144 - Ley de la revolución productiva comunitaria agropecuaria	2011
	Ley No. 300 - Ley de la madre tierra y desarrollo integral para vivir bien	2012
	Ley No. 337 - Ley de apoyo a la producción de alimentos y restitución de bosques	2013
	Decreto Supremo No. 29.215 de 2 de agosto de 2007 - Reglamento de la Ley No. 1.715 del Servicio Nacional de Reforma Agraria	2007
	Decreto Superior No. 24453 de 1996 - Reglamento de la Ley Forestal No. 1700	1996
	Decreto Supremo No. 27.572 de 17 de junio de 2004	2004
	Decreto Supremo No. 0727 de 2010	2010
Brazil	Constituição da República Federativa do Brasil de 1988	1988
	Lei No. 4.504 de 30 de novembro de 1964	1964
	Lei No. 6.001 de 19 de dezembro de 1973 - Estatuto do Índio	1973
	Lei No. 8629 de 25 de fevereiro de 1993	1993
	Lei No. 9.985 de 18 de julho de 2000	2000
	Lei No. 11284 de 2 de março de 2006	2006
	Lei No. 12.512 de 14 de outubro de 2011	2011

	Lei No. 12.651 de 25 de maio de 2012 - Novo Código Forestal	2012
	Decreto No. 1.775 de 8 de janeiro de 1996	1996
	Decreto Lei No. 59.428 de 27 de outubro de 1966	1966
	Decreto Lei No. 271 de 28 de fevereiro de 1967	1967
	Decreto No. 4340 de 22 de agosto de 2002	2002
	Decreto No 4.887 de 20 de novembro de 2003	2003
	Decreto No. 6063 de 20 de março de 2007	2007
	Decreto No. 7.747 de 5 de junho de 2012	2012
	Instrução Normativa INCRA No. 15 de 30 de março de 2004	2004
	Instrução Normativa ICMbio No. 3 de 2 de setembro de 2009	2009
	Instrução Normativa INCRA No. 56 de 7 de outubro de 2009	2009
	Instrução Normativa INCRA No. 65 de 27 de dezembro de 2010	2010
	Instrução Normativa ICMBio No. 16 de 4 de agosto de 2011	2011
	Portaria INCRA No. 268 de 23 de outubro de 1996	1996
	Portaria INCRA No. 269 de 23 de outubro de 1996	1996
	Portaria INCRA No. 477 de 4 de novembro de 1999	1999
	Portaria INCRA No. 1.141 de 19 de dezembro de 2003	2003
Cambodia	Law on Forestry of 2002 (NS/RKM/0802/016)	2002
	Land Law of 2001 (NS/RKM/0801/14)	2001
	Protected Area Law of 2007 (No. NS/RKM/0208/007)	2008
	Sub-Decree on Community Forestry Management of 2003	2003
	Sub-Decree on Procedures of Registration of Land of Indigenous Communities of 2009 (No. 83 ANK)	2009
Cameroon	Law No. 94/01 of 20 January 1994 on Forestry, Wildlife and Fisheries (1994 Forestry Law)	1994
	Decree No. 95/531/PM of 23 August 1995	1995
	Decree No. 95/466/PM of 20 July 1995	1995
	Voluntary Partnership Agreement between the European Union and the Republic of the Cameroon on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT)	2011
	Arrêté conjoint No. 076/MINFI/MINATD/MINFOF fixant les modalités de planification, d'emploi et de suivi de la gestion des revenus provenant de l'exploitation des ressources forestières et fauniques, destinés aux communes et aux	2012

	communautés riveraines	
China	The People's Republic of China Constitution	1982 (2004)
	Land Reform Law of the People's Republic of China	1950
	The Forest Law of the People's Republic of China	1984 (1998)
	Law of the People's Republic of China on Land Contract in Rural Areas	2002
	Land Management Law of the People's Republic of China	2002
	Property Law of the People's Republic of China	2007
	Guaranty Law of the People's Republic of China	1995
Colombia	Constitución Política de la República de Colombia de 1991	1991 (2005)
	Ley 21 de 1991	1991
	Ley 70 de 1993	1993
	Ley 99 de 1993	1993
	Ley 160 de 1994	1994
	Ley 1448 de 2011 - Ley de Víctimas y Restitución de Tierras	2011
	Decreto 622 de 1977	1977
	Decreto 2164 - Reglamento de Tierras para Indígenas	1995
	Decreto 1745 de 1995 - Propiedad Colectiva de las Tierras de las Comunidades Negras	1995
	Decreto 1791 de 1996 - Régimen de aprovechamiento forestal	1996
	Decreto Ley No. 4633 de 2011	2011
	Decreto Ley No. 4635 de 2011	2011
Congo (Brazzaville)	Loi No. 5-2011 portant la promotion et protection des droits des populations autochtones	2011
	Loi No. 16-2000 du 20 novembre 2000 - Code forestier	2000
	Décret No. 2002-437 du 31 décembre 2002	2002
	Voluntary Partnership Agreement between the European Union and the Republic of the Congo on forest law enforcement, governance and trade in timber and derived products to the European Union (FLEGT)	2013
Democratic Republic of Congo	Loi No. 73-021 du juillet 1973 portant Régime général des biens, Régime foncier et immobilier et Régime des sûretés telle que modifiée et complétée par la Loi No. 80-008 du 18 juillet 1980	1973 (1980)

	Loi No. 14/003	2014
	Loi No. 011/2002 du 29 août 2002 portant code forestier en République Démocratique du Congo	2002
	Decree N14/018,determinig the modalities of attribution of a LCFC	2014
	Arrêté 28/08	2008
	Arrêté 24/08 fixant la procédure d'attribution des concessions forestières	2008
	Arrêté 13/2010 fixant le modèle d'accord constituant la clause sociale du cahier des charges du contrat de concession forestière	2010
	Proposition de loi portant principes fondamentaux relatifs aux droits des peuples autochtones pygmées	2012
Ecuador	The Kichwa Indigenous People of Sarayaku v. Ecuador	2012
Gabon	Loi No. 16/01 du 31 décembre 2001 portant le code forestier de la République Gabonaise	2001
	Loi No. 003/2007 du 27 août 2007 relative aux parcs nationaux	2007
	Décret No. 001028/PR/MEFEPEPN du 1 décembre 2004 fixant les conditions de création des forêts communautaires	2004
	Décret No. 000692/PR/MEFPEPN du 2004 fixant les conditions d'exercice des droits d'usage coutumiers en matière de forêt, de faune, de chasse et de pêche	2004
	Ordonnance No. 011/PR/2008 modifiant et complétant certaines dispositions de la loi 16/01 du 31 décembre 2001 portant code forestier en République Gabonaise	2008
	Arrêté No. 018 MEF/SG/DGF/DFC fixant les procédures d'attribution et de gestion des forêts communautaires	2013
Guatemala	Constitución Política de Guatemala de 1985	1985
	Ley de Titulación Supletoria, Decreto 49-79	1979 (2005)
	Ley de Áreas Protegidas, Decreto 4-89	1989
	Ley Forestal de 1996	1996
	Ley del Chicle, Decreto 99-96	1996
	Ley de Registro Catastral de 2005	2005
	Reglamento de la Ley Forestal, Resolución 4/23/97	1997
	Reglamento del Registro Nacional Forestal, Resolución 1/43/05	2005

	Reglamento Específico Para Reconocimiento Y Declaración De Tierras Comunales, Resolución No. 123-001-2009	2009
Guyana	Amerindian Lands Commision Act (Chapter 59:03)	1969
	Amerindian Act (Chapter 29:01)	1976
	Constitution of the Co-operative Republic of Guyana, Act 1980	1980 (1996)
	Environmental Protection Act (Chapter 20:05)	1996
	State Lands Act, 1910	1910 (1997)
	Forest Act (Chapter 67:01)	1953(1996)
	Forest Regulations (Chapter 67:01)	1953 (1972)
	Mining Act (Chapter 65:01)	1989
	Forests Act, 2009	2010
	Amerindian Act, 2006	2010
	Protected Area Bill, 2011	2011
India	The Indian Forest Act, 1927	1927
	The Forest (Conservation) Act, 1980	1980
	National Forest Policy, 1988	1988
	The Wild Life (Protection) Act 1972	1972 (2002)
	Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act of 2006	2007
	Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules	2008 (2012)
	Ministry of Environment and Forests, The Circular Concerning Joint Forest Management, No. 6-21/89-P.P	1990
	Ministry of Environment and Forests, Circular, F. No. 11-9/1998-FC (pt)	2009
	Ministry of Tribal Affairs, Implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006	2012
	Orissa Mining Corporation vs. Ministry of Environment and Forest & Others	2013
Indonesia	Constitution of Indonesia	1945(2002)
	Basic Law No. 5/1990 Concerning Conservation of Living Resources and Their Ecosystems	1990
	Basic Forestry Law No. 41, 1999	1999
	Law 32/2009 concerning protection and management of the environment	2009

	Law No. 32/2004 on Regional Governance	2004
	Government Regulation No. 68 Year 1998 on Nature Reserve Area and Conservation Areas	1998
	Government Regulation No. 6, 2007	2007
	Government Regulation No. 38/2007	2007
	Government Regulation No.3, 2008 – The amendment to government regulations No. 6, 2007	2008
	Government Regulation No 28/2011	2011
	The Ministry of Forestry Regulation N° 23, 2007	2007
	Constitutional Court, PUTUSAN - Nomor 35/PUU-X/2012	2013
	MINISTER OF FORESTRY NUMBER: p.56 / Menhut-II / 2006 ABOUT ZONING CODE NATIONAL PARK	2006
	MINISTER OF FORESTRY NUMBER: P.19 / Menhut-II / 2004 ABOUT COLLABORATIF MANAGEMENT ON AREA OF NATURE RESERVE AND CONSERVATION AREA.	2004
Kenya	Land (Group Representatives) Act 1968	1968
	Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) V. Kenya	2003
	The Forests Act, 2005	2007
	The Constitution of Kenya, 2010	2010
	African Commission on Human and Peoples' Rights V. Kenya	2012
	The Wildlife Conservation and Management Act, 2013	2013
Liberia	Wildlife and National Parks Act, 1988	1988
	An Act for the Establishment of a Protected Forest Areas Network and amending chapter 1 and 9 of the new National Forestry Law, part 11, Title 23 of the Liberian Code of Law Revised and thereto adding nine new sections, 2003	2003
	The National Forestry Reform Law of 2006	2006
	The Community Rights Law of 2009 with Respect to Forest Lands	2009
	Regulations to the Community Rights Law of 2009 with Respect to Forest Lands	2011
Malaysia	Malaysian Federal Constitution of 1957	1957
	Aboriginal Peoples Act 1954 (Act No. 134)	1954 (1974)

	National Forestry Act 1984 (Act No. 313)	1984 (1993)
	Sabah's Land Ordinance (Cap. 68)	1975 (1997)
	Forest Enactment, 1968 (Sabah No. 2 of 1968)	1968 (1997)
	Forests Ordinance [Cap. 126 (1958 Ed.)]	1958 (2003)
	Sarawak Land Code	1958 (2000)
	National Forestry Act 1984 (Act No. 313)	1984 (1993)
	Koperasi Kijang Mas v. Kerajaan Negeri Perak [1991] 1 CLJ	1991
	Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor, 1 MLJ 418 (1997)	1997
	Kerajaan Negeri Johor v Adong bin Kuwau [1998] 2 MLJ 158	1998
	Sagong bin Tasi v Kerajaan Negeri Selangor (2002) 2 MLJ 591	2002
	Kerajaan Negeri Selangor v Sagong bin Tasi [2005] 6 MLJ 289	2005
	National Land Code 1965 (Act No. 56)	1965
	Land Conservation Act 1960 (Act No. 385), revised 1989	1960
	Land (Group Settlement Areas) Act 1960 (Act No. 530), revised 1994	1960 (1994)
	Protection of Wildlife Act 1972 (Act No. 76), revised 1976, 1991	1972 (1991)
	National Parks Act 1980 (Act No.226)	1980
	Aboriginal Peoples Act 1954 (Act No. 134), revised 1974	1954 (1974)
	The Wildlife Conservation Enactment 1997 (For Sabah only)	1997
	PARKS ENACTMENT 1984 (Sabah No. 6 of 1984)	1984
	Wild Life Protection Ordinance 1998 (For Sarawak only)	1998
	National Parks and Nature Reserves Ordinance 1998 (For Sarawak only)	1998
Mexico	Constitución Política de los Estados Unidos Mexicanos del 1917	1917(2010)
	Ley General Del Equilibrio Ecológico Y La Protección Al Ambiente, 1988.	1988
	Ley General de Cambio Climático	2012
	Ley de Desarrollo Forestal Sustentable	2003(2012)
	Ley Agraria	1992(2008)
Mozambique	Forestry and Wildlife Act	1999
	Land Law of 1997	1997
	Forestry Act Regulations	2002

	Decreto No. 11 de 2005 Regulamento da Lei dos Órgãos Locais do Estado	2005
	Decreto No. 43 de 2010 introduz alteração no Regulamento da Lei de Terras (No. 2 do artigo 27)	2010
	Diploma Ministerial No. 158 de 2011 que fixa os procedimentos a serem seguidos para a realização da consulta comunitária	2011
Nepal	Forest Act 2049, 1993	1995 (1999)
	National Parks and Wildlife Conservation Act, 1973	1973 (1993)
	Forest Regulation 2051, 1995	1995
	Buffer Zone Management Regulation 2052, 1996	1996
	Buffer Zone Management Guideline (2056-5-3)	1999
Nicaragua	The Mayagna (Sumo) Awas Tingni Community v. Nicaragua	2001
Nigeria	Land Use Act, 1978	1978(1990)
	Decree No. 46 - National Park Service Decree, 1999	1999
	Social and Economic Rights Action Center (SERAC) e Center for Economic and Social Rights (CESR) (2001) V. Nigeria	2001
	National Forest Policy, 2006	2006
	Cross River State Forest Commission Bill, 2010	2010
Papua New Guinea	Constitution of the Independent State of Papua New Guinea (1975)	1975 (1991)
	Fauna Protection & Control Act (1974, 1982)	1974 (1982)
	Conservation Areas Act (1980, 1992)	1980 (1992)
	National Parks Act of 1982	1982
	Forestry Act, 1991	1992(2005)
	Land Act, 1996	1996
	The 1996 Forestry Regulations	1996
	Incorporated Land Group (Amendment) Act (2009)	2012
	Voluntary Customary Land Registration (Amendment) Act (2009)	2012
	Environment Act, 2000	2012
Peru	Constitución Política del Perú, 1993	1993
	Decreto Ley No. 22175, 1978 - Ley de Comunidades Nativas y de Desarrollo Agrario de la Selva y de Ceja de Selva	1978
	Ley No. 24656, 1987 - Ley General de Comunidades Campesinas	1987

	Ley No. 26505, 1995 - Ley de la Inversión Privada en el Desarrollo de las Actividades Económicas en las Tierras del Territorio Nacional y de las Comunidades Campesinas y Nativas	1995
	Ley No. 26821, 1997 - Ley Orgánica para el Aprovechamiento de los Recusos Naturales	1997
	Ley N° 26834, 1997 - Ley de Áreas Naturales Protegidas	1997
	Ley No. 27308, 2000 - Ley Forestal y de Fauna Silvestre	2000
	Ley No 27867, 2002 - Ley Orgánica de Gobiernos Regionales	2002 (2003)
	Ley No. 28736, 2006 - Ley para la protección de pueblos indígenas u originarios en situación de aislamiento y en situación de contacto inicial	2006
	Ley No. 29763/2011, Ley del derecho a la consulta previa a los pueblos indígenas reconocido en el Convenio 169 de la OIT	2011
	Ley No. 29763, Ley Forestal y de Fauna Silvestre	2011 (not in force)
	Decreto Supremo AG No. 014/2001 - Reglamento de la Ley Forestal y de Fauna Silvestre	2001
	Decreto Supremo AG No. 038/2001- Reglamento de la Ley de Áreas Naturales Protegidas	2001
	Decreto Supremo MIMDES No. 008/2007	2007
	Decreto Supremo 009- 2006- AG	2007
	Decreto Supremo No. 001-2012-MC, Reglamento de la ley del derecho a la consulta previa a los pueblos indígenas reconocido en el Convenio 169 de la OIT	2012
	Resolución de Intendencia IRENA-IANP No. 019/2005 - Régimen Especial de administración de Reservas Comunales	2005
	Decreto Ley Nº 22.175 - Ley de Comunidades Nativas y de Desarrollo Agrario de la Selva y Ceja de Selva	1978
Philippines	Constitution of the Republic of the Philippines	1987
	Republic Act No. 7586, or the National Integrated Protected Areas System (NIPAS) Act of 1992	1992
	The Indigenous Peoples Rights Act (IPRA)	1997
	NCIP Administrative Order No. 3-2012	2012
	Executive Order No. 263 ; Adopting Community-Based Forest Management As The National Strategy To Ensure The	1995

	Sustainable Development Of The Country's Forestlands Resources And Providing Mechanisms For Its Implementation	
	Presidential Decree 705	1975
	DAO 25 S 1992 - NIPAS Implementing Rules and Regulations	1992
	DENR Administrative Order No. 96-29 October 10	1996
	DNER Administrative Order 98-41 (24 June 1998)	1998
	Presidential Decree 705	1975
	DENR Administrative Order No. 2004-32 (10 September 2004), or the Revised Guidelines on the Establishment and Management of the Community Based Program in Protected Areas	2004
Suriname	Moiwana Community v. Suriname	2005
	Saramaka People v. Suriname	2007
Tanzania	The Forest Act, 2002	2004
	The Land Act, 1999	2001
	The Village Land Act, 1999	2001
	Local Government District Authorities Act No. 7 of 1982 (as amended in 2000)	1982 (2000)
	The Wildlife Conservation (Wildlife Management Areas) Regulations	2012
Thailand	Arts 66-67, Constitution of The Kingdom of Thailand	2007
	Forest Act (1941)	1942
	National Park Act, B.E. 2504 (1961)	1961
	National Reserved Forest Act, B.E. 2507 (1964)	1964
	Wildlife Preservation and Protection Act, B.E. 2535 (1992)	1992
	Commerical Forest Plantation Act, B.E. 2535 (1992)	1992
	Regulation of the Prime Minister's Office on the Issuance of Community Land Title Deeds	2010
Venezuela	Constitución de la República Bolivariana de Venezuela de 1999, Art. 119	1999
	Ley de Demarcación y Garantía del Habitat y Tierras de los Pueblos Indígenas	2001
	Ley Orgánica de Pueblos y Comunidades Indigenas	2002
	Ley de Bosques y Gestión Forestal (Decreto No. 6.070)	2008
	Ley de Bosque	2013

Vietnam	Law on Land of 2003	2003 (2004)
	Law on Forest Protection and Development of 2004	2005
	Decree No. 181-2004-ND-CP providing for implementation of Law on Land	2004
	Decree No. 23/2006 on the Implementation of the Law on Forest Protection and Development	2006
Zambia	Forest Act No. 39, 1973	1973
	The Lands Act, 1995	1995
	Zambia Wildlife Act No. 12	1998
	Local Forest (Control and Management) Regulations, Statutory Instrument No. 47, 2006	2006

Organization/Legal System	**International Instruments**	**Year Enacted (Revised/Amended)**
United Nations	The Universal Declaration of Human Rights	1948
	International Convention on the Elimination of All Forms of Racial Discrimination	1969
	The International Covenant on Civil and Political Rights	1976
	The International Covenant on Economic, Social and Cultural Rights	1976
	United Nations Declaration on the Rights of Indigenous Peoples	2007
Food and Agriculture Organization of the United Nations	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests.	2012
International Labor Organization	ILO Convention No. 169.	1989