Collective Land Tenure and Community Conservation

Exploring the linkages between collective tenure rights and the existence and effectiveness of territories and areas conserved by indigenous peoples and local communities (ICCAs)

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Executive Summary

This paper analyzes the importance of legal recognition of collective tenure rights (including to customary land and sea tenure) of indigenous peoples and local communities for the survival and thriving of their conserved territories and areas (ICCAs); the importance of legal recognition of ICCAs for their conservation values; and the relationship between the two.

It begins by providing a description of the broader context of how the legal recognition of both collective tenure rights and territories and areas conserved by peoples and communities contributes to the conservation of nature (Section 2). Secondly, it presents a methodological framework and applies it to five selected countries. The proposed framework includes four different categories of areas considering the overlap between collective and customary control, community conservation and legal recognition. It also evaluates legal recognition of both collective tenure and ICCAs in at least four aspects: a) types of rights recognized; b) types of resources over which rights are recognized; c) recognition of the right to self-governance; and d) implementation of legal recognition in terms of hectares of land officially recognized (Section 3). Section 4 presents some lessons learned and conclusions, and Section 5 presents legal and policy recommendations for securing ICCAs based on the findings.

Overall, this paper concludes that a necessary step for the effective recognition and thriving of ICCAs, and for conservation itself, is the implementation of legal reforms appropriately recognizing collective tenure rights of indigenous peoples and local communities within but also beyond conservation and protected area laws and policies.

Collective tenure rights and livelihoods, ICCAs and conservation policy

In recent decades, new approaches have been emerging for protected areas and conservation in general. At the heart of these approaches are: a) increased legal recognition of collective customary tenure rights of indigenous peoples and local communities to their territories and lands (including those from which they have been displaced for state protected areas), and b) increased recognition of the multi-faceted (including ecological and social) values of collective governance by indigenous peoples and local communities, which is now accepted by the International Union for Conservation of Nature (IUCN) and parties to the Convention on Biological Diversity (CBD) as a main type of governance for both protected and conserved areas. Despite such advances, strong challenges remain for implementation of appropriate legal recognition of collective tenure rights, both nationally and internationally, and appropriate support for community conservation.

Status and overlap of collective tenure rights and ICCAs

Collective customary tenure systems cover large areas of land and coasts and regulate the lives of at least 1.5 billion people around the world. Notwithstanding the methodological challenges with different ways of recording land typology and use, communities are reported to own, control or otherwise claim under customary ownership up to 6.8 billion hectares or about 52 percent of the global land area. Doubts remain about the exact extent of areas regulated by customary tenure systems, but there is growing consensus that such areas are vastly larger than those formally recognized by governments.

With or without legal recognition, the effective community control of land and territories can contribute to conservation outcomes. While this is the case under an immense variety of customary institutions and local names, the generic term 'ICCA' is increasingly used to characterize the territories and areas that embody the following three characteristics:

1. A people or community is **closely connected** to a well defined territory, area or species' habitat;
2. That people or community is the **major player in decision-making (governance) and implementation** regarding the management of the territory, area or species' habitat, implying that a community institution has the capacity to develop and enforce regulations. This role is sometimes *de jure* but more commonly *de facto*;
3. The people's or community's management decisions and efforts lead to the **conservation** of the territory, area or species' habitat and associated cultural values even when the conscious objective of management is not conservation *per se*.

It has been suggested that globally and collectively, ICCAs may equal or exceed the entire area now classified under formal protected area status. Despite increasing efforts to document the global extent of ICCAs, challenges remain with classifying the exact extent of both community lands (claimed and recognized) and ICCAs, and the extent of their overlap. Four categories can be identified:

a. Areas under community control but not legally recognized as such;
b. Areas legally recognized under collective tenure;
c. *De facto* ICCAs without legal recognition for their conservation values; and
d. Legally recognized ICCAs (referred to locally by many different names).

Legal Recognition of Collective Tenure Rights and ICCAs: Case Studies

The categories described above are found in innumerous legal frameworks and *de facto* local arrangements throughout the world. This paper considers the situations in the following five countries as case examples: **Australia, Cameroon, Mexico, Philippines** and **Tanzania**. The analysis seeks to understand whether the selected countries' legal systems recognize collective tenure rights in general and/or as ICCAs in particular and to evaluate the implications of such legal recognition.

In summary, the analysis found that the legal systems of four of the five countries recognize the rights of indigenous peoples and/or local communities to their lands and territories. In Australia, Mexico, Philippines and Tanzania, the law recognizes a strong bundle of rights of communities as well as the right to self-govern their territories and areas. In Cameroon, there is limited recognition of community rights to forest resources. In all the four analyzed countries where rights are recognized and there is a high degree of self-determination, there is also strong evidence of community conservation.

The Philippines' recognition of the Ancestral Domains of indigenous peoples is the only legal framework among the five analyzed that also covers collective customary tenure rights over the sub-soil, although such recognition is both legally challenged and hardly implemented. In the cases of Australia and Mexico, customary rights are recognized to land as well as to water. In Tanzania, rights to water are limited to subsistence needs.

Of the five countries analyzed, three have legal frameworks that also specifically recognize the conservation value of community collective territories and areas (under different local names): Australia, Mexico and Tanzania. In all three cases, specific legal recognition of such "ICCAs" builds on previous broader recognition of collective tenure rights.

Successful implementation of the legal recognition of ICCAs appears related to additional forms of recognition and support received by communities. This may include, among other things, stronger control of territories and resources (as in the case of Tanzania) or forms of technical and financial support (as in the case of Australia). On the other hand, as exemplified by the case of Mexico, communities do not welcome instruments that recognize their contributions to conservation in the absence of their effective involvement in ICCA certification and recognition processes or when the recognition imposes management restrictions that undermine traditional knowledge, practices and livelihoods.

In the countries analyzed, mining and other extractive activities are reportedly among the biggest obstacles to implementation of communities' recognized collective tenure rights. Legal recognition of ICCAs *for their conservation values* appears to provide additional protection against threats from extractive industries.

Lessons Learned and Conclusions

- The legal recognition of collective and customary rights promotes and enables conservation by communities and the resilience and proliferation of *de facto* and *de jure* ICCAs, as legal recognition of ICCAs builds upon broader recognition of collective tenure rights.
- Nevertheless, the quality of legal recognition counts: the stronger the legal recognition is (in terms of the bundle of rights, right to self-governance and coverage of resources), the greater the chance that communities' stewardship and management of their lands, waters and natural resources will contribute to conservation outcomes.
- External legal recognition of ICCAs can be a double-edged sword for the peoples and communities concerned, so legal recognition and implementation of the same must be done in appropriate and culturally sensitive ways (including respecting and supporting traditional governance and management practices) if it is to effectively support and strengthen ICCAs over the long term.
- Recognition of ICCAs for their conservation values can decrease the risks faced by communities on their territories and lands (for example, from externally imposed protected areas or industrial and extractive activities) and can promote conservation on communities' own terms.
- There is a need to prioritize land tenure reforms, strengthen linkages between collective tenure and ICCAs within conservation policy, funding, and discourse, and increase collaboration between land rights reform and conservation movements.

Legal and Policy Recommendations

These findings and lessons point to at least three broad recommendations, which are addressed to national legislators, policy makers, donors, and indigenous and community

leaders, among others, with the aim of securing collective tenure rights, ICCAs and their benefits for the relevant indigenous peoples and local communities, and for society at large:

Support the visibility of indigenous peoples' and communities' territories and areas *per se* and for their contributions to conservation:

- Support community research, mapping, biodiversity inventories, resilience assessments and other efforts to demonstrate collective community rights and responsibilities for land, water and natural resources, including traditional knowledge, governance institutions and management practices, and their conservation results.
- Support the documentation, development and enforcement of community by-laws and protocols as a way to communicate and strengthen community governance and management, and their conservation results.
- Support the registration of community conserved territories and areas in dedicated national and international ICCA Registries.

Strengthen communities by recognizing both their collective tenure rights and their ICCAs across various legal processes:

- Support implementation of all existing options for the legal recognition of collective tenure rights, as appropriate in the given context, such as by:
  - Increasing communities' (as well as government officials') knowledge and understanding of the processes and benefits of legal recognition of collective tenure rights, including through community exchanges and careful consideration of equity issues;
  - Assisting communities to self-define (i.e., define who is or is not a member of the community) and obtain legal recognition as such;
  - Assisting communities to secure legal collective rights to land, water and natural resources that are inalienable, indivisible, and established in perpetuity; and
  - Assisting communities to navigate complex legal systems and access judicial and non-judicial mechanisms to redress past or ongoing injustices.
- Use evidence of community conservation to promote legal recognition and protection of collective customary tenure rights within but also beyond conservation laws and policies.

Alongside legal recognition, enhance community capacity to conserve nature through community-defined and –determined forms of support:

- Support programs, agreements and plans that recognize ICCAs and respect their customary institutions, regulations and practices.
- Provide desirable visibility and social recognition and support to ICCAs, with due regard to community privacy and mechanisms to prevent unwanted influxes of outsiders such as tourists.
- If and when necessary and desired, provide technical and financial support to communities governing ICCAs, in particular to support the realization of their own plans and priorities.

1. Introduction

The relationship of indigenous peoples and local communities[1] to their lands and territories frequently goes beyond the limited Western notion of land as resource or property. Rather, it is a profound connection at the core of their identity and spirituality, rooted in culture and history. Often it is also combined with effective local governance and results in sustainable use and conservation of ecosystems and biodiversity in large areas of the globe. These three elements together comprise the defining characteristics of territories and areas conserved by indigenous peoples and local communities (see Box 1),[2] hereafter referred to by the abbreviation "ICCAs".

1. A people or community is **closely connected** to a well defined territory, area or species' habitat;
2. That people or community is the **major player in decision-making (governance) and implementation** regarding the management of the territory, area or species' habitat, implying that a community institution has the capacity to develop and enforce regulations. This role is sometimes *de jure* but more commonly *de facto*;
3. The people's or community's management decisions and efforts lead to the **conservation** of the territory, area or species' habitat and associated cultural values even when the conscious objective of management is not conservation *per se*.

Box 1: Three defining characteristics of ICCAs

All of these elements speak to the ability of communities to exercise their customary land tenure rights as defined by their customary land tenure systems. These can be understood as systems that:

> "… operate to express and order ownership, possession, and access, and to regulate use and transfer. Norms of customary tenure derive from and are sustained by the community itself rather than the state or state law (statutory land tenure). Although the rules which a particular local community follow are known as customary law, they are rarely binding beyond that community. Customary land tenure is as much a

[1] Hereafter, in most cases we abbreviate "indigenous peoples and local communities" as "peoples and communities" or "communities", without intending to gloss over any differences between them under international law or elsewhere.

[2] Borrini-Feyerabend, G. *et al*. 2010. *Bio-cultural diversity conserved by indigenous peoples and local communities – examples and analysis*. ICCA Consortium and CENESTA for GEF SGP, GTZ, IIED and IUCN-CEESP, Tehran; Kothari, A., with C. Corrigan, H. Jonas, A. Neumann, and H. Shrumm (eds). 2012. *Recognising and Supporting Territories and Areas Conserved by Indigenous People and Local Communities: Global Overview and National Case Studies*. Secretariat of the Convention on Biological Diversity, ICCA Consortium, Kalpavriksh, and Natural Justice, Montreal, Canada. Technical Series No. 64, 160 pp; Borrini-Feyerabend, G., N. Dudley, T. Jaeger, B. Lassen, N. Pathak Broome, A. Philips, and T. Sandwith. 2013. *Governance of Protected Areas: from Understanding to Action*. GIZ, ICCA Consortium, IUCN/CEESP/WCPA, SCBD, IUCN, Gland IUCN/CEESP; more generally, see: www.iccaconsortium.org.

social system as a legal code and from the former obtains its enormous resilience, continuity, and flexibility." [3]

Customary rights can relate to both collective rights and individual rights held by community members according to customary law. The source of the right, which derives from the community itself, not from the state or other external authority, is the most important element in determining a right as customary.

Collective tenure rights as well as territories and areas conserved by peoples and communities can be legally recognized by the state. This paper considers both types of recognition and how they are related in order to better understand the conditions under which ICCAs can survive and thrive. It discusses key questions such as: ***how important is the legal recognition of collective tenure rights of communities in relation to their ability to practice conservation in their lands and territories? How important is the legal recognition of ICCAs[4] for their conservation values? How do the above relate to one another?***

To do so, the paper first provides a description of the broader context of how the legal recognition of both collective tenure and territories and areas conserved by peoples and communities contributes to the conservation of nature (Section 2). Secondly, it presents a methodological framework and applies it to five selected countries. The proposed framework includes four different categories of areas considering the overlap between collective customary control, community conservation and legal recognition. It also evaluates legal recognition of both collective tenure and ICCAs in at least four aspects: a) types of rights recognized; b) types of resources over which rights are recognized; c) recognition of the right to self-governance; and d) implementation of legal recognition in terms of hectares of land officially recognized (Section 3). Section 4 presents some lessons learned and conclusions, and Section 5 presents legal and policy recommendations for securing ICCAs based on the findings.

Overall, **this paper concludes that a necessary step for the effective recognition and thriving of ICCAs, and for conservation itself, is the implementation of legal reforms appropriately recognizing collective tenure rights of indigenous peoples and local communities within but also beyond conservation and protected area laws and policies.**

[3] Alden Wily, L. 2011a. *Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa*. Rights and Resources Initiative (RRI), Washington, D.C. Available at: http://www.rightsandresources.org/documents/files/doc_4699.pdf.

[4] The generic term "ICCA" is used here only for communication purposes – particularly at the international level – and is not meant as a label or to subsume or replace the myriad of local terms used by the relevant indigenous peoples and local communities.

2. Collective Tenure Rights and Livelihoods, ICCAs and Conservation Policy

2.1. Evolving approaches to protected areas and conservation

In recent decades, a new understanding of protected areas and conservation has been emerging. At its center are both the recognition of peoples' and communities' tenure rights to their territories and lands, including those from which they have been displaced to establish protected areas; and the recognition of ICCAs as one of IUCN's governance types.[5]

This has been informed largely by the gradual acknowledgment by governments, internationally and nationally, of the fundamental nature of the rights of indigenous peoples and traditional and local communities to their lands, territories and resources, usually as the culmination of lengthy struggles.[6] Another contributing factor for these new approaches is a growing recognition of the extent and nature of the relationship between local peoples and the nature and resources upon which they depend in areas designated as protected areas, including the acknowledgment that protected areas have been, for the most part, traditionally inhabited or used by people, including communities.[7]

The conflict between state-led conservation policies and communities often has roots in colonial times, when colonial governments 'set aside' large hunting and national parks for conservation.[8] This was largely done at the cost of displacing communities from territories they have traditionally occupied and depended upon on.

Similarly, inspired by the establishment of the United States' Yellowstone National Park and Yosemite National Park in the late nineteenth century, the proliferation of parks and protected areas in the twentieth century was largely informed by the view of parks as areas deprived of human activities, where local populations, including indigenous peoples, were perceived as a threat to nature.[9]

The establishment of protected areas has thus been marked by conflict and displacement.

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[5] See: IUCN. 2003a. The Durban Action Plan, Vth IUCN World Parks Congress, Durban, South Africa, 8-17 September 2003, Targets 8-10; and IUCN. 2003b. Recommendations, Vth IUCN World Parks Congress, Recommendation V.26; see also Stevens, S. (ed.). 2014. *Indigenous Peoples, National Parks, and Protected Areas: A New Paradigm Linking Conservation, Culture, and Rights*. The University of Arizona Press, Tucson, USA.

[6] For example, the emergence and implementation of India's Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Rights) Act 2006 (Forest Rights Act), which recognizes collective and individual rights to forests and forest resources of both 'tribal' and 'other traditional forest dwellers'. See Tatpati, M. (ed.) 2015. *Citizens' Report 2015: Community Forest Rights under the Forest Rights Act*. Pune, Bhubaneshwar and New Delhi: Kalpavriksh and Vasundhara, in collaboration with Oxfam India on behalf of Community Forest Rights Learning and Advocacy Process. Under international law, there is growing recognition of the rights of farmers, peasants, pastoralists and local communities, but they are not yet nearly as established as indigenous peoples' rights.

[7] Kothari, A., and R. Coonie. 2015. "Managing Resource Use and Development" in Worboys, G. L., M. Lockwood, A. Kothari, S. Feary and I. Pulsford. *Protected Area Governance and Management*. The Australia National University Press, Canberra, Australia.

[8] Adams, B. 2004. *Against Extinction: the history of conservation.* Earthscan, London.

[9] Poirier, R., and D. Ostergren. 2002. "Evicting People from Nature: Indigenous Land Rights and National Parks in Australia, Russia, and United States". *Natural Resources Journal* Vol. 42(2), Spring, pp. 331-351, available at: http://lawschool.unm.edu/nrj/volumes/42/2/05_poirier_ostergren_evicting.pdf.

Historically, a large number of people have been displaced from their homes or from the sources of their livelihoods by conservation efforts around the world.[10] It is estimated that at least 50 percent of protected areas worldwide created before 1992 had been established on lands traditionally occupied and used by indigenous peoples.[11]

Since the 1980s, largely as a result of these conflicts, the idea of protected areas as exclusionary spaces – although still influential – gave way to new ideas and approaches that articulate the concept of sustainable development and recognize the relationships between economic development and the environment and between poverty, wealth and nature.[12] For example, the final declaration of the 1982 IUCN World Parks Congress recognized that people are part of nature and that the economic, cultural and political contexts of protected areas matter. This declaration proposed actions to promote sustainable development and local support for protected areas, such as through participation in relevant decisions and, when compatible with protected area objectives, access to natural resource use.[13] In practical terms, however, 'participation' was by and large implemented through Integrated Conservation and Development Projects; it was translated into little to no participation in the governance of state-owned and -managed protected areas, recognition of tenure and other rights in protected areas, or recognition of ICCAs within or outside of protected areas.[14] Furthermore, many Integrated Conservation and Development Projects were managed and controlled in top-down manners and conservation and development elements were dealt with separately in the same locations.[15]

From the 1980s onwards, there was increasing documentation of communities' self-initiated conservation practices, which contributed to broader awareness and understanding of their tangible contributions to conservation.[16] Additionally, some conservation organizations – at least partly informed by common property theory[17] and spurred by evidence of the

[10] Colchester, M. 2003. *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation*. World Rainforest Movement and Forest Peoples Programme, Montevideo (Argentina) and Moreton-in-Marsh (UK); Chatty, D., and M. Colchester (eds.). 2003. *Conservation and Mobile Indigenous Peoples: displacement, forced settlement and sustainable development*. Berghahn Books, Oxford (UK); Brockington, D., and J. Igoe. 2006. "Eviction for Conservation: A Global Overview". *Conservation and Society* Vol. 4:424-70. Available at: http://www.conservationandsociety.org/text.asp?2006/4/3/424/49276.

[11] MacKay, F. 2002. *Addressing Past Wrongs – Indigenous Peoples and Protected Areas: The Right to Restitution of Lands and Resources*. Forest Peoples Programme, Moreton-in-Marsh. Available at: http://www.forestpeoples.org/topics/rights-land-natural-resources/publication/2010/addressing-past wrongs-–-indigenous-peoples-an; Stevens 2014.

[12] See RRI, 2015. *Protected Areas and the Land Rights of Indigenous Peoples and Local Communities: Current Issues and Future Agenda*. RRI, Washington, D.C., and references therein. See also the special issue of Policy Matters on Poverty, Wealth and Conservation, 2006. IUCN CEESP. Available at: http://cmsdata.iucn.org/downloads/pm4_1.pdf.

[13] Bali Declaration, 1982. World Congress on National Parks. Bali, Indonesia.

[14] Stevens 2014; RRI 2015.

[15] Borrini-Feyerabend, G., personal communication, 2015; Colchester, M. 1996. "Beyond 'participation': indigenous peoples, biological diversity conservation and protected area management". *Unasylva* No. 186, FAO, Rome; McShane, T. O., and M. P. Wells (eds.). 2004. *Getting Biodiversity Projects to Work: Towards More Effective Conservation and Development*. Columbia University Press, New York; Wilshusen, P. R., S. R. Brechin, C. L Fortwangler, and P. C. West. 2002. "Reinventing a Square Wheel: Critique of a Resurgent 'Protection Paradigm' in International Biodiversity Conservation," *Society and Natural Resources* Vol. 15:17-40.

[16] See, for example, Kothari, A., S. Suri and N. Singh. 1995. "People and protected areas: rethinking conservation in India". *The Ecologist*, Vol. 25(5): 188-194.

[17] See, for example, Ostrom, E. 1990. *Governing the Commons: The Evolution of Institutions for Collective*

significant spatial overlap between the territories of indigenous and other traditional peoples and high-biodiversity areas[18] – began to support community-based natural resource management.[19]

Meanwhile, through both international and national channels, indigenous peoples were gradually asserting and claiming their customary rights, including the rights to lands, territories and resources. Globally, the International Labor Organization adopted Convention 169 on Indigenous and Tribal Peoples (ILO 160) in 1989, establishing a legally binding international treaty that has since been ratified by 22 countries. In the 1980s, the UN also launched the negotiations that would later culminate in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly in 2007.

Specifically related to conservation law, the Convention on Biological Diversity (CBD, adopted in 1992) also called for the respect of traditional knowledge, innovations and practices[20] and acknowledged the customary use of biological resources compatible with conservation requirements with regard to both indigenous peoples and local communities.[21]

Although ILO 169 and UNDRIP concerned only the rights of indigenous peoples and not also those of local communities, there is room to argue that some recent international instruments mandate recognition of the rights of both indigenous peoples and other long-term, rural local communities.[22] This is the case, for example, the FAO's Voluntary Guidelines on the Responsible Governance of Tenure[23] and Guidelines on Small-scale Fisheries and more recent interpretation and definitions under the CBD.[24] For example, indigenous peoples and other communities with customary tenure systems are regarded specifically under Article 9 of the FAO's Voluntary Guidelines, which advises States to "provide appropriate recognition and protection of the legitimate tenure rights of indigenous peoples and other communities with customary tenure systems".[25]

At the national level, particularly in Latin America, indigenous peoples mobilized and formed alliances with other sectors of civil society in their efforts to implement democratic reforms in the late 1980s and early 1990s. As a result, several states in that region, including Brazil, Colombia, Guatemala and Peru, among others, formally recognized indigenous peoples'

Action. Cambridge University Press, Cambridge, UK, and New York, USA. 298 pp.

[18] Oviedo, G., and L. Maffi. 2000. *Indigenous and Traditional Peoples of the World and Ecoregion Conservation*. WWF International–Terralingua, Gland. Available at: www.assets.panda.org/downloads/EGinG200rep.pdf. In: RRI 2015.

[19] Western, D., and R.M. Wright (eds.). 1994. *Natural Connections: Perspective in Community Based Conservation*. Island Press, Washington, D.C.

[20] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD), Article 8(j).

[21] CBD, Article 10(c).

[22] Jonas, H., J. E. Makagon, and H. Shrumm. 2013. *The Living Convention: A compendium of internationally recognized rights that support the integrity and resilience of indigenous peoples' and local communities' territories and other social-ecological systems.* Natural Justice, South Africa.

[23] See, for example, FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, Articles 4, 8 and 9.

[24] See, for example, Lynch, O. 2011. *Mandating Recognition: International law and native/aboriginal title*. RRI, Washington, D.C. Available at: http://www.rightsandresources.org/documents/files/doc_2407.pdf.

[25] Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, Article 9.

tenure rights in constitutional and land law reforms.[26]

It was in this context – of the changing view of the relationship between people and nature, increased evidence of conservation of nature by communities, as well as important victories for global, regional and national indigenous peoples' movements – in which the World Parks Congress in Durban took place in 2003.

There, indigenous peoples' representatives made their voice heard with nearly 150 representatives presenting strong arguments to the Congress. They defined, for example, the creation of protected areas and the associated abrogation or curtailment of customary land and resource rights as a "form of cultural genocide" responsible for the "destruction of their livelihood(s)."[27] Importantly, in addition to denouncing the negative impacts of 'official conservation' and demand for accountability for violations of human and indigenous peoples' rights, they also proposed a new approach to conserving nature, capable of respecting cultural diversity and taking advantage of indigenous knowledge, skills and institutions.[28] This new approach included a new focus on *governance* of protected areas, which was for the first time clearly understood as a phenomenon distinct from *management*, involving more fundamental issues of rights, power and control. This emerging focus on governance opened the door for the recognition of territories and areas conserved by indigenous peoples and local communities as crucial for conservation.

The new approach was prominently reflected in both the Durban Accord and Action Plan[29] as well as other key outputs.[30] Soon thereafter, these were incorporated by the Parties to the CBD into the Programme of Work on Protected Areas[31] and other subsequent CBD Decisions.[32] The IUCN General Assembly continued to adopt additional supportive resolutions and recommendations at its quadrennial World Conservation Congresses.[33]

More than ten years after Durban, although the new understanding has been often quoted and adopted on paper by the IUCN, parties to the CBD and other relevant actors, much more work remains to be done in order to realize the envisioned shifts and reforms in practice. A recent study published by the Rights and Resources Initiative (RRI) analyzing the legislation of 21 high-biodiversity countries concludes that although there has been some progress since Durban, "national laws still fall far short of guaranteeing respect for customary rights in protected areas."[34] Stevens (2014) reached a similar conclusion in his analysis of the relationship between indigenous peoples, national parks, and protected areas,[35] as did two parallel reviews of legal and non-legal forms of recognition and support

[26] Yashar, D. J. 1998. "Contesting citizenship: Indigenous Movements and Democracy in Latin America". *Comparative Politics* Vol. 31(1), pp. 23-42.
[27] IUCN. 2003c. Indigenous Peoples Ad Hoc Working Group for the World Park Congress, Vth IUCN World Congress on Protected Areas, Durban, South Africa, 8-17 September 2003.
[28] Stevens 2014.
[29] See for example, IUCN 2003a, Targets 8, 9 and 10.
[30] See Stevens 2014, Table 2.1.
[31] CBD Decision VII/28 and (for example) Decisions
[32] For example, CBD Decisions IX/18, X/31, XI/14, and XI/24.
[33] For example, IUCN WCC Res. 5.094 (September 2012).
[34] RRI 2015, p. 18.
[35] Stevens 2014, chapter 12.

for ICCAs.[36]

Despite this disjuncture between agreed international law and policy and practice on the ground, the consensus in favor of the links between peoples' and communities' land rights and resource management systems continues to grow, as expressed recently in the outcomes of the sixth World Parks Congress, held in Australia in November 2014. In the Promise of Sydney, the main output of the Congress, delegates saw fit to replace the term 'protected areas' with 'protected and conserved areas', meaning that areas officially protected by the state should now be seen in tandem with areas voluntarily conserved by other actors in society, including ICCAs.[37] Delegates recommended to recognize and support "areas conserved by indigenous peoples, local communities" and stated that by recognizing "…collective rights and responsibilities of indigenous peoples and local communities to land, water, natural resource and culture, (they) will seek to redress and remedy past and continuing injustices."[38]

In summary, in the past decades, there has been increased recognition in law and policy of the links between indigenous peoples' and local communities' land rights and conservation; nevertheless, significant challenges remain at the level of implementation in order to realize these advances in practice.

2.2. Legal recognition of collective tenure rights and conservation outcomes – evidence from the literature

A growing body of empirical evidence, particularly in relation to forest use and governance, supports the central role the legal recognition of collective rights can play in underpinning conservation actions and outcomes. A recent study by the World Resources Institute (WRI) and RRI – drawing on the findings of 130 studies on the intersection of community forest rights, deforestation and forest health, and climate change – analyses the links between legal community forest rights, the extent of government protection of those rights and forest outcomes in 14 countries.[39] The study's findings confirm the positive relationship of strong legal rights of communities, both 'on the books' and in practice, and forest conditions and values such as carbon storage.

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[36] Kothari *et al.* 2012; Jonas, H., A. Kothari and H. Shrumm. 2012. *Legal and Institutional Aspects of Recognizing and Supporting Conservation by Indigenous Peoples and Local Communities: An analysis of international law, national legislation, judgments, and institutions as they interrelate with territories and areas conserved by indigenous peoples and local communities.* Natural Justice (Bangalore) and Kalpavriksh (Pune and Delhi). Notably, these two studies analyzed policies and legislation much broader than just those concerning protected areas.

[37] For an analysis of 'conserved areas', see: Jonas, H. D., V. Barbuto, H. C. Jonas, A. Kothari and F. Nelson. 2014. "New Steps of Change: Looking beyond protected areas to consider other effective area-based conservation measures". *PARKS* Vol. 20.2: 111-128.

[38] IUCN World Parks Congress. 2014. The Promise of Sydney: "Our Vision". Available at: http://worldparkscongress.org/about/promise_of_sydney_vision.html. Other relevant outcomes of the World Park Congress included, among others, Recommendations 3, 5 and 7 of the stream on indigenous peoples and traditional knowledge and culture.

[39] Stevens, C., R. Winterbottom, J. Springer, and K. Reytar. 2014. *Securing Rights, Combating Climate Change. How Strengthening Community Forest Rights help Combating Climate Change.* WRI and RRI, Washington, D.C. Available at: http://www.wri.org/securingrights.

Other evidence shows that sustainable use areas and indigenous lands have avoided more forest loss from clearing, fire, and other forces than have strictly protected areas, both globally and in the Amazon.[40] For example, a study comparing effectiveness of different types of protected areas and reduction of forest fires showed that while strict protected areas and multiple use protected areas were effective in reducing deforestation, indigenous areas had a substantially larger impact on mitigating fires.[41] In Latin America, indigenous lands achieved on average at least 16 percent better results than protected areas under all categories.[42] In Asia and Africa, the results also reinforce the linkage between the participation of local people in forest governance, conservation of biodiversity, and forest resources that improve livelihoods.[43] Despite these clear benefits, it can also be observed that community conservation rarely, if ever, receives the scale of resources at the disposal of government agencies for protected areas.[44]

Using a varied set of data, Ostrom and Nagendra (2006) concluded that "community management, under direct ownership, government concessions, or other long-term co-management arrangements, has the capacity to be as effective or, under certain conditions, more effective than public, strictly protected areas".[45]

Particularly in the case of Latin America, additional literature supports the correlation of community rights, and particularly those of indigenous peoples, with conservation outcomes. Studies analyzing deforestation in the Brazilian Amazon suggest that legally recognized indigenous lands are more effective than strictly protected and sustainable use areas at preventing deforestation in areas with high deforestation pressures.[46] Similarly, a study in Bolivia found that in an area comprised of different conservation areas, including the Tacana Indigenous Territory, the lowest percentage of deforestation (only 0.5 percent per year) occurred within the legally recognized Territory.[47] In Mexico, largely as a result of

[40] Nelson, A., and K. M. Chomitz. 2011. "Effectiveness of Strict vs. Multiple Use Protected Areas in Reducing Tropical Forest Fires: A Global Analysis Using Matching Methods". *PLoS ONE* Vol. 6(8), pp. 1-14; see also Pfaff, A., J. Robalino, E. Lima, C. Sandoval, and L. D. Herrera. 2013. "Governance, Location and Avoided Deforestation from Protected Areas: Greater Restrictions Can Have Lower Impact, Due to Differences in Location". *World Development* Vol. 55, pp. 7-20; World Bank. 2013. *Crossing Paths: Role of Protected Areas and Road Investments in Brazilian Amazon Deforestation* (Economic Sector Report). World Bank, Washington, D.C.

[41] Nelson and Chomitz 2011.

[42] Ibid; Pfaff *et al.* 2013; World Bank 2013.

[43] Ibid.

[44] Borrini-Feyerabend, G., personal communication, 2015.

[45] Ostrom, E., and H. Nagendra. 2006. Insights on linking forests, trees, and people from the air, on the ground, and in the laboratory. *Proceedings of the National Academy of Sciences of the United States of America* Vol. 103(51), pp. 19224-19231. In: Sandbrook, C., F. Nelson, W. M. Adams, and A. Agrawal. 2010. "Carbon, forests and the REDD paradox". *Cambridge Journals Online*, *Oryx* Vol. 44(3), pp. 330-334.

[46] Nolte, C., A. Agrawal, K. M. Silvius, and B. S. Soares-Filho. 2013. "Governance regime and location influence avoided deforestation success of protected areas in the Brazilian Amazon". *Proceedings of the National Academy of Sciences of the United States of America* Vol. 110(13), pp. 4956-4961; Soares-Filho, B., P. Moutinho, D. Nepstad, A. Anderson, H. Rodrigues, R. Garcia, L. Dietzsch, F. Merry, M. Bowman, L. Hissa, R. Silvestrini, and C. Maretti. 2010. "Role of Brazilian Amazon protected areas in climate change mitigation". *Proceedings of the National Academy of Sciences of the United States of America* Vol. 107 (24), pp 10821-10826.

[47] Painter, L., T. M. Siles, A. Reinaga, and R. B. Wallace. 2013. *Escenarios de deforestación en el Gran Paisaje Madidi-Tambopata*. Consejo Indígena del Pueblo Tacana (CIPTA) y Wildlife Conservation Society (WCS), La Paz. Available at:

sustainable local forest management regimes, about 80 percent of the country's total remaining forest area is under communal local ownership.[48]

In Asia, there are similar findings. Studies suggest that in Nepal, local forest regimes such as leasehold or community forests are associated with forest recovery, whereas centralized government forests have continued to deteriorate.[49] In Africa, Blomley *et al*. (2008) compared locally managed or co-managed forests with open access or government-managed forests in Tanzania and concluded that participatory forest management contributed to sustainable forest management and that forest conditions were typically declining in land administered only by government agencies with no community involvement.[50]

Beyond forests, although less robust, there is also some evidence of the positive connection between conservation and the recognition of collective tenure rights. In the case of wildlife conservation, considering both the southern [51] and eastern [52] African experiences, publications suggest that community rights to land and resources support locally driven conservation outcomes.

Similarly, in the case of marine ecosystem and fisheries, a review of 130 co-managed fisheries around the world found that community or individual quotas assigned to distinct groups of people and territorial user rights for fishing were important for the success of the

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http://www.wcsbolivia.org/DesktopModules/Bring2mind/DMX/Download.aspx?EntryId=16294&PortalId=14&DownloadMethod=attachment.

[48] Bray, D. B., L. Merino-Pérez, and D. Barry. 2005. *The Community Forests of Mexico: Managing for Sustainable Landscapes*. University of Texas Press, Austin, USA. 390 pp; Bray, D. B., L. Merino-Pérez, P. Negreros-Castillo, G. Segura-Warnholtz, J. M. Torres-Rojo, and H. F. M. Vester. 2003. "Mexico's community-managed forests as a global model for sustainable landscapes". *Conservation Biology* Vol. 17(3), pp. 672-677.

[49] Nagendra, H. 2007. "Drivers of reforestation in human-dominated forests". *Proceedings of the National Academy of Sciences of the United States of America* Vol. 104(39), pp. 15218-15223.

[50] Blomley, T., K. Pfliegner, J. Isango, E. Zahabu, A. Ahrends, and N. Burgess. 2008. "Seeing the wood for the trees: towards an objective assessment of the impact of participatory forest management on forest condition in Tanzania". *Oryx* Vol. 42(3), pp. 380-391.

[51] See, for example, the case of Community Conservancies in Namibia in Naidoo, R., L. C. Weaver, M. de Longcamp, and P. du Plessis. 2011. Namibia's community-based natural resource management programme: an unrecognized payments for ecosystem services scheme. *Environmental Conservation* Vol. 38(4), pp. 445-453; Carrington, D. (2012, 23 October). "How Namibia turned poachers into gamekeepers and saved rare wildlife". *CNN Eye On Series*. Available at: http://edition.cnn.com/SPECIALS/eye.on/; Conniff, R. (2011, 12 May). "An African Success: In Namibia, The People and Wildlife Coexist". *Yale Environment 360.* Available at: http://e360.yale.edu/feature/an_african_success_in_namibia_the_people_and_wildlife_coexist/240/; Communal Areas Management Program for Indigenous Resources – CAMPIFIRE Community in Zimbabwe, presented in Anderson, T., and Regan, S. (2011, 6 June). "Shoot an elephant, save a community. By assigning economic value to animals, hunting preserves more wildlife than it kills". *Property and Environment Research Center*. Available at: http://www.perc.org/articles/shoot-elephant-save-community; Trusts Leases from land boards in Botswana, presented in Agarwal, S., and M. S. Freudenberger. 2013. *Tenure, governance, and natural resource management*. *Contributions to USAID development objectives* (*USAID Issue Paper*). U.S. Agency for International Development, Washington, D.C.

[52] See, for example, the case of Wildlife Management Areas in Tanzania in WWF. 2014. *Tanzania's Wildlife Management Areas: A 2012 Status Report.* World Wide Fund for Nature, Dar es Salaam; and conservancies in Kenya in Glew, L., M. D. Hudson, and P. E. Osborne. 2010. *Evaluating the effectiveness of community-based conservation in northern Kenya: A report to The Nature Conservancy*. Centre for Environmental Sciences, University of Southampton, Southampton.

fisheries (measured in terms of social, economic and ecological factors).[53] Another study also concluded that a crucial factor for the success of customary marine tenure in the Pacific is its formal recognition by various Pacific Island governments. In particular, it noted that "where the ability to exclude outsiders from ones' fishing grounds is absent or weak, as noted earlier, so is the incentive to conserve ones' marine resources because outsiders can expropriate the benefits."[54]

These studies, among others, underscore the central importance of the recognition of collective tenure for the effectiveness of local conservation measures. However, it is not the only important factor; others might further support or even counteract the conservation of nature by communities. For example, key enabling or inhibiting factors can include (among others) technical and financial resources available for management, strength and quality of leadership and agency within the community, the size and composition of local groups, and the level of external pressure on resources.[55]

In conclusion, the literature presents increasingly robust evidence that the recognition of collective tenure rights is a critical enabling factor for communities to achieve positive conservation outcomes. This is because secure tenure enables local communities to make and enforce rules governing resource use, including restricting external resource exploitation, as well as to capture values from sustainable use and harvesting of forests, wildlife, fisheries and other resources, which can in turn create incentives for stewardship. It also helps prevent the diversion of ecosystems for other purposes such as dams, industrial complexes or urbanization, which may be sought or proposed by external actors without the free, prior and informed consent of the peoples and communities they affect.

2.3. Status and overlap of collective tenure rights and ICCAs

The three defining characteristics of ICCAs are closely related to a community's ability to effectively govern, control, manage and conserve a particular physical area and suite of natural resources. In a legal sense, it is largely tenure rights that determine and shape how communities are able to exercise such control. For centuries, if not millennia, these rights have derived from customary systems of law, which are still the main source of law regulating the lives of a considerable percentage of the world's population. As of 2008, at least 1.5 billion people around the world continued to regulate their land relations through customary systems.[56]

These systems also cover large areas of land. Notwithstanding the methodological challenges, Alden Wily (2011) estimates – based on different land typology and use – that worldwide, communities either own, control, or could claim up to 6.8 billion hectares or about 52 percent of the global land area.[57] Considering Africa alone, in a revised estimate of

[53] Gutierrez, N., R. Hilborn, and O. Defeo. 2012. "Leadership, social capital, and incentives promote successful fisheries". (Letter) *Nature* Vol. 470(7334), pp. 386-389.
[54] Johannes, R. E. 2002. "The Renaissance of Community-Based Marine Resource Management in Oceania". *Ann. Rev. Ecol. Syst*. Vol. 33:317–40.
[55] Kothari *et al.* 2012; Jonas *et al.* 2012.
[56] Commission of Legal Empowerment of the Poor. 2008. *Making the Law Work for Everyone*. New York. In: Alden Wily, L. 2011b. *The tragedy of public lands: the fate of the commons under global commercial pressure.* International Land Coalition and CIRAD, Rome.
[57] Alden Wily 2011b, Executive Summary.

the area claimed by communities by the same author, the potential area of community domain is about 2 billion hectares or 68.5 percent of the total continental land area, excluding major water bodies.[58] Other regions also have large areas of formally unrecognized community land claims. For example, a 2013 national estimate by the Indigenous Peoples Alliance of the Archipelago in Indonesia contended that there are contiguous (forest and non-forest) natural resource areas in approximately 40 million hectares (mha) of customary land in *Adat* (customary) villages,[59] comprising about 43 percent of Indonesia's total forest area.[60] Elsewhere, it is estimated that Indigenous territories encompass up to 22 percent of the world's land surface and coincide with areas comprising 80 percent of the world's biodiversity.[61]

Although doubts remain about the exact extent of the area claimed by communities, it is clear that these areas are vastly larger than what is formally recognized by state governments. It is estimated that only about 17.5 percent of the land potentially claimed by communities in Africa have been legally secured as community domain.[62] RRI estimates that only about 15.5 percent of the global forest area is either owned by or designated for indigenous peoples and local communities.[63] This number is as low as 6 percent in Africa, 33 percent in Asia, and 58 percent in Latin America.[64]

These findings, among others, have significant implications for the understanding of community contributions to conservation. In theory, it is likely that across all potential community domains identified by Alden Wily (*forthcoming*), peoples and communities maintain *de facto* hundreds of thousands of territories, areas, institutions and practices that embody the three characteristics of ICCAs, even if they themselves do not identify them as such.

There are increasing efforts to document the number and extent of ICCAs globally,[65] however, there are many challenges in doing so, including the prevalence of oral traditions rather than written documentation amongst communities, limited awareness among certain governments as well as communities of ICCAs, and the evolving concept and definition of ICCAs themselves.[66] Despite these challenges, the most comprehensive global estimate to

[58] This data is as of April 2015 and does not include about 11 percent of African countries, and reflects poor to mixed quality data for another 33 percent of African countries. Alden Wily, L., forthcoming. *The Fate of Custom and Commons in Africa: Unfinished Business*. In: Kaimeri-Obote, P., and C. Odote (eds.). *Essays in Honour of Professor HWO Okoth Ogendo: Thoughts on Land Law in Theory and Practice*, CASELAP, Nairobi.

[59] Setra, M. The Indigenous Peoples' Alliance of the Archipelagos. Personal communication, 2013. In: RRI. 2014. *What Future for Reform? Progress and slowdown in forest tenure reform since 2002*. RRI, Washington, D.C.

[60] 93,062 million hectares (mha), FAO estimate, 2012.

[61] Sobrevila, C. 2008. *The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners*. World Bank, Washington, D.C.

[62] Alden Wily, forthcoming.

[63] RRI. 2014. *What Future for Reform? Progress and slowdown in forest tenure reform since 2002*. RRI, Washington, D.C., p. 16.

[64] Ibid, p. 18.

[65] Kothari, A., and A. Neumann. 2013. *Number and Extent of Indigenous Peoples and Local Community Conserved Territories and Areas (ICCAs) in the World*. Unpublished table, updated from Kothari *et al.* 2012; ICCA Global Registry, UNEP-WCMC. Available at: www.iccaregistry.org; Kothari, A. 2006. "Community Conserved Areas: Towards Ecological and Livelihood Security". *Parks* 16(1), pp. 3-13.

[66] Kothari and Neumann 2013.

date contends that ICCAs may number far more than the current officially designated protected areas (around 130,000, most of which are governed by government agencies) and are estimated to equal or exceed the area covered by such protected areas (which is nearly 13 percent of Earth's land surface).[67]

If determining the exact extent of the area covered by community lands and ICCAs is challenging, it is even more difficult to understand where exactly they overlap. In the absence of available data to estimate the area of community lands (both claimed and recognized) that can be classified as ICCAs, it is suggested that their overlap be considered in terms of the following proposed categories:

a. Territories and areas **under community control** but not legally recognized as such;
b. Territories and areas **legally recognized** under **collective tenure**;
c. ***De facto* ICCAs** without legal recognition for their conservation values; and
d. **Legally recognized ICCAs** (as understood by the characteristics in Box 1 above, not necessarily using term 'ICCA' as such).

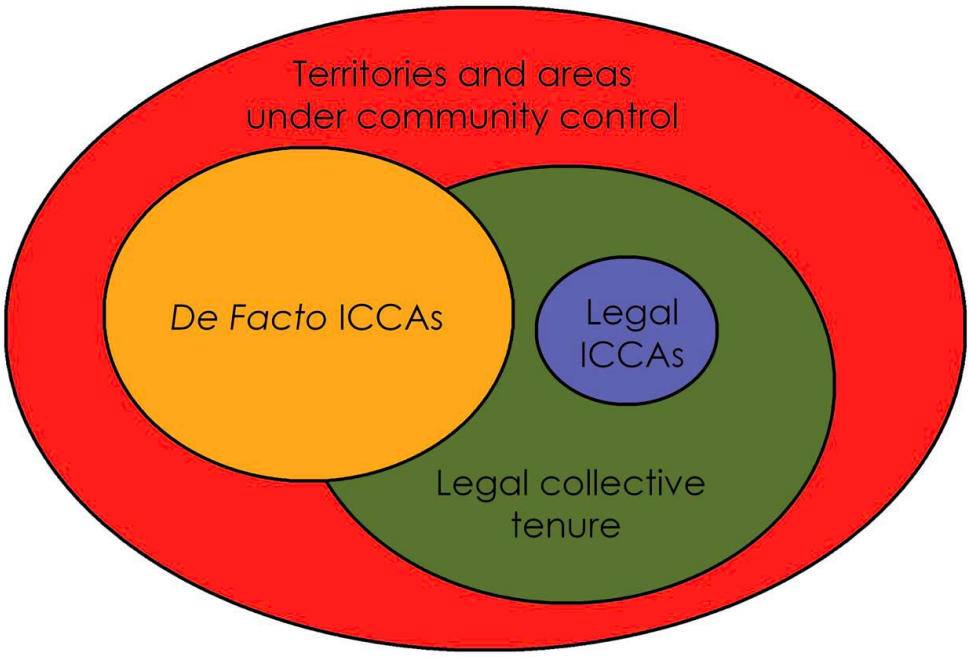

Figure 1: Four proposed categories of community lands and ICCAs, and their overlap

Category A is the overarching category, as the other three proposed are likely to be contained in areas that are at minimum *de facto* controlled or claimed by communities.[68] These include, for example, *Adat* forests in Indonesia and collective community land in the Democratic Republic of the Congo, which are not legally recognized.

[67] Kothari and Neumann 2013; Kothari, A. 2014. "Indigenous peoples' and local community conserved territories and areas". *Oryx* Vol. 49(1), pp. 13-14.
[68] It is important to note, however, that historically communities have had rights recognized over land they did not traditionally occupy or claim. This has happened, for example, in the process of colonizing the United States' East and the Brazilian Atlantic Forests.

Category B comprises the area customarily controlled by communities that has been legally recognized. Such areas include, for example, indigenous peoples' territories and lands recognized throughout Latin America and in the Philippines and Australia, and community forests in Liberia, Cameroon and Gabon. As discussed above, governments have legally recognized collective tenure over a much smaller area than the total area controlled or claimed by communities.

Overlapping both of the above, indigenous peoples and local communities have *de facto* ICCAs (Category C), which are referred to locally by a myriad of different names[69] but embody the three defining characteristics of ICCAs (strong relationship to a well-defined territory, *de facto* community governance and conservation outcomes). In some cases, ICCAs may comprise the totality of the lands controlled or legally recognized under collective tenure (for example, isolated Indigenous Territories in the Amazon) and in other cases, they may only comprise a fraction of such (for example, sacred sites or commonly managed areas).

Some countries have specific legal frameworks recognizing the conservation and other contributions of territories and areas conserved by peoples and communities (Category D). In most if not all cases, this recognition builds on a general legal recognition of territories and areas controlled by indigenous peoples and local communities. As discussed in more detail in Sections 3 and 4 below, this is the case of *Ejidos* and *Comunidades* voluntarily conserved areas in Mexico, which build on tenure rights recognition of *Ejidos* and *Comunidades.*

Typically in these arrangements, communities agree to share some of their recognized rights (such as the right to manage or exclude) with the governments concerned in exchange for capacity or financial assistance or greater protection against third parties' interest in their land. The overlaps between the four categories described above can be given effect through a wide variety of legal frameworks and *de facto* local structures.

In conclusion, greater understanding of the different scenarios in which collective tenure rights and ICCAs relate to each other in turn enables an evaluation of the relationship between the legal recognition of peoples' and communities' collective tenure rights and the survival and success of ICCAs. With these four categories in mind, the following section will analyze five country case studies (Australia, Cameroon, Mexico, Philippines and Tanzania), from which important lessons to maintain and promote ICCAs across the globe can be derived.

[69] For examples of local names, see: Corrigan, C., and T. Hay-Edie. 2013. *A toolkit to support conservation by indigenous peoples and local communities: building capacity and sharing knowledge for indigenous peoples' and community conserved territories and areas (ICCAs)*. UNEP-WCMC, Cambridge, UK, pp. 13.

3. Legal Recognition of Collective Tenure Rights and ICCAs: Case Studies

This section presents the results of a case study analysis examining the relationship between the legal recognition of collective customary tenure rights and ICCAs in the following five countries: **Australia, Cameroon, Mexico, Philippines and Tanzania** (see Table 1 and Annexes 1A-1E). The case studies encompass diverse legal arrangements as well as diverse geographic and social-cultural circumstances. In all of these countries except Cameroon, *de facto* ICCAs exist on a fairly large scale.

3.1. Methods and key terms

The objective of the case studies is to understand **if the selected countries' legal systems recognize either collective tenure rights in general or ICCAs in particular** (i.e., the defining characteristics of ICCAs), **and how the two are related.** To do so**,** the analysis is framed around the questions set out in Box 2 below.

1. *Are collective tenure rights legally recognized? If yes:*
    a. *How strong is the recognized 'bundle of rights'?*
    b. *To which resources do communities have recognized rights?*
    c. *Are communities' rights to self-governance recognized?*
    d. *Has the recognition been implemented and to what extent (in hectares)?*
    e. *Is there evidence that de facto ICCAs have been established within the area covered by recognized collective tenure rights?*

2. *Are ICCAs legally recognized for their conservation values? If yes:*
    a. *Does that build on identified recognition of collective tenure rights?*
    b. *Has the recognition been desired and felt by communities and to what extent (in hectares)?*
    c. *Is there additional technical and financial assistance for communities opting for recognition of ICCAs (by their local names)?*
    d. *Are restrictions for mining, oil and other extractive activities associated with recognition of ICCAs for their conservation values?*

Box 2: Questions used in the case study analysis

Before presenting the results of the case studies, it is important to explain some key terms that inform this framework.[70]

[70] Discussion on key terms based on Almeida, F. 2015. *Legal Options to Secure Community-Based Property Rights.* Paper presented at 2015 World Bank Conference on Land and Poverty.

The 'bundle of rights' referenced in Box 2 is based on classic common property scholarship,[71] where property is understood as a bundle of tenure rights. For the purpose of this analysis, the bundle includes seven rights: Access, Withdrawal, Management, Exclusion, and Alienation; as well as those of Duration and the Right to Due Process and Compensation (see Box 3).[72]

- **Access**: the right of a community and its members to enter an area
- **Withdrawal**: the right to benefit from an area's products for subsistence or commercial purposes
- **Management**: the right to regulate and make decisions about the forest resources and territories for which the actor(s) have recognized access and withdrawal rights
- **Exclusion**: the ability to refuse another individual, group, or entity access to and use of a particular resource
- **Alienation**: the right to alienate one's property and to transfer one's rights to another entity
- **Duration**: measure the permanence of allocated rights
- **Due process and compensation**: the right to challenge another party's efforts to extinguish, alienate, or revoke one or more rights; if such a challenge fails, rights-holders are entitled to compensation for lost resources

Box 3: Bundle of seven tenure rights

In most cases, peoples' and communities' relationships with their traditional lands and territories are a core part of their identities and spirituality and deeply rooted in their cultures and histories.[73] Ideally, all legal instruments recognizing collective tenure rights would corroborate and support this relationship, though this is often not the case in reality. Some legislation has a broad reach and recognizes rights over all natural resources within the land formally allocated to communities (normally restricted to above-soil rights). In contrast, others have a narrower scope and recognize only a particular type of resource such as forests, waters or pastures; they may only recognize the rights to the land under the forest, not even the trees themselves. The latter approach in particular can greatly undermine the security of community rights. As such, the present analysis also evaluates over what resources the law recognizes rights, including above-soil, sub-soil and water resources.

[71] Schlager, E., and E. Ostrom. 1992. "Property rights regimes and natural resources: A conceptual analysis". *Land Economics* Vol. 68 (3), pp. 249–462; and Barry, D., and R. Meinzen-Dick. 2008. *The Invisible Map: Community tenure rights*. Presented at the 12th Biennial Conference of the International Association for the Study of Commons, Cheltenham (England).

[72] The evaluation of the bundle of rights presented here draws upon RRI's legal database when data is available. When it is not, new data was collected. See http://www.rightsandresources.org/resources/tenure-data/unpacking-the-bundle/. See also: RRI. 2012. *What Rights? A Comparative Analysis of Developing Countries' National Legislation on Community and Indigenous Peoples' Forest Tenure Rights*. RRI, Washington, D.C; and RRI 2014.

[73] United Nations Permanent Forum on Indigenous Issues. Indigenous Peoples Lands and Natural Resources. Accessed 3 July, 2014: http://www.un.org/esa/socdev/unpfii/documents/6_session_factsheet1.pdf.

Governance refers to who has the authority and responsibility and who can be held accountable for key decisions related to land and natural resources.[74] The present analysis considers how formal governance structures imposed by the law contrast with self-defined (by custom or internal agreement) governance systems. This is especially important to consider as 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.[75]

Furthermore, data was collected on the area under which identified legal recognition of collective tenure has been implemented. Official data was considered where available; otherwise, secondary sources were considered. The case studies have also been informed by available information (mostly secondary sources) on the quality of implementation as well as evidence on *de facto* ICCAs within areas under recognized collective tenure rights.

It is also important to note that there are other factors and types of rights that are critical to ICCAs, for example, the recognition of indigenous peoples' and communities' economic, social and cultural rights.[76] Nevertheless, as highlighted elsewhere, the specific focus of this analysis is to understand how collective tenure recognition in general contributes to the success and legal recognition of ICCAs.

Finally, 'legal recognition of ICCAs' is understood here as the legal recognition of the characteristics comprising ICCAs and not necessarily of the term itself; indeed, none of the identified forms of legal recognition of ICCAs have used that specific term.[77]

[74] For example, Graham, Amos and Plumptre (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." Graham, J., B. Amos and T. Plumptre. 2003. *Governance principles for protected areas in the 21st century, a discussion paper*. Institute of Governance in collaboration with Parks Canada and Canadian International Development Agency. Ottawa. Cited in Borrini-Feyerabend *et al.*, 2013.

[75] See, for example, Cotula, L., C. Toulmin, and C. Hesse. 2004. *Land tenure and administration in Africa: lessons of experience and emerging issues*. IIED, London.

[76] See, for example, Stevens, S. 2010. "Implementing the UN Declaration on the Rights of Indigenous Peoples and International Human Rights Law through the Recognition of ICCAs." *Policy Matters* 17: 181–94, and Stevens, S. 2013. "Defending and Strengthening Sherpa ICCAs and Rights in Sagarmatha (Mt. Everest) National Park, Nepal." In Jonas, H. C., H. D. Jonas and S. M. Subramanian (eds.). *The Right to Responsibility*: *Resisting and Engaging Development, Conservation and the Law in Asia*. Natural Justice and United Nations University – Institute of Advanced Studies.

[77] The generic term "ICCA" is used here only for communication purposes – particularly at the international level – and is not meant as a label or to subsume or replace the myriad of local terms used by the relevant indigenous peoples and local communities.

3.2. Key findings

Table 1 below summarizes the findings from the five country case studies. The first section considers the existence and form of legal recognition of indigenous peoples' and local communities' rights, including collective tenure (Categories A and B). The second section considers the existence and form of legal recognition of ICCAs, or their defining characteristics (Categories C and D).

Table 1: Overview of findings from the 5 case studies

		Australia	Cameroon	Mexico	Philippines	Tanzania
Legal recognition of peoples' and communities' rights (including collective tenure)	Existence of legal recognition	✓	Weak	✓	✓	✓
	Bundle of rights	Strong*	Weak	Strong	Strong	Strong
	Resource coverage	Above-soil, including water*	Specific to forest and wildlife	Above-soil, including water	Sub- and above-soil, including water***	Above-soil, including water for subsistence
	Right to self-governance	✓	X	✓	✓	✓
	Implementation of recognition of indigenous / community rights	✓	✓	✓	✓	✓
Legal recognition of ICCAs (by local names, fulfilling the 3 defining characteristics)	Evidence of *de facto* ICCAs	✓	Weak	✓	✓	✓
	Existence of legal recognition of ICCAs	✓	X	✓	X (in progress) ****	✓
	ICCA recognition builds on indigenous / community rights	✓	Not applicable	✓	Not applicable	✓
	Implementation of ICCA recognition	✓	Not applicable	Weak	Not applicable	✓
	Technical or financial benefits from ICCA recognition	✓	Not applicable	✓	Not applicable	✓
	Additional protection against resource exploitation in indigenous / community land	Partial**	Not applicable	✓	Not applicable	X

* Considering the best-case scenario; varies in practice. The Native Title Act (Cwlth) mandates consideration of rights and interests of other stakeholders with claims to the area in question.

** Mining can be undertaken on a portion of the Indigenous Protected Area (IPA), as long as the proposed activities are compatible with the conservation objectives of the protected area.

*** There are legal controversies around mining rights in Ancestral Domains: although the law recognizing Ancestral Domains (Indigenous Peoples' Rights Act of 1997, IPRA) establishes that indigenous peoples have sub-soil rights in their territories, the Philippine Mining Act of 1995 contradicts IPRA and explicitly declares that all mineral resources in public and private lands within the territory and exclusive economic zone of the Republic of the Philippines are owned by the State.

**** Since 2012, indigenous peoples' organizations, NGOs, government agencies and major donors have supported the pilot recognition of ICCAs in conjunction with legal recognition of Ancestral Domains. It is expected that this *de facto* recognition will be enshrined in law if and when a draft bill on ICCAs (currently being developed) is adopted.

The national legal systems recognize the rights of peoples and communities to their lands and territories in all of the countries where ICCAs exist *de facto* on a large scale. In Australia, rights are recognized nationally under Native Title Claims and many other subnational arrangements; in Mexico, under *Ejidos* and *Comunidades* Lands; in the Philippines, under Ancestral Domains; and in Tanzania, under Village Lands. Each of these frameworks recognizes a strong 'bundle' of rights (see Section 3.1. above) and the right of communities to self-governance.

Cameroon is the only exception of the five countries. Although there are legal frameworks granting communities some forest and wildlife resource rights through Community Forests and Community Managed Hunting Zones, under these agreements, only select rights from the 'bundle' are recognized and the state remains the primary decision-maker.

In terms of the types of resources covered by identified legal recognition of collective tenure rights, the Ancestral Domain in the Philippines is the only form of legal recognition that includes sub- and above-soil rights[78] as well as water rights. Australia, Mexico and Tanzania do not recognize sub-soil rights, though do recognize the right to water; in Tanzania, the latter right is limited only to subsistence needs.

Except in Cameroon, communities can govern their legally recognized lands with a high degree of freedom. It is thus possible to infer that, in practice, several hundred *de facto* ICCAs are located within areas governed by identified legal frameworks for collective tenure. This may be because conservation is achieved through traditional management practices or because the area is conserved for religious or spiritual purposes. For example, in the Philippines, regardless of whether or not they are recognized as ICCAs, it is estimated that between 60 and 65 percent (or roughly 4.5 mha) of the Philippines' 6.8 mha of remaining natural forests are within ancestral domains.[79]

Of the five countries analyzed, three (Australia, Mexico and Tanzania) have specific legal frameworks that recognize their own national concepts that generally fulfill the characteristics of ICCAs, though without using that terminology. In Australia, Aboriginal and Torres Strait Islanders can voluntarily include part of their estates in the National Reserve System by establishing Indigenous Protected Areas (IPAs). IPAs are created by agreement between the traditional owners and the Commonwealth or State or Territorial governments.

In Mexico, the General Law of Ecological Balance and Environment Protection (LGEEPA) establishes that the Mexican protected area system includes voluntary conservation areas,

[78] There are legal controversies regarding mining rights in Ancestral Domains. The Indigenous Peoples' Rights Act (IPRA) of 1997, which recognizes Ancestral Domains (Republic of the Philippines. 1997. *Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)*, Metro Manila, Philippines), establishes that indigenous peoples have sub-soil rights in their ancestral domains. However, the Philippine Mining Act of 1995 (Republic of the Philippines. 1995. *Republic Act No. 7942 (The Philippine Mining Act of 1995)*, Metro Manila, Philippines) contradicts IPRA and explicitly declares that all mineral resources in public and private lands within the territory and exclusive economic zone of the Republic of the Philippines are owned by the State.

[79] Philippine Association for Intercultural Development (PAFID). 2011. In: Pedragosa, S. 2012. *An Analysis of International Law, National Legislation, Judgments, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: The Philippines (Report No. 16)*. Natural Justice (Bangalore) and Kalpavriksh (Pune and Delhi). Available at: http://www.iccaconsortium.org/wp-content/uploads/images/stories/Database/legalreviewspdfs/philippines_lr.pdf.

which can be established at the request of indigenous peoples, social organizations, and other landowners. These areas can be established within *Ejidos* or *Comunidades* lands, following the agreement of the relevant *Ejido* or *Comunidade* assembly and subsequent certification by the Environment and Natural Resources Secretary.[80] Furthermore, *Ejidos* and *Comunidades* can also establish Wildlife Management Units (UMAs in Spanish),[81] one of which is:

> "A unit in the official scheme of micro-territorial planning that allows diversification of the production of goods and services from wildlife, while minimizing impact on the ecosystem and biological resources. The main objective of an UMA is the sustainable management and production of specific animal or plant resources for subsistence, commerce, hunting, tourism, academic research or solely for conservation goals."[82]

In Tanzania, under the Village Land Act (1999) and Forest Act (2002), communities can establish Village Land Forest Reserves (VLFRs), which are managed by villages, and Community Forest Reserves (CFRs), which are managed by a sub-group of people within a village. Communities can also establish Wildlife Management Areas (WMAs). According to the Wildlife Conservation Act, WMAs can be established in areas outside of state protected areas that are used by local community members and within the village land. The village council must apply to the Minister responsible for wildlife, who may then declare the area to be a WMA in the respective village land set aside for community-based wildlife conservation.[83]

In all three cases (Australia, Mexico and Tanzania), specific legal recognition of community-determined and voluntarily conserved territories and areas builds on previous broader recognition of collective tenure rights. In Australia, only Aboriginal groups from estates already recognized can sign agreements with the government to establish IPAs. In Mexico and Tanzania, ICCAs are a fraction of the legally recognized community areas, where the communities themselves decide to allocate particular areas to conservation and apply for official recognition of their efforts (for example, through a certification or approval process).

IPAs have been widely implemented in Australia and cover a significant proportion of lands under Native Titles – about one fourth of the total area under Aboriginal and Torres Strait Islanders' estate.[84] In Tanzania, as of 2009, the government estimated that about 18 percent

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[80] United Mexican States. 1988. *General Law of Ecological Balance and Environment Protection*, Mexico, D.F., Mexico, Articles 46(XI), 55 BIS, 74 and 77 BIS.

[81] United Mexican States. 2000 as amended in 2015. *The General Law on Wildlife*, Mexico, D.F., Mexico, Article 9.

[82] Camacho, I., C. del Campo, and G. Martin. n.d. *Community Conserved Areas in Northern Mesoamerica: A Review of Status and Needs*. p. 26. Available at: http://cmsdata.iucn.org/downloads/mesoamerica_cca_study.pdf.

[83] The United Republic of Tanzania. 2009. *The Wildlife Conservation Act (No. 5 of 2009)*, Dar es Salaam, Tanzania, Sections 31 and 32.

[84] Native title covers a total area of about 197 mha and Indigenous Protected Areas cover just over 48 mha across Australia. See Commonwealth of Australia. 2013-2014. *Part 5: National Native Title Tribunal Report (2013-2014 Annual Report)*, Federal Court of Australia, Sydney, Australia. Available at: http://www.federalcourt.gov.au/publications/annual-reports/2013-14/part-5 and http://www.environment.gov.au/indigenous/ipa/. It is important to note that IPAs may also be established in areas recognized under other forms of legal recognition available sub-nationally.

of village forestland was classified as reserves.[85] On the other hand, in Mexico, implementation of *Ejidos* and *Comunidades* voluntarily conserved areas has been modest so far, covering less than 0.002 percent of *Ejido* and *Comunidades* lands.

Effective implementation of the legal recognition of ICCAs can be attributed to some degree to additional forms of support received by communities for their conservation efforts.[86] In Australia, the IPA program has successfully provided communities with technical and financial resources to establish and maintain their IPAs.[87] In Tanzania, when communities declare part of their lands to be either VLFRs or CFRs, they increase their legal control over forest resources. As a result of that legal designation, the village retains 100 percent of timber revenue and can also set its own license fees. Similarly, when communities declare part of their lands to be WMAs, two important conditions change: 1) the village has control over whether or not there will be any hunting in the WMA; and 2) the village retains a significant portion of the revenue from commercial trophy hunting.

In contrast, in Mexico, several of the certified *Comunidades* and *Ejidos* voluntarily conserved areas have been either cancelled or not renewed by the communities themselves.[88] Part of the reason for this cancellation is that the financial and technical assistance provided in the law have not been enough to compensate for additional environmental restrictions imposed through the certification process and areas' management agreements. In Oaxaca, for example, the imposed conservation policies are not in harmony with traditional resource management and uses and have undermined traditional knowledge, livelihoods and food sovereignty.[89] In spite of the broader success of the Australian IPA program, experts report a similar discontent among some Aboriginal and Torres Strait Islander peoples.[90]

Returning to Mexico, another inhibiting factor is that the processes for certifying ICCAs have been plagued with many procedural and technical inconsistencies. For example, several of the required processes are concluded without effective community participation and have presented voids, errors and contradictions to the detriment of communities.[91]

Despite these practical concerns with implementation, the cancellation of a voluntarily conserved area certificate does not mean that indigenous peoples and local communities in Mexico are not conserving nature within their lands. Instead, it simply means that they have chosen to withdraw from official recognition and indicates that the laws and policies recognizing *Ejidos'* and *Comunidades'* voluntarily conserved areas have not been successful at appropriately supporting communities' diverse interests and localized stewardship and management efforts, and should thus be revisited and revised.

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[85] UN-REDD Programme. 2009. Standard Joint Programme Document. UN-REDD Programme – Tanzania Quick Start Initiative, Geneva, p. 27. Available at: http://www.un-redd.org/UNREDDProgramme/CountryActions/Tanzania/tabid/1028/language/en-US/Default.aspx.

[86] In addition to the present analysis, this is also found in Kothari *et al.* 2012.

[87] Boer, B., and S. Gruber. 2010, *Legal Framework for Protected Areas: Australia*. IUCN-EPLP, No. 81. Available at: http://cmsdata.iucn.org/downloads/australia_1.pdf.

[88] See: http://www.conanp.gob.mx/que_hacemos/listado_areas.php.

[89] Bray, D, E. Duran and O. Molina. 2012. "Beyond harvests in the commons: multi-scale governance and turbulence in indigenous/community conserved areas in Oaxaca, Mexico". *International Journal for the Commons* Vol 6(2).

[90] Garnett, S., personal communication, 2015; Lee, E., personal communication, 2015.

[91] del Campo, C., personal communication, 2015; and Bray *et al.* 2012.

In the Philippines, *de facto* government recognition of ICCAs has been growing since 2012, in conjunction with a number of national conferences, initiatives and programs driven by indigenous peoples' and civil society organizations in collaboration with a particularly supportive government agency.[92] A Congressman who participated in these activities was inspired to propose an ICCA Act, which is currently being finalized in the country's congress.[93] This draft legislation aims at recognizing the role of indigenous peoples and local communities in biodiversity conservation, climate change adaptation and mitigation, and in the protection of the country's various Key Biodiversity Areas. Notwithstanding any concerns about the imposition of a foreign term, it is expected that the recognition of an ICCA as such will offer the relevant peoples and communities the security they seek for their territories in the face of undesired disturbance by mining and other extractive concessions.

Picking up on the latter point, in all five analyzed countries, mining and other extractive activities are reportedly among the biggest challenges to the implementation of communities' recognized collective tenure rights.[94] In Australia, approximately 80 percent of mining takes place within Aboriginal-claimed land.[95] Legal recognition of ICCAs, particularly on conservation-related grounds, can provide additional protection against threats from extractive industries. For example, extraction of oil is prohibited within protected areas in Mexico, including in *Comunidades'* and *Ejidos*' voluntarily conserved areas, where mining activities are subject to stricter conditions.[96] This is similar to the case of IPAs, where mining can be undertaken only if compatible with the conservation objectives of the protected area.[97] It is hoped that the Philippines' ICCA bill will offer the strongest such form of protection yet, especially given the existing legal conflict between sub-soil rights in Ancestral Domains and the Philippine Mining Act 1995.

[92] See, for example, the New Conservation Areas in the Philippines Project, a project of the Protected Areas and Wildlife Bureau-Department of Environment and Natural Resources, with funding support from the Global Environment Facility through the United Nations Development Programme. More information is available at: http://www.newcapp.org.

[93] For more information, see: http://faspo.denr.gov.ph/index.php/component/content/article/83-faps-updates/117-icca-bill-passes-senate-committee-after-house-ok.

[94] Pedragosa 2012.

[95] Priorities listed in economic strategy. (2011, 2 November). *Koori Mail* issue 513, p.5. Available at: http://www.koorimail.com/news/aiatsis-archive; also see Pedragosa 2012.

[96] United Mexican States. *Ley de Hidrocarburos*, Mexico, D.F., Mexico, Article 41.

[97] Hill, R., F. Walsh, J. Davies, and M. Sandford. 2011. *Our Country Our Way: Guidelines for Australian Indigenous Protected Area Management Plans*. CSIRO Ecosystem Sciences and Australian Government Department of Sustainability, Water, Environment, Population and Communities, Cairns, ppg. 38 and 42. Available at: http://www.environment.gov.au/indigenous/ipa/toolkit/pubs/guidelines.pdf.

4. Lessons Learned and Conclusions

The following lessons and conclusions are drawn from the case study analysis in Section 3:

The legal recognition of collective tenure rights promotes and enables conservation by communities and the resilience and proliferation of *de facto* ICCAs. Recognition of collective tenure rights increases tenure security and provides at least some of the conditions necessary for peoples and communities to govern and manage their territories and areas according to their own practices and priorities, including maintaining and strengthening *de facto* ICCAs. This, in turn, is critical to achieving national and global conservation goals and targets such as the Strategic Plan for Biodiversity 2011-2020 and Aichi Targets.

The quality of legal recognition counts: **the stronger the legal recognition is, the greater the chance that communities' stewardship and management of their territories, areas and resources will contribute to conservation outcomes.** In each country where the bundle of rights is strong and the right of self-governance is recognized over a broad coverage of resources (including sub-soil), *de facto* (and sometimes *de jure*) ICCAs are found on a large scale.

Legal recognition of ICCAs for their conservation values frequently builds on broader legal recognition of collective tenure rights. It is often the recognition of collective tenure rights that provided communities with the conditions to effectively manage and protect their lands and territories and thereby achieve conservation results. This appears to be the case when they allow their land to be incorporated in the countries protected areas' systems or simply when they establish and implement sensible land-use plans and rules. Communities with recognized collective tenure rights also seem to enter more easily into agreements with their governments to receive technical and financial assistance for conservation purposes.

Legal recognition of the three defining characteristics of ICCA should be done with caution and observing certain conditions to enhance the benefits of the legal recognition of ICCAs both for communities and the conservation of nature.[98] The examples of Australia and Mexico in particular demonstrate that:

- The peoples and communities concerned must be engaged in the process of ICCA recognition in full compliance with the right to provide or withhold free, prior and informed consent;
- Any additional environmental or other restrictions that follow legal ICCA recognition must respect and support traditional or local stewardship, governance and management practices; and
- Appropriate technical and financial support can be helpful for communities seeking ICCA legal recognition (in addition to recognition of collective tenure rights), though such support should be determined by communities themselves and sensitive arrangements made for collective governance and equitable distribution of costs and benefits to prevent elite capture and external cooptation, among other things.

[98] For detailed discussion of appropriate forms of legal and non-legal recognition and support for ICCAs, see: Kothari *et al*. 2012; and Jonas *et al.* 2012.

However, even the most sensitively written laws cannot sufficiently protect against a range of political, social, cultural, economic and other dynamics that may counteract its best intentions when implemented in practice. Of particular concern are: a) the rigidity of formal legal systems and the often bureaucratic procedures they require to claim and secure legal recognition,[99] in contrast with adaptable customary and local arrangements which are often transmitted through oral tradition; and b) the tendency of state laws to impose a single standardized or homogenous form of recognition, which undermines the inherent diversity of localized institutional and governance arrangements that elicited the ICCAs in the first place.

Importantly, the **legal recognition of ICCAs, including for their conservation values, can decrease the external risks communities face to their territories and areas. On the one hand, it can deflate the risk of land expropriation for the expansion or establishment of protected areas** (as ICCAs can be included as such within or outside of state protected areas systems for their contributions to conservation). And, on the other hand, it can **impose crucial restrictions to extractive industries and other damaging activities.**

However, not all communities will necessarily oppose mining and other industrial activities; they may even practice artisanal resource extraction in ways that contribute to conservation as well as livelihoods. Proponents of ICCAs must also be sensitive to the inherent diversity of indigenous peoples' and local communities' worldviews, visions, priorities and plans for their futures.

With due regard to the aforementioned concerns with imposed restrictions on community practices and livelihoods, it is clear that **external legal recognition of ICCAs can be a double-edged sword for the peoples and communities concerned**. **Legal recognition and implementation of the same must be done in appropriate and culturally sensitive ways** if it is to effectively support and strengthen ICCAs over the long term.

One of the key findings and lessons of this paper is that institutional provisions (laws, policies, regulations, and even constitutional clauses) that provide for **secure collective land rights**, including customary forms of tenure, provide a **critical foundation** for peoples and communities to practice conservation through *de facto* and/or *de jure* ICCAs. This highlights the **central importance of collective tenure rights to conservation efforts** around the world, particularly at a time when multilateral and national conservation policies alike are increasingly recognizing and seeking to better support ICCAs and other forms of community-initiated and -driven conservation.

Thus, there is a need to more strongly and explicitly **prioritize land tenure reforms** and strengthen the **linkages between collective tenure and ICCAs** within conservation policy, funding, and discourse than has been the case to date. At the (sub-)national level, **greater collaboration between the land rights reform and conservation movements** could help strengthen both legal and non-legal forms of recognition and support for ICCAs. For example, in India, there are ongoing political discussions around the implementation of the

[99] For example, an Ancestral Domain Sustainable Development and Protection Plan must be submitted and affirmed as part of the requirements to secure a Certificate of Ancestral Domain Title in the Philippines.

Forest Rights Act, which could potentially greatly strengthen community-level rights over forests across large parts of the country.[100] Despite the potential for such measures to strengthen local forest governance and tenure, in turn creating key enabling conditions for community conservation measures such as ICCAs, the mainstream Indian conservation sector has generally been resistant to supporting implementation of the Forest Rights Act.[101] Similarly, the implementation of Indonesia's 2013 constitutional court decision on customary forest rights (commonly known as 'MK35') is potentially the most important reform in terms of enabling improved forest governance and conservation in that country's shrinking forests. Yet this critical reform process is still viewed in some quarters as a threat to conservation outcomes.[102] Regardless of the robustness of these counterpoints, they at least highlight the need for more careful and strategic thinking around the intersections and potentially divergences or conflicts between local land and resource tenure and conservation outcomes, and the need for more effective communication of their synergies. It is hoped that this report will be one further step towards the improved articulation and strategic collaboration between, on the one hand, efforts to advance community land tenure reforms and, on the other, conservation through ICCAs and other community conservation initiatives.

[100] Khare, A. 27 June, 2015. "Let's not miss the wood". *The Hindu.* Available at: http://www.thehindu.com/opinion/op-ed/lets-not-miss-the-wood/article7358626.ece.

[101] For example, communities continue to be forced to relocate from Critical Tiger Habitats without implementation of the Forest Rights Act. See Tatpati 2015.

[102] Butler, R. A. 14 March, 2015. "Proposed law could decimate Indonesia's remaining forests". *Mongabay*. Available at: http://news.mongabay.com/2015/03/proposed-law-could-decimate-indonesias-remaining-forests/.

5. Legal and Policy Recommendations

These findings and lessons point to at least three broad recommendations, which are addressed to national legislators, policy makers, donors, and indigenous and community leaders, among others.[103] The aim is to secure collective tenure rights, ICCAs and their benefits for the relevant indigenous peoples and local communities, and for society at large. These non-exhaustive recommendations are intended to support the rights to self-determination and self-governance and be undertaken only where culturally appropriate and compatible with community plans and priorities.

Support the visibility of indigenous peoples' and communities' territories and areas *per se* and for their contributions to conservation:

- Support community research, mapping, biodiversity inventories, resilience assessments and other efforts to demonstrate collective community rights and responsibilities for land, water and natural resources, including traditional knowledge, governance institutions and management practices, and their conservation results.
- Support the documentation, development and enforcement of community by-laws and protocols as a way to communicate and strengthen community governance and management, and their conservation results.
- Support the registration of community conserved territories and areas in dedicated national and international ICCA Registries.

Strengthen communities by recognizing both their collective tenure rights and their ICCAs across various legal processes:

- Support implementation of all existing options for the legal recognition of collective tenure rights, as appropriate in the given context, such as by:
    - Increasing communities' (as well as government officials') knowledge and understanding of the processes and benefits of legal recognition of collective tenure rights, including through community exchanges and careful consideration of equity issues;
    - Assisting communities to self-define (i.e., define who is or is not a member of the community) and obtain legal recognition as such;
    - Assisting communities to secure legal collective rights to land, water and natural resources that are inalienable, indivisible, and established in perpetuity; and
    - Assisting communities to navigate complex legal systems and access judicial and non-judicial mechanisms to redress past or ongoing injustices.
- Use evidence of community conservation to promote legal recognition and protection of collective customary tenure rights within but also beyond conservation laws and policies.

[103] For more detailed recommendations about legal and non-legal recognition and support, please see: Kothari *et al.* 2012; and Jonas *et al.* 2012.

Alongside legal recognition, enhance community capacity to conserve nature through community-defined and –determined forms of support:

- Support programs, agreements and plans that recognize ICCAs and respect their customary institutions, regulations and practices.
- Provide desirable visibility and social recognition and support to ICCAs, with due regard to community privacy and mechanisms to prevent unwanted influxes of outsiders such as tourists.
- If and when necessary and desired, provide technical and financial support to communities governing ICCAs, in particular to support the realization of their own plans and priorities.

Annexes: Detailed Case Studies

Annex 1A: Australia

A. Areas under community control but not legally recognized as such

No estimate of the total area claimed/controlled by Aboriginal and Torres Strait Islanders was found. There are indications that the claimed area is larger than the area currently recognized under Native Titles schemes. Indeed, there is tacit acknowledgement of ongoing Aboriginal or Torres Strait Islanders' connection to all parts of Australia apart from a few small offshore islands and including urban areas long alienated from formal recognition.

Additionally, by law, there is no time requirement for resolving the claim in any of the three jurisdictions with a process to deal with Native Titles claims (Northern Territory, Queensland and New South Wales). As a consequence, claims can take many years to be resolved. For example, in New South Wales, claims can take up to 20 years and as a consequence, by 2011, there were more than 10,000 land claims waiting to be resolved.[104]

B. Areas legally recognized under collective tenure

In Australia, Aboriginal people and Torres Strait Islanders' tenure rights can be recognized through the registration of their Native Title Claims under the federal Native Title Act (and complementary state and territory native title legislation); or by a statutory grant of land by governments to indigenous peoples as the result of successful claims under state or territory 'land rights' laws.[105] Furthermore, indigenous peoples may also individually and collectively purchase land, utilizing funds provided by government or from other sources.[106]

Given the complexities of the Australian legal system, where many jurisdictions have concurrent legislative powers and there are several different tenure arrangements, this case study will focus on Native Title Claims under Federal Native Title Act.

Native Title claims under Federal Native Title Act:

In 1992, the Australian High Court recognized Native Title in the *Mabo* case decision, overturning the long-held legal doctrine of *Terra Nullius*, according to which land in Australia was considered to be empty and subject to acquisition upon the arrival of colonizers. Soon

[104] "No-one can benefit from locked-up land". (2011, 6 April). *Koori Mail* issue 498, p.27. Available at: http://www.koorimail.com/news/aiatsis-archive/.

[105] Relevant subnational legislation include: Torres Strait Islander Land Act (QLD) of 1991 (The State of Queensland. 1991. *Torres Strait Islander Land Act of 1991*, Brisbane, Australia); The Aboriginal Land Rights Act (NT) of 1976 (Northern Territory. 1976. *The Aboriginal Land Rights Act*, Darwin. Australia); Native Title (QLD) Act of 1993 (The State of Queensland. 1993. *Native Title (Queensland) Act of 1993*, Brisbane, Australia); Native Title (NSW) Act of 1994 (New South Wales. 1994. *Native Title (New South Wales) Act of 1994*, Sydney, Australia); Validation of Titles and Actions (NT) Act of 1994 (Northern Territory. 1994. *Validation of Titles and Actions of 1994*, Darwin. Australia); Land Titles Validation (Vic) Act of 1994 (Victoria. 1994. *Land Titles Validation Act of 1994*, Melbourne, Australia); Native Title (TAS) Act of 1994 (Tasmania. 1994. *Native Title Act of 1994*, Hobart, Commonwealth of Australia); and Native Title (SA) Act of 1994 (South Australia. 1994. *Native Title Act of 1994*, Adelaide, Australia).

[106] Smyth, D., and H. Jaireth. 2012. *An Analysis of International Law, National Legislation, Judgments, and Institutions as they Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Australia (Report No.18)*. Natural Justice (Bangalore) and Kalpavriksh (Pune and Delhi), p. 9.

thereafter, the Native Title Act (Cwlth) of 1993 implemented this judiciary decision at the Commonwealth level.

The expression of Native Title or Native Title Rights and Interests refers to the communal, group, or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in regard to lands or waters. The Native Title Rights and Interests held by particular indigenous groups take into account not only the traditional laws and customs of such group, but significant interests of other stakeholders with claims to the area in question. In practice, this results in various legal arrangements, ranging from access and use rights, to rights of exclusive possession, depending on the specific conditions of each case. **Generally speaking, Native Title claims must give way to the rights held by others.**

Most relevant laws:

National level: The Native Title Act of 1993 (Cwlth); *Mabo v Queensland (No 2)* (1992).

Extent:

As of 30 June 2014, 291 registered determinations of Native titles covered a total area of about 196,595,600 hectares or 25.4 percent of the landmass of Australia.[107]

As of 2012, considering all three forms of accessing land by indigenous peoples described above, it is estimated that indigenous peoples have rights over about 20 percent of the land mass of Australia.[108]

Rights-holders:

Once Native Title is recognized, Aboriginal people or Torres Strait Islanders are required to nominate a body corporate to hold (as trustee) or manage (as agent) their native title rights and interests. These corporations are known as Prescribed Bodies Corporate (PBCs). Once registered by the National Native Title Tribunal PBCs are the legal representative of the relevant community.[109]

Bundle of rights:

Taking into account the best-case scenario, the bundle of rights is very strong. In practice, however, it varies a great deal. The Native Title Act of 1993 (Cwlth) establishes the possibility for all rights to be recognized, except that of alienation. Nevertheless, the rights and interests of other stakeholders with claims to the area in question are also considered when determining the bundle of rights of each particular case, which can range from access

[107] Commonwealth of Australia. 2013-2014. *Part 5: National Native Title Tribunal Report (2013-2014 Annual Report)*, Federal Court of Australia, Sydney, Australia. Available at: http://www.federalcourt.gov.au/publications/annual-reports/2013-14/part-5 and http://www.environment.gov.au/indigenous/ipa/.

[108] Areas of Indigenous held land in Australia in 2012, including land held in trust for Indigenous communities, land granted to Indigenous groups and native title determinations. Courtesy of John Hughes, Centre for Aboriginal Economic Policy Research, Australia National University, Canberra. In: Smyth and Jaireth 2012.

[109] Commonwealth of Australia. 1993. *Native Title (Queensland) Act of 1993*, Sydney, Australia, Sections 223 and 224 and Preamble.

and use rights to rights of exclusive possession.[110]

Resource coverage:

Under the Native Title Act 1993 (Cwlth), the Australian legal system recognizes rights and interests of Aboriginal and Torres Strait Islander peoples to land and waters according to their traditional laws and customs.[111]

Mining may occur within land covered by a Native Title. Under the Act, when a company wishes to explore for mineral resources on Aboriginal land, the Aboriginal group must negotiate the right of the company to enter their estate. If agreement cannot be reached, either party may refer the matter to arbitration by the National Native Title Tribunal.[112] Mining is one of the main challenges faced by Aboriginal land with 80 percent of mining in Australia taking place within Aboriginal land.[113]

Procedures:

"A claimant application is made by a group of people, a native title claim group, who declare they hold rights and interests in an area of land and/or water according to their traditional laws and customs. The Native Title Registrar can provide assistance to people who want to make a claim.

The members of the native title claim group are seeking a decision from the Court that native title exists, so their rights and interests are recognized by the common law of Australia. This is called a native title determination. A determination is a decision by the Federal Court or High Court of Australia, or a recognized body, that native title either does or does not exist in relation to a particular area of land or waters.

If the Court finds that native title rights and interests exist, the group must set up a prescribed body corporate to hold the rights and interests, as an agent, or in trust, for the group."[114]

Governance:

As described above, according to the Native Title Act (Cwlth), a Prescribed Body Corporates hold the rights and interests, as an agent, or in trust, for Aboriginal or Torres Strait Islanders. They are registered with the Office of Registrar of indigenous Corporations (ORIC) and which have prescribed functions under the Native Title Act 1993 (NTA) to: a) hold, protect and manage determined native title in accordance with the objectives of the native title holding group; and b) ensure certainty for governments and other parties interested in accessing or regulating native title land and waters by providing a legal entity to manage and conduct the affairs of the native title holders.

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[110] RRI 2014.
[111] http://www.fedcourt.gov.au/law-and-practice/areas-of-law/native-title.
[112] Korff, J. (2015, 8 June). Aboriginal culture – Land - Native Title. *Creative Spirits*. Available at: http://www.creativespirits.info/aboriginalculture/land/native-title#ixzz3chhDiWx8.
[113] "Priorities listed in economic strategy". (2011, 2 November). *Koori Mail* issue 513, p.5. Available at: http://www.koorimail.com/news/aiatsis-archive.
[114] http://www.nntt.gov.au/nativetitleclaims/Pages/default.aspx.

In addition to carrying out their statutory functions, PBCs may engage in a diverse range of activities that include: a) mining and resource sector agreements; b) land and water conservation partnerships (e.g. IPAs); c) pastoral, agricultural and farming activity; d) research partnerships; e) return to country programs; f) recording and archiving cultural information.[115]

In a paper analyzing the governance of native title, Weir (2007) found that:

> "Prescribed Body Corporates are an important form of indigenous governance for both indigenous peoples and governments. However, this governance potential is challenged by the complicated PBC governance context, including the different views held on what a native title determination means. Prescribed Body Corporates have the potential to take on many roles but this has to be balanced with their main role to manage and protect native title."[116]

C. *De facto* ICCAs without legal recognition as such

As described in the Australian ICCA legal review, "many areas of the indigenous estate across Australia are likely to have characteristics equivalent to ICCAs (…). There is increasing recognition by government conservation agencies and by conservation non-government organizations (NGOs) of the current and potential contributions of indigenous people to the national conservation effort".[117]

No estimate of extent was found.

D. Legally recognized ICCAs – Indigenous Protected Areas (IPAs)

Australia's Indigenous Protected Area (IPA) Program has been in place since 1997/98. The Program is a mechanism to increase the representativeness of the National Reserve System through the voluntary inclusion of indigenous estates and by supporting the development of cooperative management arrangements.[118]

There is no formal legal framework in place as is the case for legally gazetted protected areas such as national parks. IPAs are created by agreement between the traditional owners and the Commonwealth or State or Territorial governments. Under these agreements, the traditional owners typically make an agreement with the government regarding their recognized land (here not only under Native Title, but also other forms of recognition not discussed here) for the creation of a park in exchange of technical and financial assistance. In exchange, the government is able to achieve its CBD targets without having to conserve other 'valuable' land as well as protection of rights to continue traditional use and participate in management of the parks.[119]

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[115] http://www.nativetitle.org.au/about.html.

[116] Weir, J. 2007. "Native Title and Governance: The Emerging Corporate Sector Prescribed for Native Title Holders". *Native Title Research Unit* Vol. 3(9), pp. 1-12. Available at: http://www.academia.edu/1775687/_Native_title_and_Governance_the_emerging_corporate_sector_prescribed_for_native_title_holders_.

[117] Smyth and Jaireth 2012, p.10.

[118] See http://www.environment.gov.au/indigenous/ipa/.

[119] Boer and Gruber 2010.

In other words, at the basis of state recognition of indigenous peoples' conservation efforts through the establishment of IPAs lies the recognition of indigenous peoples' rights over their land and/or sea under other forms of rights recognition. It is this preceding recognition that enables them to enter into legal agreements with the government for conservation purposes.

Extent:

There are 60 declared IPAs covering just over 48 mha across Australia. IPAs now cover an area that equates to around 36 percent of the National Reserve System.[120] This is about one fourth of the total area recognized covered under Native Title.

Restriction on third parties' exploitation of resources within recognized ICCAs:

The formation of an IPA doesn't preclude economic activities such as mining or tourism. Mining can be undertaken on a portion of the IPA, so long as the proposed activities are compatible with the conservation objectives of the protected area.[121]

Aboriginal people and Torres Strait Islanders' critiques of IPAs:

The system doesn't really allow for economic self-determination – IPAs are seen as a social justice issue while others reap the conservation benefits.[122] Some peoples in Queensland want to rescind their IPAs, as they aren't deriving the benefits of managing country according to custom; some allege that they are still Western administration top-heavy and don't recognize Aboriginal governance.

Conclusion:

Australia has often been seen as a country where the legal recognition of conservation by indigenous peoples has been very successful. For the purpose of the present case study, it is important to note at least two elements that contributed to this. The first one is that in Australia, national and regional legislation recognize the collective rights of Aboriginals and Torres Straight Islanders to the land they have traditionally occupied, both in laws and practice. The second is that the government also recognizes their contribution to the conservation of the environment by including IPAs in its official protected area system and providing both financial and technical support.

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[120] http://www.environment.gov.au/indigenous/ipa/.

[121] Hill, R., F. Walsh, J. Davies, and M. Sandford. 2011. *Our Country Our Way: Guidelines for Australian Indigenous Protected Area Management Plans*. CSIRO Ecosystem Sciences and Australian Government Department of Sustainability, Water, Environment, Population and Communities, Cairns. Available at: http://www.environment.gov.au/indigenous/ipa/toolkit/pubs/guidelines.pdf, pp.38 and 42.

[122] Moorcroft, H. 2015. "Paradigms, paradoxes and a propitious niche: conservation and Indigenous social justice policy in Australia". *Local Environment: The International Journal of Justice and Sustainability,* 24pp.

Annex 1B: Cameroon

A. Areas under community control but not legally recognized as such

In Cameroon, although in practice customary law regulates land rights in the majority of the country (an area that could be classified as land claimed by communities), the vast majority of land and natural resources are statutorily owned by the government.[123] The land tenure system in force in Cameroon since 1974 does not provide for customary land ownership.[124] As a consequence of this tenure rights insecurity, Cameroonian communities are vulnerable against expropriation from state and private companies.[125]

B. Areas legally recognized under collective tenure

B.1. Community Forest Management Agreement

Communities in Cameroon may have some access to forest resources by entering into a Community Forest Management Agreement, an agreement through which the Forests Administration entrusts a local community with rights of access, withdrawal (subject to the acquisition of permits for the commercial use of timber) and management of forest areas of maximum 5,000 ha adjacent to that community. A Community Forest Management Agreement is only possible within Non-Permanent Forest Domain area and in areas not covered by forest operating licenses.[126]

Most relevant laws:

Law N° 01/1994; Decree N° 531/1995; Decree N° 466/1995, Arrêté conjoint N° 076/MINFI/MINATD/MINFOF fixant les modalités de planification, d'emploi et de suivi de la gestion de revenus provenant de la exploitation des ressources forestières et fauniques, destinés aux communes et aux communautés riveraines.

Extent: 1.18 mha.[127]

Rights-holders:

A community established in a legal form and represented by a management officer.[128]

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[123] Cotula, L., and J. Mayers. 2009. *Tenure in REDD – Start-Point or Afterthought?* Natural Resource Issues No. 15. International Institute for Environment and Development (IIED), London; Alden Wily, L. 2011c. *Whose Land is It? The Status of Customary Land Tenure in Cameroon*. CED/ FERN/ Rainforest Foundation, Yaoundé; Alden Wily, L. 2011b. "'The Law is to Blame': The Vulnerable Status of Common Property Rights in Sub-Saharan Africa". *Development and Change* Vol. 42(3), pp. 733–757; FAO. 2011. *Reforming Forest Tenure: Issues, Principles and Process*. FAO Forestry Paper No. 165. Food and Agriculture Organization of the United Nations, Italy; and RRI 2014.

[124] Nyama, J. M. 2001. *Régime foncier et domanialité publique au Cameroun*. Presses Universitaires de l'Université Catholique, Yaoundé, Cameroun. 484 pp.; Nguiffo, S., P. E. Kenfack, and N. Mballa. 2009. *L'incidence des lois Foncières Historiques et Modernes sur les Droits Fonciers des Communautés Locales et Autochtones du Cameroun*. Forest Peoples Programme, London; Assembe-Mvondo, S., C. J. P. Colfer, M. Brockhaus, and R. Tsanga. 2014. "Review of the legal ownership status of national lands in Cameroon: A more nuanced view". *Development Studies Research: An Open Access Journal* Vol. 1(1), pp. 148-160. Available at: http://dx.doi.org/10.1080/21665095.2014.927739.

[125] Cotula and Mayers 2009; and Alden Wily 2011c.

[126] Republic of Cameroon. 1994. *Law N° 01/1994*, Yaoundé, Cameroon, Articles 27-32.

[127] RRI 2014.

Bundle of rights:

Weak. Rights are granted for a limited period of time (5 years renewable) and there is no requirement for the state to pay compensation in case it wishes to extinguish recognized rights. Rights to management are also limited and conditional to compliance with the area's management plans.[129]

Resource coverage:

Limited to forest resources.

Procedures:

A community wishing to participate in a Community Forest Management Agreement must first hold a consultation meeting with community members, present an application dossier to the Forest Administration Official, if approved, develop a management plan and have it notified by the local forest management official.[130]

Governance:

Right to self-governance is not recognized.

B.2. Community Managed Hunting Zones

The law also establishes **Community Managed Hunting Zones**, which are areas within the Non-Permanent State Forest that are regulated by a Management Agreement between a local community and the government administration in charge of wildlife. Under these agreements, communities may have subsistence hunting rights in forest areas and, in the best-case scenario, limited management rights are recognized. In contrast with Community Forest Management Agreements, conservation is at the heart of establishment of Community Hunting Grounds. Within these areas "the service in charge of wildlife entrusts a community with a hunting zone on national land for the purpose of ensuring the conservation and sustainable use of the wildlife resources therein in the interest of the community area."[131]

Most relevant laws:

Law N° 01/1994; Decree N° 466/1995

Extent

3.08 mha.[132]

Rights-holders:

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[128] Republic of Cameroon. 1995. *Decree N° 531/1995*, Yaoundé, Cameroon, Article 28.
[129] RRI 2014.
[130] RRI 2014.
[131] Republic of Cameroon. 1995. *Decree N° 531/1995*, Yaoundé, Cameroon, Articles 28-31.
[132] World Resources Institute. 2012. Interactive Forest Atlas of Cameroon. Version 3.0. Overview Report. Washington, D.C, p.16. Available at: http://www.wri.org/publication/interactive-forest-atlas-cameroon-version-30.

A community involved in hunting activities for subsistence purposes, established with a legal personality, and represented by a management officer.[133]

Bundle of rights:

Very weak. Rights limited to subsistence hunting rights in forest areas. Exercising this right does not require the acquisition of a permit, and is subject to certain species limitations. Communities also have limited ability to participate in the management process.[134]

Resource coverage:

Limited to subsistence hunting rights and subsistence use of some forest resources.

Procedures:

Rights are established by a Management Agreement approved by competent authority and agreement between community members.[135]

Governance:

Right to self-governance is not recognized.

C. De facto ICCAs without legal recognition as such:

As highlighted by an ICCA regional legal review, "the status of Community Conserved Areas (CCAs) in Cameroon is generally poor and highly constrained by the weakness of collective management institutions".[136]

For example, according to WRI (2012), "despite efforts to promote sustainable forest through community forests, Cameroon's forests have been cleared since 1990—an area approximately the size of Belgium. Much of this forest loss is due to increasing pressure from other sectors such as commercial and subsistence agriculture, mining, hydropower, and infrastructure."[137]

D. Legally recognized ICCAs:

Considering the three defining characteristics of ICCAs, **Community Forests Agreements can be considered as a legal recognition of ICCAs in Cameroon in those cases where communities are *de facto* the 'primary decision-makers'.** Nevertheless, according to the law, the state can still retain important decision-making rights over the areas covered by Community Forest Agreements and the conditions should be evaluated in a case-by-case basis.

Similarly, although Community Managed Hunting Zones are established by protected area

[133] Republic of Cameroon. 1995. *Decree N° 466/1995*, Yaoundé, Cameroon, Articles 25(2) and 27(1).
[134] RRI 2014.
[135] Republic of Cameroon. 1995. *Decree N° 466/1995*, Yaoundé, Cameroon.
[136] Blomley, R., F. Nelson, A. Martin, and M. Ngobo. 2007. *Community Conserved Areas: A review of status and needs in selected countries of central and eastern Africa (Draft Report for Comments)*. IUCN, CEESP, WCPA, SwedBio, IUCN-CEESP, TGER, and CEPA. Available at: http://cmsdata.iucn.org/downloads/east_central_africa_cca_study.pdf.
[137] http://www.wri.org/our-work/project/governance-forests-initiative/cameroon.

legislation, within these areas, communities are not the primary decision-makers and therefore these areas cannot be classified as ICCAs.

Conclusion:

Although the legal system of Cameroon does include some legal arrangements for communities to access and use natural resources (forests and wildlife), it does not recognize sufficient rights for communities to govern, manage and defend the lands on which their livelihoods depend. The lack of customary tenure rights recognition has jeopardized tenure security in Cameroon and communities' ability to conserve their territories and resources. It has put Cameroonian communities in a situation of vulnerability against expropriation from state and private companies.

Annex 1C: Mexico

A. Areas under community control but not legally recognized as such

No data found on the estimate of land claimed by communities that have not been recognized.

B. Areas legally recognized under collective tenure

***Ejidos* and *Comunidades* Land**

Communities' ownership of land is recognized in Mexico since 1917 by the constitution that was approved following the Mexican Revolution of 1910.

Since then, Mexican law has recognized two types of collective tenure regimes, *Comunidades* and *Ejidos*. *Comunidades* are "a population nucleus formed by land, forest and inland waters recognized or restituted to a community that has owned and managed them from ancient times guided by communal customs and practices".[138] *Ejidos*, on the other hand, are a product of the agrarian reform and are often referred to as land allocated to communities after the Mexican revolution as collectives of peasant landholders who are granted access to land and resources for which they have no prior legal claim. The main difference between the two is the time of the land claim: while the **land claims of *Comunidades* pre-date the 1917 constitution and go back to time immemorial, *Ejidos* may have been established afterwards.**

Most relevant laws:

Article 27, VII of the Mexican Constitution of 1917 (as amended in 2010); Agrarian Law of 1992.

Extent:

As of 2012, *Ejidos* and *Comunidades* covers about 100.3 mha, or 51 percent of the total area of Mexico.[139]

Rights-holders:

Ejido/*Comunidad* Assembly comprised of all members, men and women above 18 years of age, of the *Ejido*/*Comunidad*.[140]

Bundle of rights:

Very strong, the law recognizes all of the rights in the bundle.[141]

Resource coverage:

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[138] Martin, G. J., I. C. C. Benavides, C. A. D. C. Garcia, S. A. Fonseca, F. C. Mendoza, and M. A. G. Ortiz. 2011. "Indigenous and Community conserved areas in Oaxaca, Mexico". *Management of Environmental Quality: An International Journal* Vol. 22(2), p. 255.

[139] http://www.sedatu.gob.mx/sraweb/noticias/noticias-2012/abril-2012/12166/.

[140] United Mexican States. 1992. *Agrarian Law*, Mexico, D. F, Mexico, Article 22.

[141] RRI 2014.

In what regards, above-soil rights, the constitution is broad and defines "lands, forest and waters"[142] (Article 27, VII of the Mexican Constitution of 1917 (as amended in 2010).

On the other hand, rights to minerals and oil on sub-soil are domain of the national state, inalienable and imprescriptible. [143]

Furthermore, according to the Mining Code the right to grant concession to exploit the minerals in *Ejidos* and *Comunidades* belong to the State.[144] Nevertheless, the concessionaire must agree with the *Ejidos* and *Comunidades* about the access to the mining area. In case there is no agreement, the state may still grant access of *Ejido'* and *Comunidade*' land to concessionaire provided it pays compensation and follow due process.[145] The case of oil exploitation is similar.[146]

Procedures:

Comunidades: A *Comunidad* may be established by an action of restitution, a voluntary act of those holding the land claimed by a community, a judicial decision, or the conversion of an *Ejido* to a *Comunidad*.[147]

[142] Regarding rights to water, Art 27 of the Constitution (United Mexican States. 1917 as amended in 2010. *Political Constitution of the United Mexican States*, Santiago de Querétaro, México) determines that "In the Nation is likewise vested the ownership of the waters of the territorial seas, within the limits and terms fixed by international law; inland marine waters; those of lagoons and estuaries permanently or intermittently connected with the sea; those of natural, inland lakes which are directly connected with streams having a constant flow; those of rivers and their direct or indirect tributaries from the point in their source where the first permanent, intermittent, or torrential waters begin, to their mouth in the sea, or a lake, lagoon, or estuary forming a part of the public domain; those of constant or intermittent streams and their direct or indirect tributaries, whenever the bed of the stream, throughout the whole or a part of its length, serves as a boundary of the national territory or of two federal divisions, or if it flows from one federal division to another or crosses the boundary line of the Republic; those of lakes, lagoons, or estuaries whose basins, zones, or shores are crossed by the boundary lines of two or more divisions or by the boundary line of the Republic and a neighboring country or when the shoreline serves as the boundary between two federal divisions or of the Republic and a neighboring country; those of springs that issue from beaches, maritime areas, the beds, basins, or shores of lakes, lagoons, or estuaries in the national domain; and waters extracted from mines and the channels, beds, or shores of interior lakes and streams in an area fixed by law. Underground waters may be brought to the surface by artificial works and utilized by the surface owner, but if the public interest so requires or use by others is affected, the federal Executive may regulate its extraction and utilization, and even establish prohibited areas, the same as may be done with other waters in the public domain. Any other waters not included in the foregoing enumeration shall be considered an integral part of the property through which they flow or in which they are deposited, but if they are located in two or more properties, their utilization shall be deemed a matter of public use, and shall be subject to laws enacted by the States."

[143] United Mexican States. 1917 as amended in 2010. *Political Constitution of the United Mexican States*, Santiago de Querétaro, México, Article 27.

[144] United Mexican States. 1992 (2006). *Ley Minera*, Mexico, D. F, Mexico.

[145] United Mexican States. Guía de Ocupación Superficial. *Alianzas Estratégicas para la Promoción y el Desarrollo de la Competitividad del Sector Mineiro Mexicano*, Secretaría de Economía, Mexico, D. F, Mexico, p. 4. Available at: http://www.economia.gob.mx/files/comunidad_negocios/industria_comercio/informacionSectorial/minero/guia_de_ocupacion_territorial_0513.pdf.

[146] Calle, L. de la. (2014, 28 August). "Derechos de propiedad, hidrocarburos y minería". *El Universal*. Available at: http://www.eluniversalmas.com.mx/columnas/2014/08/108514.php.

[147] United Mexican States. 1992. *Agrarian Law*, Mexico, D. F, Mexico, Article 98.

Ejidos: Since the enactment of current Agrarian Law, the creation of an *Ejido* is a voluntary act, which does not require authorization from any public agency, whereby stakeholders constitute using private land. Once a community decides to form an *Ejido*, it is required to become a legal entity and to abide with the rights and obligations established by the Law.[148]

Governance:

In Mexico, the Law describes in detail the structure and internal procedures of *Ejidos* and *Comunidades* governance bodies. There are at least three bodies in *Ejidos* and *Comunidades*: a) an assembly including all members of the *Ejido* (men and women); b) the *comisario,* which is the elected executive body, and c) a monitoring council, in detail the structure and internal procedures.[149] *Ejidos* and *Comunidades* may create written internal rules, which may be registered with the Registro Agrario Nacional.[150]

As explained by Brown (2004):

> "Each *Ejido* or *Comunidade* is very much its own decentralized self-governing body and, outside of the general parameters established by the Agrarian Law, can do as it pleases. Some have used this flexibility to devise complex internal rules, service requirements and joint projects, while for others, infighting has kept them from using this flexibility to their benefit. Many *Ejidos* and *Comunidades* have written rules, but not having written rules is not perceived as a problem since the rules are customary and longstanding and are therefore known by all."[151]

C. *De facto* ICCAs without specific legal recognition as such

Indigenous groups have been owners of land, forest and waters in Mexico, *de facto* for centuries and *de jure* since 1917 either as an *Ejido* or a *Comunidad*. Their traditional and current land and territories management practices have achieved conservation in a diversity of ways, in addition to "show[ing] great resilience during important historical phases of colonization, independence and globalization."[152] Furthermore, *mestizo* (mixed indigenous-Spanish) communities have also developed and maintained appropriate land use and resource management systems in many parts of Mexico.

Also, as explained above, within the limits of the Agrarian and other laws, *Ejidos* and *Comunidades* govern their land with a high degree of freedom. From that, it is possible to imply that in practice, several hundred *de facto* ICCAs are located within *Ejidos*' and *Comunidades*' land, be it because the community has allocated an specific area for conservation, or because conservation is achieve through traditional management practices.

There is no estimate of the area under *de facto* ICCAs, but scale is likely to be high. A good proxy is the fact that about 80 percent of the country's total forest area is under communal

[148] For a more detailed description, refer to http://www.pa.gob.mx/publica/pa07fb.htm.
[149] United Mexican States. 1992. *Agrarian Law*, Mexico, D. F, Mexico, Articles 21-42.
[150] United Mexican States. 1992. *Agrarian Law*, Mexico, D. F, Mexico, Article 10.
[151] Brown, J. 2004. *Ejidos and Comunidades in Oaxaca, Mexico: Impact of the 1992 Reforms.* Rural Development Institute *(*RID Reports on Foreign Aid and Development #120), Seattle, available at: http://www.landesa.org/wp-content/uploads/2011/01/RDI_120.pdf.
[152] Camacho *et al*., n.d.

local ownership.[153]

D. Legally recognized ICCAs

Martin *et al.* (n.d.) notes that there are at least 11 types of ICCAs in Mexico that are either legally recognized or implemented through non-legally binding state policy: Community Voluntarily Conserved Areas, *Ejidos* Voluntarily Conserved Areas, Permanent Forest Areas (specific to Quitana Roo), Community Forest Enterprise Reserves, Community Association Reserve, Sacred Natural Sites, Cellular Reserves, Wildlife Management Units, Agroforestry and Agroecology Systems, Soil and Vegetation Conservation Areas, and Autonomous Municipal Reserves. [154]

At the basis of all of these 11 types of ICCAs is the legal recognition of *Ejidos*' and *Comunidades*' tenure rights, as these are specific areas allocated to conservation within legally recognized *Ejido* and *Comunidades*.

Mexican National Law explicitly recognizes the contribution to conservation of at least three of these eleven types of ICCAs: *Ejido* and *Comunidades* voluntarily conserved areas and Wildlife Management Units. Together these are also the most prominent type of ICCAs in terms of the area occupied. [155] These three types of legally recognized ICCAs will be described in detail below.

D.1. Legal recognition of *Ejidos* and *Comunidades* voluntarily conserved areas

Description of legal recognition:

The General Law of Ecological Balance and Environment Protection (LGEEPA) of 1988 as amended in 2008 determines that the Mexican protected area system includes **voluntary conservation areas, established at the request of indigenous peoples, social organizations, and other landowners**. These areas can be established by *Ejidos* or *Comunidades* within their territories, following the agreement of the relevant *Ejido* or *Comunidade* assembly and subsequent certification by the Environment and Natural Resources Secretary.[156]

As part of the certification process, *Ejidos* and *Comunidades* need to establish a "management regime, which should include the actions of protection and conservation of natural resources, guidelines for the use and exploitation of natural resources, frequency and content of reports to be submitted to the secretariat and, where appropriate, restoration of disturbed areas."[157]

The Secretary may monitor conservation activities in the area and can revoke the certificate if the *Ejido* or *Comunidade* fails to comply with the obligations on the management plans.[158] *Comunidades* and *Ejidos* can also request the cancelation of the certificate of voluntary

[153] Bray *et al.* 2005; and Bray *et al*. 2003.
[154] Camacho *et al*., n.d., pp. 24-26.
[155] Camacho *et al*., n.d., p. 27.
[156] United Mexican States. 1988. *General Law of Ecological Balance and Environment Protection*, Mexico, D.F., Mexico, Articles 46(XI), 55 BIS, 74 and 77 BIS.
[157] United Mexican States. 2000. *Reglamento De La Ley General Del Equilibrio Ecológico Y La Protección Al Ambiente En Materia De Áreas Naturales Protegidas*, Mexico, D. F, Mexico, Article 131 (VII).
[158] United Mexican States. 2000. *Reglamento De La Ley General Del Equilibrio Ecológico Y La Protección Al Ambiente En Materia De Áreas Naturales Protegidas*, Mexico, D. F, Mexico, Article 132.

conservation if they are unable to comply with the requirements imposed by the certification of the property.[159]

As part of the certification process, communities also receive technical assistance for the development of the management plan,[160] fiscal incentives and economical benefit.[161]

Most relevant laws:

The General Law of Ecological Balance and Environment Protection (LGEEPA) of 1988 as amended in 2008, Regulations of LGEEPA regarding Natural Protected Areas.

Extent:

According to the National Commission of Protected Areas (CONANP, in Spanish), as of March 2015, there were 43 areas voluntarily conserved by *Comunidades*, covering 148,958.11 ha, and 57 *Ejido* common lands, covering 94.488,151ha, summing up to 243,446.23 ha, the majority of which are in Oaxaca and Chiapas.[162] **This is only about 0.002 percent of the total area recognized under either *Ejido* or *Comunidades*.**

Indigenous peoples' and peasant communities' cancellation of Voluntarily Conserved Areas Certificates in Oaxaca

Under the law, *Comunidades* and *Ejidos* may request cancellation of their voluntarily conserved area certificates. According to the website of the Environment and Natural Resources Secretary, several of these areas' certificates have either been cancelled or not renewed by the *Comunidades* and *Ejidos*.[163]

Part of the reason for cancellation is that the financial and technical assistance received by communities under voluntary conservation programs have not been enough to compensate for additional environment restrictions imposed through the certification process and subsequent area's management agreements. These agreements can be very strict, imposing conservation practices that are not in harmony with traditional resource management and use, and undermining traditional knowledge and livelihoods.[164]

Another important factor according to del Campo (2015) of the Global Diversity Foundation[165] is that the process for certifying ICCAs can present many procedural and technical inconsistencies, notably, several of the required process are concluded without community participation and have presented voids, errors and contradictions to the detriment of communities. For example, in the case of the Santiago Tlatepusco's community, the process of certification concluded that the greatest risk posed to the biodiversity conservation is the erosion caused by traditional swift cultivation, which is the

[159] United Mexican States. 2000. *Reglamento De La Ley General Del Equilibrio Ecológico Y La Protección Al Ambiente En Materia De Áreas Naturales Protegidas*, Mexico, D. F, Mexico, Article 134.
[160] United Mexican States. 1988 as amended in 2008. *General Law of Ecological Balance and Environment Protection*, Mexico, D.F., Mexico, Article 77 BIS.
[161] United Mexican States. 1988. *General Law of Ecological Balance and Environment Protection*, Mexico, D.F., Mexico, Articles 21, 22 and 45 BIS.
[162] http://www.conanp.gob.mx/que_hacemos/listado_areas.php.
[163] Ibid.
[164] del Campo, personal communication, 2015.
[165] Ibid.

traditional agricultural practice. Affected communities not only refuse to state this is true, but other independent studies have demonstrated that swift cultivation has elevated biodiversity and agrobiodiversity. Furthermore, the communities of Santiago Tlatepusco also claim that the area agreed by the general assembly to set aside for conservation was smaller than the one officially allocated under the certificate.

Cancelling a certificate of a voluntarily conserved area does not mean that communities stop conservation within their areas; it means that they have decided to withdraw from official recognition.

Legal recognition of Wildlife Management Units:

Most relevant laws: The General Law on Wildlife of 2000 as amended by 2015 and its regulations.

Description of legal recognition:

The General Law on Wildlife authorizes the Environment and Natural Resources Secretary to promote, register and supervise Wildlife Management Units (UMAs, in Spanish).[166] UMAs are "an official scheme of micro-territorial planning that allows diversification of the production of goods and services from wildlife, while minimizing impact on the ecosystem and biological resources. The main objective of a UMA is the sustainable management and production of specific animal or plant resources for subsistence, commerce, hunting, tourism, academic research or solely for conservation goals."[167]

Ejidos and *Comunidades* can be holders of UMAs provided there is **agreement of the relevant *Ejido* or *Community* assembly**. Holders of UMAs are required to comply with a management plan authorized by the Secretary of Environment and Natural Resources.[168] Registered UMAs may also receive technical and financial support from state institutions.

Restriction to third parties' exploitation of resources within recognized ICCAs:

Exploitation of oil is prohibited within protected areas in Mexico, including *Comunidades'* and *Ejidos*' voluntarily conserved areas.[169]

In the case of mining, the law allows mining within protected areas, however these zones "should be exploited without damaging the ecosystem, changing substantially the landscape, or causing irreversible environmental impact" [170] and subjected to an environmental impact assessment.[171] It is not clear if these restrictions also apply to *Ejido* and *Comunidades* reserves and UMAs.

Conclusion:

[166] United Mexican States. 2000 as amended in 2015. *The General Law on Wildlife*, Mexico, D.F., Mexico, Article 9.
[167] Camacho *et al*., n.d., p. 26.
[168] http://www.semarnat.gob.mx/temas/gestion-ambiental/vida-silvestre/sistema-de-unidades-de-manejo.
[169] United Mexican States. *Ley de Hidrocarburo*, Mexixo, D. F., Mexico, Article 41.
[170] United Mexican States. 1992. *Ley Minera*, Mexico, D. F., Mexico, Article 20.
[171] United Mexican States. 1988. *General Law of Ecological Balance and Environment Protection*, Mexico, D.F., Mexico, Article 28.

The contribution of indigenous and peasant communities to conservation in Mexico has been robustly documented. **At the heart of communities' ability to conserve the resources within their lands lies a relatively strong recognition of their tenure rights both 'on the books' and in practice.** Current legislation allows *Ejidos* and *Comunidades* to govern and manage their land with a high degree of freedom, including for conservation purposes. Furthermore, a series of national and sub-national policies, in particular those promoting sustainable community forestry, have succeeded to engage communities in sustainable practices.

Nevertheless**, this success cannot be attributed to recent reforms recognizing ICCAs through the insertion of Voluntarily Conserved Areas, including *Ejido* and *Comunidad* reserves, in Mexico's protected area system.** Although the program does provides for financial and technical support to the communities, they do not seem to be enough to compensate for the stricter environmental conditions imposed by these areas' management plans. Also, implementation of the program has presented inconsistencies to the detriment of communities. Finally, establishing these areas do not provide extra protection against mining activities in *Ejido* and Comunidades lands.

Annex 1D: Philippines

A. Areas under community control but not legally recognized as such

Following the Constitutional mandate,[172] indigenous peoples' rights to land, waters and natural resources is expressly recognized under the Indigenous Peoples Rights Act of 1997 (IPRA) as Ancestral Domains and Lands.

In strict legal terms, Ancestral Domain/Land claims are recognized under the law regardless of formal title based on the principle of Native Title. The principle of Native Title, as distinguished in the 1909 case of *Cariño v. Insular Government* (212 U.S. 449 (1909) and carried over into the IPRA, holds that when lands and domains have been held since time immemorial under a claim of individual and common private ownership by an indigenous people, these are presumed to have never been public lands.[173] Thus, "under the IPRA the legal presumption is that Ancestral Domains are private community-based property and this presumption is not contingent on whether or not a particular CADT has been approved or awarded."[174]

However, as pointed out in the 2012 ICCA legal review, indigenous peoples face many challenges in exercising their rights to Ancestral Domains and land. One strategy used by communities to address these challenges is obtaining formal titles over ancestral domains/lands and the resources therein through the issuance of Certificates of Ancestral Lands Titles (CALTs) and Certificates of Ancestral Domain Titles (CADTs), as well as seeking the formal acknowledgement of the indigenous peoples' role in conserving biological diversity.[175] CALTs and CADT are described below.

B. Areas legally recognized under collective tenure

B1. Certificates of Ancestral Lands Titles (CALTs) and Certificates of Ancestral Domain Titles (CADTs)

Ancestral Domains cover "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."[176] The concept of Ancestral Lands is more limited than that of Ancestral Domain and only covers ownership and possession of surface rights, and do not extend to inland waters, coastal areas and natural resources.[177] The main difference between Ancestral Domains and Lands in terms of tenure rights relates to their transfer and titling. While The IPRA and its Implementing Rules do not prohibit the transfer

[172] Republic of the Philippines. 1987. *The 1987 Constitution of the Republic of the Philippines*, Metro Manila, Philippines, Article II, Section 22.
[173] Republic of the Philippines. 1997. *Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)*, Metro Manila, Philippines, Section 3(l).
[174] La Viña, A. G. M., and O. J. Lynch. 2011. *REDD Light: Who Owns the Carbon in Forests and Trees? Carbon Ownership as the Basis of Social Accountability: The Case of the Philippines*. ANSA-EAP, Baguio City, p. 21.
[175] Pedragosa 2012, p.25.
[176] Republic of the Philippines. 1997. *Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)*, Metro Manila, Philippines, Section 3 (a).
[177] Republic of the Philippines. 1997. *Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)*, Metro Manila, Philippines, Section 3(b).

of Ancestral Lands subject to customary laws and traditions,[178] the transfer of Ancestral Land to non-members of the community is prohibited and tainted with vitiated consent or fraud.

Most relevant laws:

Indigenous Peoples Rights Act of 1997 (Republic Act No. 8371), Presidential Decree 705 (1975); National Commission on Indigenous Peoples Administrative Order No. 3-2012.

Extent:

As of 2014, according to the NCIP, there were 175 approved Ancestral Domain Titles, covering an area of 4,568,895.67 hectares; and 257 Certificate of Ancestral Domain Titles, covering 17,293.14 hectares.[179]

Rights-holders:

Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs).[180]

Bundle of rights:

Very strong. All rights, except that of alienation is recognized.[181]

Resource coverage:

Ancestral Domains:

> "… 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".[182]

Furthermore, "ancestral lands/domains shall include such concepts of territories which cover not only the physical environment but the total environment including the spiritual and cultural bonds to the areas which the ICCs/IPs possess, occupy and use and to which they have claims of ownership."[183]

IPRA explicitly includes mineral resources as resources covered under ancestral domains. As

[178] Republic of the Philippines. 1997. *Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)*, Metro Manila, Philippines, Section 8.
[179] http://202.57.46.66/adis/Public/ApprovedCALTSummary.aspx.
[180] Republic of the Philippines. 1997. *Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)*, Metro Manila, Philippines, Section 2.
[181] RRI 2014.
[182] Republic of the Philippines. 1997. *Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)*, Metro Manila, Philippines, Section 3 (a), emphasis added.
[183] Republic of the Philippines. 1997. *Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)*, Metro Manila, Philippines, Section 4.

explained in the Philippines ICCA review,[184] "this right of ownership is further clarified when taken in the context of the Civil Code of the Philippines. This law provides that the owner of a parcel of land is the owner of its surface and of everything under it."[185] From the foregoing provisions of law, it follows that indigenous peoples have rights over sub-soil resources.

However, the Philippine Mining Act of 1995 contradicts IPRA and explicitly declares that all mineral resources in public and private lands within the territory and exclusive economic zone of the Philippines are owned by the State (Section 2).[186] As a consequence, mining has been one of the most significant threats to Ancestral Lands and Domains.

Procedures:

As explained above, indigenous peoples' claimed lands are private community-based property whether or not a particular CADT has been issued. CALTs and CADTs may, however, increase the security of the tenure claim in face of third parties' rights.

If a community wishes to obtain a title, the procedures to obtain either a CALT or a CADT are well defined in the relevant regulations. They are comprised of several complex steps, filled with legalese. These include, for example, written accounts of the customs, traditions, and political structure and institution; survey plans and sketch maps; anthropological data; and genealogical surveys, among others. A petition filed by the indigenous community to the NCIP initiates the process. The NCIP is then responsible for carrying out the rest of the process in collaboration with the community.

According to Corpuz (2012),[187] the NCIP is a governmental body with limited budget and its lack of sufficient financial resources was an initial barrier to the allocation of rights in practice. To overcome this challenge, NGOs were also accredited to act in the place of NCIP to complete the steps required by law. In many instances, NGO securing of international aid for this purpose was a definitive factor of the application of the law in practice.

Governance:[188]

In addition to indigenous peoples' rights to their Ancestral Domains, IPRA recognizes their rights to self-governance and empowerment, which includes respect for their traditional resource management practices. IPRA provides that "the State shall protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social, and cultural wellbeing and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain".[189]

IPRA further provides that indigenous peoples "have the right to manifest, practice,

[184] Subsequent paragraphs extracted from Pedragosa 2012.
[185] Republic of the Philippines. 1949. *Republic Act No. 386 (An Act to Ordain and Institute the Civil Code of the Philippines)*, Metro Manila, Philippines, Book II, Title II, Chapter 1.
[186] Pedragosa 2012, pp. 28-29.
[187] Corpuz, J. 2012. *Collective Ownership of Forest Resources and Poverty Reduction in the Philippines*. Presentation at the Workshop on the "Legal Options to Secure Community Property Rights" held by RRI and the Ateneo School of Government (ASoG), Baguio City.
[188] Section based on Pedragosa 2012.
[189] Republic of the Philippines. 1997. *Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)*, Metro Manila, Philippines, Chapter 1, Section 2b; and Pedragosa 2012, p. 26.

develop, and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access to their religious and cultural sites".[190] The law also grants them full participation in the maintenance, management, and development of "ancestral domains or portions thereof, which are found necessary for critical watershed, mangroves, wildlife sanctuaries, wilderness, protected areas, forest cover, or reforestation."[191] In other words, the law recognizes indigenous peoples' and other local communities' systems of governance and management developed over centuries.

B.2. Community Based Forest Management (CBFM)

In addition to CADTs and CALTs, tenure rights may also be awarded to local communities under Executive Order 263 (1995), which adopted Community Based Forest Management (CBFM) as the national strategy to ensure the sustainable development of the country's forestlands resources. Section 3 of Executive Order 263 (1995) regulating CBFM provides that "participating organized communities may be granted access to the forestland resources under long term tenurial agreements, provided they employ environment-friendly, ecologically-sustainable, and labor-intensive harvesting methods… It is a production-sharing agreement, limited to a period of 25 years and renewable for another 25 years, between an organized community and the government, to develop, utilize, manage and conserve specific portions of forest land consistent with the principles of sustainable development and pursuant to an approved Community Resource Management Framework Plan (CRMF). The CRMF defines the terms and procedures for access, use and protection of natural resources within CBFM area."[192]

B.3. Protected Area Community Based Resource Management Agreement

In addition to CALTs and CADTs, the Community Based Program in Protected Areas (CBP) gives "opportunities to organized tenured migrant communities and indigenous peoples to manage, develop, utilize, conserve and protect the resources within the zones of the protected area and buffer zones consistent with the Protected Area Management Plan."[193] The Protected Area Community Based Resource Management Agreement represents a stage in the implementation of the CBP that can provide communities with tenurial security and other incentives for their management and conservation of a protected area.

C. De facto ICCAs without specific legal recognition as such:

As explained above, indigenous peoples in the Philippines have the right to self-governance recognized regardless of the conservation outcome of their traditional management practices. As a consequence, while conserved areas within Ancestral Domains and Lands are legally recognized under the umbrella of CADT/CALT, the current legal system does not explicitly recognize ICCAs either as part of the protected area system or based on their

[190] Republic of the Philippines. 1997. *Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)*, Metro Manila, Philippines, Section 33.
[191] Republic of the Philippines. 1997. *Republic Act No. 8371 (The Indigenous Peoples' Rights Act of 1997)*, Metro Manila, Philippines, Section 58.
[192] Pedragosa 2012.
[193] Republic of the Philippines. 2004. *DENR Administrative Or No. 2004*-32 *(Revised Guidelines on the Establishment and Management of Community-Based Program in Protected Areas)*, Department of Environment and Natural Resources, Quezon City, Philippines, Section 2.

conservation outcomes.

Nevertheless, indigenous peoples and communities have been conserving the natural resources within their Ancestral Domains in the Philippines for centuries. For example, it is estimated that between 60 and 65 percent (or roughly 4.5 million hectares) of the Philippines' 6,838,822 hectares of remaining natural forests are within Ancestral Domains.[194] While the area under Ancestral Domains may provide some indication on the extent of ICCAs in the Philippines, the exact area under ICCAs is still to be determined as some indigenous communities consider their entire areas to be an ICCA, while others consider only a small part to be so.

De facto government recognition of ICCAs has been growing since 2012, in conjunction with a number of national conferences, initiatives and programs driven by indigenous peoples' and civil society organizations in collaboration with a particularly supportive government agency (for example, the New Conservation Areas in the Philippines Project[195]). An ongoing inventory – carried out by the Philippines Association for Intercultural Development (PAFID), the Koalisyon ng mga Katutubo at Samahan ng Pilipinas/National Coalition of Indigenous Peoples in the Philippines (KASAPI) and other partners – estimates that there are at least 200 ICCAs in the country.[196]

D. Legally recognized ICCAs

The Philippines congress and senate are currently discussing a bill being referred to as the ICCA Act, which is aimed at recognizing the role of indigenous peoples not just in biodiversity conservation but also in climate change adaptation and mitigation, and in the protection of the country's various Key Biodiversity Areas.[197]

Conclusion:

The Philippines has a relatively strong legal recognition of indigenous peoples rights under CADT and CALT. Furthermore, rights under Ancestral Domains and Lands arguably extend to untitled claims and all resources, including sub-soil ones. There is also robust indication that a substantial area within these Domains and Lands are conserved by these communities and would be categorized as ICCAs. Given the many challenges faced by these communities, notably mining, this can be largely attributed to tenure security.

The strict legal recognition of ICCAs through the approval of the ICCA draft law can provide indigenous communities additional incentives and resources to conserve their lands. Nevertheless, as the examples of Australia and Mexico show, this will only be the case if communities are involved entirely in the process of ICCA certification, their traditional management practices not excessively constrained and that their rights are upheld during implementation of the law.

[194] PAFID 2011. In: Pedragosa 2012.
[195] This is a project of the Protected Areas and Wildlife Bureau-Department of Environment and Natural Resources, with funding support from the Global Environment Facility through the United Nations Development Programme. More information is available at: http://www.newcapp.org.
[196] Kothari and Neumann 2013.
[197] http://faspo.denr.gov.ph/index.php/component/content/article/83-faps-updates/117-icca-bill-passes-senate-committee-after-house-ok.

Annex 1E: Tanzania

A. Areas under community control but not legally recognized as such

In Tanzania, the law recognizing collective land rights determines that "regardless of the certificate, villages possess customary rights over land which falls within the definition of Village Land."[198] As a consequence, at least in theory, all land claimed on the basis of custom have been recognized by the Village Land Act. Nonetheless, without documentation, challenges remain to defend these rights against other claimants. Legal recognition of Village Land is described below under Section B.

No estimate of total land claimed by communities on the basis of custom was found.

B. Areas legally recognized under collective tenure

Village Land:

Communities in rural areas are divided into villages. The Village Land Act recognizes the rights of villages to land held collectively by village residents under customary law. These lands are managed by Village Councils. Village Councils are corporate bodies, and are answerable and accountable to Village Assemblies, which consist of all the adults older than 18 years of age living within the village area.

According to the Land Act of 1999 and Village Land Act of 1999, villages are the basic unit for making local land use and management decisions in Tanzania. The Village Land Act enables villages to zone communal and individual land areas through Land Use Plans and the Village Councils and Assemblies are responsible for collective land management decisions for these Village Lands. Village Councils and Assemblies provide an established statutory mechanism for local community decision-making and collective negotiation regarding land and resource uses, including conservation.[199]

Most relevant laws:

Village Land Act of 1999; Land Act of 1999.

Extent:

Village Land is estimated to cover 70 percent of land in Tanzania or about 65.779 mha.[200]

Rights-holders:

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[198] Veit, P. (2010, August). "Brief: The Precarious Position of Tanzania's Village Land". *Focus on Land in Africa*. Available at: http://www.focusonland.com/fola/en/countries/brief-the-precarious-position-of-tanzanias-village-land/; Section 7 of the Village Land Act (United Republic of Tanzania. 1999. *The Village Land Act*, Dar es Salaam, Tanzania) regulates the certification and registration process of Village Lands.

[199] United Republic of Tanzania. 1999. *The Village Land Act*, Dar es Salaam, Tanzania; see also, Blomley *et al*. 2007.

[200] WRI and Landesa. 2010. *Focus on Land in Africa: Brief. Tanzania, Lesson 2: Village Land*. World Resources Institute and Landesa Rural Development Institute, p. 3. Available at: http://theredddesk.org/sites/default/files/village_land_1999.pdf; and Ylhäisi, J. 2010. "Sustainable Land Privatization Involving participatory Land Use Planning in Rural Areas: An example from Tanzania". *Land Tenure Journal* No. 1, pp. 91-120.

Village Assembly.

Bundle of rights:

Very strong. No alienation rights, all other rights guaranteed.[201] Nevertheless, although partially recognized, there are several legal restrictions to the right to use and manage non-reserved forests and wildlife resources.

Resource coverage:

The Village Land Act recognizes villages' rights to land, which is defined as:

"'land' includes the surface of the earth and the earth below the surface and all substances other than minerals and petroleum forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to land".[202]

As described above, the Law explicitly excludes rights to minerals and petroleum. Regarding mining rights, the law regulating mining activities in Tanzania is the Mining Act, No. 15 of 2010. According to this Act, "The holder of a mineral right must, through consultation with the local Government authority and the village council if applicable, get the consent of the lawful occupier before he can have access to the license area. Such consent may be granted subject to adequate compensation for the land and improvements thereon. Where consent is being unreasonably withheld, the Minister may direct that such consent be dispensed with."[203]

A new Water Act of 2009 has further regulated access to water and determines that "the country's water is a public resource vested in the state, with the President authorized to act as trustee of the resource on behalf of the population. The Act requires anyone who diverts, dams, stores, abstracts or uses water – other than for domestic purposes – to obtain a water permit from the Basin Water Board. Individuals and groups with legal access to land are permitted to access surface water for domestic needs without a permit. Landholders are also permitted to access to groundwater through hand-dug wells and may construct facilities to harvest rainwater for domestic use without a permit".[204]

Procedures:[205]

"Village Land is formally registered by obtaining a Certificate of Village Land. The Village Land Act also provides that regardless of the certificate, villages possess customary rights over land that falls within the definition of Village Land.

The procedure for certifying Village Land requires villagers to identify their borders. If the boundaries are in dispute, the government appoints a mediator and, if necessary, an inquiry

[201] United Republic of Tanzania. 1999. *The Village Land Act*, Dar es Salaam, Tanzania; RRI 2014.
[202] United Republic of Tanzania. 1999. *The Village Land Act*, Dar es Salaam, Tanzania, Section 1.
[203] United Republic of Tanzania. *Mining Act, No. 15*, Dar es Salaam, Tanzania.
[204] USAID. 2011. *Tanzania – Property Rights and Resource Governance Profile*. U.S. Agency for International Development, United States of America. Available at: http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Tanzania_Profile.pdf.
[205] Based on description contained in Veit 2010; Section 7 of the Village Land Act (United Republic of Tanzania. 1999. *The Village Land Act*, Dar es Salaam, Tanzania) regulates the certification and registration process of Village Lands.

to resolve the matter. When the boundaries are established, the Village Land is surveyed and demarcated. Thereafter, the Commissioner of Lands issues a Certificate of Village Land which formally empowers the Village Council to manage the land."

Governance:

According to the Village Land Act, each village is represented by a Village Council, the organ responsible for making decisions about village land use and land allocations.[206] The power of allocation of village land by the Council is, however, subject to the approval of the Village Assembly, which is the supreme authority on all matters of general policy-making in relation to the affairs of the village and is comprised of all the adults older than 18 years of age living within the village area. In addition to the Village Council, a Village Adjudication Committee marks land boundaries, sets aside land for rights-of-way and settles boundary disputes between villagers. The Village Council's authority is also circumscribed by the District Council, which will hear appeals from decisions of the Village Council, and by the Land Commissioner.[207]

C. *De facto* ICCAs without specific legal recognition as such

As described by Nelson (2007) "local communities in Tanzania capture a wide range of livelihood and cultural values from forests and traditional mechanisms for establishing forest reserves through customary laws are widespread albeit insufficiently documented and quantified.

The Village Land Act enables villages to use their Land Use Plans to establish communal and individual land areas and enforce these zones with village by-laws. These by-laws must not violate any other laws of the country, but as long as they do not, they are legally binding and fully enforceable in courts of law. **This recognition alone enables communities to support traditional land use practices, including those that lead to conservation with statutorily recognized plans and by-laws. As a consequence, several ICCAs may exist as legal entities at the village level without being documented."**[208]

D. Legally recognized ICCAs

In addition to the reforms introduced by the Village and Land Acts of 1999, changes in Forest Law and Policy have also allowed local villages to formalize their forest management practices by giving local people the statutory authority to protect and manage their resources by establishing Village Land and Community Forest Reserves. Community conservation in Tanzania is also specifically recognized through the establishment of Wildlife Management Areas (WMAs). Village Land and Community Forest Reserves as well as Wildlife Management Areas are discussed in detail below.

The Forest Act, also establishes the possibility of Joint Forest Management Agreement (JFMA) made between the Director of Forestry and: community groups or other groups of persons living adjacent to and deriving the whole or a part of their livelihood from that National Forest Reserve; a District Council or a Village Council and a community group

[206] United Republic of Tanzania. 1999. *The Village Land Act*, Dar es Salaam, Tanzania, Section 8.
[207] United Republic of Tanzania. 1999. *The Village Land Act*, Dar es Salaam, Tanzania; and USAID 2011.
[208] Blomley *et al*. 2007.

within a Local Authority Forest Reserve; a Village Council and a community group providing management within a Village Land Forest Reserve; the manager of a private forest and community groups living adjacent to and deriving the whole or a part of their livelihood from or adjacent to the Private Forest.[209] JFMs would not, however, follow under the definition of ICCAs as communities are not the main decision makers regarding forest resources and their management rights are dependent on these agreements with national or district government authorities.[210]

D.1. Legal recognition of Forest Reserves and Community Forest Reserves in Village Land

Tanzania's forest policy and legislation builds on the land tenure and local governance institutions present in the country, enabling local communities to own and manage forests.

The Forest Act of 2002 calls for forests to be managed at the lowest possible level of government and provides flexible institutional arrangements for local forest management and ownership. These include: Village Land Forest Reserves (VLFRs), which are managed by villages, as well as Community Forest Reserves (CFRs) which may be managed by a sub-group of people within a village. VLFRs and CFRs can be managed in various ways. Some are managed according to **customary rules and practices** and others according to **by-laws** and other **rules made by the Village Council**, all of which are defined at the village level.[211]

Most relevant laws:

Forest Act of 2002; Village Land Act of 1999.

Extent:

According to Tanzania's Ministry of Natural Resources and Tourism as of 2008, there were 1457 villages under Community Based Forest Management (CBFM), including 331 declared Village Land Forest Reserves (VLFR) encompassing about 2.3 mha.[212] In another assessment, the government estimates that of 20 million hectares of village forestland, about 3.6 million hectares are classified as reserves.[213]

Restriction on third parties' exploitation of resources within recognized ICCAs:

The government, through the Ministry of Natural Resources and Tourism, is the custodian of unreserved forestland and as such may issue timber and other licenses to non-villager members.[214] When communities declare part of their lands to be either VLFRs or CFRs they increase legal control they have over forest resources as a result of that legal designation. Timber harvesting licenses for forests on village land which are not VLFRs are issued by the District Forest Officer and the vast majority of revenue by-passes the village and goes back to the district and in some cases to the central government. When a VLFR is declared or

[209] United Republic of Tanzania. 2002. *The Forest Act*, Dar es Salaam Section 16(1).
[210] Blomley *et al*. 2007, op cit, footnote 99.
[211] United Republic of Tanzania. 2002. *The Forest Act*, Dar es Salaam Section 34.
[212] United Republic of Tanzania. 2008. *Participatory forest Management: facts and figures*. Ministry of Natural Resources and Tourism, Forestry and Beekeeping Division, Dar es Salaam, Tanzania.
[213] UN-REDD. 2009, op cit, footnote 58, p 27.
[214] United Republic of Tanzania. 2002. *The Forest Act*, Dar es Salaam Part II; and Meschak; Nelson and Persha, written comments, 2014.

gazetted, the village retains 100 percent of timber revenue and can also set its own license fees independent from scheduled government license fees.

No additional restrictions found for mining and other resource exploitation activities were found.

D.2. Wildlife Management Areas

Most relevant laws:

2009 Wildlife Conservation Act, Wildlife Management Areas (WMA) regulations of 2012.

Description of legal recognition:

Wildlife Management Areas (WMAs) emerged during the reform process in the 1990s as the framework for communities to manage and benefit from wildlife. They began to be formally implemented in 2003, following WMA Regulations first issued in 2002, and the first WMAs were gazetted in 2006. In 2009, Parliament approved a new Wildlife Conservation Act. New WMA Regulations under the 2009 Act were issued in 2012, which contain a number of key changes, including strengthening the communities' involvement and influence over trophy hunting concession allocations in WMAs, as well as providing greater clarity around benefit-sharing.[215]

According to the Wildlife Conservation Act, WMAs can be established in areas outside of core protected areas; areas which are used by local community members; and within the village land. The Village Council must apply to the Minister responsible for wildlife, who than declares the area to be a Wildlife Management Area in the respective village land set aside for community-based wildlife conservation.[216]

Extent:

According to the ICCA Consortium, more than 3 percent of the country's land area is under 38 Wildlife Management Areas.[217] USAID estimates there are 14 WMAs are registered and 22 WMAs in various stages of development.[218]

Restriction to third parties' exploitation of resources within recognized ICCAs:

Similar to the case of VLFRs and CFRs, when communities declare part of their lands to be WMAs they increase legal control over wildlife resources as a result of that legal designation. For example, trophy hunting (the most lucrative form of wildlife utilization in Tanzania) on village lands which are not designated as WMAs is entirely centralized. The Wildlife Division of the Ministry of Natural Resources and Tourism controls large concession

[215] Based on Tetra Tech ARD and Maliasili Initiatives. 2013. *Tanzania Wildlife Management Areas Evaluation (Final Evaluation Report)*. U.S. Agency for International Development, United States of America. Available at: http://pdf.usaid.gov/pdf_docs/pdacy083.pdf; and Long-needed reform for Wildlife Management Areas in Tanzania. (2013, 18 January). Available at: http://www.maliasili.org/long-needed-reform-for-wildlife-management-areas-in-tanzania/.

[216] The United Republic of Tanzania. 2009. *The Wildlife Conservation Act (No. 5 of 2009)*, Dar es Salaam, Tanzania Sections 31 and 32.

[217] http://www.iccaconsortium.org/?page_id=1704.

[218] Tetra Tech ARD and Maliasili Initiatives. 2013, op cit, footnote 178.

areas that overlap with Village Lands and all revenues returns to treasury. When a WMA is gazetted, two important conditions change: 1) the Village has control over if there is going to be any hunting in the WMA. If there is hunting, the Village is responsible for issuing the concession, negotiating the contract with private operator, etc.; 2) the Village retains a significant portion of the revenue, up to 60 percent of total revenue. Villages can also negotiate to get more payment than prescribed in government's concession and trophy payment schedules.

Mining is allowed within WMAs.[219] No other restrictions found.

Conclusion:

The recognition of Village Lands has enabled communities to support traditional land use practices including those that could be characterized as ICCAs through statutorily recognized villages land use plans and by-laws.

Additional legal recognition of communities' rights to sustainably management their forest and wildlife resources have increased communities control over these resources, both in terms of management and financial benefit.

Finally, it is important to highlight that **the specific recognition of communities' rights to sustainably manage their forest and wildlife resources in the forms of VLFRs, CFRs and WMAs in Tanzania are based in the general recognition of the right of villages to develop their own land use plans.**

[219] The United Republic of Tanzania. 2009. *The Wildlife Regulations*, Dar es Salaam, Tanzania, Section 51.