An Analytical Framework for Customary Rights: Opportunities and Risks for VPA Engagement

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EXECUTIVE SUMMARY

This paper presents a framework for the preliminary analysis of the contexts and debates around customary rights relevant to forests (including but not limited to land, timber, NTFPs, environmental services, genetic material, and carbon). The framework is not designed to deliver concrete guidance on particular issues or country cases; it is conceived as a tool for those engaged in VPA processes who are not versed in the topic of customary rights to orient themselves to the variety of debates and the relevant contexts. Using the framework, EFI and partners should be able to identify:

- the country's *legal framework* for recognition of customary rights,
- the specific *rights and rightsholders* to which this recognition applies (and possible controversies associated when some rights and rightsholders are left out),
- the diversity of *stakeholders' motivations for recognizing (or opposing) these rights*, different interests surrounding these motivations, and conflicts in law that might result from these different positions,
- relevant *historical legacies* affecting how customary rights are viewed and/or exercised in practice, in particular, situations that enable or stifle debate and therefore influence progress in the realization of customary rights, and
- *current political-economic dynamics* that influence the status of customary rights.

Whether unrecognized or unenforced, the unresolved issue of customary rights is likely to have contributed to a forest sector that is unsustainable in all three pillars of environmental, social, and economic sustainability. Although they cannot dictate the outcomes, the EC can help facilitate dialogue and consensus that meets FLEGT's goals of fostering SFM. Using the above analytical framework, the paper suggests possible opportunities that may exist to for the EC to engage with the issues, including to facilitate open stakeholder discussion, support capacity building, provide technical expertise on legal reform, negotiation procedures with communities, benefit sharing and management planning standards, and general awareness raising on the capacities and authority of community to manage and monitor the forests they claim and depend upon for survival.

However, these opportunities come with risks, to the VPA itself, to efforts to recognize local rights, as well as to the interests of local communities and the forests they depend upon. For the EC to play a useful catalyst role in these highly controversial issues, EFI and EC players engaged in the VPA process must understand not only the rights themselves, but the different positions and interests surrounding them and how these have changed over time and in relation to current contexts. In this way, VPA actors can help win constituents for rights recognition that will benefit both forests and people.

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Introduction

A rich body of literature has highlighted the dual role of weak governance and undiscriminating consumer demand in driving destructive logging that threatens forests and the wellbeing of local communities. This recognition of the shared responsibility of both producer and consumer countries has spurred efforts such as the FLEGT Action Plan to support mechanisms that not only exclude actors who do not comply with the law but reward actors who demonstrate good practice in sustainable forest management (SFM). However, in practice, difficulty remains in establishing a robust system for verifying that SFM principles are met, and more fundamentally, in generating a durable commitment to these principles in either the private or public sector. Even with legal compliance—for which there is strong consensus for meeting obligations—there is often a lack of agreement between stakeholders as to what exactly constitutes 'legal timber'. While SFM is broadly understood as having three pillars: *i.e.,* ensuring ongoing benefits in environmental, economic, and social spheres, the latter can be especially difficult to codify because customary law is often seen as being at conflict with statutory law.

This paper provides some generic preliminary analytic tools to provide a better understanding of customary rights issues, debates, and contexts, and how they may be represented (with possible positive or negative effects) in the FLEGT Action Plan's Voluntary Partnership Agreements (VPAs).[1] Indeed, in some VPA processes in, different interpretations of the role of customary rights in legality definitions have proven to be a major obstacle in consensus between NGOs and government. However, the new EU 'Due Diligence Regulations'[2] explicitly requires importers to ensure compliance with legislation that covers "third parties' legal rights concerning use and tenure". The legislation recognizes FLEGT certificates as sufficient in meeting these requirements. Therefore, while every country articulates its own legality definition (through a multistakeholder process), one of the VPA guiding principles is that the definition include "Respect for tenure or use rights to land and resources that may be affected by timber harvest rights, where such rights exist."[3]

The fear among some critics is that the inclusion of customary land rights in legality definitions will doom VPAs to intractable political debate or drive governments from VPAs because enforceable recognition of customary rights will significantly diminish the State's authority over forest land. But on the other hand, community advocates ask whether, without the inclusion of legally recognizable

[1] Communication from the Commission to the Council and the European Parliament. "Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan." (COM/2003/0251 final) . http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0251:EN:HTML

[2] Article 2 (h); REGULATION (EU) No 995/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market

[3] EU FLEGT Briefing Note 2 "What is Legal Timber?" March 2007.

customary rights, definitions of legality can be credible and ethically defensible. These critics ask whether, in accepting such a partial definition of legality would stakeholders risk further legitimating a deeply disempowering political structure for controlling resources that is ultimately harmful to both communities and forests? There is not one answer to these questions, but framework presented here is designed to better understand the agendas and interests at play in the VPA process in any given country.

Moreover, outside of the negotiation of the legality definition, the VPA process's multistakeholder deliberations may also potentially provide an opportunity to discuss the nature of community rights in the forest sector and how they might be more fully realized in law and practice. However, it would be unrealistic to expect that the VPA process can accomplish the realization of all rights and needed reforms. The EFI and partners will need to consider what elements of the prevailing context either enable or disable progress on the recognition of customary rights. This paper aims to help the reader begin to investigate how the VPA can most productively engage in this wider debate.

These questions are complex, deeply contextual, and carry high stakes. This paper presents an initial framework for the preliminary exploratory analysis of relevant contexts and debates around customary rights. **Using the framework, EFI and partners should be able to identify:**

- the country's ***legal framework*** for recognition of customary rights,
- the specific ***rights and rightsholders*** to which this recognition applies (and possible controversies associated when rights and rightsholders are left out),
- the diversity of ***stakeholders' motivations for recognizing (or opposing) these rights,*** different interests surrounding these motivations, and conflicts in law that might result from these different positions,
- relevant ***historical legacies*** that affect how customary rights are viewed and/or exercised in practice, in particular, situations that enable or stifle debate and therefore influence progress in the realization of customary rights
- ***current political-economic dynamics*** that influence the status of customary rights, and,
- based on this analysis, possible ***opportunities for engagement*** within the VPA process through the legality definition or facilitating debate through other related multistakeholder platforms, and ***potential negative impacts*** such engagement might have.

The framework is not designed to deliver concrete guidance on particular issues or country cases; it is conceived as a tool for those engaged in VPA processes who are not versed in the topic of customary rights to orient themselves to the variety of debates and the relevant contexts. However, specific country examples are included when possible. An in-depth use of the tool in the case of Peru is included in the Annex and references to this case (or other examples where Peru is not relevant) are included at each step in the framework.

In understanding the complexity in each country, the paper stresses the need to not only understand the legislative framework surrounding customary rights, but to understand the motivations of the various stakeholders, which is often the result of historical legacies and present socio-political realities. Often, it is these 'extra-legal' factors that provide key indicators of how likely customary rights are to be respected in practice, whether or not they are recognize formally in law.

This first section lays out a generic roadmap for analysis of customary rights. The second uses a case-study illustration of the framework used in Peru, where there is no VPA process currently underway but where opportunities exist for one in the future.

1. Legal Framework

The first step in establishing the status of customary rights in a country is to investigate their current recognition in law. (As an overview of the various types of customary rights to be discussed in detail later in the paper, see the box on page 9).

National constitutions[4] often contain language affirming indigenous rights to cultural integrity, sometimes including rights to land under customary claim. Some more recent constitutions also contain language on the right to make decisions regarding land use and changes that affect them, reflecting emerging international standards for indigenous peoples. But at the same time, most constitutions recognize that the natural resources of the country should be used for the benefit of the entire citizenry, and many also claim state ownership over all natural resources.

For example, in Peru, the 1993 Constitution respects the cultural identity of both indigenous and rural peasant (non-indigenous) communities and recognizes them as having legal existence as legal persons. It affirms that they are autonomous in their organization, communal use and free disposal of their lands, as well as economic and administrative matters within the framework established by law. It holds that communal

Identify the Legal Framework

Sources: Online databases such as FAOLEX, National Forest Programme, Tropical Timber Action Programme, national legal databases maintained by law schools or legal advocates.

National Constitution

- Identity and procedural rights
- Land and other community rights , especially for the indigenous
- State ownership and/or control of natural resources

Domestic Law & Regulations

- Forestry
- Agrarian reform & land titling
- Land use zoning & planning

[4] Text of national constitutions may be found online at sites such as: www.constitution.org, www.servat.unibe.ch/icl/, and confinder.richmond.edu/index.html. However, some internet links are broken or text not updated and special care should be taken when using unofficial translations.

ownership of land is imprescriptible (not subject to cancellation) except in the case of "abandonment", in which case ownership reverts to the State for private sale.

Prior to 1993, the 1920 constitution had provided that communal lands were not saleable, mortgageable nor prescriptible. As amended 73 years later, the 1993 text removes the first two of these restrictions, granting communities autonomy to freely dispose of their lands. The provisions, which have yet to be regulated by law, apply to the Amazon as well as highland and coastal areas, making Peru the only Amazonian country to allow, in principle, the parceling of communally titled indigenous lands into individual lots.

However, at the same time that the 1993 constitution recognizes the autonomy of the indigenous and rural peasant communities, an earlier article states that all natural resources belong to the State, which alone has the ultimate authority over their use or transfer, except as issued through legal concessions. This ambivalence about indigenous land rights is echoed in subsequent forestry legislation, as discussed below.

Identify the Legal Framework

International Instruments

- Ratified conventions
- Non-binding instruments
- Customary international law

Ambiguities or contradictions

- Within individual laws
- Between sectors or jurisdictions
- Between domestic and international law

Even in cases where there is no ambiguity in a national constitution's recognition of customary rights, constitutional principles have little practical application if they are not further elaborated and interpreted through subsequent domestic law. Further, where land rights are recognized in law, this does not always extend to trees, as in Peru, where all forest is owned by the State.

National forestry legislation may differentiate between different types of forest use or ownership rights in recognition to customary claim. Laws that claim all natural resources and decision making authority for the State regardless of constitutional recognition for indigenous claim significantly undermine customary rights. Further, the ***implementing regulations*** of national legislation are essential to enforcing rights in practice, even those that are affirmed in national law. Often these regulations lag far behind the law, crippling the realization of rights recognized in law. For example, in Peru, legal communal title as part of an agrarian reform program was made law under President Velasco Alverado at the end of the 1960s, but the program did not include any mechanism for systematic titling of land. Consequently, the bulk of land demarcation has been carried out by NGOs and to this day many communities remain unmapped and untitled.

Where legal recognition already exists in law this lays an important foundation through which local community stakeholders and advocates (as well as international advocates) can push for

implementing regulations to be passed. This is an important opportunity where a VPA process might usefully engage stakeholders to address these weaknesses.

However, it is important to remember that the VPA is likely to be only one part of a larger land and forest policy reform process, and this is especially true for dialogue that may be facilitated outside of the ambit of the legality definition. For example, historically in Indonesia, although the 1945 Constitution recognized the existence and customary rights of indigenous communities (*masyarakat adat*), it did so without elaboration either in the text or in regulations on what these rights were or how the community was to be identified. The 1960 Basic Agrarian Law specifically recognized indigenous usufruct land rights, but no implementing regulations were passed in relation to these articles. Meanwhile, the Basic Forest Law of 1967 declared all forest land to be the property of the State. The implementing regulation further stipulated that the rights of *adat* communities to extract nontimber forest products shall not to interfere with industrial logging operations[5] and can be suspended where logging operations are active.[6] After the end of Suharto's regime, the reformed Basic Forest Law of 1999 provided possibilities for the *adat* community to form cooperatives in order to manage and use *adat* forest 'as long as these communities are evidently in place and their presence is acknowledged' by the State. No clear standards are given as to how and under what circumstance this recognition would occur. Civil society organizations have continued to press for policy reforms to more fully realize customary rights, and the VPA process has been one means for stakeholders to debate these issues.

The recognition of these various forms of customary rights may experience tides of more or less support (see discussion below on historical and political-economic contexts). Erosion of standards for recognition of customary rights is evident in countries where rights once recognized are progressively ***abrogated,*** typically in favor of state control to issue natural resource concessions to private companies[7]. Additionally, it is important to note any relevant ***incoherence between laws*** that recognize local rights and those laws that deny them or confuse jurisdictions. Conflicts between mining and forest-sector laws in this regard are common, as are potential confusion in decentralization laws regarding jurisdictions for issuing licenses.

For example, in Peru, oil exploration and extraction concessions pose significant threats to customary rights. In 2001, the government reduced royalties on oil exploration in order to promote investment, producing a boom in oil operations in Amazonian forests within indigenous territory,

[5] Government Regulation No. 21 of 1971 concerning Right of Forest Exploitation and the Right to Harvest Forest Products, Article 6.1

[6] Ibid, Article 6.3

[7] For an example from Liberia, see Liz Alden Wiley, 2004, "Who owns Liberia's forest?" Washington DC: Rights and Resources.

some of whom are uncontacted, and whose livelihoods and health are at great risk from contact with oil operations. In 2002, a petroleum exploration concession was granted to the Camisea oil project in the Amazonian districts, including the Nahua Indigenous Reserve. Machiguenga communities living in voluntary isolation in the Reserve were contacted and forcibly displaced to other areas.[8] By 2008, Perupetro, the state owned petroleum company, had issued concessions for oil exploration and extraction covering 89% of the Peruvian Amazon. Of the 64 blocks under concession, 58 overlap with titled indigenous territories, 15 with territories of uncontacted groups. Twenty blocks overlap Protected Areas.

Finally, ***international legal instruments*** such as the International Labor Organization Convention 169 Concerning Indigenous and Tribal Peoples (ILO 169)[9] and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[10] affirm standards for indigenous rights related to land and resources that arguably contribute to an emerging standard in 'customary international law' (i.e. a general practice accepted as law that applies broadly to states even when they have not signed on as parties). These include:

- The right of indigenous peoples to be consulted in decisions that affect them[11]
- Ownership of lands they traditionally occupy[12]
- Use and management of their natural resources[13]
- Rights to means of subsistence[14]
- Right to freely dispose of their land and natural resources.[15]

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[8] Smith, Richard Chase. 2005. "Can David and Goliath Have a Happy Marriage? The Machiguenga People and the Camisea Gas Project in the Peruvian Amazon" In Peter Brosius, Anna Ling, and Charles Zehner, Eds. *Representing Communities Histories and Politics of Community-Based Resource Management*. Lanham, MD: Altamira Press.

[9] http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169

[10] http://www.un.org/esa/socdev/unpfii/en/drip.html

[11] ILO 169 Art. 7(1).

[12] ILO 169 Art.14; International Covenant on Civil and Political Rights (ICCPR) Art.1 (1-2); Committee on the Elimination of Racial Discrimination (CERD), General Recommendation XXIII on Indigenous Peoples (Fifty-first session, 1997) U.N. Doc. A/52/18, annex V.

[13] International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 1 (2); CERD General Recommendation XXIII on Indigenous Peoples (Fifty-first session, 1997) U.N. Doc. A/52/18, annex V.

[14] ICCPR Art. 1 (1-2); ICESCR Art. 1(2)

It should also be noted that the 2010 EU 'Due Diligence' legislation for timber products states that, in absence of an internationally agreed definition, legality should be defined using the producer country's legislation *as well as* any international agreements to which the country is a party. [16]

Further, **differences in the binding nature of individual instruments should be noted**. For example, if states endorse an international declaration, they agree to uphold its standards but are not bound to issue domestic implementing legislation, whereas state parties to international conventions such as the UN Convention on the Elimination of All forms of Racial Discrimination (CERD)[17] are generally obligated to introduce implementing legislation.[18] Yet taken as a whole, the body of international legal instruments that affirm specific elements of indigenous rights are understood in the legal community as amounting to a broad acceptance of the principles as 'customary international law'.

Another relevant binding instrument is the Convention on Biological Diversity (CBD),[19] which also recognizes the dependency of indigenous and local communities on biological diversity and the unique role of indigenous and local communities in conserving life on Earth. This recognition is enshrined in the preamble of the Convention and in its provisions. In particular, Article 8(j) obligates States Parties to respect, preserve, and maintain the knowledge, innovations and practices of indigenous and local communities relevant for the conservation of biological diversity and to promote their wider application with the approval of knowledge holders and to encourage equitable sharing of benefits arising out of the use of biological diversity.

The right to be consulted has received special attention in recent years, in part because in practice it is often reduced to notification rather than true consultation, or the consultation is subject to intimidation or used as a means of corrupting key local leaders. An important concept that is now well supported in international law is that of **free, prior and informed consent (FPIC).** [20] The UN Permanent Forum on Indigenous Peoples defines FPIC as:

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[15] The article further recognizes the right to dispose of natural wealth "without prejudice to any obligations arising out of international economic co-operation." ICESCR Art 1(2).

[16] REGULATION (EU) No 995/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, Recital 14.

[17] http://www2.ohchr.org/english/law/cerd.htm

[18] See UNCERD, General Recommendation XXIII (51) concerning Indigenous Peoples. Adopted at the CERD Committee's 1235th meeting, 18 August 1997. UN Doc. CERD/C/51/Misc.13/Rev.4, at para4(d).

[19] http://www.cbd.int/doc/legal/cbd-en.pdf

[20] Anaya, James. 2005. "Indigenous Peoples' Participatory Rights In Relation To Decisions About Natural Resource Extraction: The More Fundamental Issue Of What Rights Indigenous Peoples Have In Lands And Resources". *Arizona Journal of International & Comparative Law* 22(1):7-17.

- a *process*, implying an iterative series of consultations,
- with the full *participation* of authorized leaders, representatives or decision-making institutions, as decided by the concerned group,
- *free of coercion or manipulation*,
- with *sufficient time* for effective choices,
- with *all relevant information* provided,
- and that demonstrates clear and compelling *agreement*.

Several bodies are working toward principles and indicators for operationalizing FPIC. [21] For example, ILO 169 calls upon governments to take steps as necessary to *identify the lands* of indigenous peoples, and to establish adequate procedures within the national legal system to *resolve land claims* by the peoples concerned.[22] Further, in its General Recommendation on Indigenous Peoples, the CERD Committee calls upon states parties where indigenous peoples have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.[23]

A feasibility study of implementing FPIC was undertaken by the Swiss NGO Intercooperation in seven concessions in Gabon and Congo[24], and used field experience with FSC certification[25] to offer insights into key issues around operationalizing FPIC. These issues include: defining consent and in

[21] See also the ongoing work of the UN Permanent Forum on Indigenous Issues to develop a standard-setting exercise on FPIC; guidelines on operationalizing consent developed under the World Commission on Dams; the IFC's policy review process of Performance Standard No. 7 on Indigenous Peoples, which begins to address how they might operationalize FPIC (http://www.ifc.org/ifcext/policyreview.nsf/Content/PerformanceStandard7 and http://www.ifc.org/ifcext/policyreview.nsf/Content/QCR-PS7). In the private sector, Foley Hoag has completed an analysis of the approaches and benefits of FPIC for Talisman mining http://www.foleyhoag.com/~/media/Files/Publications/eBooks/FOLEY-HOAG-Informed_Consent_Policy_eBook.ashx

[22] ILO 169, Art 14(2-3),

[23] Committee on the Elimination of Racial Discrimination, General Recommendation XXIII on Indigenous Peoples (Fifty-first session, 1997) U.N. Doc. A/52/18, annex V.

[24] Lewis, Jerome; Freeman, Luke; and Borreill, Sophie. 2008. "Free, Prior and Informed Consent and Sustainable Forest Management in the Congo Basin: A Feasibility Study conducted in the Democratic Republic of Congo, Republic of Congo and Gabon regarding the Operationalisation of FSC Principles 2 and 3 in the Congo Basin" Berne: Intercooperation.

[25] Specifically, Principles 2 (on tenure and use rights and responsibilities) and 3 (Indigenous peoples' rights).

particular its dynamic nature, institutional capacity building (on the part of the company), content and communication of information, benefit sharing, protection of resource-based livelihoods, dispute resolution and building credible partnerships, transparency (see box). The experience reveals the potential for positive engagement on these issues when companies approach the process in good faith and with adequate resources devoted to the task. The researchers found one case in Gabon to be an exemplary model for success:

> *This company managed to channel its relations with villages into an ongoing transaction of information and material items based on timber production in their forest areas. This outcome can be attributed to a combination of appropriate staff, sound research, inputs from experts (from universities, agencies and local and international NGOs), continual dialogue over many years, and a constant effort on the part of the company to improve its practice.*
>
> *This example should dismiss the fears expressed by other companies around entering into ongoing contractual relationships. After all, it was the only concession visited where we heard local communities saying that they gave their unreserved consent to forestry activities and that despite minor issues, they were generally satisfied with the way things have been carried out.*

Steps to Free, Prior, and Informed Consent

1. *Build Institutional Capacity.* The training and resources of the social team are critical, but also the integration and coordination of the team into the broader company structure and support for its work by higher management. This includes the need for mainstreaming and training of all staff on the importance of issues related to FPIC.

2. *Appropriate information and communication.* Adequate information regarding the potential and likelihood of impacts (direct, indirect, positive, negative) of forest operations. Context specific research is required to discern the most appropriate and comprehensive forms for information to be conveyed. Awareness raising should be approached as a two-way learning process. Communities may be able to add to these impact assessments and contribute to approaches for prevention or mitigation.

3. *Participation in decision making.* Mechanisms for the whole community to participate are critical, as well as working to create a culture of openness and social inclusion. Local communities should be considered as partners in forest management, and receive capacity building to participate effectively.

4. *Dispute resolution.* To maintain functioning partnerships, both parties must feel there is a forum for resolving disputes equitably and transparently, and are accessible to all (including cultural, language, and literacy considerations).

5. *Acknowledge different models of consent.* Research and cultural understanding is required to understand the different parties notion of consent and how it is maintained and manifest. It is often not a one-off event, but an ongoing mutual negotiation of needs and expectations. Further, the importance of legal weight of signed documents are key but also important to include are other cultural rituals of agreement.

6. *Protect local resource livelihoods. A key element of community consent depends on the continued access to and health of locally important resources. Therefore, steps must be taken to identify and map these resources/areas, and different use patterns. It is critical that these activities include the whole community with special attention to marginalized (women, certain ethnic groups, age groups, more remote households, etc).*

7. *Negotiated benefit sharing.* Compensation should not be presented as a *fait acompli* but rather as a negotiation of price per unit of timber, with negotiated and transparent forms of payment and accounting to a community association (not controlled by a few elite). This negotiation should involve all members of the community rather than a few spokesmen. Harvest and revenue payments should be continually and transparently reported to the community, with feedback channels from the community to the company and dispute resolution body should payments not be received.

Adapted from Lewis, Freeman, and Borreill, 2008.

In addition to these efforts to operationalize FPIC, because of its relevance to the work of the CBD considerations relating to the traditional knowledge of indigenous and local communities are also being incorporated in all the programmes of work under the Convention. In particular, a working group on Article 8(j) and related provisions was established in 1998 by the fourth meeting of the Conference of the Parties (COP4). At its fifth meeting in 2000, the COP adopted a programme of work to implement the commitments of Article 8(j) of the Convention and to enhance the role and involvement of indigenous and local communities in the achievement of the objectives of the Convention, and has made much progress in this area that may serve as starting points or areas of collaboration for VPA stakeholders wishing to engage in operationalizing the right to FPIC, benefit sharing, and participation.

For example, Parties adopted the *Akwé: Kon Guidelines*[26] for the conduct of cultural, environmental and social impact assessments of proposed projects that are likely to impact resources traditionally occupied or used by indigenous and local communities. These guidelines are intended to provide a collaborative framework ensuring the full involvement of indigenous and local communities in the

[26] http://www.cbd.int/decision/cop/?id=7753

assessment of cultural, environmental and social concerns and interests of indigenous and local communities of proposed developments.

The area of protection of rights relating to use of and benefits flowing from indigenous knowledge may also offer some useful parallels for the VPA. Working groups of the CBD are developing monitoring indicators for the retention of traditional knowledge and methods and measures to address the underlying causes of the loss of such knowledge, an ethical code of conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant to the conservation and sustainable use of biological diversity,[27] negotiation of the Nagoda Protocol--an international regime on access and benefit sharing of indigenous knowledge,[28] and a joint strategy with UNREDD to use a human rights approach to prevent and mitigate negative impact of REDD initiatives on indigenous communities.

In summary, identifying the current legal framework with respect to the status of customary rights will reveal ambiguities and contradictions in law, and this will inevitably begin to identify some of the debates and obstacles that could possibly be resolved in the VPA's *legality definition* or through the VPA multistakeholder process in general. Governments may resist recognition of community rights if they view this as undermining their own authority both over resources and economic development decisionmaking, while indigenous groups may seize the opportunity of the VPA mulitstakeholder dialogue to argue for greater recognition of customary rights, especially when those rights have been eroded over time. Early in the process, negotiators will have to decide how to recognize rights that are viewed as customary (and may be recognized as international law), but for which, there is no formal recognition in domestic legislation.

Opportunities for VPA engagement

Where legal recognition already exists in law this lays an important foundation through which local community stakeholders and advocates (as well as international advocates) can push for implementing regulations to be passed where they have not been. This is an important opportunity where a VPA process might usefully engage stakeholders to address these weaknesses.

Several efforts to investigating principles and approaches for operationalizing FPIC can serve as useful convening points to generate coherent discussions of how to implement and monitor social safeguards of customary rights in relation to VPAs, and to ensure that different initiatives do not produce contradictory standards or operational practices.

[27] http://www.cbd.int/doc/meetings/tk/wg8j-06/official/wg8j-06-04-en.doc

[28] http://treaties.un.org/doc/source/signature/2010/Ch-XXVII-8-b.pdf. See also the Bonn Guidelines on access to genetic resources and equitable sharing of benefits arising out of their utilization http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf.

2. What Rights and Who Holds Them?

'Customary' rights can mean different things to different people. It is critical to assess:

- *to what* the rights attach,
- *who* the rightsholders are, and
- whether these arrangements will provide incentives for better forest management and more secure livelihoods.

This section provides an overview of the suite of different rights that may be relevant to timber production, VPAs and the different rightsholder groups. Debates around the different interpretations of what these customary rights entail are useful guideposts to revealing the motivation of the different stakeholders behind their desire (or not) to recognize these rights.

The prevailing idea of property in the Global North is associated with clearly delineated 'things' or discrete spatial areas, and these concepts are often those that guide legal recognition. But in practice, customary rights are often complex arrays of overlapping and conditional rights to different things, uses, and forms of authority. For example, under statutory law, an individual may hold fee simple title to property, including the forests that grow there. While under customary law, a family may establish individual rights to farm plots by clearing forest, but only as long as they reside in the community. Elsewhere states or corporations may limit the recognition of indigenous use to certain forest products but not include timber (ie, NTFPs), or to trees but not land, or to land and trees but not subsurface resources like minerals, gems, oil, gas or water. Alternatively, customary rights recognized by states may only extend as far as consultation and possibly some benefits (either periodic monetary payments or of development projects) but not to shared uses or management authority, or right to negotiation or withhold consent.

For example, in Peru, there are essentially two types of rights recognized in Peruvian law: Communal Reserves and Community private titles. In Communal Reserves, usufruct rights to forested areas (sometimes within designated Protected Areas) are communally held and are inalienable, unembargoable (not mortgageable or liable to lien) and not prescriptable, except if deemed to be "abandoned", although it does not define how land

Identify the Specific Rights

Sources: legislation and conventions; interviews with civil society, academics and other experts; fieldwork to interview local community members.

Rights to Things

- Territory/land
- Timber
- NTFPs
- Farmland
- Subsurface resources
- Water
- Forest carbon
- Genetic material
- Knowledg3

Rights to Uses

- Habitation
- Subsistence
- Agricultural
- Commercial

would be identified as such. The rights allow residents to restrict outsider access, thereby legally protecting uncontacted groups from incursions, at least in theory. Some legislation restricts membership in indigenous communities to those who have resided in the community continuously for twelve consecutive months, except for reasons of health or military service.

Some restrictions on use exist within Communal Reserves within protected areas, requiring that such use be consistent with conservation. These reserves are not proprietary rights, the State retains ownership, but limited to subsistence uses and no agriculture is permitted. However, in such protected areas, mechanisms for routine consultation with the communities living in or near the forests are also required in management planning.

The 1974 Native Communities Act, the 1993 Constitution, and subsequent land reform and titling laws allow for registration and issue of private title for communal lands. The Constitution and Agrarian Reform Laws allow for sale, mortgage or division of communal land into individual parcels, when approved by a majority vote in coastal communities and a 2/3 vote in lowland and Andean communities.

Identify the Specific Rights

Authority

- Consultation
- Consent
- Benefit-sharing
- Self-identification
- Management duties
- Mgmt Rule-making
- Monitoring
- Veto/exclusion

Right of Transfer

- Sale
- Mortgage

Throughout the world, complex issues around what customary rights attach to what resources have arisen in recent years in relation to intellectual property rights or genetic material when bio-prospectors discover pharmaceutical remedies in forest plants and animals within traditionally-claimed territories. Likewise, who holds the rights to forest carbon is a question now being passionately debated and indeed may contribute to driving the rights recognition process forward in many contexts.

Critical questions in assessing the extent of local rights include:

- Are the rights to controlling access and use of **all land and resources within a defined territory** or are the rights to **specific resources or uses** only?
- Are rights **secure** or conditional and/or time-limited?
- Are rights to consultation/consent also accompanied by **right of refusal** (*i.e.*, veto)?
- Are **use rights** included? Do they extend to **commercial** uses or only **subsistence**?
- Are use rights accompanied by management authority, including **rule making, monitoring** ability, or are they simply a host of **labor responsibilities**?

- Are rights able to be transferred through **sale or mortgage**?

Determining what rights are included in the 'bundle' of customary rights recognized by a *legality definition* is critical to assessing the ability of the VPA to act as a measure for local empowerment, sustainable forest management, or poverty reduction and indeed the mitigation of vulnerability of local communities and the forests on which they depend.

As noted above, the rights of **free, prior and informed consent** in regard to resource decisions that affect local communities are well established in customary international law, although in many cases states limit these rights to the right of **consultation**, which often results in a pro-forma and corruptible process that does not contribute to either local empowerment or sustainable resource use.

As with consultation, many domestic legal frameworks require as part of the concession agreement some form of **benefit sharing** with local communities. However, as with consultation, when the requirements are left vague in such agreements and their implementation, and the oversight and accountability procedures, then these agreements are often ignored in practice or are used to bribe village elites rather than to benefit the affected community who holds the rights. Likewise, a more robust form of benefit sharing would involve a **balanced and informed negotiation process with the affected communities** by which they could win a more equitable share of the benefits, rather than simply taking what they are offered. The VPA dialogue may provide a platform where all stakeholders can agree on a process by which communities can better negotiate the terms of benefit sharing in forest contracts, and help establish a dispute resolution mechanism when communities feel that companies have not complied with the agreement.

Use

Many national legal frameworks recognize **use rights**, which grant local communities the right to cultivate land, harvest timber, NTFPs, and/or conduct small scale mining for gems or minerals. These rights are often limited to certain resources, seasons, gear, locations of extraction, as well as quotas on harvest size and number. Use rights might also be limited according to whether the use is for subsistence or commercial purposes. Critics note that often the most lucrative forests are reserved for large companies, while degraded forests are allocated to local operations, if locals are even permitted to engage in **commercial** operations. [29]

The form of these use restrictions has **implications for the ease and cost of monitoring and, therefore, enforceability**. For example, it is easier to monitor use by location than it is for limitations on species or size class. Determining whether a use is intended for sale or subsistence is an even more complex undertaking for enforcement.

[29] Dove, Michael R. 1993. "A Revisionist View of Tropical Deforestation and Development." *Environmental Conservation* 20(1): 17-24, Spring 1993; Larson, Anne M. and Ribot, Jesse C. 2007. "The poverty of forestry policy: double standards on an uneven playing field" Journal of Sustainability Science 2(2).

Further, in many contexts, use rights are **time-limited and conditional** on requirements that communities prepare management plans, timber surveys, and performance reviews. These requirements and/or the sanctions resulting from non-compliance are in fact above what are required even of large-scale corporate logging operations. Critics note that in addition to these requirements being far beyond the capacity of local communities, while government oversight and enforcement of community operations is often far more stringent than for large logging companies, creating an uneven playing field.[30]

For example, in Cameroon, communities neighboring forests have been granted a ''pre-emption right'' that gives them the option to choose community forest management before short-term concessions, known as ''ventes de coupe,'' are granted to outsiders.[31] However, the required management plan can cost as much as USD 55,000 and take up to two years to complete.[32] Community management plans must include a forest inventory of all trees above 40cm DBH in 10m wide belts covering two percent of the forest. These trees must be located on a map sheet and their scientific or vernacular names noted. [33] In addition, logging must be undertaken using low-impact procedures. The process is so complicated that no community has been able to establish a community forest without extensive external assistance.[34] The costs are considerable for communities, especially for a management regime granted only for ten years. Not surprisingly, even some years after the new law was enacted (1994), the Ministry reported that only seven Community Forests had been finalized. In contrast, ''ventes de coupe'' require no management plan, and there are no restrictions regarding logging methods.[35] Procedures may be almost as cumbersome in other countries such as Guinea Conakry, Nigeria, Ethiopia and South Africa, particularly in respect of establishing a Community Trust, Association or other legal entity.

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[30] Larson and Ribot 2007.

[31] Larson and Ribot 2007; Ribot JC and Oyono R. 2005. "The politics of decentralization". In: Wisner B, Toulmin C, Chitiga R (eds) *Toward a new map of Africa.* Earthscan Press, London; Oyono PR, Ribot J, Larson A. 2006. "Green and black gold in rural Cameroon: natural resources for local governance, justice and sustainability". Environmental governance in Africa Working Paper No. 22. World Resources Institute, Washington DC

[32] Larson and Ribot 2007

[33] Wily, Liz Alden. "Participatory forest management in Africa: an overview of progress and issues" in *The Proceedings of The Second International Workshop On Participatory Forestry In Africa: Defining The Way Forward: Sustainable Livelihoods And Sustainable Forest Management Through Participatory Forestry*, 18-22 February 2002 Arusha, United Republic of Tanzania. Rome: FAO. pp31-58.

[34] Oyono PR 2004. "Institutional deficit, representation, and decentralized forest management in Cameroon." Environmental Governance in Africa Working Paper, No. 15. World Resources Institute, Washington DC

[35] Oyono et al. 2006

At the same time, where oversight is lacking, smaller 'community' operations have often been co-opted by large commercial operators who cobble together the permits from many smaller operations as a way of avoiding regulations prohibiting large concessions, and/or illegally use these permits issued for "small concessions" to log in protected areas. This was the case in Peru, where under the 1977 Forestry Law that did not require concessions under 1000 hectares to submit management plans. As a result, big logging companies cobbled together several small concessions, often registered in the name of an employee, in order to sidestep management requirements. Such operations were responsible for a large amount of illegal logging in indigenous reserves. Passed under the indigenous President Toledo, a new 2001 Forestry law rescinded concessions of <1000 ha for this reason, sparking violent protest by a small number of large logging interests in Madre de Dios, who burned local government and NGO offices.

However, there are some examples where the management burdens are within community capacities and therefore have produced long term benefits for local people. For example, in Mexico, 80 percent of forests are the *dejure* properties of thousands of *ejidos* and *comunidades agrarias*, [36] with very little state-owned forests. After the 1975 reform of the Rural Agricultural Secretariat, an office to promote community participation in forestry was established that organized unions of ejidos and small property owners and made capital and training available, including to prepare forest management plans and establish forest enterprise.[37] Although of course not all community forest management is sustainable, some eijidos have succeeded in building modern forest enterprises to produce certified timber for the export market.[38] The VPA could help support capacity building for community management planning as well as facilitate the development of management expectations that balance the need for sustainability with community means, as well as making industrial management expectations proportional to their means.

Authority

Some use rights also include **management responsibilities**, such as thinning, pruning, and fertilizing, which may also be beyond the financial capacity of communities. Users may or may not also have rule-making authority regarding management, including placing limitations on certain kinds of practices, such as logging in particular areas, as well as monitoring and sanctions responsibilities. Where **decision-making** authority is not included in the array of rights recognized, critics have

[36] The ejido is a form of collective tenure in México, which may or may not be indigenous. The formal owner is the group of ejidatarios, but inside the group private rights are recognized, especially over agricultural and urban land. Forest areas tend to be collective property. A comunidad agraria is a recognized indigenous community with ownership fights over commonly held land.

[37] Klooster, Dan. 2003. "Campesinos and Mexican Forest Policy During the 20th Century." *Latin American Research Review* 38(2) 94.

[38] Merino, Leticia. 2005 "El Balcón, Mexico: Building Peace And Governability Around Communal Forests" ETFRN News 43-44/05, pp79-81.

noted that the State has effectively off-loaded its own management costs onto communities by requiring them to undertake management tasks such as planting and thinning, without providing any correlating authority. It begs the question whether local users will have the incentive to carry out management duties if they are not given authority of decision-making over the resource. For example, the Joint Forest Management program in India was designed as an efficient way to reforest degraded lands, but offered no management authority and unclear future access once the trees were established. In addition, the forest agency's preference for planting single tree species reduced the variety of commercially valuable NTFPs, leading to further economic marginalization of indigenous groups and communities dependent on petty commodity extraction from these areas.[39]

Indicators for successful community forest management

Recognizing management and rulemaking authority will not in all circumstances result in sustainable management. Common property theorists, led by Nobel Laureate Elinor Ostrum, have used case studies to identify basic principles for successful management of commonly held resources:

<u>Characteristics of resources</u>
- well-defined boundaries

<u>Characteristics of user groups</u>
- Small size/frequently interacting user groups
- Well-defined user group boundaries, able to exclude outsiders
- Homogeneity among subgroups
  - small variation in endowments/wealth and income,
  - shared livelihood strategies,
  - shared identities, norms & values,
- Low levels of poverty
- History of successful cooperation (social capital)
- Appropriate leadership—legitimacy, flexibility

<u>Relationship of users to resource</u>
- Location close to resource
- High levels of dependence of users on resource
- Fairness in allocation of benefits from common resources (legitimacy)
- Low levels of user demand
- Gradual changes in user demand

[39] Rangan, H. and M. B. Lane. 2001. "Indigenous Peoples and Forest Management: Comparative Analysis of Institutional Approaches in Australia and India" *Society and Natural Resources*, 14:145–160.

Characteristics of management institutions

- Access and use rules determined by users (legitimacy, adapted to local conditions)
- Rules easy to understand
- Rules able to respond to changes
- Harvest restrictions are matched to ecological regeneration
- Low cost, ease of detection/monitoring
- Graduated sanctions
- Low cost, accessible dispute resolution mechanisms
- Accountability of monitors/enforcers to other users

Characteristics of the relationship between users and external forces and authorities

- Outside demographic pressure
- Technology
  - Low cost exclusion methods
  - Low levels of capitalization of extraction
  - Low efficiency of extraction technology
- Market penetration
  - Low market penetration
  - Gradual change in market articulation
- State control
  - Nested levels of governance for appropriation, provision, enforcement, governance. Tasks delegated to the lowest level of authority with competence to complete the function
  - Recognition and support from central government for local authority to use and manage
  - Supportive external sanctioning institutions to back up local sanctions
  - External aid to compensate local users for conservation that restricts use.

Researchers emphasize that these principles are not *all* requirements for successful management, but simply that statistical analysis has found that circumstances where most of these principles are present are those most likely to have robust management outcomes, while those with few of the principles are likely to have failed management. Therefore, the principles are not a checklist but simply a preliminary guide to where VPAs might engage stakeholders to address some of the weaknesses.

Adapted from : Agrawal, Arun. 2003. "Sustainable Governance of Common-Pool Resources: Context, Methods, and Politics" *Annual Review of Anthropology* 32:243–62; Ostrum, Elinor. 1990. *Governing the Commons: The Evolution of Institutions for Collective Action.* Cambridge University Press.

The authority to control use is of critical importance, and the ability to prohibit use a central element in this authority. However, in some contexts, the responsibility and rule-making for management is devolved to local communities, but not the **right of refusal**. That is, the community cannot decide to forgo harvest or to reject a company's benefit sharing proposal. For example,

logging companies may be required to seek participation of local communities regarding operations within their concessions, but the communities cannot refuse to allow logging. This significantly hampers the bargaining power of the community and their ability to protect forests from outside use. At the same time, some view the right of refusal to be granting too much power to local communities over lucrative resources.

The right of refusal has been especially controversial recently in Peru, as in 2010 when President Garcia vetoed a bill passed by congress to mandate prior consultation with indigenous community in development and resource extraction decision making. Among his objections was what he interpreted as the bill's grant to communities of a unilateral "veto" for such projects, which he rejected as both an undermining of supreme state authority as well as holding hostage development projects that in his view would otherwise benefit the citizenry as a whole.[40]

It is worth noting, however, that UN Special Rapporteur on Indigenous Rights James Anaya has argued (including in direct reply to Garcia's rejection of the bill) that a unilateral and unqualified "right to veto" is in his view neither tenable nor supported in international law. Anaya argues that the right to consent better understood as the right to a good faith process through which consensus is mutually sought regarding benefit sharing and mitigation of negative impacts. If the project has "significant negative impacts" on the community then the State must further endeavor, through this process, to protect the rights of the community and ensure that adverse affects of the project are prevented or adequately mitigated.[41] In these circumstances, if the State fails to fulfill this duty of care, then, in Anaya's view, international law supports the right of the community to deny consent. Indeed, a right of consent is only meaningful if there is some possibility of withholding it. However, this right, as are all rights, is not unlimited.

Transfer

At the far end of the spectrum of rights is full **ownership**, or 'fee- simple' title, which confers all the rights of proprietorship plus the right of **alienation through sale or mortgage**, within limitations set by state law or zoning. This final restriction on right of alienation figures centrally in many debates, which again are revealing of the different perspectives on recognition of rights. For example, some in the development economics field, most prominently Hernando DeSoto, have argued (controversially) that rights of sale are necessary to realize development goals by enabling the use

[40] Letter from President Alan Garcia and Javier Velasquez (President of the Cabinet) to Congressional President Luis Alva Castro, June 21, 2010, Lima. (Official Correspondence No. 142-2010-DP/SCM)

[41] James Anaya. July 2, 2010. "Public Statement of the Special Rapporteur on human rights and fundamental freedoms of indigenous people on the Law of the right to prior consultation with indigenous peoples recognized in the Convention No. 169 of the International Labor Organization and approved by the Congress of Peru."

property as collateral with which to seek loans and develop entrepreneurship. As well, others among community advocates argue that full recognition of community ownership and sovereignty may not restrict transfer of property.[42]

On the other side of the debate, some argue that rights that derive their meaning from ancestral presence should not be entitled to cut short the rights of future generations to those same resources by the sale of the property. Given the lack of capacity and information available to most rural communities, many advocates view the possibility of sale as anti-poor as it is a means for local communities to be quickly fleeced of their land and resources and left even more disempowered.

In summary, it is of critical importance to specify precisely which rights and rightholders are at play when engaging in debate regarding recognition rationale and strategies. Likewise, the identification of these will be the subject of much debate, which is important for EFI and partners to understand in order to grasp the different interests and positions at stake.

The VPA dialogue may provide a platform where all stakeholders can agree on a process by which communities can better negotiate the terms of benefit sharing in forest contracts, and help establish a dispute resolution mechanism when communities feel that companies have not complied with the agreement.

Additionally, the VPA process could support capacity building for communities to improve management and monitoring capacities, and help build support among government and private sector actors for community management and monitoring, as well general awareness raising of community rights.

[42] Lynch, Owen and Emily Harwell. 1990. *Whose Resources? Whose Common Good? Towards a New Paradigm of Environmental Justice and the National Interest in Indonesia*. Washington DC: The Center for International Environmental Law.

Who are the Rightsholders?

The other critical aspect of engagements with local rights is defining the exact groups of rightsholders. Once again, this will in large part be colored by the different goals and motivations of the stakeholders, from individuals to government entities. As with identifying the rights at stake, it will be critical to undertake multistakeholder engagements to discuss the different, and often competing, perspectives on identifying the relevant rightsholders.

Identify the Rightsholders

- **Individuals**
- **Ethnic group**
- **Indigenous community**
- **Peasant community**
- **User groups**
- **Gender**
- **Village government**

As mentioned previously, the argument by development economists about the need to recognize local rights has been driven by an understanding of **individual** 'fee simple' property as being the most efficient for capital development. In addition to the use of land for collateral, drawing on the 'Tragedy of the Commons' view of common property, this school of thought envisions an 'evolution' of property types from common property using land-extensive forms of subsistence such as hunting and gathering or shifting cultivation, to demand more individualized holdings where returns to labor investments can be guaranteed. This, in fact, was the very rationale that many states (both colonial and post-independence) have used in privileging corporate use over community use of natural resources. Local, communal tenure was seen by definition as wasteful and unsustainable. In fact, however, there is no inherent guarantee that corporate use will be sustainable nor that community use will be profligate in the absence of government oversight.[43]

Indeed, a school of social scientists, economists and common property theorists-- most notably Nobel Laureate Elinor Ostrum-- found that in many circumstances **collectives** can jointly manage resources in a sustainable fashion.[44] The question then becomes, which collective holds the rights? Will it be:

- a **community as a whole**, regardless of whether they engage in a particular resource use,
- a **collective of particular users** (loggers or charcoal makers, for example), whose interests will be in the sustained access to the resource but may neglect the consequences of this use for the broader community of non-users,

[43] Larson and Ribot 2007

[44] Elinor Ostrum. 1990. *Governing the Commons: The Evolution of Institutions for Collective Action.* Cambridge University Press.

- a community defined based on its **ethnic or 'traditional' status,**
- or a community of disempowered **landless (non-indigenous, no longer self indentified as indigenous, or no longer considered "traditional") peasants?**
- Who will make these decisions and what does that say about **the location of authority and accountability**?

It should also be noted that even when not in formal law, there are often **gender limitations** in customary practice on who can hold rights, particularly to land or lucrative extractive resources such as timber. Often simple codification of customary law may have the effect of further disempowering women who may not be traditionally able to own land. This consideration is especially important in post-conflict contexts where the number of female headed households (war-widows) increases dramatically. In this way, efforts to be both pro-poor and socially sustainable must carefully investigate the gendered aspects of rights.

Finally, the rights may be decentralized to a **lower level of government** at the village level, but often accountable to higher government authorities rather than the community itself. As discussed below, in many contexts, decentralization has been undertaken, not out of recognition of legitimacy of local claims, but out of desire to increase efficiency of government operations. The rationale behind this transfer is often that management and enforcement capacity by the State at the local level is weak and that local agencies will be more responsive to local conditions and needs. At its best, decentralization can also internalize externalities of resource extraction by shortening communication and feedback channels to increase ability to address to negative environmental and social impacts, so costs and benefits of resource extraction are not disproportionately borne by one group. Likewise, decentralization, by relocating authority closer to the resources and communities that depend on them, makes those who hold power more accessible, thereby (potentially) increasing transparency and accountability and assisting in local development and poverty reduction.

However, if the central state agencies lack capacity to manage natural resource adequately, it begs the question whether local government institutions will have the capacity to do so (especially if no financial resources are earmarked for building capacity). Further, if the institutions that are to be the managers of the resource are formed by the State, with representatives appointed by the State, and the rules set by the State, this is not a recognition of local rights *per se*, or even a devolution of authority, but rather an extension of central state control to the regional level.

3. Understanding Positions: Why Recognize Customary Rights?

There are many motivations for different parties to favor recognition of customary rights. When these motivations are considered in historical and current political-economic contexts, they help us understand what drivers push forward the process and what outcomes we might expect from different types of engagement through the VPA process. This section briefly outlines some of the different perspectives on the role of local rights in forest management and some of the controversies surrounding these arguments. Identifying the different motivations provides insight into stakeholder positions and how to best to build constituencies for customary rights recognition.

One means of understanding the positions of different stakeholders regarding the recognition of customary rights is to assess the relative ***salience*** of the rights to a particular stakeholder's interests and the relative **influence** of the stakeholder to the debate. For example, for **local communities**, in general, salience is likely to include such factors as the importance of access to land and livelihood strategies (including the degree of dependence on land and forests, and whether an individual is currently employed or likely to become employed by logging operations, whether informal or formal. Another key element is the role of cultural and/or spiritual importance of particular forests and other locations likely to be affected by logging. Finally, if communities are to be relocated or denied access to forests – this could be a critical factor in community positions.

However, it is important to recognize that community interests are not uniform and different community members will have different interests at stake in how rights are recognized. Even in small communities (and indeed within families) the salience of the issue of customary rights recognition, and the rights and rightsholder groups that such recognition would empower, will vary widely with variables such as gender, length of residence, livelihoods, status and whether the individual is in a position to capture benefits, and individual personality and values. Often attempts to recognize customary rights will empower male elites and particular user groups (such as those involved in the local timber trade), who stand to gain from negotiations with logging companies, at the expense of **lower status families, ethnic or religious minorities, youth, or women** who make their living from agriculture or collection of non-timber forest products.

Like communities, government agencies are not homogeneous but rather have diverse mandates and interests, as do the variety of officials within them. In general, **forest agencies** are often reluctant to relinquish authority and control over forests and their revenues, both licit and illicit. This may be due to a belief in the superior capacities of the State to sustainably manage resources, or simply a question of maintaining prestige and power that comes with jurisdiction and control of revenue streams. On the other hand, some officials may recognize the failure of state capacity to adequately control and manage forests, to the detriment of both the local communities and the natural environment. Such officials may favor recognition of rights where there is a history of robust local management institutions. However, it is always important to bear in mind that officials are individuals with particular histories, networks, experience, and personalities that also color their positions.

Civil society also varies in their constituencies and the mandates of their organizations. Some NGOs that are primarily conservation oriented may be resistant to community rights recognition, in the belief that local communities will over-extract and degrade biodiverse areas. Others who represent communities will advocate for their empowerment and the fulfillment of their rights.

The **private sector** is also diverse. Some operators, like forest officials, will seek to maximize revenue streams and the extent of their control over the forest and its use. However, others may see partnerships with local people as a way to improve the reliability of their 'social license to operate' and therefore protect their operations and product stream rather than be interrupted by blockades, violence or intimidation of staff, or dealing with protracted disputes. In addition, some operators will view these partnerships as a way to set themselves apart as 'good players' and thereby increase their market share among discriminating consumers. A review of corporate responsibility policies and history of performance on voluntary community agreements and engagements will provide an indication of where individual companies fall in this spectrum.

Identify Stakeholder Positions

Sources: document research, interviews

Motivations to support recognition of customary rights:

Efficiency

Government

Sustainability

Environmental NGOs

Community & Advocates

Pro-Poor

Community & Advocates

Development workers

Legal Standing

Community advocates

Justice/Redress

Community & Advocates

Good business, market share

Private Sector

Indigenous Political Constituencies

Political Parties

Community & Advocates

Influence is rather more difficult to generalize as it is deeply contextual. The extent of state capture by logging interests is a central consideration, as is **class** and **access to financial resources.** But the ability to access and mobilize resources to support one's position also applies to political resources. The ability of certain positions (or the stakeholders supporting them) to mobilize sizeable constituencies will increase their influence in a debate. Political constituencies are key factors, but so to are those networks defined by ethnic or religious ties.

Gaining an understanding of a stakeholder's position requires accessing several sources. Policy documents, public statements, and news interviews are a good start. This should be complemented with comprehensive interviews with a variety of members of each group. The profile and influence of a stakeholder member is an important consideration of how widely they view might be held within their group, but it is **mistaken to assume that the perspectives of a few leaders are representative of the entire group.**

It is important to emphasize two essential truisms of this type of inquiry. First, perspectives are dynamic. It cannot be assumed that stakeholder interests and positions will remain static, nor their influence on the debate. Changing circumstances often affect interests and priorities, which might significantly shift a stakeholder's position.

Second, when attempting to assess a stakeholder's viewpoint, it is critical to remember that responses are colored by factors such as the profile of interviewer and how are viewed by the respondent, where the interview takes place, who else is present, and how current events are likely to influence the respondent's thinking.

With these caveats in mind, the following sections outline the various motivations for recognizing customary rights and the debates surrounding them that might marshal opposition.

Interests that May Create Opposition to Recognition of Customary Rights

Maintain maximum authority over forests and forest revenues (licit and illicit)

Forest officials

Private sector

Lack of confidence in community management capacity

Forest officials

Environmentalists

Fear of demands and protracted negotiations with communities

Private sector

Commitment to industrial extraction as path to national economic development and poverty reduction

Donors

Forestry officials

Fear of complexity of monitoring and verification of legal compliance of rights

Donors, IFIs

Government

Private sector

Lobbying power of private sector, political constituencies

Forestry officials

Executive and Legislative branches

Efficiency

Forests are often degraded when the State is absent or unresponsive to local conditions. State agencies, particularly in the developing world, often have low capacity for effectively managing forests located far from capital cities. At the same time, as noted at the start of this paper, local communities are already present and managing large portions of the world's forests with and even without formal recognition of tenure.

In addition to **physical proximity** to the resource and (in many cases) an already **established capacity for forest management**, communities are often more efficient in their use of labor. Theorists in agrarian economies have noted that **household labor is more flexible** that wage labor as different household members can be called into service as needed and their time divided among a diversified portfolio of products according to market, seasonal and harvest cycles. Subsistence livelihoods in particular have a tendency to stretch labor as far as necessary to reach adequate returns, whereas wage-laborers will only work for the tasks and hours for which they are paid.[45]

For example, many indigenous Dayak farmers in Borneo have a complex livelihood strategy of rice farming and cultivation of rubber, pepper and fruits that allows them to add income during slack periods in the agricultural cycle. This 'balanced portfolio' further provides income when climatic cycles or pest outbreaks reduce rice yields.[46]

Common property theorists have noted **lower transaction costs of management** when the managers have close social ties and proximity to the resource. These transaction costs include the communication of rules to users, the detection of environmental, market and social changes, adaptation through making new rules, and the ease and cost of monitoring and enforcement.

However, these advantages are limited by **the relative frequency of interaction.** The less often users interact, the more diffuse social networks become as individual members interact less often, increasing the difficulty of communication about rules and changing environment becomes. Also, the larger a community is, the less interdependent its members are and the more pronounced **differences in livelihood strategies and values associated with resources**, as well as in overall norms. This heterogeneity makes conflicts over rules and use more frequent, although well-crafted conflict resolution mechanisms can help resolve these.

[45] See for example, Ellis, Frank. 1993. *Peasant Economics*. Cambridge University Press.

[46] Dove, M.R. 1993. "Smallholder rubber and swidden agriculture in Borneo: A sustainable adaptation to the ecology and economy of the tropical forest." *Economic Botany* 47(2): 136-147.

Sustainability

Those interested in the conservation of resources in the developing world have noticed the tendency of protected areas in these regions to exist primarily as "paper parks" due to lack of state capacity or will for enforcement and lack of involvement or **incentive for communities to protect resources** from which they are excluded from accessing. In recognition of this problem, conservationists have increasingly drawn on the arguments of anthropologists and community advocates about indigenous resource management capacity and their role in maintaining even forests previously considered to be 'untouched' primary forests. This new model of 'people centered' conservation and forestry has moved from the model of excluding surrounding communities from parks and forest estates toward recognizing the ability of many local users to sustainably manage resources, particularly in comparison to large logging companies.

One major pillar of this argument is the large field of study devoted to **indigenous technical knowledge**, which is highly place-specific, accumulated expertise about local ecological and social conditions that make management very specialized. Others note that long-term community presence and economic dependence on the resource provides motivation for long-term planning and sustained yields, and can take into account non-market values such as water quality, NTFPs, and spiritual values associated with standing forests, thereby facilitating the internalizing of externalities of extraction.

However, critics note that indigenous knowledge can be romanticized and is often limited by technological capacity and can be driven by values other than long-term management of the resource. Additionally, local communities are not immune to the influence of markets and resource value, which can undermine the sustainability of management decisions. Likewise, cultural change may endanger established resource use patterns and management values.

Nonetheless, the **security of local access and management investments** is a key factor. If eroding internal legitimacy of resource rules, combined with outside pressure on resources and declining recognition of exclusivity of use, are deemed by local users to put their future access at risk, the community may opt instead to reap short-term benefits, to the detriment of the sustainability of the resource.

Pro-poor

Neoliberal economic development theory holds that poverty reduction is possible through increased foreign direct investment and increased GDP. But research has shown that the poorest sectors of rural populations depend most heavily on forests for subsistence and when commercial extraction reduces community access to forest, even when overall GDP is increased, this exacerbates poverty. [47]

[47] Kaimowitz, David. 2003. "Forest Law Enforcement and Rural Livelihoods." *International Forestry Review* 5(3):199-210.

Development economists have argued that recognition of local rights to resource management provides security of their management investments, which encourages increased capitalization and commercial activity, thereby leading to local economic development and poverty reduction. Further, ecological anthropologists have noted that local livelihoods often rely on a wide 'diversified portfolio' of commercial and subsistence strategies including different forms of agriculture, rubber tapping, timber or charcoal sale, wage labor, which households can turn to in different seasons and under different market and labor availability conditions. This diversified economy is more resistant and resilient to economic and climatic shocks.

Some logging operations that aim to integrate local communities come with a capacity building or technical assistance component, which has obvious advantages for poverty reduction. However, even in absence of this formal assistance, there is some evidence that recognition of local rights can increase income and livelihood security by improving their negotiation positions with middlemen and other outside contracting parties who might otherwise try to intimidate the local community, especially if their use of the forest is deemed to be 'illegal' in the eyes of the State.

Community advocates have argued that local rights are essential to equity in access to benefits. Poverty, in Nobel Laureate Amartya Sen's observation, is not attributable merely to insufficient access to financial and other resources (including natural resources), but to a lack of citizenship and political, economic and social freedoms as well as the capacities that enable one to reliably enjoy these freedoms. Are indigenous communities the most vulnerable? What about landless and migrant communities? What are the gendered and age-effects of rights recognition? To be truly pro-poor, therefore, many community advocates argue that rights recognition must occur within a larger context of economic and political empowerment.

Legal standing

Others have argued that recognition of customary rights of participation in forest management decisions is not just a good idea for efficiency, sustainability, or poverty reduction reasons—it is actually a legal duty.[48]

As noted above, several elements of customary rights are well established in international law, particularly in regard to free, prior and informed consent and the importance of land and resource control to indigenous cultural identity. These rights are often affirmed in national law. Therefore, even where such rights are not codified in national law, many stakeholders, especially community advocates, are likely to argue for recognition of international law within the legality definition.

Further, human rights activists argue that the recognition of rights to forests is essential for full citizenship and the enjoyment of other human rights, including redress and rule of law, freedom

[48] Anaya, James. 2005. "Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources." *Arizona Journal of International & Comparative Law* 22(1): 7-17.

from racial discrimination, effective representation, as well as to cultural heritage. As the Forest Peoples Programme (an NGO prominent in the indigenous tenure debate) has argued, "Effective recognition of the rights of forest peoples needs to go 'beyond tenure', in the sense of just allocating community forestry leases or land titles to forest users. This is not just to repeat the 'bundle of rights' argument about [the multiple kinds of rights associated with] land ownership but to assert that for tenurial rights to be effectively exercised, they need to be secured within a wider framework of rights recognition."

Justice and Redress

As noted above, existing law may recognize the rights of local people in relation to forests, but these rights may have been ignored or abrogated over time. Therefore, recognition of rights may be motivated by a desire or duty to redress abrogated rights or unjustly seized land and resources. Such restitution or redistribution often occurs in time of transition, such as post-conflict or in political transformation (e.g. post-socialist or post-apartheid), but not exclusively in such contexts (e.g. India's Forest Rights Act). Such a recognition process is contentious, requires local input to identify the appropriate right-holders, effective conflict management mechanisms, and demands significant capacity and resources and therefore a strong commitment from the State. Indeed, the process of adjudicating land disputes can play an important role in rebuilding society and trust in the State if the process involves local people and is seen as legitimate, but it can also exacerbate conflicts (and create new ones) if the process is seen as unfair.

Good Business

Some in the private sector resist any effort to include rights of tenure or consent for local communities as it only adds expense and effort to logging operations. However, more progressive companies have recognized that their field operations depend on buy-in from local communities, whose protests can interrupt product streams by erecting blockades, abducting local staff, or encouraging boycotts or strikes. This necessary 'social license to operate' means that meaningful and good-faith negotiation and recognition of local rights makes good business sense and a fiduciary responsibility to the shareholders to protect corporate investments. This has been a powerful motivator for corporations in forging workable local partnerships. Further, increasingly, as legality requirements continue to emerge for wood imports into some markets, as well as procurement policies, financing, certification and membership in timber federations, market access may hinge on credible demonstration of compliance with the law. To the degree that customary rights are recognized in law, compliance will increasingly become important for operators to demonstrate.

Recognition can also be used to improve or support the reputation of a company (or country) as 'good actors' and thereby improve market share of timber products among consumers with awareness and concern about the social impact of timber sourcing.

Political Constituencies

Although certainly not the only factor at play, many actors may choose to recognize local rights as a strategy for establishing or reinforcing political constituencies. For example, in India a significant factor in strong support for the contentious Forest Rights Act by the leftist parties was the need to appease voters among Scheduled Tribes, particularly in the face of increasing Maoist "Naxalite" activity. Lack of recognition for land and forest rights has been argued to be a major factor in fanning Naxalite activity across India's forested tribal regions.

Identify the Historical Context

Sources: academic articles, interviews

Issues:

Pre colonial use and tenure

Colonial prohibitions, manipulation of settlements and resource use

Post Colonial nation building and legal reforms

Armed Conflict

Ethnic or religious competition

Past efforts at rights recognition

Summary

One of the realities of multistakeholder engagement is that different stakeholders have different interests and motivations, which are ever changing. Therefore, different players may want to see different rights recognized, and different people will want to frame the recognition of the same right in different ways, hoping to ensure that their interests are served by the recognition. Although what rights if any are recognized through a VPA process is up to the country's stakeholders to determine through dialogue and consensus, if the EC is to play an effective catalyzing role to include elements that will help support the three pillars of SFM, it is important for negotiators to understand the landscape of interests in which this dialogue will occur.

4. Historical Context

Legacies of past events and dynamics are important considerations in understanding how customary rights are viewed by different groups in the current context, and thus how they will argue for different aspects of the way the recognition plays out in reality. Although ever-evolving, **pre-colonial or pre-contact social and institutional structures and livelihood practices** lay the foundation for how indigenous communities organize themselves and view land and resource use/ownership today.

These structures and practices were invariably profoundly altered by **colonial interventions.** Some traditional structures or practices may have been outlawed or wiped out, others may have been strengthened or manipulated by the colonial powers to suit their own ends, such as political control, tax collection, or large-scale resource extraction and trade. Colonial powers were

particularly hostile to mobility of indigenous groups, and often sought to sedentarize communities--whether for control and taxation, or ostensibly for their "protection" or "salvation"--which had substantial consequences for indigenous communities organized around seasonal hunting, gathering, or pastoral resource uses. Some colonial powers were strictly mercantile while others pursued indirect rule through indigenous leaders and power structures, and the indigenous organizations were profoundly affected by these different strategies of rule.

Likewise, **post-colonial regimes** have laid down yet another layer of influence in their own efforts to control people, territory, and trade, which often involve carrying over colonial forms of control. These trends of replicating colonial practice and identity politics in the post colonial State are often contradicted by the need to consolidate former colonial subjects into a new "nation" that is durable because of its sense of common belonging.[49] Developing a sense of nationhood often draws on a rhetoric of 'indigeneity' as a means of breaking with colonial pasts that abrogated and disrespected indigenous identity and rights.

However, the **ethnic competition** and strife set in motion by colonial interventions is often difficult to overcome. Indeed some of this ethnic conflict may have predated colonial contact but was nonetheless exacerbated by it. And of course countries without a colonial past are not immune to ethnic and religious conflict. This ethnic and religious differentiation and competition (if not violent) often configures whether certain ethnic rights and/or practices have support and recognition, especially if one of the groups has been privileged by colonial and/or post-colonial States.

Armed conflict, whether between ethnic groups, between insurgents and states, or between neighboring states, inherently create land conflicts. Conflict causes waves of displacement, and often land seizures. Refugees return to find squatters on their land, perhaps with their own claims after a long period of occupation and improvements. Insurgencies may have been motivated (even if only nominally) by indigenous interests and rights subordinated under current regimes. The aftermath of these wars may bring some progress in legal recognition of rights, but may also leave lingering suspicions of indigenous agendas where movements or leaders may have used the cover of indigenous empowerment struggles for personal, political, and even criminal economic power.

A further historical element to consider is **past efforts at recognition of customary rights and their outcomes.** What justifications were used, what responses did the effort(s) generate, and what were the impacts on local communities, other competing resource users, the private sector, and the condition of the forest resource itself? These outcomes will likely contribute either positively or negatively to the current status of rights in their legal standing, the expectations of local communities and the NGO advocates, political parties, and the private sector.

[49] Benedict Anderson. 1991. *Imagined Communities: reflections on the origin and spread of nationalism.* Verso.

In summary, the historical development of how customary rights have been recongized, violated, and/or manipulated by various parties and for various ends is of critical importance in assessing how different stakeholders will view any VPA engagement with them in the present.

5. Current Political Economic Context

Legacies of the past continue to be filtered through current political-economic dynamics in their effects on the customary rights of communities today. This section examines possible current influences on customary rights and how in turn it may influence different stakeholder perspectives to the inclusion of customary rights in the VPA process. These dynamics stem from and reverberate back to multiple scales: the global, regional, national, district, and community, and form new connections with new constituencies that can either work to support or undermine particular interpretations of customary rights recognition.

At the ***international level***, free trade agreements, foreign direct investment and demand for natural resources tend to work against the recognition of indigenous rights, as they are often viewed as obstacles to investment and (a neoliberal theory of) economic development. At the same time, however, international support for human rights and the land and resource rights of indigenous communities in particular has been building since the late-1980s, and has seen significant progress in standard-setting and pressure on governments and multilateral institutions to respect customary rights, especially in relation to REDD initiatives.

In Peru, a critical factor in the status of customary rights is the role of the international trade of resources, especially of mahogany, oil and gas, oil palm, and soy. Likewise, logging for mahogany has significant negative impacts on the integrity of the forest within native territories and on which they depend for their livelihood, it also creates inroads for colonization. Oil exploration has caused pollution and brought outsiders into indigenous communities who pose a significant danger because of introduced diseases to

Political-Economic Dynamics

Sources: news media, academic articles, interviews

International

- Trade & investment
- Indigenous advocacy
- Carbon markets
- Conservation
- Geo-politics

Regional

- Flow of timber, finance
- Ethnic alliances
- Political support or conflict

National

- Political parties
- Decentralization
- State capture by industry
- Importance of timber industry to economy
- Post conflict pressures

Local

- Reach of government
- Involvement in logging
- Class dynamics

Civil Society capacity

Private sector's record

Community capacity

uncontacted groups. Increasing demand for biofuels and other agricultural products has created a land market that represents a serious threat to natural forests under community control.

In addition to international trade generally, the US Peru trade agreement is a particularly salient factor in current debates around customary rights and forest sustainability. The agreement was initially negotiated and passed under the Bush administration but a Democrat-controlled Congress pushed for environmental and social safeguards. Thus, the Forest Annex to the agreement required reforms to forest governance and anti-corruption mechanisms. However, as discussed below, the Garcia administration had made strategic use of these international dynamics and the trade agreement requirements to push through his own legislative changes that indigenous people felt would undermine their property rights in favor of foreign investment.

Additionally, a burgeoning carbon market is significantly influencing the debate as Peru is among the countries targeted for funds for Reduced Emissions from Deforestation and Degradation (REDD), for example in the World Bank's Forest Carbon Partnership. Indigenous groups have expressed concern that carbon trading will proceed without adequate consent of the affected communities, inadequate share of benefits and issue "carbon concessions" on lands that they claim in further abrogation of their rights.

However, international advocacy continues to support the rights of indigenous communities, not only through international NGOs but through organization such as the UN Working Group on Indigenous Peoples, as well as the US courts.[50]

At the ***regional level,*** there are significant "neighborhood effects" on a country's political economic context, that is, political developments and trade relationships with neighboring countries play an important role. Mobility across borders of people (including indigenous groups whose boundaries do not coincide with national territories), capital, and trade figure prominently in the pressure to protect land and resources or to convert them to alternative uses.

Regional dynamics have had a significant role in the US interests in Peru, especially in the context of increasing concerns both about the trend of **socialist politics in Venezuela and Bolivia** under Hugo Chaves and Evo Morales, including macroeconomic policies such as nationalization of oil and gas as well as a general climate of opposition to US "imperialism". These dynamics overlay long standing North American concerns over the **drug trade and coca production** in the Andean regions. At the same time, Evo Morales, as an indigenous person

[50] An appeals court ruled that a case filed by indigenous plaintiffs from the Peruvian Amazon against Occidental Petroleum Corp. should be heard in Los Angeles. The lawsuit filed in 2007 accused the Los Angeles-based company of causing health and environmental problems by knowingly dumping an estimated 850,000 barrels of toxic wastewater per day into the rainforest inhabited by the Achuar people of northern Peru. Health studies have revealed that Indians living in the contaminated areas suffer from high blood concentrations of cadmium and lead. (AP. Dec 6, 2010. "LA court can hear Peruvian case against oil giant")

himself, has made important **strides in Bolivia toward indigenous empowerment** and strengthening indigenous land and resource rights. These dynamics of indigenous mobilization have stretched across borders to increase awareness and resistance to policies and private sector activities that indigenous communities view as against their interests.

At the ***national level,*** dynamics involving the rhetoric and campaign platforms of competing political parties are critical in configuring the landscape for customary rights. Movements toward decentralization increase the visibility of customary rights and may also increase the likelihood that these rights will be included in law (although in many cases, in practice, decentralization has simply relocated to the local level corruption and trampling of local rights by private interests). Further, factors related to national government such as corruption and capture by corporate interests, and capacity for enforcement of customary rights, are critical.

The size and relative importance of the industry to the national economy is also an important element to consider as economically important sectors are also politically important sectors, with deeply entrenched elites in both the private sector and in government, whose interests are likely to be opposed to any erosion of authority over forests and forest revenues. However, sectors with significant international trade to markets where there is pressure from consumers and/or governments to demonstrate that resource industry does not violate community rights are likely to be more open to community partnerships involving recognition of rights. Countries whose primary markets are domestic or in consumer countries where there is not demand for social responsibility in timber products are likely to be more resistant to change. However, this is not always the case as seen in countries where significant progress has been made as a result of the US Lacey Act amendments and EC Due Diligence Law, even though the US and Europe represent only small proportions of the producer country's market.

In post-conflict countries, there are invariably pressures to quickly increase resource extraction to generate employment and revenue for reconstruction and recovery, as well as to demonstrate a "peace dividend" to citizens and former combatants. Furthermore, there is likely to be a speculation around concession allocation with operators who are looking for a high return in exchange for the high risk investment. Such investors may cut corners on social and environmental regulations in order to increase returns, especially where oversight is lacking.

The post-conflict rush to re-establish industrial logging

Post conflict governments, sometimes with support from the donor community, tend to prioritize natural resource extraction through industrial concessions, including logging, as a means to jump start the economic recovery, at times to the detriment of smallholder access and health of forests important for local livelihoods. The World Bank Inspection Panel has found that the Bank favored industrial logging to the detriment of indigenous livelihoods in Cambodia and DRC. (A further complaint for Liberia was put forward in 2010, and is still under review). A rush to allocate large concessions can result in a resource grab by political elite due to access to economic and political assets. In the absence of specific safeguards, post-conflict further entrenches these inequities.

For example in Mozambique, Hatton et al (2001) report that in the initial post-war economic rush to increase investment, concessions were granted at different levels of government and without coordination between sectors. Further, "the process of granting concessions was not consultative, especially with regard to local communities living in the areas concerned. Consequently, the same area of land was sometimes granted to different concession seekers, and often there was conflict with local communities. In some cases, (displaced) local communities returning to their places of origin discovered that tracts of land had been requested or given over to outsiders…Concessions were even allocated in protected areas, at a time when management had not yet been re-established in most protected areas." Hatton at el also further report that, due the dearth in information and weakened state institutions before the war, land use zones including boundaries to protected areas were not well known, resulting in frequent overlap with concessions. Finally, in somewhat of an understatement, Hatton et al note that, "with the transition to peace and associated shifts in power, corruption in some cases became a factor in the allocation, control and use of land and natural resources.

Sources: Harwell, Emily, 2010 "Forests in Fragile and Conflict-Affected States" Washington DC: The World Bank; Hatton, J., M. Couto, and J. Oglethorpe. 2001. "Biodiversity and War: A Case Study from Mozambique." Washington, DC, USA: Biodiversity Support Program.

At the ***local level***, the reach of government to remote rural communities will determine whether there is the capacity to protect customary rights even if they are recognized in law. Likewise, local class dynamics and involvement in extractive operations may color how local recognition initiatives play out. For example, if there are local elites who derive some benefit from extractive operations, either through bribes or employment, these power differences are likely to be reflected in some people's representations of "the community's interest." For example, under Liberia's new Community Rights Act, the committee controlling access to forest and the revenues from benefit sharing are required to have local legislators as members, even if they do not originate or reside in the community.

At all these levels, the ***reach and capacity of civil society organizations*** is an important factor in their ability to mobilize and raise awareness around the interests of communities, as well as carry

out tasks like demarcation and land titling activities when the government has no will or capacity or credibility to do so.

A final consideration is the **record of the extractive companies in relations with local communities and with government**. A private sector that has been allowed to operate in the absence of adequate consultation with or compensation of local communities, or to renege with impunity on benefit sharing or community development agreements is likely to have expectations that such behavior will be allowed to continue. In turn, bad practice by the private sector is likely to have contributed significantly to a demand by communities for improved respect for local rights. Additionally, corporate lobbying power with the government has proven to be a formidable obstacle to recognition of local rights and enforcement of legal norms for customary rights.

6. VPAs and Customary Rights: Risks and Opportunities

The mandate of VPAs to support SFM through the development of and support for timber legality assurance systems certainly provides scope for engagement on customary rights, although direct engagement through the VPA might not in every case be the most effective means to advance either the VPA's goals or the goal of promoting the recognition of these rights. Having examined some tools for assessing the kinds of customary rights at stake and the various motivations and contexts for their inclusion in forest sector reform, we now turn to the possible opportunities for engagement of these issues in the VPA process, and the potential risks this engagement may pose to success of the VPA and to the success of the efforts to recognize rights. These opportunities are not intended to be prescriptive or used as a template for action. Rather, the central point of this framework is that the circumstances in each country must be carefully analysed in context to determine the forms of engagement that are likely to be most productive in furthering the recognition of customary rights and the three pillars of sustainable forest management.

First, it should be noted that the arena for engagement of customary rights in the VPA process is circumscribed by several factors. The scope of negotiation, which respects the **sovereignty of producing country** to determine the content of the legality definition. However, as citizens of the country, various concerned actors including local community representatives, CSOs, and the private sector also have a legitimate role to play in the debate around the management of the country's natural assets. The fact that the EC strongly encourages **multistakeholder involvement in all stages of the process** increases the likelihood that CSOs with strong ties to local communities will continue to raise the importance of customary rights in any conceptualization of 'legality'.

Several VPA multistakeholder processes have been able to facilitate legislative reform. For example, some VPAs identify specific **legal reform** needs to recognize local rights where legislative tools were currently lacking. These legislative reform commitments are part of the VPA and will be addressed during implementation. Much will also depend on the **capacity and influence of civil society, as**

well as the private sector, in lobbying the government for change. It is in **facilitating and providing capacity building where needed for this multistakeholder engagement** that the EC is likely to have an important role.

The most direct field of VPA engagement with customary rights is in the content of the **legality definition**. If domestic laws recognizing customary rights already exist, the multistakeholder process might choose to include them in the legality definition to be verified in order to receive an FLEGT export license.

However, the success of the legality definition depends on the **rigor of its verifiers** within the legality assurance system. Criteria must be clearly defined and verifiers unambiguous as well as practicable and enforceable. There are some concerns that the difficulty in reliably verifying social criteria might make them impractical to include as legal requirements. Regulatory provisions may not be sufficiently specific to provide concrete and unambiguous standards of performance and laws may be especially vague with respect to land tenure and local community rights.[51]

Voluntary timber certification regarding land tenure and indigenous rights (FSC principles 2 and 3) provides some experience on verifying social criteria. The FLEGT and VPA support programmes could support other research in this area to compile this experience with social criteria in certification, procurement requirements or verification for other legality assurance system, perhaps in other sectors. As mentioned above, as FPIC is more and more incorporated into domestic law, international financial institutions, and best practice guidelines for corporations, multi-stakeholder dialogue is taking place through the CBD (such as the *Akwé: Kon Guidelines)*, IFC Performance Standard 7 on Indigenous Peoples, and other private sector initiatives on what mechanisms could be used to document that FPIC requirements have been met.

Further, it is important to note that in the VPA legality definition there can be **no 'hierarchy' of criteria**; all criteria must be verified in order for the licenses to be issued. For example, in contexts such as Indonesia where the government historically failed to undertake local consultation in land use zoning and routinely issued concessions on community claimed forests, whether to include these laws within the legality criteria is a subject of considerable contention. Compliance with these criteria would require rezoning of the entire forest estate and reallocation of concessions before certificates could be issued, making it likely that pressure from the private sector (and their public sector advocates) could lead to sidelining or fudging these criteria. On the other hand, excluding these considerations from any definition of legality runs the risk of legitimating an illegal and disempowering arrangement and failing to meet the FLEGT goals of social sustainability.

[51] See for example, Adrian Wells, "The legal basis for forest sector verification systems" in *Legal Timber: Verification and Governance in the Forest Sector*. David Brown, Kate Schreckenberg, Neil Bird, Paolo Cerutti, Filippo Del Gatto, Chimere Diaw, Tim Fomété, Cecilia Luttrell, Guillermo Navarro, Rob Oberndorf, Hans Thiel, Adrian Wells. London: Overseas Development Institute. pp227-236.

One possible approach in such cases might be for companies to address community claims on concessions they have already been issued by entering into a good faith negotiation of benefit sharing and participation in management decision making and monitoring, even if this process by definition cannot meet the standard of 'prior' consent.

It is also important to remember that the **legality definition is an iterative process**, which can be further revised in the future to fill in gaps in legislation.[52] If there are no laws currently on the books, specific elements of customary rights could be **included as "Additional Measures"** while legal reform is underway and the formal definition revised once reform is complete. This inclusion would both recognize the public commitment by the government and increase the pressure on all parties to ensure that progress is made in these areas.

However, is the inclusion of these obligations as Additional Measures or in the implementation plan (and therefore not requiring their verification for FLEGT export certificates to be issued) realistically sufficient to push for progress in these areas, or will the lack of political will maintain reform paralysis on social obligations while reaping the political and economic benefits of FLEGT legality certification? This is a question for the multistakeholder process of the VPA to discuss and for lessons to be learned from the early experience with VPAs in a variety of countries.

But the opportunity for engagement with customary rights through the VPA process is not limited to the legality definition. **There may be fertile opportunities outside of the legality assurance debate to facilitate open stakeholder discussion, support capacity building, and provide technical expertise in areas such as**

- **developing adequate regulations for existing laws** recognizing local rights,
- developing **fair procedures for negotiation with communities** and i**ndicators for when these procedures have been complied with**,
- **capacity building for community to negotiate** on their own behalf with companies,
- developing **credible dispute resolution mechanisms and complaint channels** for resolving conflicts around compliance with community-company agreements
- developing **equitable management requirements** for industry and community based logging operations that balance needs for sustainability and means,
- **capacity building for communities for management planning and monitoring**,
- building **awareness and support among government and private sector for community authority to monitor and manage resources**.

[52] EFI. 2010. "Current Guidance in the Development Of Legality Definitions in FLEGT Voluntary Partnership Agreements"

Risks

The success of any engagement with customary rights (indeed with any element in the legality definition) is very much constrained by the positions and influence of various stakeholders in the VPA process and their ability to reach consensus. Most crucial is the **political will on the part of the government agencies** (and specifically the abilities of the **individual government negotiators** and their capacity to win support for their position and mediate between players) to engage the customary rights debates and seek a way to credibly include them in the VPA process. **The expectations and influence of the private sector** also plays an important role. The capacities and influence of CSOs, as well as threats to them and the availability of protections from these threats are critical elements to the openness of debate. Finally, the level of **popular support** for customary rights and in particular those relevant to timber production is an undercurrent in many of these stakeholder positions.

If the issue of customary rights is included in the legality definition or as a central pillar in the multistakeholder working groups and dialogue, what are the possible **risks of engagement to the VPA's ability to successfully meet its goals**? There is a risk that the VPA agenda will be overloaded by issues that exceed the political will of the government. To overcome a dearth in political will, legality definitions may contain criteria and verifiers that might be so overly vague as to cripple enforcement and undermine the credibility of the legality certificates. Alternatively, the verifiers might be logistically complex or difficult to carry out, stalling momentum on chain of custody, revenue transparency or other legality assurance mechanisms. The process could become mired in intractable debates and in-fighting around issues and allegiances that extend beyond the timber supply and cause the collapse or indefinite stalling of the negotiations. More generally, the VPA might become, or seen to be, a catalyst for flare ups in protest, political tensions and instability, and even violence. EC negotiators could be seen or portrayed, not as neutral actors, but as pressing a political agenda that impinges on the producer country's sovereignty. This risk is increased depending on how visible and contentious the VPA process is within a given country context.

Furthermore, aside from the risks to the VPA, if not undertaken carefully, recognition of "community rights" could in fact bear some **risks to the community itself.** This can happen when there are not adequate safeguards to prevent "local" elites (who might not even reside in the community) to coopt the process and gain control of decision making and revenues, denying the community any opportunity for meaningful participation or benefit sharing from the extraction of their forests.

There may also be **risks to the agenda of formal recognition of local rights** if the debate is centered around a high profile bilateral trade agreement. Such high level state-to-state negotiations could raise suspicions of foreign intervention, especially in contexts where certain political interests are served by fanning the flames of either xenophobia or anti-indigenous sentiment.

However, there are also very real **risks of not engaging** with customary rights in the VPA process. Although the producing country has sovereign authority to determine the content of the legality definition of the VPA, the EC requires that **the definition and the process by which it is reached be considered legitimate and credible.** If not, the VPA is likely to be unenforceable and short-lived, as it is likely to meet strong resistance from civil society and local communities. The lack of social license to operate may endanger the ability to move timber to market. This is particularly true in countries where there is already domestic legal affirmation of some aspects of customary rights, although these elements are not ultimately included in the legality definition.

In such a situation where customary rights are sidelined, logging operators will enjoy the benefits of presenting themselves as being in compliance with the law but the VPA will in fact run counter to the FLEGT stated goals of supporting sustainability including of social benefits. Such an agreement runs the risk of further disempowering already impoverished communities by providing EC imprimatur to land grabs that endanger local livelihood and political rights. Such an outcome would not only fail to meet the stated goals of FLEGT, it would damage the hard-won credibility of FLEGT and the EC more generally as an honest broker in the sector. Further, as illustrated in the Peru example to follow, in some contexts, the neglect of customary rights can also lead to inflamed political tensions, protests and blockades, and physical violence.

Summary and Conclusions

There are four likely scenarios that VPA negotiators (on both sides of the table) are likely to encounter in relation to customary rights and for which consensus will need to be sought:

- Customary rights are recognized in law, but are not supported by implementing regulation, contradicted by other legislation, and therefore have been routinely ignored in establishing land use zones and allocating concessions, and by the forest sector in general
- Customary rights are recognized in law but are ambiguously defined (likely because there is little political will to operationalize and enforce them), and therefore reliable verifiers are difficult to identify
- Customary rights were once recognized in law, but have since been abrogated, and some stakeholders want to use the VPA as a platform for reinstating them
- Customary rights are not recognized in domestic law, but some stakeholder wish to use the VPA process as a platform for pushing for recognition through legal reform, with the possible goal of eventually including them in a legality definition.

In all of these cases, the unresolved issue of customary rights is likely to have contributed to a forest sector that is unsustainable in all three pillars of environmental, social, and economic sustainability.

Although they cannot dictate the outcomes in these different circumstances (indeed for different rights, all four scenarios may be playing out in a single country), the EC can help facilitate consensus that meets FLEGT's goals of fostering SFM.

Opportunities may exist to facilitate open stakeholder discussion, support capacity building, and provide technical expertise on legal reform, negotiation procedures with communities, benefit sharing and management planning standards, and general awareness raising on the capacities and authority of community to manage and monitor the forests they claim and depend upon for survival.

Regardless of the form of engagement, for the EC to play a useful catalyst role in these highly controversial issues, EFI and EC players engaged in the VPA process must understand not only the rights themselves, but the different positions and interests surrounding them and how these have changed over time and in relation to current contexts. In this way, VPA actors can help win constituents for rights recognition that will benefit both forests and people.

ANNEX 1: Peru case study

Peru ranks ninth in the world in forest area, with some 72 million ha of with natural forests and 725,000 ha of plantation. 28 million hectares are designated as production forests. [53] The largest areas of forest are in the lowland Amazon near the borders with Brazil, Bolivia and Ecuador, also home to many indigenous communities, some of them living in voluntary isolation. Globally, Peru is particularly important because it has the largest remaining commercial density stands of mahogany, some of which are within the territories of uncontacted indigenous people.[54] Further, Peru is notable for its high levels of illegal logging, which some estimate accounts for 90% of the country's timber. These dynamics are critical threats to the survival of many peasant and indigenous communities, and for decades have figured centrally in the political landscape from the local to the international levels.

Between 30-48% of Peru's population are indigenous, most of whom live in remote rural areas, and most of whom live in poverty or extreme poverty. [55] The country has a history of land dispossession of indigenous communities, but in the last decade and a half Peru has undergone a nationwide agrarian reform program, formalizing titles for customary land, for both indigenous and peasant (non indigenous) communities.

However, critics complain that, motivated by a neoliberal agenda of privatizing and sale of land, the State has devoted few resources to titling communal lands, instead easing the process for the privatizing communal holdings, to the detriment of both communities and forests. Further, communal title has not been adequately protected by the State, and incursions by loggers and oil companies are frequent, posing a risk not only to indigenous forest resources but to the health and safety of the communities themselves. Even when community rights are respected, forests with communal reserves or community titled lands are still considered "public", that is, owned by the State with proprietary usufruct rights held by the community. This ambiguity in use rights has led to forest degradation, tenure insecurity and increased impoverishment for local communities, political tensions, and even violence.

[53] FAO 2006

[54] Kommeter R, Martinez M, Blundell AG, Gullison RE, Rice RE. 2004. Status of mahogany in Bolivia and Peru. *Ecology and Society*. 9:12.

[55] In 2005, 53% of those in extreme poverty in Peru were indigenous. World Bank. 2005 "Indigenous Peoples, Poverty and Human Development in Latin America: 1994-2004." Washington DC

Sources

This overview of the relevant contexts and dynamics of customary rights in Peru was informed by various sources including *international NGOs* (CIFOR, Traffic, Environmental Investigation Agency, Rights and Resources, Forest Peoples Programme, Amazon Watch, Save our American Forests, Environmental Law Institute, and Rainforest Foundation), *national NGOs* (Asosiación Interétnica de Desarollo de la Selva Peruana or AIDESEP; Derecho, Ambiente y Recursos Naturales or DAR; Sociedad Peruana de Derecho Ambiental or SPDA); *multinational institutions* such as the FAO for forest data, UN Working Group on Indigenous Affairs for the relevant legislative framework and pressures on native communities, World Bank and the IDB, which have been especially involved in land reform and titling programs in Peru. *Bilateral* sources included US Trade Representative and US Congress Ways and Means Committee (for information on the US Peru trade agreement); and the EU's 5 year strategy papers for Peru for information on relevant political economic contexts. Analysis on political economics of forest reform was available from *private sector* chain of custody operator VERIFOR; policy briefings on the trade agreement from EIA, Amazon Watch, DAR and AIDESEP, as well as *academic* and a variety of national and international *media* sources. Texts of laws can be found on the Peruvian congressional site (www.congreso.gob.pe/ntley/LeyNumePP.htm); US Library of Congress site, some with English summaries (www.glin.gov) and the DAR site (www.dar.org.pe/legis.htm).

Legal Framework

Customary rights to land in Peru have a strong basis in law, both in the constitution and in various land titling acts and provisions for the establishment of communal reserves, as well as in ratified international conventions. However, these rights are compromised in law by some ambiguity when it comes to the ownership of forests and subsurface resources, and how this intersects with communal rights to land.

Constitution

The 1993 Constitution respects the cultural identity of both indigenous and rural peasant (non-indigenous) communities and recognizes them as having legal existence as legal persons (Art 88). It affirms that they are **autonomous in their organization, communal use and free disposal of their lands**, as well as economic and administrative matters within the framework established by law (Art 88). It holds that **communal ownership of land is imprescriptible (not subject to cancellation) except in the case of "abandonment"** (Art 89), **in which case ownership reverts to the State for private sale** (Art 88).

Prior to 1993, the 1920 constitution had provided that communal lands were not saleable, mortgageable nor prescriptible. The 1993 text removes the first two of these restrictions, granting

communities autonomy to freely dispose of their lands. The provisions, which have yet to be regulated by law, apply to the Amazon as well as highland and coastal areas, making Peru the only Amazonian country to allow, in principle, the parceling of communally titled indigenous lands into individual lots.

At the same time however, in an earlier article (Art 66), the text states that **all natural resources belong to the State, which alone has the ultimate authority over their use or transfer**, except as issued through legal concessions. This ambivalence about indigenous rights is echoed in subsequent forestry legislation, as discussed below.

Domestic Law and Regulations

Indigenous and peasant community rights

While the legal status of customary use rights is defined in law, the enjoyment of these rights has been confounded by lack of state presence and will. Communal titling has been carried out largely through NGOs and therefore is still incomplete despite the legal grounds for registration having been promulgated in 1974.

Indigenous and peasant communal lands may be titled and registered, pursuant to the Native Communities Act of 1977, and Agrarian Reform and Titling Act of 1995. However, the laws were designed primarily to achieve efficient land markets, modern cadastres, and tax structures through secure private titles. Many critics complain they have undercut communally held title by facilitating their transfer to individual holders.

Further, forestry laws claimed all forests not under private title for the State. Long-term usufruct rights can be granted by the State to indigenous groups, and Communal Reserve rights could be established for non-agricultural subsistence (not commercial) uses in forested areas. Lands outside the forest estate can be mortgaged or sold, if approved by two thirds of the community assembly, as outlined by the 1995 Law of Private Investment. Lands deemed to be "abandoned" or "unclaimed" by registered title may be privately sold by the State.

Even where communal title has been successfully registered, weak law enforcement in remote areas to enforce these rights against outside encroachment poses significant risks to the forests and the health and integrity of the communities. Perhaps most pernicious is the lack of clear state commitment to respect and protect these rights over private investment opportunity, as discussed below.

Forestry and other resources

As noted above, the constitution grants ownership of all resources to the State, with sole authority for their management, except as temporarily and conditionally granted through concession. [56] The

[56] 1977 Forestry Law; 1997 Law for Sustainable Use of Natural Resources; 2001 Forest and Wildlife Law; Hydrocarbon Law 1993, 2005

issue of oil and gas concessions in the lowland forests has been especially threatening to local communities, as these concessions overlap with indigenous reserves or titled land.

Further, for agriculture, controversial decrees were passed in 2008 in association with the US free trade agreement, detailing the procedures for transfer of "abandoned" land that was deemed suitable for agricultural development.[57] Such land is defined as land that is uncultivated but with agricultural potential. Exempted are lands that are formally titled, either privately or communally. These decrees raised concerns among indigenous groups that land that they claimed but which had not yet formally surveyed and registered[58] would be open for plantation development, particularly for oil palm by Brazilian investors. Indeed, in this same year, President Garcia issued several decrees declaring various biofuel crops, including oil palm, as being in the national interest.[59]

The 1977 Forestry Law, however, allowed for the creation of Communal Reserves, with exclusive subsistence usufruct rights in forested areas. These rights are inalienable and unembargoable.

There are no legal restrictions on communities applying for small commercial logging permits but the requirements for complex management plans are the same for both large and small operators, a fact that some claim has made legal compliance out of local communities' reach because of the capacity and financial investment needed. CIFOR notes that many communities wind up selling logs at liquidated prices to companies that file the paperwork for them, discounting from the payment costs that they have incurred along the way. Logging companies also falsify timber extraction permits for communities and traffic the legal permissions granted under the communities' names to launder timber cut from protected areas, making it appear as though it has come from the community's territory. Communities are then stuck owing taxes on the timber, even though it may not have actually come from their forests. There are many indigenous communities who are not even aware of the enormous debt burden that loggers have amassed for them.[60]

Abrogation

[57] D.L. 994, DL 02-20080AG

[58] NGOs report there are some 300 communities waiting to have their land surveyed and registered and some 500 who have applied for extension to their territory but are still waiting for these extension to be processed. ("Comments on Peru's REDD Readiness Preparation proposal" Rainforest Foundation, Environmental Investigation Agency, Global Witness. June 2010)

[59] Supreme Decree 04-2008-AG – National Interest for energy proposes the installation of Wild Cane and Bamboo Plantations; Supreme Decree 016-2008-AG - National Interest for the installation of Jatropha curcas y Ricinus communis (higuerilla) plantations. Already passed in 2000 was legislation for oil palm Supreme Decree 015-2000-AG - National Interest the Installation of Oil Palm Plantations.

[60] Deborah Barry and Peter Leigh Taylor. 2008. "An Ear to the Ground: Tenure Changes and Challenges for Forest Communities in Latin America" Washington DC: Rights and Resources Initiative.

As detailed below in the discussion on historical contexts, Peru has experienced repeated ideological shifts between various forms of recognition of communal title as a means of protecting indigenous cultural identity as well as "peasant" (not necessarily indigenous) livelihoods, followed by somewhat contradictory efforts to promote economic development through expanded markets for resource extraction and land through alienable individual title.

Forestry Laws of 1977 and 2001 and the 1997 Law on Sustainable Use of Natural Resources effectively abrogated the right of community ownership over forest lands that was affirmed in the 1974 Native Communities Act, claiming that all such land was the property of the State, with sole sovereignty to determine its use. This proprietary right was reduced to a subsistence usufruct right, which could be revoked at any time by the State.

International instruments

Peru has ratified the UN conventions on Elimination of All Forms of Racism (CERD), Civil and Poliitcal Rights (ICCPR), Economic Social and Cultural Rights (IESCR), The Convention on Biological Diversity (CBD), and the International Labor Organization Convention 169 on Indigenous Peoples. As discussed in Part I above, these binding instruments require states to identify and protect the property rights over the lands and resources occupied by indigenous peoples, and to consult them in decisions affecting these assets.

What Rights and Who Holds Them?

There are essentially two types of rights recognized in Peruvian law: Communal Reserves and Community private titles. In **Communal Reserves**, forested areas sometimes within designated Protected Areas, subsistence usufruct rights are communally held and are inalienable, unembargoable (not mortgageable or liable to lien) and not prescriptable, except if deemed to be "abandoned", although it does not define how land would be identified as such. The rights allow residents to restrict outsider access, thereby legally protecting uncontacted groups from incursions, at least in theory. Some legislation restricts membership in indigenous communities to those who have resided in the community continuously for twelve consecutive months, except for reasons of health or military service.[61]

Some restrictions on use exist within Communal Reserves within protected areas, requiring that such use be consistent with conservation. These reserves are not proprietary rights, the State retains ownership, but limited to subsistence uses and no agriculture is permitted. However, in such protected areas, mechanisms for routine consultation with the communities living in or near the forests are also required in management planning.

[61] Native Communities and Amazonian Development Act DL 22175, May 9, 1978, Art 9.

The 1974 Native Communities Act, the 1993 Constitution, and subsequent land reform and titling laws allow for registration and issue of **private title for communal lands**. The Constitution and Agrarian Reform Laws allow for sale, mortgage or division of communal land into individual parcels, when approved by a majority vote in coastal communities and a 2/3 vote in lowland and Andean communities.[62]

Although no explicit **gender limitations** to land ownership exist in law, Peru's land reform law in practice favors granting of land titles to men, as it follows community practice of assigning traditional household headship to men as "qualified" community members. It does not provide for joint titling, or give priority to women in titling as in Colombia.[63] Peru's law does not explicitly state that men and women have equal rights to land, or to benefit from state programs independently of marital status, as other laws in the region do. [64]

CIFOR notes that he law does not specify the amount of land per capita that should be titled to an indigenous community, but because the demarcation is subject to approval by the decentralized Land and Cadastral Agency (PETT), the size of territories is subject to the arbitrary decision of agency officials and does not necessarily represent the ancestral territory of the community. A community may apply for an extension/enlargement (*ampliación*), but these are difficult to obtain because the government suspects that indigenous communities seek rights to that land only so that they can sell the timber. The government reportedly considers *ampliaciones* not as rightful ancestral territories, but as state resources that have been granted to indigenous peoples.[65]

In addition to indigenous communities, a significant number of **peasant (non indigenous) farming communities** have acquired the legal status of *comunidad campesina* and therefore hold communal titles to their land, although in practice these are usually small areas.[66]

[62] del Castillo Pinto, Laureano. 2004. "La Titulación de Tierras de Propiedad de Comunidades Campesinas en el Peru." Land Reform, Land Settlement and Cooperatives:111-130.; Baranyi, S., C.D. D eere and M. Morales. 2004. Scoping Study on Land Policy Research in Latin America. International Development Research Center.

[63] Taylor, Peter Leigh. 2006. "Country Case Study: Forest Tenure and Poverty in Peru." CIFOR and Rights and Resources.

[64] Although after the 1995 Beijing Conference on Women, Peru modified its administrative regulations to allow joint titling for married couples, these regulations do not carry the same force as legislation(Deer and Leon 2001)

[65] Barry and Taylor 2008.

[66] De Jong, 2008.

	Communal Reserve	**Community Title**
Indigenous only are eligible	YES	NO
May include forests	YES	NO
May be inside protected areas	YES	NO
Ownership	State (public)	Private
Use restrictions	Subsistence only. If in Protected Areas use must be consistent with conservation goals	Commercial allowed
Alienable	NO	YES
Embargoable	NO	YES
Prescriptable	YES if use restrictions not complied with	NO except “abandoned” or “uncultivated”
Privatizable to individuals	NO	YES by majority vote (coastal communities, 2/3 vote (lowland and mountain communities
Gender impacts	None	None in law, but in practice individual titles usually issued to male household heads (not jointly, not to female headed households)

In summary, a significant number of peasant and indigenous communities have received title or use rights to their lands, although frequently not to all the land and resources they claim. Titles are issued to communities not to ethnic groups and are often small and not contiguous. Nevertheless, regularization and titling programs have achieved significant progress in clarifying and making more secure community access and use rights. Further, government efforts to operationalize decentralized government agencies and to incorporate participatory consultation have opened up new avenues for local participation.

However, a significant drawback is that indigenous and peasant private titles do not include ownership of forests. Rights are governed by overlapping land use/policies and administration, which does not consistently protect their interests or that of sustainable resource management. Further, many critics express concern that the customary titling laws are contributing to the division of communal lands into individually owned parcels that are then easily sold or lost through mortgage liens.

Further, rights to subsurface resources rests with the State, regardless of indigenous or peasant title or reserves. Almost the entire Peruvian Amazon is carved up for possible exploitation; 36 million ha of this area overlaps with indigenous territories.[67] While the law requires that communities be "consulted" if mineral or petroleum exploration is to take place, this often does not happen in practice nor does it act as a safeguard from contamination from the operations, impacts on forests and wildlife, and health risks from introduced disease.

Historical Timeline

1532	
	Fall of the Incan empire to Spanish
1780	
	A revolt against the Spanish led by Tupac Amaru, the last Incan chief. The rebellion is put down and Tupac Amaru is executed.
1824	
	Simon Bolivar declares Peurvian independence
	Dispossession of indigenous territory rampant as wealthy "Creole" landowners amassed large estates
1916	
	Law passed ordering all land illegally taken from the *comunidades* be restored to them, but is not widely implemented

Historical Context

The political history of Peru, like many Latin American countries, reflects strong currents of colonial dispossession and indigenous and peasant mobilizations and strengthening of customary rights. But these periodic cycles of recognition

[67] De Jong 2008.

were often countered by a liberal (and neoliberal) ideology of economic growth through state control and industrial extraction of the country's rich natural resources.

Pre-colonial Diversity and Mobility

Amazonian Indians lived in small, seasonally-mobile family groups dispersed throughout large territories of jungle. The livelihoods of these groups consisted of a diverse suit of hunting, fishing, and gathering of NTFPs. Some also practiced shifting agriculture. In contrast, the Andean (highland) agricultural communities (*allyu*) were more settled and concentrated under strong hierarchical organization of the Incan empire, which used the allyu organization to extract tribute and labor from subject populations.

Colonial Conquest and Indigenous Reserves

Throughout Latin America, both fiscal and labor policies favored ethnic differentiation in land tenure regimes. After the Conquest, the Spanish Crown assumed patrimony over all native lands, allowing Spanish colonists to take over indigenous lands and labor and force natives into vassalage of the *encomienda* system. Some pre-colonial social institutions such as the Incan *ayllu* were able to receive legal status through the system of reserves (*reducciones)* set up to facilitate tribute collection by the Spanish administrators. In areas less desirable for agriculture, indigenous people were herded into *reducciones* run by Jesuit missionaries nominally for the "protection" of the Indians but where they were required to contribute labor. [68]

Post Independence Instability and Tides of Recongition/Abrogation

After Simon Bolivar declared Peruvian independence from Spain in 1824 (the last in Latin America to do so), the subsequent political climate of liberalism espoused a vision of prosperity that relied on individual title and open land

1920	
	The 1920 Constitution recognized the indigenous communities' existence and their right to communally claimed land
1957	
	Communal Reserves allowed, with usufruct rights
1965	
	Guerilla attacks on the government by the Movement for a Revolutionary Left, inspired by the Cuban revolution
1968	
	Civilian government toppled in a coup by Gen. Juan Velasco Alverado
1971	

[68] Plant, Roger and Hvalkof, Soren. 2001. "Land Titling and Indigenous Peoples" Washington DC: Inter-American Development Bank.

markets. Laws protecting indigenous communal title were abolished by mid-century and many lands were sold by the State.[69]

The last half of the nineteenth century marked the beginning of a long period fraught with instability, military dictatorships, and a pendulum of political struggle between conservative landed elites and liberals who pushed for political and economic reform, and increased recognition and empowerment of peasant farmers.

Throughout Latin America in the early twentieth century, the prevailing climate was one of recognition. In 1909, Forest Law 1220 gave the State dominion over forests. Indigenous people were permitted to live in and around the forest, but they could not obtain land titles.[70] However, following the Mexican revolution and the establishment of communal *eijidos*, other Latin American countries began to grant legal ownership to indigenous communities or to encourage the establishment of new reserves. A Peruvian 1916 law ordered that all land illegally taken from the *comunidades* be restored to them upon payment; and the 1920 Constitution explicitly recognized the indigenous communities' existence and their inalienable right to communal lands (as did Bolivia's 1938 Constitution. In 1937 Ecuador enacted its Statute on Communities, which urged that they be transformed into producer cooperatives). However, these policies were primarily paternalistic, designed to protect indigenous communities and offered no autonomy or decision making control. The land areas were likely to be small, not equivalent to the entire area of claimed territory, and often not contiguous.[71]

In the 1950's and 60s, the tide reversed, and land was increasingly concentrated into large *latifundia* estates controlled by a few elite. Some studies estimate 75% of the country's agricultural land was concentrated in less than 4000 holdings. [72]Indigenous farmers were driven onto small parcels, onto estates as landless seasonal labor for export agriculture, or immigrated to cities due to landlessness and food insecurity. This motivated increasing indigenous frustration and organization during the 1960s, when occupations of large estates by peasants (indigenous and non-indigenous) were frequent.[73]

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[69] Ibid.

[70] Stocks, Anthony. 2005 "Too Much for Too Few: Problems of Indigenous Land Rights in Latin America" *Annual Review of Anthropology* 34: 85-104.

[71] Ibid

[72] Ballantyne, Brian, Michael Bristow, Buster Davison, Sean Harrington, and Khaleel Khan. 2000. "How Can Land Tenure and Cadastral Reform Succeed? An Inter-Regional Comparison of Rural Reforms." *Canadian Journal of Development Studies* XXI:693-723.

[73] Plant and Hvalkof 2001.

At the end of the 1960s, the tide again turned toward recognition with President Juan Velasco Alverado, a dictatorial general who took power from the civilian government in a coup but who nevertheless enacted the previous government's early attempts at agrarian land reforms. The reforms redistributed large land holdings but organized around communal ownership and collectivized production, rather than indigenous institutions or practices. A leftist administration, the land reforms downplayed ethnic differences in favor of increasing Soviet-style class consciousness, referring to peasant communities rather than indigenous. The socialist collectivization of indigenous lands was problematic for the forest-dwelling indigenous groups who are not necessarily organized into large discrete communities and their subsistence practices require access to large tracts of land.

Further, a systematic titling program did not accompany the land distribution. Of the total number of almost 5,000 peasant communities registered under the agrarian reform program, only 1,565 received title to their land. Rather, many communities found themselves involved in cooperative ventures, which turned into economic failures and caused much resentment.

In 1970, however, the Statute on Peasant Communities was passed, which established a state representative for the indigenous and peasant communities. Growing colonization and conversion of lowlands led to the first concerted efforts to demarcate or title communal lands in the tropical lowlands. Peru became the first country to recognize full rights of collective ownership for its Amazonian indigenous populations.[74] The first indigenous reserves were also established. In 1974, the ***Native Communities Act*** was passed, allowing indigenous communities to petition for **communal and inalienable land titles**. **Third parties could be removed** from recognized native community areas, upon payment of compensation for land improvements. The lands were **not transferrable through sale or mortgage**, and **did not include subsurface rights**. Free access to third parties was nevertheless permitted for oil and mineral extraction in forest regions.[75]

[74] Ibid

[75] Ibid

The initial impact of the 1974 act was slow. Some 315 native communities were titled during the first five years, but the titled areas were small islands in the midst of expansive colonist enterprises. The initial titling was conducted as largely administrative measures, changing the legal status of former reserve lands to that of native communities. The effects were far more significant after the late 1970s when, in the face of growing pressure from colonists, new indigenous organizations in the Peruvian Amazon began to undertake their own demarcation and titling initiatives with the support of NGOs.

Success of the Amazonian indigenous movement in titling land has now persuaded the self-identified *ribereños*[76] to reconsider their ethnic identity. One such group of *ribereños* on the lower Huallaga river redefined themselves as indigenous Cocamilla in the 1970s, and had their community territory titled. Neighboring ribereños groups soon followed suit. In the largest protected area of Peru (the Pacaya-Samiria National Reserve inhabited by more than 35,000 ribereños) more than twenty new native communities have now been recognized by law as indigenous and have been claiming their rights to communal territories. This illustrates the beginning of ethnic revitalization that has also recently begun to also have resonance in the Andean communities.

The law also recognized the right of native communities to form confederations (both within and across different ethnic groups) that would act as direct interlocutors to the State to advance their interests, and marked the beginning of the rise of indigenous organization and advocacy.

In 1975, Velasco was ousted (following decline of the economy and his health) by Gen. Bermudez, who resumed democratic elections and established a constitutional assembly. But the new democratic reforms and development of an effective state apparatus did not reach the rural indigenous areas.

1973	
	Manu National Park established to protect forest and several indigenous (including some uncontacted) groups.
1974	
	Native Communities Act passed, allowing for indigenous land titling
1975	
	Velasco ousted from power by Gen. Bermudez
1977	
	New forestry law nationalized all forests, abrogates indigenous title to

[76] Indigenous people who are detribalized and do not refer to themselves as indigenous due to the negative connotation. The term is analogous to the *cholo* people in the Andes.

Under pressure from nationalists who argued that timber should be a public asset and conservationists who wanted tighter forest regulation, the ***Forestry Law of 1977*** **nationalized all forested lands** and established a special regime for national parks and reserves and the Native Communities Law was modified to reflect these changes. Since that time, the Peruvian **state claims all ownership of forests and no longer recognizes indigenous property rights over forest lands**; instead, the revised law granted communities the possibility of a **long term, preferential concession from the State for certain forest usufruct rights within the area demarcated for the community**. Indigenous farmers, under this law, must request permission from the State to fell natural forest for shifting agricultural fields. Articles 28 and 29 subject legally-recognized native communities to greater "social interest," providing right-of-way for all state-constructed roads now and in the future and free passage, without indigenous consultation, to oil or gas pipelines and installations, telecommunication or energy electric lines, and public irrigation and drainage channels.[77]

However, in partial compensation for the loss of forest ownership rights, the new law reaffirmed the possibility for creating **Communal Reserves**, large areas of forest designated for **collective non-agricultural use and management by the communities** bordering on it.[78]

In 1979, the constitution was reformed to protect all ethnicities recognizing the right of people to adhere to their own "cultural identities". Bilingual education

1979

Constitution recognizes indigenous cultural identity and language rights

1980s

Rise in demand in US creates expansion of coca cultivation by Andean communities

1982

UN Working Group on Indigenous Peoples established

1980-2000

[77] Stocks 2005

[78] Robert Chase Smith. 2003. "Can David and Goliath Have a Happy Marriage? The Machiguenga People and the Camisea Gas Project in the Peruvian Amazon" In *Representing Communities Histories and Politics of Community-Based Resource Management*. Peter Brosius, Anna Ling, and Charles Zehner, Eds. Altamira Press.

was recognized, including the right to deal with the State in one's own language, through an interpreter if necessary. Article 149 also gives indigenous communities judicial functions within their territory in "accordance with customary law".
However, realization of such guarantees was long delayed.

During the 1980s, El Niño climatic extremes caused economic hardship and increasing demand in the US created a rise in coca production in the Andes. At the same time there was also an increase in international awareness and advocacy around indigenous communities and their interests, including the ILO 160 revision of the 1957 Convention on Protection of Indigenous Peoples. The United Nations officially acknowledged indigenous people in 1982, when the Working Group on Indigenous Populations (UNWGIP), a special forum of human rights experts, was established in Geneva for representatives of indigenous organizations and Governments to exchange views on a wide range of issues. The Working Group began drafting the Declaration on the Rights of Indigenous Peoples in 1985.

The regional Coordinating Body for Indigenous Organizations of the Amazon Basin (COICA), formed in 1984 and a participant in the proceedings of the UNWGIP, began an international campaign for recognition of aboriginal rights to a *territory*, that is, to a large continuous homeland, including all forest, aquatic, and subsoil resources (although the State continues to claim all subsurface rights). By the end of the decade, international funding facilitated a broad program of indigenous territorial mapping and titling efforts, especially as undertaken by the Interethnic Association for the Development of the Peruvian Amazon (AIDESEP), formed in 1982.

1990-2000

Alberto Fujimori's administration, marked by a move to urban violence and a brutal counter-insurgency

1990

Kugapakori Nahua Communal Reserve established for the protection of uncontacted indigenous communities.

1992

Fujimori suspends the constitution in order to implement anti-terrorist measures.

Tarata bombing by the Shining Path in Lima. Shining Path leader Guzman captured just weeks later

Civil War and Indigenous Victimization

The 1980s also marked the rise of the Marxist insurgency of the Shining Path (*Sendero Luminoso)*, who claimed to represent indigenous and peasant interests but who, along with state security forces, subjected these communities to decades of brutal violence and

intimidation. The same period also saw the rise of the indigenous Tupac Amara Revolutionary Movement (MRTA), who aspired through violence and insurrection to a nativist socialist state. But unlike the Shining Path, the MRTA did not attack unarmed civilian communities. [79] Indigenous communities were caught between the violent tactics of the Shining Path and the State's counter-insurgency against both rebel groups.

In 1985 President Alan Garcia took office, in the first peaceful democratic succession in 45 years. But increasing insurgency violence from Shining Path and state counterinsurgency, as well as hyperinflation and arrears on international debt continued to create instability.

In 1990, Alberto Fujimori became president and his administration saw a sharp upswing in violence. In 1992, the Shining Path began a deadly bombing campaign in an affluent neighborhood in Lima, for the first time bringing the civil war to the attention of many urban residents. In response, Fujimori suspended the constitution to enable more aggressive counterinsurgency measures. He formed an anti-terrorist security force, which waged a brutal crackdown on Shining Path and its "sympathizers", often engaging in collective punishment of indigenous communities. That same year, Shining Path leader Abimael Guzman was captured and imprisoned. Guzman called for a peace deal and disarmament, but a faction of his forces split and continued armed violence and narcotrafficking.

Access to forests during this period was controlled by insurgents, who all but shut down the timber trade. Some writers have seen the legacies of decades of rural violence in the lack of trust in indigenous institutions for management. For example, in addition to a theory of development that privileges industrial scale extraction operations, De Jong argues that the government's orientation to communal control of forested regions remains in many ways influenced by the role of remote forested regions as areas of rebellion and violence, and a need to exert state rather than community control.[80] The persistence of a top-down orientation, even in the face of a lack of state presence in the very regions that are still forested has doomed forests and forest communities to encroachment. De Jong estimates that even today some 90% of Peru's timber is from illegal sources.

[79] Final Report of the Truth and Reconciliation Commission. "General Conclusions."

[80] De Jong 2008

Post-Conflict and the Neoliberal Agenda of Tenure Formalization

As noted above, the 1993 amended constitution recognized and pledged protection for indigenous land rights but made it easier for them to be sold or mortgaged. Part of a broader trend of neoliberal, market oriented agrarian reform and land titling programs across Latin America,[81] Peru embarked on a new wave of tenure reform in the 1990s. However, founded in neoliberal goals of privatization and entrepreneurship, it prioritized saleable and mortgageable rights, and individual titles over communal.

The State established a Land and cadastral Agency (PETT) to register titles, but critics complain that there were inadequate resources devoted to titling communally held lands and most of the registrations were for private parcels in the coastal regions experiencing development booms.[82]

In 1995, the **Law of Private Investment in the Development of Economic Activities in the Lands of the National Territory and of the Peasant and Native Communities** was passed. Much of the law is concerned with the conditions under which various land categories can be opened up to the market, or sold by the State to private investors. A distinction is drawn between communal lands in mountain or forested areas mountain and Amazon regions on the one hand, and coastal areas on the other. **In the Andean and Amazonian areas, any rental, sale, or mortgaging of communal lands requires the approval of two thirds of the members of the community's general assembly. In coastal regions, which were undergoing significant growth in commercial agriculture and investment, only half of the community members were needed to approve the private transfer. The law also directed the government to auction off "unclaimed" or uncultivated "wastelands" (*tierras eriazas*).** The provision aroused concern that this would apply to substantial land areas claimed by indigenous communities, but not as yet titled. Indigenous organizations and

1993	
	Constitution amended to recognize and respect indigenous land rights
	Peru ratifies CBD
1994	
	Peru ratifies ILO 169.
1995	
	Lands Law for Private Investment in the Development of Economic Activities in the Lands of the National Territory and of the Peasant and Native Communities.
1997	
	Constitutional Law for the Sustainable Use of Natural Resources, reaffirms that all natural resources are owned by the State, which has sole authority for

[81] Baranyi, Stephen, Carmen Diana Deere and Manuel Morales (2004) Scoping Study on Land Policy Research in Latin America. Ottawa: The North-South Institute; International Development Research Centre (IDRC).

[82] FAO 2004. *Land Reform, Settlement and Colonization*, especially Marcus Colchester, Tom Griffiths, Fergus MacKay and John Nelson. 2004. "Indigenous land tenure: challenges and possibilities" pp 2-27; and Pinto, Laureano del Castillo. "La titulación de tierras de propiedad de comunidades campesinas en el Perú" pp110-119.

NGOs have argued that under these laws the collective rights of indigenous groups are being sacrificed to the interests of private investors. [83]

Following the mandate of Article 66 of the 1993 Constitution, the 1997 Law on the Sustainable Use of Natural Resources established the main conditions for the use of natural resources by private companies and individuals. According to this law, **natural resources belong to the patrimony of the Nation**. However those natural resources obtained in accordance to the statutes and regulations, belong to the titleholder, private company or individual, of such right. The new law provided a definition of natural resources and provides for the regulation of concessions for the sustainable use of the resources. Non-compliance with the conditions set within the regulation can lead to the nullification of the concession.[84]

When a community solicits collective title to an area of land it is demarcated by the Land and Cadastral Agency, PETT. Then the State, through the natural resource agency, INRENA, classified that area into sections for agriculture and ranching, forestry, and permanent protection. The actual title is only granted for the agricultural and ranching land, while the forestry and protection forests are given to the community under a usufruct contract. Although the government could revoke the contract if it found those areas were not properly used, those rights have never been revoked in any community.

Toledo's Administration and The Rise of Indigenous Rights

In 2000, after the forced resignation of Fujimori following revelations of widespread corruption, Peru's first indigenous president was elected, Alejandro Toledo. However, Toldeo's party did not have a majority of seats in Congress. Under his

1998	
	Matses Communal Reserve (457,000 ha) established for subsistence use.
2000	
	Fujimori forced to resign due to revelations of corruption. He flees to Japan.
2000-2006	
	Election of the first indigenous president, Alejandro Toledo.
2001	
	New Forestry Law closes regulatory gaps for small concessions being used to avoid management regulations.
2002	
	Indigenous Aguaruna forcibly evicted a community settled in their territory, killing 16, wounding 17, and kidnapping 4 minors. A court had ruled the village was illegal but the state did not act to remove them.

[83] AIDESEP "Decretos Legislativos Que Afectan a los Pueblos Indígenas, Emitidos Por El Poder Ejecutivo O En Virtud a la Ley No. 29157."

[84] Taylor, Peter Leigh. 2006. "Country Case Study: Forest Tenure and Poverty in Peru." Bogor Indonesia: CIFOR. August 2006.

administration, legal recognition of indigenous rights was strengthened, but also continued to be undermined in practice by threats from industrial extraction and uncontrolled outside incursions.

Like other Latin American countries at the time, Peru began a process of administrative decentralization in an attempt to improve efficiency and responsiveness of government.[85] In November 2001, President Toledo opened an unprecedented dialogue with representatives of political parties, industry, labor, religious and other civil society organizations, to reach a National Agreement on key policies, programs and objectives. After months of multiple level meetings, an Agreement was signed in July 2002 which included 29 state policies geared toward boosting democracy, rule of law, equity and social justice, competitiveness in world markets, efficiency, transparency and government decentralization. The list of policies did not include land reform or access to resources, though it did mention sustainable development, the promotion of equal opportunity and elimination of poverty, and protection of the environment. [86] Also as part of this multistakeholder dialogue, Consensus Roundtables ("Mesas de Concertacion") were established to seek consensus on forestry policies and goals.

Other events that raised awareness of the situation facing indigenous communities, a Truth and Reconciliation Commission was established to examine the patterns of human rights violations during the civil war. The Commission found that some 70 000 were killed or disappeared during the civil war, 80% of whom were indigenous people (primarily the Quechua speaking people of the Andean highlands). The commission highlighted the role of ethnic discrimination and exclusion of indigenous communities from Peruvian society, and the lack of a positive state presence in remote indigenous areas as major contributors to the violence. A program of "collective reparations" has now begun through social investment in the affected regions (rather than a focus on individual victims). [87] President Toledo also established the National Institute for the Development of the Andean, Amazonian and Afro-Peruvian Peoples (INDEPA) at the ministerial level as lead agency for the protection and development of indigenous communities.

2003

TRC final report outlines victimization of indigenous people during the war and their systematic exclusion from Peruvian society

Communal reserves established for the Ashinenka, Yine, Yanesha, Shipibo-Conibo, Jibaro, Purus, and Machiguenka people.

Royalties on oil exploration reduced in order to promote investment, producing a boom in oil operations in Amazonian forests within indigenous territory, many of whom are uncontacted.

[85] Barry and Taylor 2008.

[86] Taylor 2006

[87] *Final Report of the Peruvian Commission for Truth and Reconciliation*, August 28, 2003. Lima.

Communal reserves were also established for Ashinenka (184,468 ha), Yine (402,355 ha), Yanesha (34,000 ha), and Shipibo-Conibo (616,413 ha), Jibaro (95,000 ha), Purus (202,033 ha), and Machiguenka (218, 905 ha), with the goal of protecting biodiversity for the benefit of local communities and allowing their continued voluntary isolation. **Expansion of settlement and agriculture is prohibited, as is livestock activities and timber extraction for commercial use. Communal reserve establishment does not grant property rights to the communities. Instead, the State recognizes and protects the right of traditional access to natural resources for subsistence-based activities**.

However, customary rights in law are regularly ignored in the remote forests where the Amazonian communities live and where there is little state presence. Illegal loggers in particular make regular incursions into indigenous territory in search of lucrative mahogany trees. Once the roads are established, logging of the less valuable species, and agricultural colonists soon follow. [88]

For example, the Nahua people, who were campaigning against ongoing invasion by loggers into their territory even though it was protected as a Communal Reserve, reportedly demanded that their territory be recognized in a communal land title and excluded from the Reserve, feeling that communal title would offer them greater legal protection than reserve status. (This presented a challenge as to how to avoid undermining the legal status of the Reserve and therefore the territories of its other uncontacted groups).[89]

Forests in Peru also face serious threat. Estimate of illegal logging range from 60 to 90% of production.[90] In addressing threats to the country's forest assets, a new 2001 Forestry law Nº 27308 rescinded concessions of <1000 ha, which were exempt from management regulations. The 1977 Forestry Law allowed big

2006

Garcia wins presidency in a run-off

2007

Garcia unsuccessfully attempts to dissolve INDEPA

Garcia publishes his "Dog in the Manger" editorial

The US Congress passes a free trade agreement with Peru

Protest from Amazonian indigenous communities and advocacy groups over what the agreement will mean for indigenous land rights.

[88] Kometter, R. F., M. Martinez, A. G. Blundell, R. E. Gullison, M. K. Steininger, and R. E. Rice. 2004. "Impacts of unsustainable mahogany logging in Bolivia and Peru." *Ecology and Society* 9(1): 12.

[89] World Rainforest Movement." Peru: Policy development for indigenous peoples in voluntary isolation" http://www.wrm.org.uy/bulletin/87/Peru.html

[90] De Jong 2008

logging companies to cobble together small concessions, in practice often registered in the name of an employee, and sidestep management requirements. Such operations were responsible for a large amount of illegal logging in indigenous reserves.[91] The new forest law sparked violent protest by a small number of large logging interests in Madre de Dios, who burned local government and NGO offices.[92] Further, concession allocation auctions that took place following the cancellation of the smaller parcels resulted in concessions being granted that overlapped with communally held land, according to the government because out of date cadastral maps[93].

There were also significant threats to customary rights from oil exploration and extraction. In 2001 the government reduced royalties on oil exploration in order to promote investment, producing a boom in oil operations in Amazonian forests within indigenous territory, many of whom are uncontacted. In 2002, a petroleum exploration concession was granted to the Camisea oil project in the Amazonian districts, including the Nahua Reserve. Machiguenga communities living in voluntary isolation in the Reserve were contacted and forcibly displaced to other areas.[94]

However, there was some evidence of leverage for indigenous rights. In 2005, the Chinese oil company Sapet, was granted an exploration permit that included territory within indigenous reserves of uncontacted people in Madre Dios. After pressure from advocacy groups, Sapet agreed not to work in this part of their concession and it was subsequently removed from maps available for future auction. Partly as a result of growing concern about the special needs of uncontacted forest communities and the threat to them from oil exploration in particular, an Advocacy Resolution for the Protection of Indigenous Peoples in Isolation was issued by Congress, which became law the following year. The law reaffirms the right of communities in voluntary isolation as owners of the lands they occupy and their right to restrict outsider access and contact.

[91] Beatriz Huertas Castillo. 2004. *Indigenous peoples in isolation in the Peruvian Amazon: their struggle for survival and freedom*. Copenhagen: International Working Group on Indigenous Affairs.

[92] July 1, 2002. "Peru Forestry Law triggers Violent Protests" *Environmental News Service.* http://www.rainforests.net/peruforestrylawtriggersviolentprotest.htm (access Nov 25, 2010)

[93] FAO 2006, Griffiths.T. 2004."Indigenous Peoples and Land Tenure in Latin America" In Land Reform, Settlement, and Coloniazation. FAO.

[94] Smith 2005

Although the new land reform and forest law facilitates community involvement in forest activities, community interests continue to be poorly represented in national political agendas. Within the forest sector, indigenous and other local community tenure rights are currently governed by the 2001 Forestry and Wildlife Law and the associated National Strategy for Forest Development. National forest policy aims to update forestry activities in consonance with economic liberalization, the pursuit of sustainable development and sustainable production of forest products on the basis of government forest land use plans, promotion of multiple forest uses, protection of forest resources and wildlife, increased value added, rehabilitation of forest areas, and institution building.[95] Indigenous advocates complain the law exposed the privileged place of timber and the timber industry in forest planning, and a lack of vision on the part of the Ministry of uses and roles of forests for NTFPs, ecotourism, and environmental services nor does it provide space for holistic ecosystem approaches to management that would encompass food and livelihood security and traditional knowledge. [96]

2008

Garcia issues 99 Presidential decrees, including allowing land rezoning without community consultation

Perupetro, the state owned petroleum company, issued concessions for 8 more blocks in the Amazon for oil exploration, bringing the total percentage of the Peruvian Amazon covered by concession to 89%. Of the 64 concessions, 58 overlap with titled indigenous territories, 15 of territories of uncontacted groups.

Widespread indigenous protest. State of Emergency again declared.

Current political economic dynamics: Free trade and indigenous resistance

There are number of important international influences on the status of local rights, which play out at the regional, national and local levels. The most important is the role of the **international trade** of resources including mahogany, oil and gas, oil palm, and soy. As noted above, logging for **mahogany** has significant negative impacts on the integrity of the forest within native territories and on which they depend for their livelihood, it also creates inroads for colonization. **Oil** exploration has caused pollution and brought outsiders into indigenous communities who pose a significant danger because of introduced infections.

[95] Taylor 2006

[96] Griffiths, Tom. "Indigenous peoples in the Peruvian Amazon call for forest policy reform and major changes in implementation of the Forest Law." World Rainforest Movement. http://www.wrm.org.uy/countries/Peru/reform.html

Increasing demand for **biofuels** and other agricultural products has created a land market that represents a serious threat to natural forests under community control.

In addition to international trade generally, the **US Peru trade agreement** is a particularly salient factor in current debates around customary rights and forest sustainability. The agreement was initially negotiated and passed under the Bush administration but Democrat-controlled congress pushed for environmental safeguards. Thus, the Forest Annex to the agreement required reforms to forest governance and anti-corruption mechanisms. However, as discussed below, the Garcia administration had made strategic use of these international dynamics and the trade agreement requirements to push through his own legislative changes that indigenous people felt would undermine their property rights in favor of foreign investment.

Additionally, a burgeoning **carbon** market is significantly influencing the debate as Peru is among the countries targeted for funds for Reduced Emissions from Deforestation and Degradation (REDD), for example in the World Bank's Forest Carbon Partnership. Indigenous groups have expressed concern that carbon trading will proceed without adequate consent of the affected communities, inadequate share of benefits and issue "carbon concessions" on lands that they claim in further abrogation of their rights.

However, **international advocacy** continues to support the rights of indigenous communities, not only through international NGOs but through organization such as the UN Working Group on Indigenous Peoples, as well as the US courts in the case of Occidental petroleum.[97]

Regional

Regional dynamics have had a significant role in the US interests in Peru, especially in the context of increasing concerns both about the trend of **socialist politics in Venezuela and Bolivia** under Hugo Chaves and Evo Morales, including macroeconomic policies such as nationalization of oil and gas as well as a general climate of opposition to US "imperialism". These dynamics overlay long standing North American concerns over the **drug trade and coca production** in the Andean regions as well as. At the same time, Evo Morales, as an indigenous person himself, has made important **strides in Bolivia toward indigenous empowerment** and strengthening indigenous land and resource rights. These dynamics of indigenous mobilization have stretched across borders to increase awareness and resistance to policies and private sector activities that indigenous communities view as against their interests.

[97] An appeals court ruled that a case filed by indigenous plaintiffs from the Peruvian Amazon against Occidental Petroleum Corp. should be heard in Los Angeles. The lawsuit filed in 2007 accused the Los Angeles-based company of causing health and environmental problems by knowingly dumping an estimated 850,000 barrels of toxic wastewater per day into the rainforest inhabited by the Achuar people of northern Peru. Health studies have revealed that Indians living in the contaminated areas suffer from high blood concentrations of cadmium and lead. (AP. Dec 6, 2010. "LA court can hear Peruvian case against oil giant")

National and district

In February of 2007 Garcia issued a Presidential Decree (without consultation) to dissolve the autonomous and decentralized National Institute for the Development of the Andean, Amazonian and Afro-Peruvian Peoples (Indepa) and reduce it to a Native Peoples' Department within the Ministry of Women and Social Development (MIMDES), thereby significantly reducing its authority. Because Indepa was established by an act of Congress, and therefore can only be dissolved by Congress, the decree was subsequently (Dec 2007) declared unconstitutional and cancelled but viewed as "a shot across the bow" of indigenous interests.

To further emphasize his point, in that same year, Garcia published an editorial titled "The Dog in the Manger"[98] in the largest paper in the country, and repeated the central points in several speeches. The article argues that "unused" resources must be extracted to generate economic development, and compares indigenous communities who resist extractive industries operations on their lands to a dog which has no use for hay in the barn but also selfishly keeps others from using it. The editorial sparked widespread outcry and protest from indigenous communities and NGO advocacy groups, resulting in Garcia declaring States of Emergency in several districts throughout the year.

Following the signing of the trade agreement, President Garcia issued 99 decrees (without consultation) under the pretext of complying with requirements of the FTA, including DL 1015 and DL 1064, designed to speed the privatization of collectively held lands. **DL 1015** facilitated procedures for the fragmentation and sale of communal lands held by indigenous and farming communities in the Andean (Sierra) and Amazonian (Selva) regions of the country, enabling these crucial decisions to be made in an assembly by a simple majority, instead of the previously required two thirds of communal landowners, thus bringing these regions in line with the procedures of Peru's coastal region. New legislation also provided for already titled

January 2009

Free trade agreement ratified, with Forest Annex.

New forest and wildlife law regulation DS 1090 allowing for conversion of forest if it is deemed 'in the national interest'.

April-June 2009

Indigenous protests of the new forestry regulation

June 5, 2009

Police clash with protestors in Bagua Amazonas. 30-100 killed, hundreds wounded.

June 10 , 2009

Garcia creates National Group on the Development of Amazonian Peoples, whose mandate includes consultation with indigenous communities

[98] *El Comercio*. October 28, 2007.

communal areas, but that are considered “abandoned” or “idle”, to revert to government control, for private sale.

DL 1064 reclassified communal land rights as subordinate to individual and private ownership and removed the requirement for any negotiation with a community prior to the declaration eminent domain for projects on their land, making it easier for companies with concessions to get changes in zoning permits directly from Peru's central government, without needing approval of local communities.

In June 2008, responding to the package of Decrees in general and DL 1064 and DL1015 in particular, AIDESEP initiated an Amazon-wide mobilization. The recently appointed Minister of the Environment was chosen to dialogue with AIDESEP's leadership. Viewing the minister as lacking political weight, AIDESEP suspended negotiations, and entered into talks with Congressional leaders. The Environment Minister warned the public that behind the demonstrations "there is a movement to liberate ancestral indigenous territories, even until they are independent from the Peruvian State." Peruvian Prime Minister Jorge del Castillo compared the actions to the strategy of the Shining Path. Other prominent figures in the Peruvian government and commentators publicly speculated that NGOs, opposition political parties or Venezuelan President Chavez must have been behind the actions.

States of Emergency were established in regions of unrest, nominally to protect oil operations and pipelines to the capital in danger of being interrupted. Indigenous leaders called the measures “a declaration of open war”.

On August 19th, police were first sent to break up the occupation of the Corral Quemado bridge in Bagua, a key transportation link between the Amazon region and the rest of the country. Onsite negotiations between police and protestors led to an agreement that police would not permit the intervention of military special forces in the area, and that the 2000 indigenous demonstrators would voluntarily open the bridge to traffic for 24 hours. The situation was defused the following day when Congress agreed to rescind DL 1073 (a modified version of DL 1015), review other Legislative Decrees, and request that the Executive repeal the State

June 11 , 2009

Law 19376 suspends Legislative Decrees 1090 and 1064

June 19, 2009

Legislative Decrees 1090 and 1064 declared unconstitutiona l and repealed

2010

Consultations held for new Forestry Law

June 6, 2010

Congress passes law requiring free prior and informed consent of indigenous communities in decisions that affect them

June 23, 2010

Garcia refuses to sign consultation law, saying that communities should not have a “veto” of decisions that could obstruct economic

of Emergency.[99]

In January 2009, the trade agreement was ratified, with the forestry annex. Ostensibly to meet requirement of the new agreement, changes to the forestry law were passed by decree 1090. The previous law said land defined as "National Forest Patrimony" cannot be used for "agricultural or other activities that affect the vegetative cover, sustainable use, or conservation of the forest resource." **Presidential Decree 1090**, promulgated without consultation or legislative approval, redefined "forests" only as those lands zoned as Protection Forest, removing regulations for biodiversity protection and sustainable use from roughly 60% of the nation's forests, thereby allowing their conversion to agriculture if the Peruvian government declares that doing so would be in the "national interest." (There is already precedent for declaring the establishment of cane, bamboo, pine and castor bean plantations for biofuel to be in the "national interest.").[100] DL 1090 also **eliminated the National Forest Policy Consultative Committee,** which facilitates public participation in government decisions regarding the forestry sector.[101]

In April 2009, indigenous protests again ignited in response to the forestry decree 1090, which they viewed as endangering their rights in favor of parceling and sale of communal land and the prioritization of unsustainable resource extraction for the benefit of a few outsiders. Work stoppages, road blocks and blockades were set up (including of major petroleum operations). The government again responded by instituting States of Emergency in effected districts.

In June, tensions escalate in **Bagua** district and police were called in to quell the protests. Between **30-100 people were killed**, attracting international media attention. Government claimed most victims were police while protestors claimed the police dumped bodies of indigenous people into the river to conceal the death count. **Decrees 1090 and 1064 were subsequently suspended and eventually declared unconstitutional.**

August 1, 2010

Peru fails to meet the deadline to implement the new forest regulations as defined in the Forest Annex. Members of the US Ways and Means congressional committee say they are "extremely concerned" about the delay.

November 13, 2010

AIDESEP boycotts the forestry consultation meeting due to the rejection of indigenous proposals to the

[99] Amazon Watch. "Issue Brief: Indigenous Mobilizations in the Peruvian Amazon" May 8, 2009.

[100] Derecho Ambiente Y Recursos Naturales (DAR). n.d."Implementación De Compromisos Forestales Iría en Contra El Propio TLC - D.L. Nº 1090: Implementación del TLC ponen en riesgo los bosques amazónicos." Vigilancia Ciudadana de la Implementación del TLC Perú – EE.UU. con enfoque de Derecho. Lima: DAR.

[101] Environmental Investigation Agency. 2010. "Peru's Forest Sector: Ready for the New International Landscape?"

Garcia formed the **National Group on the Development of Amazonian Peoples** to investigate the events at Bagua and to facilitate consultation around the new forestry law.

In June 2010, a **community consultation law** was approved by the Peruvian Congress that would have required that affected indigenous peoples be consulted in advance of any legislative or administrative measure, development or industrial project, plan or program that directly affects their collective rights. However, President Alan **Garcia vetoed** the law. To justify his refusal, Garcia argued that prior consultation with indigenous peoples would delay or prevent the economic development of the country. Garcia proposed that the law should be modified to recognize the government's supreme authority to override the result of any consultation process, and national and regional development projects should be excluded from consultation for fear of holding up infrastructure development. [102]

Meanwhile, pressure is building from both the Peruvian and US Congress to pass the forestry law in compliance with the Forest Annex of the trade agreement, but indigenous groups including AIDESEP continue to complain that the process is rushed and the procedures for including their input into the new draft remain unclear. Gustavo Suarez de Freitas, a former Director General of Forestry and Wildlife and a former Director of Protected Natural Areas, opines that AIDESEP "is in great negotiation and dispute with the State, which goes far beyond the forestry law."

Civil Society

While communities themselves are often remote with little access to state agencies—indeed many communities are in voluntary isolation from the outside world--civil society organizations representing indigenous interest in Peru, many of them staffed and led by indigenous people, have a relatively high level of capacity for networking to advocate not only with government but regional and international interlocutors in support of customary rights. Indeed, it is NGOs that have undertaken the titling and registration of indigenous lands. In the late 1990s, for example, in the Ucayali Titling and Communal Reserve Project, indigenous communities worked with national and international NGOs to secure indigenous territories within constraints of national legislation.[103] They employed a combination of Law of Native Communities and national Forestry Law to obtain land titles for 209 indigenous communities over 2.5 million ha, and to establish access and subsistence use rights over to 7.5 million ha of communal reserves. In Madre de Dios, indigenous people succeeded in excluding concessions from their titled indigenous lands and the territories of indigenous people in voluntary isolation.[104] NGO advocates and legal aid organizations have also

[102] Letter from President Alan Garcia and Javier Velasquez (President of the Cabinet) to Congressional President Luis Alva Castro, June 21, 2010, Lima. (Official Correspondence No. 142-2010-DP/SCM)

[103] Taylor 2006

[104] Forest Peoples Programme 2004; Griffiths 2004

succeeded in bringing a lawsuit against US-based Occidental Petroleum in US court to claim damages for environmental contamination of indigenous territories.[105] The mobilizations around policy changes following the free trade agreement further demonstrate the ability of NGOs to spread awareness and mobilize local action.

However, as CIFOR observes, it is interesting to note that indigenous people are organized around their ethnic identity and their human rights derived from ancestral claims. However, non-indigenous forest dwellers, be they traditional peoples who no longer self identify as indigenous or *mestizos,* do not have a region-wide image or identity, structure for representation or formal organization, although there is a nascent network of community forestry leaders and their community organizations.[106] In addition, among urban Peruvians, there is some level of resistance to the trend of recognition of indigenous rights in sparsely populated but resource rich areas as an injustice of its own that allows "too much land for too few."[107]

Possible VPA windows of Opportunity/Risk

Given the degree of legal recognition of customary rights, and especially in light of recent widespread mobilization and violence around the issue, it would be virtually unthinkable that a VPA process in Peru could avoid engagement with the issue in some meaningful way. However, also given the lack of trust, high stakes and tensions around the topic, it would also certainly be a highly contentious discussion. But it is one with considerable space for FLEGT to act as a catalyst for progress toward sustainability.

Existing forums for multistakeholder engagement

One positive aspect of the Peruvian political landscape is the number of existing forums for multistakeholder engagement around forest use, through which consensus might be reached on how to most effectively and fairly include customary rights in the process .

Existing Multi-stakeholder Forums

Forestry Law Platform

National Group for the Development of Amazonian Peoples

Mesas de Concertación

Association of Forest Communities

[105] *Reuters*. "Occidental lawsuit should stay in US : appeals court" December 6, 2010.

[106] Barry and Taylor 2008.

[107] Stocks 2005

The Forestry Law Platform was created in 2010 for consultations on the new forestry law, including representatives of civil society, indigenous organizations, universities, research centers, and professional organizations, as well as representatives of other government agencies. Through face-to-face meetings, email lists, and a "Google Group" to share documents, the contributions of stakeholders were compiled and published. During the open comment period, the government received 112 contributions. Once the new draft of the law is developed, it will be sent to the Congress of the Republic. It will be up to the Congress to decide if they will approve the version they received, modify it, or develop a new one. During the last sessions of the platform, the participants recognized the advances made in this participatory process with respect to the previous attempts, and they congratulated the government on that. But they also took advantage of the opportunity to note that the modality chosen for this process, of presenting contributions without having a space for debate, is not ideal. Several agreed that without a debate, there is no possibility of arriving at a consensus. There was also frustration on the part of some participants who asked why their contributions had not been considered, and they requested explanations as to the criteria used to decide what should and should not be incorporated into the law.[108] As mentioned above, a key participant, AIDESEP, boycotted one of the recent meetings because they felt their contributions were not being included.

The **National Group on the Development of Amazonian Peoples** was created in 2009 by the President and organized four working groups: 1) to investigate events at Bagua, 2) participatory work on the new forestry law, 3) develop a mechanism for prior consent, 4) develop a proposal for the sustainable development of the Amazon. As with the platform above, there is still debate about how much of the input from Group 2 was incorporated by the government into the new law.

Mesas de Concertación, established in 2004, are multi-stakeholder roundtables formed at the district level to seek consensus on problems and priorities and coordinate plans and activities to meet common needs through concerted action. Initially the roundtables were formed around poverty reduction, but have since expanded to a variety of other issues including local forestry use. They involve participation from government, the National Forestry Chamber, the National Timber Corporation of Peru (CORMADERA), the Exporters Association (ADEZ) as well as producer based organizations in Loreto, Ucayali and Madre de Dios districts. Other participants include environmental NGOs, and include indigenous and peasant organizations such as the National Commission of Andean, Amazon and Afro-Peruvian Communities (CONAPAAA), the Association of Women Peasants of Ucayali (AMUCAU), and the Indigenous and Peasant Agroforestry Coordinator of Peru (COICAP).[109] De Jong reports that although the roundtables had no formal authority, they were influential and taken very seriously by the various government agencies who actively

[108] Environmental Investigation Agency. 2010. "Peru's Forest Sector: Ready for the New International Landscape?"

[109] Taylor, Peter Leigh. 2006. "Country Case Study: Forest Tenure and Poverty in Peru." Bogor Indonesia: CIFOR. August 2006.

participated in the meetings. Roundtables for Forestry Consensus reportedly continue today in Peru and in some cases have become quite influential forums.[110]

Finally, there are a number of incipient indigenous organization efforts, including the SNV-supported **Association of Forest Communities** in Loreto, which seeks to gain legal access to forest activities, and to become more involved in forest production.[111]

Risks

Clearly, the subject of indigenous rights is highly charged in Peru and outside engagement with the topic could act as a catalyst for more unrest, or doom a VPA to intractable debate. However, there would seem to be already demonstrable risks that not including rights would doom a VPA to widespread resistance from stakeholders.

Summary

Peru has a long history of recognition of the rights of both indigenous and peasant communities to communal land for subsistence use. However, communities have also weathered shifting political climates of recognition and abrogation of rights in favor of state and private elite and/or corporate ownership and resource extraction.

At present there are two types of customary rights: Communal Reserves for subsistence use of inalienable communal territory, and private communal title, which can be mortgaged or parceled into individual plots and sold. Both types of rights can be cancelled by the State if they are deemed to be "abandoned" but the criteria for identifying lands as such remain worryingly unclear. In both types of holdings, the State remains the owner of forest, water, and subsurface resources although communities have proprietary usufruct rights. Commercial uses are permitted in titled land but not in Reserves.

However, although these are the rights as exist in law, they are hotly contested on both sides—both from communities and their allies who argue that third party resource rights are a threat to not only their subsistence and territorial integrity but to their very health and existence as a community. The free trade agreement has heightened these fears to the point of violence. Corporate actors and their allies in government, on the other hand, argue that communities already control too much land and are an obstruction to development. Any VPA engagement would be forced to work within this landscape.

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[110] De Jong, W. "New agendas, old habits in Amazonian forest policies" In De Jong, W (ed). *Forest Policies for a Sustainable Humanosphere.* CIAS Discussion Paper Number 8. Kyoto Japan: CIAS. March 2009. pp 25-34.

[111] Barry and Taylor 2008.