Guidelines for Researching, Scoring and Documenting Findings on
'What National Laws Say About Indigenous & Community Land Rights'

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INTRODUCTION

This document outlines the methods that analysts use to conduct research, establish scores and document the findings for the indicators of the legal security of indigenous and community land for LandMark. The Guidelines were designed to provide quality assurance and to ensure consistency in data collection, analysis, and scoring of indicators, allowing for comparative analysis – over time and across countries—of the indicator scores.

The Guidelines are organized into six sections.

I. Definition of Terms. This section provides definitions of relevant terms used in the Guidelines.
II. Outline of Indicators. This section introduces the ten indicators.
III. Data Collection Methods. This section presents the method for collecting the information needed to score the indicators.
IV. Scoring of Indicators. This section describes the method for scoring each indicator.
V. Documenting the Findings. This section describes the method for documenting the information and findings from this research.
VI. Indicators & Analysis. This section provides a more detailed explanation of each indicator and highlights some critical issues to be taken into account in the assessment.

I. DEFINITION OF TERMS

For the purposes of this review, the following definitions apply:

- Communities are groupings of individuals and families that share common interests in a definable local land area within which they normally reside. Communities vary in size, identity, internal equity, and land use systems, and may distribute rights to land in different ways. However, communities in reference to community lands are everywhere similar in these ways:
  1) They have strong connections to particular areas or territories and consider these domains to be customarily under their ownership and/or control.
  2) They themselves determine and apply the rules and mechanisms through which rights to land are distributed and governed. The rules themselves alter over time, as do the mechanisms through which these are upheld (e.g. from autocratic chiefs to committees).

Many rules are customary, based on tried and tested customs followed by forebears. Others are new, developed by the community to address new challenges (e.g. land shortage) or to be consistent with constitutional rights of members who are also citizens of modern states (e.g. as relating to women's land rights).

3) Collective tenure and decision-making characterize the system. Usually, all or part of the community land is owned in common by members of the community and to which rights are distributed. Sometimes, community lands are traditionally entirely subdivided into family lands but over which the community exercises authority, establishing the means by which family rights are recognized, held, used, and transferred.

- Community Lands are all lands that fall under the customary governance of the community whether or not this is recognized in national law. Community land is variously described as the community domain, community land area, community territory, or other terms (e.g., Tanzania refers to village lands, Ghana to customary lands, China to collectives, Cambodia refers to indigenous lands, etc.).

- Customary tenure means community based systems of land ownership and administration that have longstanding origins in the norms and practices of communities and may go back centuries. Customary law refers to the rules that a community observes. Although the term "customary" is not uniformly in use, it is important to note as many countries make reference in their constitutions to customary tenure and customary law.

- Customary governance means that it is the community that decides the type of rights allocated within its area and upholds these rights through community-based mechanisms. These mechanisms may be traditional, such as vesting land authority in a chief or a council of elders, or they may be more modern, such as an elected land committee, a village council, a community assembly of members, or adopted into the norms and rules of an official community-level local government. The land rules that a community follows are usually applied by other communities within the same ethnic group or tribe. Practices are also often similar across regions and continents where the same land use systems are followed.

- Commons are areas maintained as the communal property of all community members. Some communities and Indigenous Peoples hold and use all of their land communally. This is usual among hunter-gatherers and mobile nomads who practice transhumance (i.e., moving livestock from one grazing location to another in a seasonal cycle). Many communities, however, do not use all of their land communally. While the community exercises jurisdiction over the entire land area, it may be the case that each family possesses its own distinct part of the domain. Or the community may draw a distinction between lands that it has allocated to families for residence and permanent farming, and other lands which it purposely retains the shared property of all members, which is referred to as commons, commonage, or common property. Lands for grazing and wildlife, forests and woodlands, mountaintops, sacred localities, and lakes and streams within the community land are usually retained purposely as collective property commons to which all members have use rights.

- Indigenous Peoples are the sector of the world's communities which identify themselves as such. They adopt this definition on various grounds, such as having stronger relations to their land than other nationals, longer origins in the locality, or distinctive cultures and ways of life that run special risks of being denied or lost in modern conditions. Many communities consider themselves indigenous to the locality but do not define themselves as Indigenous Peoples. This is especially so in Africa and Asia. Moreover, there are many commonalities in land tenure and governance between Indigenous Peoples and other communities.

The distinction between Indigenous Peoples and other communities is made on LandMark mainly because their rights may be subject to special national legislation and which must be reviewed distinctly from laws affecting the rights of other communities. In addition, Indigenous Peoples are the subject of specific internationally-recognized collective rights, including rights to land and natural resources (e.g., International Labour Organization Convention 169, United Nations Declaration on the Rights of Indigenous Peoples).

- Indigenous Lands or territories refer to the collectively-held and governed lands (and natural resources) of Indigenous Peoples. As with other community lands, some indigenous lands may be allocated with group consent for use by individuals and families. Other indigenous land is managed as common property. In a few cases, Indigenous land is held by individuals or families (e.g., New Zealand).

II. OVERVIEW OF INDICATORS

The tenure security of Indigenous Peoples and communities is indicated in a host of legal provisions that address a range of critical land rights issues. Based upon the experience of the LandMark Operational Team (LOT) and with inputs from the Steering Group (SG), the following ten indicators have been identified as among the most important to consider for this analysis. These indicators focus on:

i. The extent to which the law upholds the land rights of Indigenous peoples and communities as ownership rights or only use rights;
ii. The seriousness of national law (and thereby the state) in enabling these owners to sustain those rights such as through formalization and recognition of community-based governance; and
iii. The special vulnerability that Indigenous Peoples and communities face to loss of rights over natural resources (e.g., rights to trees, water, protected areas).

A full understanding of the legal security of indigenous and community land requires assessment of many more aspects. For LandMark at this time, however, the lands and rights of Indigenous Peoples and communities are scored most secure legally when these ten indicators are met in national legislation.

1. Legal Status. The law recognizes the rights that Indigenous Peoples/communities customarily exercise over their lands as lawful forms of ownership, inclusive of lands they possess in common. Community lands are therefore treated in national laws as property and rights to these lands as property rights.

2. Quality of Protection. Recognition and protection of the rights of Indigenous Peoples/communities have equivalent legal force and effect as accorded rights derived from non-indigenous/non-community-based tenure regimes, including where these are not formally registered.

3. Formalization of Land Rights. The law provides accessible and affordable opportunities for Indigenous Peoples/communities to secure formal entitlement for their lands, such registration

being obtainable without converting their rights into non-indigenous/non-community-based forms of ownership such as freehold or leasehold.

4. Legal Personality. The law recognizes Indigenous Peoples/communities as legal persons for purposes of landholding so that they are not obliged to form and register legal entities in order to have legal standing or to secure formal entitlement.

5. Legal Authority. The law recognizes the right of Indigenous Peoples/communities to govern their interests in accordance with their customary norms provided these are in accordance with human rights and good governance provisions stipulated for all citizens.

6. Rights in Perpetuity. The law recognizes that founding indigenous/community land rights may be owned in perpetuity.

7. Consent in Inclusive Manner. The law requires informed and inclusive consent by the Indigenous People/communities for involuntary land takings, including by the state when acquiring land for public purposes (e.g., compulsory land acquisition or eminent domain).

8. Rights to Trees. The law accepts that naturally occurring trees on indigenous/community lands belong to the Indigenous People/community.

9. Rights to Water. The law accepts that rights to local water sources within indigenous/community lands belong to the Indigenous People/community.

10. Rights in Protected Areas. The law upholds the ownership, and participatory governance rights, of Indigenous Peoples/communities over their lands and natural resources declared to be formally-declared Protected Areas.

A more detailed explanation and other information on these indicators are provided in Section VI.

III. DATA COLLECTION METHODS

National Laws. The assessment of each indicator will be based on a review of relevant national (statutory) laws, including the constitution, statutes, regulations, and court rulings, to the extent they are available. The scoring of indicators should be based exclusively on express legal provisions (or the lack of them). Please note that this does not suggest that the law is enough on its own, is without contradictions, or is fairly and transparently applied. These matters will be addressed by future panels of indicators. For the immediate exercise there should be no attempt by the researcher to assess the implementation or enforcement of the law. There should also be no attempt to examine government, community or Indigenous Peoples perceptions of the security of their land rights.

Federal, not State Laws. In countries with a federal political system, such as India and Australia, the review should be limited to national or federal laws, not state or local laws. Certainly some state laws in federal systems provide more legal protection for community land than federal laws. For example, in Australia, the state laws in the Northern territory provide stronger indigenous land rights and more legal security than the federal laws (including providing Indigenous Peoples with the right of Free, Prior and Informed Consent over mining operations on their lands). If the researcher

becomes aware of the existence of such state laws, this should be noted and documented, but the state laws should not factor into the scoring of the indicator.

International Law. Any international conventions signed or ratified by a country should be included in the assessment only to the extent that they were incorporated into domestic law and enacted as local statute.

Review Laws, not Bills, Policies or Reports on the Law. The researcher should read and review the national laws directly and should not rely on reports or articles that review and interpret the legislation. However, cases will exist where the law is not available, not readable in an accessible way by the researcher, and yet an up-to-date and reliable report exists on the subject. In these cases, the assessor may use such a report but must indicate this clearly in the appropriate reporting columns (see below). For Indicators 8, 9 and 10, the researcher will likely need to review land, forestry, water and wildlife laws. The researcher should note when a highly relevant law is under consideration in the legislature, but bear in mind that the assessment focuses on enacted laws, not proposed laws, even when they are in the legislature as official bills under consideration. Further, national policies should not be used as a foundation for assessment, even where these have been adopted by the legislature.

Review in Original Language. If possible, the laws should be reviewed in their original, official language, and by a native speaker. If this is not possible, researchers should review good-quality (and, if possible, official) translations of the law. Researchers should note when translated laws are reviewed.

Collective Tenure Types. It is important for the researcher to clarify which laws govern the different types of collective lands in a country. In many countries, no distinction is drawn between the lands of Indigenous Peoples and communities and all are governed by the same laws. In some countries, the only collective rural properties are those belong to Indigenous Peoples. In still other countries, indigenous lands, community lands and perhaps other types of collective land are governed by distinct laws. The indicators will be assessed separately for each type of collective lands where these are governed by different statutory laws. For example, in Brazil, the indicators should be scored twice – once based on the laws that govern the lands of Indigenous Peoples and a second time for the laws governing the lands of Afro-Brazilian communities.

Communities as Traditional Social Entities. This research excludes assessing the security of land that is collectively-acquired and held by modern associations, cooperatives or groups of people without a history as a social community or shared connections with the concerned lands. However, cases where the traditional collective ownership of communities is vested in new legal entities or expressed in new legal forms should be noted (e.g. the Collective Agricultural Enterprises of Algeria and the Group Representatives Ranches of Kenya).

Community-Controlled Land. In many countries, indigenous or community land includes land that an Indigenous People or community - or the responsible local institution - allocates to individuals and households (e.g., homesteads and individual/family farms) as well as land held and managed by the community as common property (e.g., forests, pastures, wetlands). In certain cases (e.g., some community lands in India), the community land that has been allocated to individuals and households is titled in non-customary forms (e.g., freehold) and is no longer within the ambit of collective authority. In such cases, community land is limited to the lands that are collectively held and/or managed under community rules, such as the common property. In such cases, the researcher will score the indicators on the security of the land that remains under the exclusive control of the community.

Distinguishing between Ownership of the Land and Ownership or Rights to the Land. There are many cases (e.g., in Africa this includes Tanzania, Senegal, Ethiopia, Malawi, Gambia, Mozambique, Angola, Eritrea among others) where the entire country area is owned by the state or the nation in common which means that all property rights including and indigenous and community land rights in national law constitute ownership of the right to the land, not ownership of the land itself. In such cases, analysts should respond to questions as if answering ownership of rights to the land. However, analysts should also take note of legal conditions where non-indigenous and non-community lands are owned by private persons in absolute title, while the state retains root title to indigenous and community lands, producing an uneven playing field for different tenure systems (e.g. this is the case in Zimbabwe and Namibia). Where the justification for this is a presumption that these lands are not owned, only occupied and used, this can be discriminatory. In some cases, the state retains ultimate title to the land strictly as a protective measure; this should be assessed and noted by the researcher.

IV. SCORING OF INDICATORS

Each indicator will be assigned a score of 1, 2, 3, 4, N/A (Not Applicable), or ND (No Data).

Score	Description of Score
Score 1	The legal framework clearly or expressly meets the issue addressed in the indicator. The law in a particular jurisdiction fully meets the requirements of the indicator. For example, a score of 1 is given to Indicator 5 if the law expressly recognizes that a village institution – traditional or modern - has full authority over community land.
Score 2	The legal framework makes significant progress towards, but does not entirely meet the issue addressed in the indicator. The law is closer to meeting all the requirements than it is to not meeting the indicator (i.e., closer to a Score of 1 than to a Score of 4).
Score 3	The legal framework addresses the indicator, but insignificantly. There is only limited attempt to meet the issue addressed in the indicator (i.e., the legal framework struggles to meet the indicator). The law is closer to not meeting the requirements than it is to meeting all the requirements (i.e., closer to a Score of 4 than to a Score of 1).
Score 4	There are no attempts in the law to meet the issue addressed in the indicator. The law in a particular jurisdiction is either silent on an issue or there is express exclusion. For example, a score of 4 is given to Indicator 1 if indigenous or community land rights are not acknowledged or recognized in formal law as a legitimate form of land ownership.
N/A	Not Applicable. N/A is only applicable where the subject matter in question is non-existent. For example, N/A is appropriate for the indicators of community land when there is no community land in the country (even though there may be lands of Indigenous Peoples in the country).

ND — No Data. ND is applicable when there is no or not enough information available to the assessor to enable a score to be made (e.g., when the researcher in not able to access the essential law or regulation).

V. DOCUMENTING THE FINDINGS

A spreadsheet (in Microsoft Excel) has been developed to document the research findings on the ten indicators of the legal security of indigenous and community land (attached). The spreadsheet has 11 fields of information.

1. Name of Assessor. Record the name of the assessor in every row. The name of the assessor will be made public.

2. Date of Assessment. The analysis itself must also be dated, as legal changes are presently common in this area of land and property law.

3. Country. Record the name of the country in every row.

4. Community Tenure Type. Record whether the laws being assessed are directed to communities, Indigenous Peoples, or to all communities including Indigenous Peoples.

5. Indicator Number and Short Title. The short title for each of the ten indicators is:
    1. Legal Status
    2. Quality of Protection
    3. Formalization of Land
    4. Legal Personality
    5. Legal Authority
    6. Rights in Perpetuity
    7. Consent in Inclusive Manner
    8. Rights to Trees
    9. Rights to Water
    10. Rights in Protected Areas

6. Score. The researchers should record the score assigned to the indicator. Possible scores are: 1, 2, 3, 4, N/A or ND (see above)

7. Justification of Score. A brief commentary explaining why the particular score was assigned. The justification should recognize and refer to the specific language in the relevant law(s) that address the indicator issue. The justification must be no more than 250 characters which means the researcher will only be able to highlight the main factor (or possibly two factors) that led to the score (more information may be provided under Additional Information).

8. Law and Provision. The assessor/researcher should record the name of the law(s) and the specific provision(s) in the law(s) that provide the answer to the indicator (legal citation must be no more than 250 characters. If additional space is needed, the citation can extend into the Additional Information field). See How to Cite Legal Materials (http://www.lib.jjay.cuny.edu/research/quicklegalcite.pdf) for guidance on how to cite primary

and secondary sources in the US. Use simpler citation forms for other countries as necessary for example, Constitution, 1998, Art. 63 (3) (d) (ii); Land Act, 2012, s. 5 (1) (a); Forests Act, 2005, s. 19; Land Act Regulations, 2015, Reg. 48-56. Where you have information on the latest amendment to the law, provide this as for example: Constitution, 1998 (2007), Land Act, 2012 (2015).

9. Language of Law used for Review. A note on whether the law was assessed in its original language or whether an English translation of the law was assessed; for example: English original, French in official translation, French in unofficial translation. Cited text of an article should be in English.

10. Additional Information. The assessor/researcher may provide additional relevant information here to explain the country laws and scores (the comment must be no more than 2500 characters). For example, there is opportunity here to more precisely cite the relevant legal clause.

11. Sufficiency of Sources. This column requires an overall assessment of whether you have been able to access all the relevant laws, regulations, and as relevant, court cases. Choices include:
    Sufficient
    Sufficient in Parts
    Insufficient

VI. INDICATOR QUESTIONS TO ANSWER

The core question for the researcher to answer for each indicator is provided below, along with additional information on the indicator and scoring.

INDICATOR 1. LEGAL STATUS OF THE RIGHTS AND LANDS OF INDIGENOUS PEOPLES/COMMUNITIES

Core Question: Does the law recognize rights which Indigenous Peoples/communities customarily hold to their lands as lawful forms of land ownership and therefore recognize their lands as their property?

Principle. The law recognizes the rights which Indigenous Peoples and communities exercise over all their lands as lawful forms of ownership and therefore does not treat their lands as unowned or as lands owned by others (including government). This specifically includes lands which Indigenous Peoples or communities hold in common such as often the case for forests, grazing lands and wetlands.

Explanation. Many laws do not recognize rights as deriving from indigenous or community-based tenure systems as having force and effect as property interests in the land. They therefore treat these lands as unowned (such as calling these public or national lands, often vested in the government). Or, the law recognizes only some rights in indigenous or community lands as amounting to rights of ownership (e.g., to lands which are farmed or settled, sometimes referred to in law as "used and occupied" lands), excluding forests, rangelands and other collective lands of the community, defining these "wastelands" or state property). This can leave common properties without recognition or protection. The emphasis in this indicator is upon equivalency of legal support, not necessarily 'sameness'. For example, a law that recognizes freehold, leasehold and customary tenure as equally lawful forms of ownership and does not require those systems to

operate in the same manner or to be subject to the same rules, but equally enforces the law in their regard can be scored as 1.

Examples

Legal Status

- Score of 1: Full ownership rights explicitly granted by the law and with no limits on the types of commons that may be owned
    i. South Sudan -"Customary rights including those held in common shall have equal force and effect in law with freehold or leasehold rights acquired through allocation, registration of transaction" (Sec 8(6), Land Act 2009).
    ii. China - The law grants ownership of collectively-owned lands, forests, mountains, grasslands, unclaimed land, beaches to all members of the village collectives (Art. 58, Property Rights Law, 2007).
- Score of 2: Possessory interest (right of occupancy and control, benefit) OR ownership to most but not to ALL indigenous/community lands OR land held in trust or reserved by government in a manner which renders community lands of lesser status than non-community owned lands.
    i. Cambodia: Ownership of indigenous community lands is granted by the State to indigenous communities as collective ownership. Collective ownership right is limited to cultivated/shifting cultivation lands, burial land, spiritual forest land (Art 25-26 Land Law 2001).
    ii. Zambia: Land is vested absolutely in the President on behalf of the people, but customary fully recognized as existing and protected. However, defined as a right of use and occupation under customary law, not ownership and unable to be formalized in a title (Sec. 2,7,8 Land Act No. 29 of 1995) .
    iii. US: 25 U.S. Code Sec. 81 provides that "Indian lands" means "lands the title to which is held to the United States in trust for an Indian tribe or lands the title to which is held by an Indian subject to a restriction by the United States against alienation.
- Score of 3: Use and occupancy rights only, in a context where others may obtain fuller rights outside community lands, or where ownership is limited to certain land types (e.g. available only for house plots and permanently farmed lands)
    i. Zimbabwe: Customary rights defined as occupation and use rights only, land itself is vested in President, governed by him with absolute powers, many devolved to District Councils, but with admission of customary law and powers of appointed traditional authorities to allocate rights to these lands (Communal Land Act, No. 20 of 1982 (2002), s. 4, 7, 8, 10).
    ii. Russia: Federal legislation grants Indigenous Peoples the right to freely use land and renewable natural resources in their traditionally occupied territories. Art. 8 On Guarantees of the Rights of Numerically Small Indigenous Peoples of Russian Federation (Federal Law No. 82-FS).
    iii. Indonesia: The Constitutional Court recognizes Indigenous Peoples as owners of customary forests, but this is not implemented through legislation (Constitutional Court decision "PUTUSAN – Nomor 35/PUU-X/2012").

- Score of 4: This is justified when the laws do not explicitly mention indigenous/community land rights although these lands are known to exists, or where the law acknowledges these interests as no more than permissive occupancy at the will of the state on national/state lands and where there is also no protection for this occupancy.
    i. Eritrea: Justification for this score is that a) customary rights are abolished despite the majority acquiring rights through this system; b) the law does not provide for collective tenure other than for arable farming; c) state takes direct control over 95% of the country as unfarmed; and d) despite high proportion of pastoralist and agro-pastoralist population, sedentarization is coerced through legal provision only for farm parcels (Constitution, 1997, Art. 10 & 23; Land Proclamation No 58/1994, Arts. 3, 4, 6, 9, 11, 12, 14, 17).

INDICATOR 2: QUALITY OF PROTECTION FOR INDIGENOUS/COMMUNITY-DERIVED RIGHTS IN RELATION TO COMMON PROPERTIES IN PARTICULAR

Core Question: Does the law give indigenous/community land rights and common properties in particular the same level of protection as it gives to rights acquired under non-indigenous/non-community systems?

Principle. Indigenous and community land rights are given equivalent level of legal protection given to rights acquired under non-local systems such as for freehold, leasehold or other state-derived rights.

Explanation. Best legal practice is where the law protects the land rights of Indigenous peoples and communities to the same degree as it protects rights that have been acquired through other tenure regimes. Best practice is indicated where (a) the law gives protection even where indigenous/community-derived rights have not been formally identified, mapped and registered; (b) this legal acknowledgement and protection extends to off-farm lands such as forests and rangelands and other lands which communities own collectively; and (c) where the law stipulates that even unregistered indigenous/community land owners as individuals, families or communities as appropriate, are eligible in the event of compulsory acquisition for public purpose for the same terms and levels of compensation payable to owners holding registered statutory ownership.

Examples

Quality of Protection

- Score of 4: Law explicitly provides that customary/common land is equal to private property rights. No registration required for this to take effect
    i. Tanzania: a) Granted & customary rights have same status; b) compensation equitable for granted & customary rights; c) collective ownership & lands accepted (sec. 4, Land Act, 1999, sec. 18, Village Land Act, 1999)
    ii. Uganda: Customary tenure does not require registered entitlements, law upholds customary rights without formalization (Art. 26, 237 Constitution; sec. 3 & 4 Land Act, 1998)

- Score of 2: Collective property receives equal protection, but registration is required for this to take effect
    i. Peru: The integrity of Indigenous People's customary land rights is secured and recognized over third party land possession. Community land rights have constitutional level of recognition and receive protection the same as other types of property, but must register to receive protection. Constitution, Art. 89; Law 22715, Art. 10; Law 24657, Art. 2.
    ii. China: Collectively-owned properties are protected by law, but the right only takes effect upon registration (Art. 58, 59, 60, Property Rights Law 2007). The State retains broad power to expropriate or requisition collectively-owned property.
    iii. Botswana: Strong in that law protects unregistered customary rights, pays prior compensation at compulsory acquisition; weak in that focused on individual rights and only for houses & farms, no protection for family & community rights and no mechanism for group entitlement. Constitution, 1966, Art.8, Tribal Land Act (CAP 32:02), Sec. 25, 33.
- Score of 3: Only use/occupancy rights are granted (not equal to private property with the national context), or ownership over common properties is limited by type or procedure
    i. Angola: Strong legal support in that titled community lands are protected against issue of concessions. Weak in all other ways e.g. the holder requires formal title for protection, the title excludes natural resources/commons other than to immediate areas of pastures and to livestock routes (Land Law, 2004, Arts. 10, 12, 37, 45, 55)
    ii. Thailand: Law grants only land use permit. Since communities may only manage and use state-owned land under a "Community Land Use Permit", community land rights do not receive the same level of protection as rights acquired under freehold tenure (Regulation of the Prime Minister's Office on the Issuance of Community Land Title Deeds, 2010).
- Score of 4: Relevant laws fail to mention the status of indigenous/community land rights, or they treat these interests as no more than informal occupation and use of lands at the will of the state on lands presumed by the law to be unowned or government property, so that communities of Indigenous Peoples may be evicted at any time as if squatters.
    i. Chad: communities may lose untitled lands at will without the State having to prove a public purpose as the land is registered in the name of the State (Law No. 24 On the System of Land Tenure and Customary Rights, 1967, Art. 1, 9,13,15).

INDICATOR 3. VOLUNTARY & ACCESSIBLE PROVISION FOR FORMALIZATION OF INDIGENOUS/COMMUNITY RIGHTS AND PROPERTIES

Core Question: Does the law require that the state provide Indigenous peoples/communities with formal title to their lands on request as well as a detailed (e.g., georeferenced) map of their property?

Principle. The law provides clear, simple, accessible and affordable procedures for Indigenous peoples and communities to apply for and receive formal entitlement for their collective properties, and to receive documentary evidence in the form a collective title deed with a detailed map which leaves no dispute as to the location of the perimeter boundaries of their territory.

Explanation. Best legal practice does not require Indigenous Peoples or communities to formalize their collective properties but does provide an easy route for their rights to be formalized in an official registry if they wish. As example, these elements need to be considered in scoring this indicator:

- Provision of Procedure: Does the law provide a clear procedure for Indigenous Peoples and communities to follow, or is this left up to themselves to find a way to register their collective rights?
- Voluntary or Compulsory: Is the procedure obligatory in order for communities and Indigenous Peoples to be recognized as owners of their lands? Compulsion is usually accompanied by a time limit and failure to register those rights can further jeopardize tenure security.
- Accessibility: Is the procedure accessible to even the remotest Indigenous People or community? This may be assessed by whether or not the law or regulations under the law enable registration to occur in genuinely decentralized centres including in community government or local commune and district offices.
- Assistance: Does the law make it obligatory for local governments or other state actors, or encourages civil society organizations (e.g. NGOs) to assist Indigenous Peoples and communities to make applications, such as where most members are illiterate and cannot easily complete forms? Does the law establish institutions, planning procedures, or other administrative measures designed to facilitate the registration of indigenous and community property?
- Affordability: Without reading reports on the country it will be difficult to assess this, but an indication of costs may be provided in regulations, or the main law itself may specify that the procedure is cost-free for Indigenous Peoples and communities or to be set at very low levels.
- Tangible Evidence: Usually the primary evidence of registration is what is recorded in the land register, and from which an evidential title deed is issued. It is important for Indigenous peoples and communities to receive paper evidence along with a reasonably scaled map that shows the location and boundaries of the territory in a clear, georeferenced and not easily disputable manner.

Examples

Formal Documentation

- Score of 1: Clear/free procedures with assistance mechanisms
    i. Brazil: Formalization including mapping of territories is not mandatory but is promoted to reinforce Quilombo communities' land rights. Demarcation following self-assessment by Quilombo communities. The procedure is done at no cost to the community and provides legal title over the land (Decree 4887, Art. 1, Art. 2, Art. 22).
    ii. Australia: The law requires the Register of Native Title Claims to include detailed information and a map of the land covered by a claim. Federal law established the Indigenous Land Corporation, which provides financial assistance to indigenous communities to claim native lands (Sec. 62, 184- Native Title Act 1993; Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995).

iii. Burkina Faso: Fees for issuing rural land certificates is very low as laid out in Decree No. 2012-1042 (and Agrarian Reform Law, No. 034 of 2012), and six times less expensive for collective title as compared to individual title, to discourage subdivision of family or community lands.

- Score of 2: clear procedures, but no provisions on affordability/accessibility (assistance mechanisms)
  i. Mongolia: Articles 31- 34 of Law on Land 2002 provides clear procedures for requesting a possession contract. The contract must include a map, description of the land, etc. But there are no provisions on affordability or accessibility.
  ii. China: While the law is silent on whether registration must be affordable, there are clearly defined procedures and collectives may obtain government assistance in registering their land (Art. 11, Law on Land Administration; Arts. 9-22, 2007 Property Law).
  iii. Botswana: Easy & free procedure for individuals to secure Certificate of Customary Rights. Only sketch map required. No equivalent provision for a family, group, village or ward to secure a formal customary entitlement to family or community lands (e.g. for grazing lands) (Tribal Land Act (CAP 32:02), s.13-16. Tribal Land Regulations, Reg. 6-17).
- Score of 3: less clear, accessible or cheap mechanisms, or limited in that extinction of customary/community-derived rights is required
  i. Zambia: Procedure is free, accessible, and voluntary, subject to local chief's consent, and to mapping undertaken by government offices. However, formalization is achieved only through extinction of customary right in favor of a leasehold entitlement; this is also only available to individuals and legal entities, not to families or communities (Land Act, No. 29 of 1995, s. 4).
  ii. Thailand: Regulation allows for communities to formally register their customary land use permits, but it is unclear whether a detailed and georeferenced map of communal property is provided. Also unclear if procedures are affordable or accessible.
  iii. Indonesia: While land registration is a requirement (Art. 19 of Basic Agrarian Law), it is unclear whether the law provides clear, simple, accessible and affordable procedures for Indigenous Peoples and communities to apply for and receive formal entitlement for their collective property rights; legislation implementing Court Decision has not been enacted.
- Score of 4: no provision for communities to directly secure any of their lands as customary/community property without conversion of those rights into non-community based forms of ownership, and specifically, no provision for communities to register collective ownership
  i. Chad: Recognition and protection of ownership is available only through formalization, which involves extinguishing community-derived rights in favor of statutory forms of ownership. This is not available to other than individuals or legal entities. No concessions are made to communities in respect of affordability or accessibility of obtaining these titles or maps.

INDICATOR 4. LEGAL PERSONALITY OF INDIGENOUS PEOPLES/COMMUNITIES

Core Question: Does the law recognize Indigenous Peoples/communities as legal persons for the purposes of land ownership?

Principle. The law recognizes traditional and existing collective social entities in the Indigenous peoples and community as legal persons for the purposes of recognition as landowners.

Explanation. Some laws enable Indigenous Peoples or communities to formally register their collective ownership only if they first establish a company, cooperative, association or other registered legal entity in which to vest those rights. This is often costly and confusing, and limits uptake of registration by communities. It has also been known to force communities to subdivide their common property into individual parcels. Further, this requirement contradicts the reality that the concerned Indigenous People or community already exists as an owner, although in accordance with customary law. The relocation of rights into a company or other legal entity extinguishes critical features of community-derived rights, including the rules by which they are upheld, transferred and inherited. Contrary rules may apply under company, cooperative, association, or society regulations. For example, company law may make it unlawful for an Indigenous People or community to disallow sale of plots that it allocates to families to build homes or to establish permanent farms, even though this may be a central principle in the norms of that society. Therefore, best legal practice acknowledges Indigenous peoples and other communities as natural or legal persons for the purpose of recognition of collective ownership and formal registration of their property. Or, sometimes, the law provides a very simple form of collective tenure that is structured around those traditional forms of collective ownership.

Examples

Legal Personality

- Score 1: No requirement to create legal entity first, clear legal personality of the community as a land owner.
    i. Philippines: An indigenous cultural community (ICC) or an Indigenous People (IP) is explicitly recognized as a legal person for purposes of delimitation of community land and issuance of ancestral domain/land titles. Title is issued in the name of the community, containing a list of all members identified in the census undertaken for the purpose (R.A. 8371, IPRA, Sec. 52; A.O. 4)
    ii. Tanzania: Any person, family unit, group of persons recognized under customary law including the whole community is a recognized land right holder and may receive a formal Certificate of Customary Right of Occupancy, without forming a legal entity. (Village Land Act, 1999, s. 22.)
- Score 2: Clear legal personality, but not as landowners and must create and register legal entity first.
    i. Canada: The Supreme Court granted legal standing to indigenous communities in several constitutional cases, but they are not always legal persons for the purposes of land ownership and must first register or obtain treaty rights (Sec. 13.2, Indian Act).
- Score 3: Only legal entities are recognized as legal persons (not communities) or only some indigenous/communities are granted legal standing.

i. Namibia: Only legal entities may acquire leaseholds for lands that include commons. Since 2014 families & groups may apply in own name for customary certificates but only for residential & farming units (Communal Land Reform Act, 2002, s. 20 ff. Agricultural Commercial Land Reform Act, No. 6 of 1995.)
ii. Indonesia: Art. 51(1) of Law No. 24 of 2003 on the Constitutional Court provides that community-based customary law groups that are still in existence may be granted legal standing when their constitutional rights are violated. But this is limited to customary forests.

- Score 4: No provision for communities or other traditional collectivities to obtain title, either directly or through first forming a legal entity in which to vest the land.
  i. Malawi: while the law permits families and communities to hold private title jointly or as a legally registered entity, no similar provision is made for communities, who have no means of obtaining registered title in customary land areas (Registered Land Act, 1967 s. 25 & 101).

INDICATOR 5. LEGAL AUTHORITY OVER INDIGENOUS/COMMUNITY LANDS

Core question: Does the law recognize the indigenous group/community as the legal authority over the land?

Principle. The law recognizes and upholds the right of indigenous peoples and communities to define and regulate their land rights through institutional mechanisms rooted in the community.

Explanation. All owners have the right to govern their own properties and this must also apply to the governance of collective properties by indigenous peoples and communities. Some laws vest management of indigenous and community lands in government bodies, land boards, paramount chiefs, or other bodies but which may be too remote from indigenous peoples and communities to enable them to influence decisions made concerning their lands. Best legal practice stipulates that the indigenous or community owner may govern its property directly. It also stipulates that the indigenous group and community may govern in accordance with its own norms so long as these do not contradict human rights or equitable governance procedures stipulated in national constitutions.

Watch points on this indicator include:

1. Devolution. Is the lawful land administration of community lands at the community level? Sometimes boards, committees, or other agencies are located at commune, district or county levels (this is the case in Botswana and Namibia, and where additionally, both bodies are not elected, mainly comprising government officials).
2. Is autonomy significant? In some cases (e.g. China) the governing body is at the village level but is the implementer of government decisions and cannot act autonomously.
3. Accountability to community members. It cannot be assumed that just because the law designates the chief or other traditional authority as the legal administrator that this is just for community members. Traditional Authorities may be autocratic, especially in today's era of rampant land grabbing in which they may collude. A main land administration trend affecting rural communities is for laws to require that the community elects those whom it designates as administrators and accordingly these may be referred to as 'village land commissions' (e.g. Benin and Burkina Faso) or 'village councils (Tanzania). They may of course elect their traditional leaders to these positions and often do, especially in early

electoral processes. In other cases, the chief is required to work with a number of persons elected to help him make decisions (e.g. Malawi).

4. Regulatory power. Village land committees, councils or commissions may not have authority to make rules in a manner that are legally binding. Best practice requires this legal empowerment and additionally, is clear that community based regulation applies not only to community members but also to all persons seeking to use or access those lands. Modern community based land administration mechanisms do provide for this, best illustrated in provisions for the community-based body to make regulations and by-laws, so long as these do not contradiction national law provisions, with implication that the courts must uphold those by-laws when appeals are made to them.

Examples

Legal Authority

- Score 1: Law explicitly granted authority of indigenous/community lands to the community itself. Power is devolved to the local level and communities are autonomous.
    i. Burkina Faso: Authority over community lands is devolved to communities who set up Village Land Commissions and also develop Local Land Charters specifying community agreed rules which are binding on all persons (Law 034-2009 on Rural Land Tenure, Art. 81ff on Village Land Commissions; Art. 11 ff. for Local Land Charters).
    ii. South Sudan: Traditional Authority is constitutionally recognized & part of local government system which includes community based boma governments (cluster of related villages or one large village). Courts to apply customary law subject to Constitution and statute. Provision for local level institutions to be lawful land authorities in community land sector (Constitution, Art. 5, 166-167; Land Act, s. 15)
- Score of 2: Relevant legal authority is granted but not to community level organizations (traditional or modern) or authority is constrained in another way.
    i. Mexico: The law grants the community the right to determine the use of its land, the division of separate portions, and other rules governing the land. However, management of the land is left up to the comunidad through a representative body. (Art. 74, 100, Agrarian Law).
    ii. Zambia: Traditional Authority (Chief) has lawful authority to govern customary lands under customary law. However, there is no legal requirement to govern inclusively. No provision for elected land committees (Chiefs Act, No. 67 of 1965, s. 10 (a)).
- Score of 3: Legal authority is granted, but subject to significant limitations such as applicable only to certain types of lands or real authority over disposition of land is held by higher level bodies.
    i. Chad: Constitution supports customary law including traditional authorities powers but subject to various limitations and which also include stipulation that no custom may be an obstacle to public action (Constitution 1996 (2005) Art. 161-163).
    ii. Indonesia: The Forest Law states indigenous communities, if still existent, shall be allowed to manage their forests according to the prevailing indigenous law so long as it does not contravene state law; this is only applied to forest land (Art. 67, 1999 Forest Law).

- Score of 4: No provision for a community to be empowered as the lawful land authority over community lands or collective properties within these countries.
    i. Botswana: while village headman and committees are consulted parties, no decision-making powers. District Land Boards are not elected and report to government not communities (Tribal Land Act, 1968, Regulation 7).

INDICATOR 6. INDIGENOUS/COMMUNITY LAND RIGHTS HELD IN PERPETUITY

Core Question: Does the law and formal entitlements issued recognize indigenous/community land rights may be held in perpetuity?

Principle. The law and the formal entitlement (document) recognize that indigenous and community land rights may be held in perpetuity.

Explanation. Some national laws enable an Indigenous peoples or community to apply for a license or agreement to legally occupy their land for the short to medium-term. By accepting that the collective property rights of an Indigenous peoples or community is a right held in perpetuity is to accept customary practice, and to deepen and secure the right.

Examples

Right in Perpetuity

- Score of 1: No durational limit
    i. Tanzania: A customary right of occupancy shall be presumed to be granted for an indefinite term, unless a grant of a customary right of occupancy specifies otherwise (sec. 27, Village Land Act, 1999)
    ii. China: The law does not establish durational limits on the land which is collectively owned by members of the collective (2007 Property Rights Law)
- Score of 2: Rights may be held in perpetuity, but either indirectly held by the community or limited to certain categories of land indigenous/community land. Perpetuity may be implied.
    i. Botswana: The Board owns tribal land in perpetuity in trust for citizens, citizens hold use rights in perpetuity (Tribal Land Act (CAP 32:02, s. 10, 13).
    ii. Canada: Reserve land may be held in perpetuity, but the Indian Act grants the Minister discretion to issue temporary certificates of occupation (Sec. 20(4)-(6), Indian Act 1985).
- Score of 3: Heritable lifetime usufruct rights provided OR lack of explicitly provisions in legislation.
    i. Malaysia: legislation is silent, but High Court suggested Orang Asli land may be held in perpetuity (did not impose any durational requirements). High Court case - Sagon Bin Tasi v. Government of Malaysia
    ii. Namibia: By custom, rights in perpetuity, but registered as heritable lifetime usufructs (Communal Land Reform Act, No. 5 of 2002, s. 26).
- Score of 4: No provision for the community to hold a right in perpetuity or of term is ignored with this intention.

i. Sudan: As customary rights are usufructs on government land subject to continued use and occupation, no provision for these to be held in perpetuity. No provision for collective tenure although a family may obtain a 15 year usufruct (Civil Transactions Act, 1984, Cht. 4).

INDICATOR 7. INDIGENOUS PEOPLES/COMMUNITY CONSENT BEFORE LAND ACQUISITION

Core Question: Does the law stipulate that documented Indigenous Peoples/community consent is required, through an inclusive and transparent manner that is protected from third party manipulation, before an outside actor (including government) may acquire indigenous/community land?

Principle. The law provides that the consent of an Indigenous People or community is required before an outsider actor (including government) may acquire indigenous or community land. Further, that the procedural norms for achieving consent are clear for all, fair for all, and cannot be manipulated by the state or other actors (e.g. the quorum for numbers of community members who must be involved, the percentage of positive votes required, inclusiveness of who votes stipulated in a way that allows majority interests to be reflected).

Explanation. Best legal practice not only prescribes that consent is required before an outside actor acquires indigenous or community land or special rights to its use, but lays out an inclusive procedure through which the Indigenous People or community is to consider and consent or reject the request. This should include sufficient time to enable all members to come together to consider the matter, and in a manner which does not enable elites within the group or outside actors to manipulate the procedure to serve their interests. It should also include legal requirement that a record of how the matter was considered, and with signatures or thumbprints of more than one or two leaders will signal consent or rejection. Assessors should take into account if and for which conditions the state or state agencies are required to secure consent prior to compulsory acquisition under the principle of eminent domain. A good score on this indicator includes both the requirement of consent and that the decision must be arrived at in an inclusive manner.

Right to Consent Before Land Acquisition

- Score of 1: Clear procedure for gathering consent and in an inclusive/transparent manner.
    i. Philippines: Free and prior informed consent (FPIC) explicitly provided for Indigenous Cultural Communities and for Indigenous Peoples (ICC/IP). FPIC includes right to give or withhold consent to a project or acquisition, government or private. ICC/IP community entitled to internal consensus building using its own traditional structures and processes (R. A. 8371, IPRA, Sec. 7 (b) & (c)).
- Score of 2: Consent requirement exists but the process is unclear (e.g. there is no inclusive, transparent manner that is protected from third party manipulation) or other limitations.
    i. Zambia: Consultation with those affected and the consent of chief required before customary land under his aegis is alienated into leaseholds (Land Act, NO. 29 of 1995, s. 3(4), 4(2)).
    ii. Tanzania: While transfer for public purpose of Village to General or Reserved Land must have community consent if <250 ha, for larger areas, Minister must

consider village views but may approve even if no consent for larger tracts of land; (Land Act, 1999, s. 2, 4, 6 of the Village Land Act, 1999).

iii. Australia: The Native Title (Prescribed Bodies Corporate) Regulations 1999 provides that body corporates holding native title rights must consult and obtain consent with holders of native title holders prior to making a decision affecting their livelihood but with no requirements relating to procedure (Sec. 8, 8A Native Title (Prescribed Bodies Corporate) Regulations 1999).

- Score of 3: Consultation is required when land is expropriated, but consent is not required.
  i. Cambodia: When acquiring land, the government "Expropriation Committee" must arrange a public consultation with communities affected by expropriation. However, the law does not require consent from communities (Art. 16, Cambodia Expropriation Law).
  ii. Angola: Consultation not permission is required at compulsory acquisition (Land Law, 2004, Art. 9, 12, 28, 37).
- Score of 4: The law does not provide consultation or consent requirements for Indigenous Peoples or communities at compulsory acquisition for public purpose or for other acquisitions by non-community members.
  i. Sudan: No provision for consent or even consultation since the Land Settlement and Registration Act, 1925 & Land Acquisition Act, 1930, 'land subject to village or tribal rights' refers to Government owned lands, and no compensation is required (1925, s. 13 (ii), 1930 (s. 9 (1)).

INDICATOR 8. RIGHTS TO TREES ON INDIGENOUS/COMMUNITY LAND

Core Question: Does the law explicitly recognize that indigenous/community property includes rights to all trees on the land?

Principle. The law recognizes that the rights to all trees on the indigenous or community lands are held by the resident Indigenous People or community.

Explanation. In some countries, the law provides that all trees on indigenous and community land belong to landowners including to communities of Indigenous Peoples. In other countries, the law distinguishes between naturally-occurring trees and planted trees, with the naturally-occurring trees often being the property of the state and planted trees belonging to the person who planted them. In these countries, the landholder may not harvest or cut down the natural trees without a permit from government. Where naturally-occurring trees are the property of the state, the government often has the authority to grant rights to such trees to actors outside the Indigenous peoples and community. In some cases, law provide exceptions, such as enabling sacred groves or forests used for specific cultural or spiritual purposes to be community property.

Best practice is where the law explicitly recognizes communities and indigenous peoples as the owners of the trees located on their land and with powers to fell and use those trees through community-based regulation. In this event scoring the case as a 1 should be considered.

In other cases, the law does not recognize communities or indigenous peoples as owners of land of trees but does grant communities free and unfettered rights to use or cut trees on their land. In this case a score of 2 should be considered. This may also apply where the only legal restrictions are against sale of trees, or use of trees for commercial purposes without a permit. A score of 3 should be considered where the law only provides a limited right to use trees on some indigenous/community lands (see Cambodia example below). A score of 4 should be given where the law stipulates that all trees of all kinds are the property of the state/government and may only be used with its permission.

Examples

Rights to Trees

- Score of 1:
  i. Uganda: Trees are owned by landowner (and customary rights are property), save that Minister or District Council may protect certain species or trees in a special location (National Forestry and Tree Planting Act, 2003, s. 27, 31).
  ii. China: The Forest Law recognizes the right of collectives to own forest resources, including trees. Collectives may utilize, dispose and obtain benefit from collectively owned lands (art. 3, Forest Law; art. 58, 61 Property Rights Law 2007).
- Score of 2:
  i. Zambia: All forest produce is owned by state but use is for the benefit of the inhabitant. If needed to clear for agriculture or are non-reserved species may be used (but not sold) without a license (Forests Act, No. 7 of 1999, s.3, 38.).
- Score of 3:
  ii. Eritrea: The usufruct holder has right to cut roots and branches extending into her land from neighbours, implying rights to use trees on own land (Art. 21), but no explicit provision.
  iii. Cambodia: Traditional users' rights are granted to local communities for forest products. These rights include dead wood, timber to build homes, and trees for domestic purposes. However, the law does not include all forestlands within community titled lands so rights to natural trees are excluded (Art. 40, Law on Forestry).
- Score of 4:
  i. Sudan: All natural trees belong to the State and a permit to fell or utilize is required (Law on Forests and Renewable Natural Resources, 2002, s. 40; Timber Utilization and Management Act, 2003).

INDICATOR 9. RIGHTS TO WATER ON INDIGENOUS/COMMUNITY LAND

Does the law explicitly recognize that indigenous/community property includes the rights to local water sources on the land?

Principle. Ownership of local water sources on indigenous and community land are held by the resident Indigenous People or community.

Explanation. Many, perhaps most countries make surface and ground water the property of the State. However, in many countries the law provides that landholders, including indigenous peoples and communities, have use rights to local water sources, including collected rainwater, water in

natural and man-made ponds or reservoirs, and water that flows in rivers and streams within their lands. In many countries, these rights are restricted to domestic or subsistence use and the community may not use the water for commercial purposes without formal authority from the government.

Watch points include -

Best practice is where the law explicitly recognizes communities and indigenous peoples as the owners of local waters where this has been traditional, such as affecting ponds, lakes and streams and hand-dug wells within their territory. In this event scoring the case as a 1 should be considered.

In other cases, the law does not recognize communities or indigenous peoples as owners of water but does grant communities free and unfettered rights to use waters within their lands; in this case a score of 2 should be considered. This may also apply where the only legal restrictions are against sale of water, or use of the water for commercial purposes without a permit. A score of 3 should be considered where the law only provides a limited right to use water and this use right is subject to government discretion (see China example). A score of 4 should be considered where local community rights to water on their lands is severely constrained in law (even although in practice they may use the waters at will).

Rights to Water

- Score of 1:
  i. Brazil: Indigenous Peoples are entitled to the exclusive use of the rivers and lakes within their territory (Constitution Article 231.2; Law 6001, Art. 22, Art. 24).
  ii. South Sudan: Pools, streams, swamps or secondary rivers are recognized as traditionally owned and managed by a community (sec. 10, Land Act 2009).
- Score of 2:
  i. United States: The Supreme Court held that water rights are defined by Congress but when American Indian reservations are established by treaty, statute or executive order, implied reservation of water rights is included (Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 531 U.S. 1 (2000)).
  ii. Peru: Water resources belong to the Nation. However, customary rules are respected as well as their right to use water resources within their lands including commercial and sustenance purposes (Law 29338 Art III, Art 64, Art 107, Art 117, Art 118).
- Score of 3:
  i. China: The Chinese government owns all water resources. Collectives are only granted use rights. The Ministry of Water Resources is charged with allocating water entitlements on an annual basis (Art. 3, 2002 Water Law).
  ii. Australia: Native Title Act 1993 indicates that indigenous populations may file claims for native title to water resources, but the law does not specify the extent of indigenous water rights (Art. 184, 211, Native Title Act 1993).
- Score of 4:
  i. Mongolia: The law does not explicitly establish indigenous community rights to water.

INDICATOR 10. LAND RIGHTS IN NATURAL PROTECTED AREAS

Core Question: Does the law uphold indigenous/community land rights in the ownership and governance of formal protected areas (e.g., national parks, wildlife sanctuaries, forest reserves)?

Principle. The law recognizes and upholds indigenous and community land rights in the ownership and governance of lands that are designated as natural protected areas by the state.

Explanation. Many protected areas (e.g., national and local government parks, forest reserves, and wildlife sanctuaries) include lands traditionally owned, occupied and used by communities or Indigenous Peoples. Some laws automatically exclude declared protected areas from the possibility of being owned, occupied or used by them. Others allow only access and some uses to continue after the land is declared a protected area.

Best legal practice upholds customary ownership rights of Indigenous Peoples and communities in protected areas, so long as this does not limit the purposes and activities of protection. This may also include provisions for formal restitution of protected areas to community ownership, on conditions that the indigenous and community owner adheres to agreed resource conservation conditions. The researcher will need to include the following as factors when scoring the strength or weakness of the law:

- Does the law explicitly prevent any protected area from being owned and regulated by Indigenous Peoples and communities?
- Does the law make provision for indigenous and community-owned areas to be subject to protection orders and conditions without jeopardizing that ownership?
- Does the law allow certain classes of protected areas to be owned and managed by Indigenous peoples and communities?

A high score is provided when the law recognizes indigenous and community land rights in the ownership and governance of all categories of protected areas.

Watch points include -

Best practice is where the law explicitly recognizes communities and indigenous peoples as the owners of land within protected areas or areas previously recognized as natural protected areas (see Bolivia). In this event scoring the case as a 1 should be considered.

In other cases, the law does not recognize communities or indigenous peoples as owners of land within protected areas but does grant communities free and unfettered rights to use or manage land/natural resources/wildlife in any protected area; in this case a score of 2 should be considered. This may also apply where the only legal restrictions are against sale of water, or use of the water for commercial purposes without a permit from that protected area. A score of 3 should be considered where the law only provides a right to use/occupy land/natural resources/wildlife within some protected areas (see Botswana example below). A score of 4 should be considered where the law does not provide any opportunities at all for a community or Indigenous People to own, occupy, use or manage a protected area and in respect of which they are therefore considered to be squatters or unlawful users of areas of their traditional lands made protected areas.

Rights to Protected Areas

- Score of 1:
    i. Bolivia: PIOC's land titling is possible on areas previously recognized as natural protected areas. Management is shared with the government and subject to the IP's customary rules (Constitution Art. 385.II, Art. 403; Law 1333, Art. 62, Art. 64. Art 78; Supreme Decree 24781 Art. 9, Art. 47. Art. 79).
    ii. Mexico: Federal protected areas may contain land held under any tenure type and are divided into core zones and buffer zones. Buffer zones are designated for sustainable resource use, including use by ejidos/ comunidad (Arts. 63, 77bis, General Law on Ecological Balance and Protection of Environment).
- Score of 2:
    i. Australia: No explicit ownership rights, but the law allows indigenous communities to apply for native use rights in PAs and continue traditional use of areas within Commonwealth reserves for hunting, fishing or food-gathering or ceremonial and religious purposes. (sec. 8, 359A, 528, The Environmental Protection and Biodiversity Conservation Act 1999; Sec. 211, Native Title Act 1993.
    ii. Brazil: Extractive Reserves and Sustainable Development Reserves are categories where IPs can inhabit Forest resource extraction for sustenance purposes is allowed. Relocation is needed if communities are located in other conservation categories. Decree 4340, Art. 39; Law 9985, Art. 14, Art. 18, Art. 20, Art. 42.
- Score of 3:
    i. Indonesia: indigenous communities may manage land within protected areas that is classified as traditional, religious, or particular zones but not other protected areas even although these may fall within their traditional lands (Government Regulation PP. No.28/2011 regarding the management of nature reserves and conservation areas).
    ii. Botswana: National Parks & most Wildlife Reserves are state property: no legal obligation to respect customary rights. Individuals & entities may lease tribal land in Wildlife Management Area to obtain exclusive use rights.
- Score of 4:
    i. China: Chinese legislation does not explicitly grant indigenous/community land rights in protected areas.