Chapter 3. Indigenous lands: Recognition, management and development

The objective of this chapter is to assess and identify the key features of governance that enable Indigenous communities to realise the development potential of land and water resources, supporting self-determination. The chapter begins with a discussion about Indigenous rights to land, the recognition and enforcement of these rights, and the legal frameworks that shape options for land management. The second section discusses the different tools that give Indigenous peoples the capacity to manage land, participate in or undertake land use planning, establish objectives for community development and obtain revenues from land. The third section of the chapter focuses on how Indigenous peoples participate in different phases of project development, and can negotiating benefits with investors to create sustainable business and employment opportunities.

Key findings

- Indigenous lands are territories and waters that Indigenous peoples traditionally use or occupy.
- Clarification of legal rights over land and waters is critical for Indigenous peoples to mobilise economic development opportunities and achieve self-determination.
- Effective Indigenous land tenure systems require transparent and fair procedures to recognise rights, allocate them to groups, demarcate and title land, and protect from intrusion.
- Indigenous land management encompasses the processes whereby different agencies and levels of government make decisions about the use of Indigenous lands. Three types of Indigenous land management are defined based on the degree of autonomy granted to Indigenous peoples: self-governance, joint management and co-existence.
- The chapter identifies and discusses a number of different instruments (land use planning, regulation of resources, and land leasing and acquisition) that can be utilised to mobilise the economic potential of land under these different models.
- Indigenous communities also face the situation where governments and corporations will seek to invest in projects that affect their lands, traditional activities and livelihoods, and commercial interests.
- This chapter discusses effective practices (e.g. agreeing on the definition of consultation, early engagement, compensating for costs, and monitoring and enforcing agreements) to include Indigenous peoples in environmental approvals processes and negotiate benefit-sharing agreements with project proponents.

Recommendations

Recognise and protect **Indigenous land rights** by:

- Ensuring Indigenous tenure is reflected in statutory instruments, in accordance with existing obligations under national law.
- Providing specific procedures to address conflicts related to existing treaties and agreements with Indigenous groups and unresolved land rights issues with Indigenous groups.

Support the **allocation of land rights** by:

- Adopting technical rules for demarcation processes in collaboration with Indigenous peoples and have Indigenous peoples participate in the delimitation of boundaries.
- Recording Indigenous land rights in registry systems that are transparent and easily accessible, in order to prevent competing land claims and facilitate access to data.
- Ensuring efficient and timely administrative processes for land demarcation, titling and registration.

- Providing technical support for Indigenous communities to collect data about land and water resources and map it to inform regulatory decision-making and to identify opportunities for economic development.

Activate and support economic development opportunities on Indigenous lands by:

- Providing Indigenous communities with the authority, data and support to develop land use plans, land codes and zoning maps that clearly identify areas of protection on ecological and cultural grounds, and for potential economic development (applicable under the self-governance model).
- Ensuring mechanisms are in place for Indigenous communities to have meaningful consultation on land use planning of municipal and other authorities that have jurisdiction on or near their traditional territories (applicable under all models).
- Creating opportunities for Indigenous peoples to benefit from surface and sub-surface resources by:
  - Developing and updating data that provides information on the quantity and quality of these resources.
  - Ensuring that traditional knowledge and practices are incorporated into decision-making about natural resource management including planning and licensing.
  - Clarifying property rights over natural resources and providing commercially viable pathways to exploit these resources and/or lease them to third parties (applicable under the self-governance and joint management models).
- Creating agreements that support the inclusion and leadership of Indigenous peoples in conservation and natural resource management and give opportunities for Indigenous peoples to generate economic development opportunities from them (e.g. land stewardship, ecosystem services and cultural and tourism activities) (applicable under the self-governance and joint management models).
- Introducing efficient tools and processes into Indigenous land tenure regimes that facilitate investment and open up markets for land:
  - Support for the acquisition of lands that can be used for traditional purposes and to generate own-source revenues (including freehold and public lands).
  - Long-term leasing of land parcels that are transferrable.
  - Revision of succession rules and support for land consolidation that overcome problems of fragmentation (applicable to the self-governance model).

Ensure the participation of Indigenous peoples in decisions about projects (e.g. infrastructure, energy and mining projects) that affect their traditional territories by:

- Supporting and encouraging project proponents to engage in dialogue and meetings with Indigenous groups prior to submitting projects for approval and agreeing up front on the terms and procedures for engagement (e.g. timing, location, language and translation, and financial support).

- Increasing the scope of environmental impact assessments to include traditional knowledge and socio-cultural issues, and to assess the cumulative and wider impacts of projects on Indigenous people's cultural values and traditional activities.
- Developing a national framework for consultation with Indigenous groups about project development that seeks alignment with UN international standards of Free, Prior and Informed Consent and thus comprises:
  - Reduced or no costs associated.
  - Broad and early consultation.
  - Clear information and informed engagement.
  - Possibility to present alternatives.
- Supporting the implementation of benefit sharing agreements that:
  - Are guided by common tools and templates, and best practice examples.
  - Provide opportunities for third-party advice and support to Indigenous groups.
  - Combine monetary and non-monetary benefits that are linked to objectives for the community's long-term development and well-being.
  - Establish agreed timing and an action plan for implementation.
  - Have mechanisms for addressing disputes and/or revising the terms of the agreement.
  - Include provisions for project closure and remediation.
  - Provide regular reports on progress and outcomes to community members.
- Developing accessible databases that systematically record and publish benefit-sharing agreements (excluding commercial-in-confidence information), in order to ensure more transparency and, ultimately, more accountability.

Introduction

This chapter analyses the key features of governance arrangements that enable Indigenous communities to realise the development potential of land and water resources, supporting self-determination. The chapter begins by discussing Indigenous rights to land, the recognition and enforcement of these rights, and the legal frameworks that shape options for land management. The second section focuses on land management issues, which refers to the different tools that give Indigenous peoples the capacity to manage land, participate in or undertake land use planning, establish objectives for community development and obtain revenues from land. The third section outlines the different phases of project development on Indigenous land. This includes how Indigenous peoples participate in planning and licensing procedures and are consulted about projects under development that may affect their lands and livelihoods, as well as negotiating benefits with investors to create sustainable business and employment opportunities.

Scope and definitions

The value of land and water for Indigenous peoples resides in a myriad of aspects: cultural, spiritual, social, environmental, political and economic. The spiritual beliefs and worldviews of Indigenous peoples are deeply rooted in their connection with the land and often with related subsistence activities of hunting, fishing and gathering. Indigenous stewardship of land contributes to environmental preservation and biodiversity. Access to land provides Indigenous peoples with stronger negotiation positions, being better able to leverage and protect their interests. These different aspects complement each other. The enjoyment of cultural practices does not detract from environmental protection and greater political power contributes to keeping land in the hands of Indigenous peoples. Anthropological and sociological studies have long investigated the relationship of Indigenous peoples with their traditional lands, referring to this complexity of values and functions (Tidwell and Zellen, 2016[1]; Lennox and Short, 2016[2]; Jentoft, Minde and Nilsen, 2003[3]).

Box 3.1. Indigenous testimonies about the meaning of land and water

"The land has everything it needs. But it couldn't speak. It couldn't express itself. Tell its identity. And so, it grew a tongue. That is the Yolngu. That is me. We are the tongue of the land. Grown by the land so it can sing who it is. We exist so we can paint the land. That's our job. Paint and sing and dance. So it can feel good to express its true identity. Without us it cannot talk. But it is still there. Only silent.

People should listen and learn and understand, because this is what Australia means. Australia has patterns and designs and stories, and objects beyond that. Australia has a culture, a significant culture for both worlds. For blackfella and whitefella to know about and to understand. What is the meaning of blue-white water in the sea? And the green ferrying water running from the inland? And also the aggy baggy blue water inland? It is all meaningful, and they all have stories, songs, patterns and designs. And this is what I say; this knowledge is a document and our titles for our country.

But we are on a different territory today when new things are coming into our lives, like mining and money affairs. Sometimes this makes Yolngu people move away and not care about what belongs to us. But we need to care for our bays and rivers, water holes and rocks – it is a very powerful part of our connections and titles that we remain to care for those countries."

Djambawa Marawili AM, a leader of the Madarrpa clan, Yolngu people, and Member of the Prime Minister of Australia's Indigenous Advisory Council

"In Anishinaabemowin, the language of the Ojibwe, Odawa and Potawotomie people of central Canada, many of our words are derived from the land and nature. When we say we are are connected to the land, we truly are.

*In Anishinaabemowin, the word for the "earth" is "*akii*". Akii is the root of many of our words. For example, the word for lightning in our language is "*nimkii*" which describes the zagged light from the sky touching the earth. The word for frog is "*mukii*" which translates to mean the being that lives in the mud, in the earth. The word for elderly man is "*akii wenzii*" which describes a man who is standing and hunched forward facing the earth. There are many words in our*

language that are connected to the earth and the natural life around us. We regard Mother Earth – Shkakii mi kwe *– as sacred, as medicine, as a nurturer of life.*

*In Anishinaabemowin, the word for "water" is "*nibii*" or "niibii". We regard water as the lifeblood of Mother Earth. Water sustains life and is also medicine. We understand that we cannot live without water, but water can survive without us. Each of us come into this world through water. It teaches us that we can overcome challenges and go around obstacles. It is also the root for many of our words. The word for calm person is "*niibokawin*" which describes a person as like tranquil waters. "*Nibiin*" translates into summer, a season when the water becomes warm while "*niibiishaaboo*" translates into leaf water to describe tea.*

Our ceremonies honour the earth and the water. These are the elements of life that our people hold in honour above ourselves. That is why we protect these elements and see ourselves as stewards caring for them, praying for them, concerned for them. It is about balance in our use of these elements and gifts from the Creator."

Dawn Madahbee Leach, Aundeck Omni Kaning First Nation, General Manager – Waubetek Business Development Corporation, and Vice-Chair of the National Indigenous Economic Development Board of Canada

"We, the Sámi people, are the indigenous people in Sápmi. Our people have lived here since time immemorial, managing the lands and waters with great respect and care. We are a part of the landscape in Sápmi. Our lives – our trades and cultural expressions – adapt flexibly in order to balance what nature can give and what we can take without depleting nature. Our deep relationship to nature is difficult to capture in words. To live in nature and to live directly from what nature can give, creates an immediate relationship between us and nature, the lands and waters. We rely on a living relationship to Sápmi, our home. If we – or someone else – destroy nature, it will also harm our culture. The environment in Sápmi is delicate. A resilient nature requires that we use it very carefully. A long-term perspective and a sustainable way of life have always been the basis for our traditional trades. If a natural resource declined in a certain area then it was possible to use alternative resources while the weakened resource had time to recover and renew itself. Through combined use of traditional and modern trades, this natural self-regulation is still embedded in our trade structure. However, our traditional flexible and diverse resource use is at risk and on its way to disappearing altogether, not the least through the exploitation of our lands. The meaning of land is expressed by the Sámi poet Paulus Utsi:

As long as we have water, where fish live
As long as we have land where reindeer graze
and walk
as long as we have land where the wild hides
We have consolation on this earth
Once our homes don't exist any longer and our
lands are destroyed
Where shall we then live

Our own land, our livelihood has shrunk
Lakes have risen
Rivers have dried out

Creeks sing with sorrowful voices
Lands blacken, the green withers
Birds become silent and flee

All the good we have been given
Does not reach our hearts
That which would have made our lives easier
Lost its value

Hard stone roads make our movements painful
The calm of the wild person
Weeps in its heart

The hurrying time
is thinning our blood
our unison snaps
the water stops roaring"

Per-Olof Nutti, President, Sami Parliament of Sweden

By definition, Indigenous peoples are those who inhabited a country prior to colonisation (see Chapter 1). During the colonisation process, there were episodes of forced removal and internal displacement. Treaties and agreements were made, and in many cases violated. There were institutional policies of assimilation that sought to break traditional relationships with land and lack of opportunity to shape or give consent to agriculture, forestry, fisheries and aquaculture, and mining. As a result, many Indigenous peoples lost the use and control of their traditional territories, were relocated to reserves and fragmented and dispersed. From a settler point of view, this had a legal basis either through the doctrine of discovery and terra nullius and/or through formal and ad hoc agreements with tribal leaders (Box 3.2). As this chapter demonstrates, the contemporary legal basis for Indigenous land rights varies across jurisdictions. However, the unique status of Indigenous peoples (as nations within a nation) is generally recognised, and on that basis, there is an allocation of legal rights to them, including to land and water.

Box 3.2. Dispossession and subjugation: The role of the Doctrine of Discovery and terra nullius

Fifteeth-century English legal scholarship forwarded the Doctrine of Discovery, with long-lasting ramifications for Indigenous rights. The doctrine provided that newly arrived Europeans immediately and automatically acquired legally recognised property rights in Indigenous lands and also gained governmental, political and commercial rights over the inhabitants without the knowledge or consent of Indigenous peoples.

The notion of *terra nullius*, meaning empty or void land, is one of the key elements of the Discovery Doctrine. The doctrine argues that the lands that were not possessed or occupied by any person or nation, or were occupied by non-Europeans but not being used in a fashion that European legal systems understood or approved, were considered to be empty and available to be claimed. Indigenous lands easily fell into the category of not being governed according to European laws and cultures, and were thus available for discovery claims.

The doctrine has been severely criticised as a fictional justification of the European colonisation and of the subjugation of Indigenous peoples and lands around the world. Despite this, it is only in recent decades that the governments and courts of Australia, Canada, New Zealand and the United States have sought to overcome this doctrine of land dispossession.

Source: Adapted from Miller, R. et al. (2010[4]), *Discovering Indigenous Lands*, http://dx.doi.org/10.1093/acprof:oso/9780199579815.001.0001.

Without delving into sociological considerations that explain the spiritual, cultural, social value of land, this chapter focuses on how Indigenous peoples can mobilise the economic potential of the land. Access to land, if deployed correctly, can be a powerful tool for Indigenous development, however, they may conceptualise it. As peoples entitled to the right of self-determination and the right to determine their own development path, Indigenous peoples should be free to use their assets in the manner that is best aligned with their own development goals.

Chapter structure

The chapter presents the key lessons, mechanisms and tools for Indigenous peoples to access, control, care for and develop their lands, according to their own objectives. It is organised as follows:

- **Rights to land** discuss how lands have been both taken away and granted by states and how rights are recognised and enforced in order to be able to access and use land, against detrimental uses of third parties.
- **Land management** concerns the tools available to states and/or Indigenous groups to manage land, participate in or undertake land use planning, establish objectives for community development and obtain revenues from land.
- **Project development** on Indigenous land and how Indigenous peoples participate in planning and licensing procedures and are consulted about projects under development that may affect their lands and livelihoods, as well as benefit from employment, infrastructure development and revenue-generating opportunities.

Box 3.3. Glossary

- **Local communities**: groups of Indigenous peoples who shared a common sense of identity and belonging, and attachment to a territory. While communities vary in size, identity, internal equity and land-use systems, they all share strong connections to their lands and distribute rights according to norms, which they themselves devise. "Local communities" are referred to in international agreements such as the Convention on Biological Diversity and the 2015 Paris Agreement on climate change.
- **Customary law**: norms that have force within the community. When national legislation recognises that customary law has force, the rules also become part of statutory law.
- **Land rights**: rights of people to land, either individually or collectively. These rights include the rights of access, withdrawal, management, exclusion, alienation and others. They can also include the rights to various natural resources on and below the surface of the land. Land rights, particularly in the context of agrarian countries, are inextricably linked with the right to food and a host of other human rights. In many instances, the right to land is bound up with a community's identity, its livelihood and thus its very survival.

Source: Oxfam (2016[5]). *Common Ground: Securing Land Rights and Safeguarding the Earth,* https://d1tn3vj7xz9fdh.cloudfront.net/s3fs-public/file_attachments/bp-common-ground-land-rights-020316-en_0.pdf (accessed on 05 October 2018).

Traditional lands and rights frameworks

What are Indigenous lands

Indigenous lands can be defined as the territories and waters that Indigenous peoples traditionally use or occupy. Traditional use or occupation is the one in accordance with cultural practices and customs, and which is necessary for the reproduction of Indigenous livelihoods, language and culture. These territories include spaces for housing and social events, for cultivating food, harvesting and hunting and sacred spaces for rituals and connection with their ancestry. It often belongs to the Indigenous group as a collective, in an extended view of ownership which may be also composed of deceased members and spirits. Individuals or families may in some cases own or occupy specific plots of land, having the rights to use and transfer them to others in the community.

The definition of Indigenous lands may not be straightforward empirically, whereas it remains necessary for legal purposes such as land rights recognition and demarcation. It involves two complex and disputed concepts: community and territory. To attribute rights to a group, first the group has to be identified as a unity that can speak for itself and represent common interests (as a community) then it has to be allocated a geographical unit over which it conducts its affairs (for purposes of social reproduction, economic activity or spiritual beliefs), i.e. a territory. Some indications on this process of attribution of meaning are provided in Box 3.4 referring to the case of Aboriginal communities in Australia.

Box 3.4. On community and territory: Dispatches from Australia

In each part of Australia, there are many kinds of Aboriginal groups that can be defined in relation to interests in, and associations with, land. While some of these have labels, others do not. Whether labelled or unlabelled, none of these geographically definable socio-political Aboriginal entities is synonymous with "the territories of Aboriginal people" because the same population can normally be divided into a number of different landed entities, such as small unilineal land-holding units, local sets of totemically or ritually linked units, language groups, named sets of distinct languages, groups holding environmentally similar country, people coming from the same direction, people who hail from the same residential community, members of the same legally incorporated body etc. Identifying these different kinds of geographically definable entities in a particular area yields a number of overlapping "territories" for the same population and the question then arises as to whether or not one of these candidates is to be selected to be the relevant locus of communal interests in land for a land claim, or not.

The term "community" for instance is used in several different ways in writings on Aboriginal people. One refers to the "geographic community" as the population of people at a particular Aboriginal settlement such as former missions or government stations, regardless of how socially integrated such a collectivity may be or how few of its residents may subscribe to a notion of the common good. This is a very common sense of the term "community" as used in Aboriginal affairs.

A community can be at once a place, a population of residents (in some cases frequently shifting about, in other cases very sedentary), a collection of subsets of ethnic, territorial and other groups, a focal concentration point in a regional system of overlapping egocentric social networks, a local cultural milieu, a mini-economy, a political unit both formal and informal, and a unit of local governance. Another sense of "community" refers to an Aboriginal social field within the wider context in which it is embedded, such as the Aboriginal community of Sydney, or the Aboriginal community of Australia.

Communities can be determined by geography or not. To illustrate, "clans", "tribes", "language groups" and "patrifilial groups" are categories of person, not residential aggregates. It is notable that most if not all native title determination applications have thus far been made exclusively, or in the first place, on behalf of non-residential categories of person, even where a local resident population is somehow covered or referred to in the finer detail or in a subsequent determination. The "community of native title holders", however legally defined, is not going to be the same as, or necessarily closely aligned with, populations living within determination areas.

In all, if defining "community" and "territory" may seem unavoidable from a legal standpoint, for instance in native title determination procedures, one must at least reject a "cookie-cutter" approach to Aboriginal society in which there are or were discrete, cell-like societies. Instead, it is necessary to remain open to the empirical possibility that there are points of cleavage and discontinuity in the social, cultural, economic, marital and other communicative and culturally constructed fabrics of Aboriginal Australia.

Source: Sutton, P. (2003[6]), *Native Title in Australia: An ethnographic perspective.* Cambridge University Press, pp. 85-99.

Why land matters

The former United Nations Special Rapporteur for Rights of Indigenous peoples, James Anaya, has stated that securing the rights of Indigenous peoples to their lands is of central importance to Indigenous peoples' socio-economic development, self-determination and cultural integrity (2012[7]). Because of this strong connection to the land, land rights are crucial to the maintenance of the collective identity of Indigenous groups. Furthermore, access to land and natural resources is fundamental for material reproduction, be it through traditional subsistence activities or leading socio-economic development in novel ways. Indigenous land rights are also important in terms of protecting cultural and language diversity, mitigate the effects of climate change (forests managed by Indigenous peoples are estimated to store 37.7 billion tons of carbon) and as a tool to empower women (Oxfam, 2016[5]).

Land has significant economic value. Across OECD countries, land and buildings constitute by far the most important share of wealth, making up 86% of the total capital stock (roughly evenly split between land and property), with a corresponding value of USD 249 trillion (OECD, 2017[8]). For Indigenous people, the value of land may be more difficult to assess, because of the challenges of measuring social and cultural aspects of the land. Even then, this shows the importance of land as an asset – with value in itself and as a basis for further economic development. The formalisation of Indigenous property rights is positively associated with improved economic outcomes. Research from Canada demonstrates that formal property rights in the form of modern treaties reduce transaction costs, increase resource extraction on Indigenous lands and are associated with higher local income (Aragón, 2015[9]).

Framework for Indigenous Rights at an international level

The main treaties and conventions of international law[1] on Indigenous peoples' rights are the Convention 169 of the International Labour Organization (ILO), the United Nations International Covenant on Civil and Political Rights (ICCPR) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The ILO Convention and the UN Covenant have binding effects for ratifying states, while the UN Declaration expresses a political commitment from the states that voted in favour of it, which is not legally binding. The main rights ensured by these documents that matter for land use issues are land rights, but also right to self-determination, right to development, right to remedy and the right to participate in decision-making. Cultural rights, which involve language, spiritual beliefs and practices such as hunting and fishing, are also relevant.

Self-determination and land rights

The ICCPR has two provisions that touch upon land rights: the right of all peoples to self-determination (Article 1) and the protection afforded to "minorities" to enjoy their own "culture" (Article 27). Without an explicit mention to "indigeneity" or to land rights, these provisions have nonetheless been used to support the recognition of Indigenous peoples' rights and claims to land (United Nations Human Rights - Office of the High Commissioner, 2019[10]).[2]

The ILO's 1989 Indigenous and Tribal Peoples Convention (C169), which has been ratified by 22 countries, recognises the right of Indigenous peoples to maintain their cultural and political integrity, including a right to collective forms of property ownership (Gilbert, 2016, p. 107[11]).[3]

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007 by 144 states, provides the most comprehensive treatment of Indigenous rights as yet. It explicitly recognises that Indigenous peoples have the *right to self-determination*, which is to "freely determine their political status and freely pursue their economic, social and cultural development" (Article 3). This right contains an economic aspect, related to subsistence and control over natural resources (Gilbert, 2016, p. 242[11]). It also has a procedural dimension of participation in decisions that affect their territory and traditional ways of life (see below).

As per the *right to development*, recognised in the ILO C169 (Art. 7) and the UNDRIP (Art. 32), Indigenous peoples have the right control the direction of their development and decide their priorities and strategies in their own terms.

Regarding *land rights*, the UN Declaration states that Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired including the right to own, use, develop and control these lands (Art. 26). It further notes that states should give legal recognition and protection to these lands, territories and resources and that they should establish, together with Indigenous peoples, independent, impartial, open and transparent processes to recognise Indigenous peoples' laws, traditions, customs and land tenure systems (Art. 27).

Procedural rights: Participation, consultation and redress

The right of participation corresponds to governments' duty to consult in good faith with the aim of obtaining free, prior and informed consent (FPIC) (Articles 19 and 32 of UNDRIP). Nation-states have the obligation to consult and co-operate in good faith with Indigenous groups in order to obtain their free and informed consent, prior to the approval of any project affecting Indigenous lands and resources. FPIC does not, however, entail a collective right to veto. While involving Indigenous peoples at an early stage, the process of dialogue and negotiation should extend over the course of the proposal, from planning to implementation and follow-up. More than being informed about a proposal, Indigenous peoples have to be given the possibility to influence the outcome of decision-making and to suggest alternatives to it.[4]

If conflicts or disputes over land rights arise, Indigenous groups have the right to seek remedies for their situation. The *right to redress* – recognised in Article 6 of ILO 196 and Article 10 of UNDRIP – comprises different types of remedies, such as land restitution, fair and just monetary compensation, material assistance or an official apology. Indigenous peoples have the right of restitution for lands which were taken from them in a discriminatory manner (Article 28, UNDRIP). Whenever restitution is impossible, because of encroachment on third parties' rights, some other form of compensation is due.[5] The just, fair and equitable compensation can be due in monetary form or in the form of lands, territories and resources of equal quality, size and legal status (Article 28, UNDRIP). In general, relocation should be preferred over monetary compensation, given the special relation that Indigenous peoples have with their territories.

Redress can take the form of judicial claims for land, too. For instance, in some provinces in Canada, when land promised under treaty is not reserved or only partially attributed to an Indigenous group, the group is entitled to file a judicial claim that obliges the state to fulfil its obligation. This is assured under the Treaty Land Entitlement process.[6]

Ratification and adhesion status

The international rights described above impact national laws and obligations differently, depending on the nature of the document from which they arise. By nature, declarations are documents that express political commitments for nations who vote in favour of it. Countries can vote in favour or against it, or abstain from voting; they do not sign or ratify it. A certain number of votes in favour are required for a declaration to enter into force. Countries can always opt in or out of a declaration afterwards. In some cases, states have reconsidered their initial positions. For example, Canada, which initially had objector status to the UN declaration, has since adhered to it. Adhering countries do not have new legal obligations but the declaration provides a context for the development of domestic policies.

In contrast, treaties and conventions express rights and obligations that ratifying states are responsible for. When a treaty or convention is made, countries first sign it, which indicates support for its principles and the intention to ratify it. The ratification is an internal process by which the treaty is approved by the national parliament or congress. For that to happen, countries usually enact a national law or statute, which may also be followed by similar enactments at the state or regional level. In some countries, however, that is not necessary, as the internal approval expressed in the ratification process automatically turns the international treaty into a source of national law.[7] This stronger degree of responsibility partially explains why less than 30 countries ratified the ILO conventions, in comparison to 144 adhesions to the UNDRIP.

Beyond ratification or adhesion status, the evolution of Indigenous land rights at the international level has informed national laws (and vice versa). For example, the idea of collective forms of ownership based on the social function of land and its importance to a community's identity is now reflected in many national constitutions. While state property rights regimes, in general, are based on individualistic land rights, there has been a legislative and jurisprudential evolution towards the recognition of collective Indigenous land rights. In addition, there has been a growing recognition of land rights as a "right to use" based on the significance of land and natural resources for Indigenous culture and way of life. In this way, rights to use land have sometimes been interpreted as an essential human right for Indigenous peoples. In many countries, there is also a growing trend towards the recognition of the duty to consult with Indigenous communities in issues that impact them.

Land rights: Classification and comparison between countries

Defining property rights

Property rights are the rights of someone over a thing (*in rem)*, which can be sustained in opposition to others. The relation is defined between the person who holds the right and all the others who do not – not between the person and the thing. It generates obligations to people, such as the one of not destroying another person's property, as a general rule. Whereas the classical legal perspective sees property as a right to a thing, in anthropology property is perceived as a network of social relations, which dictate the behaviour of people in respect to using and disposing of things (Small and Sheehan, 2008[12]). Without entering into these social relations and power dynamics, here the concern is with the land, which is seen as a thing over which property rights can exist.

The classification below proposes defining Indigenous land rights according to the attribute, source of law history of occupation, type of ownership and division.[8]

Table 3.1. Classification of land rights

Attribute	Possess, use, transfer, manage, and exclude
Origin (source of law)	De jure: Statutory De facto: Customary
Type of ownership	Private, public, or collective
Division	Individual/household or communal land plots

Box 3.5. Classification of property rights

Attributes

Property rights typically have five attributes: right to possess, to use, to manage (and to explore resources), to transfer and to exclude others from accessing your property. Full property rights or "fee simple rights" contain all these attributes (owner). Some Indigenous rights frameworks grant ownership rights, but with limitation on the right to transfer (proprietor). In the United States, individuals can have "restricted fee", by which they hold title to land but can only transfer it with government's approval. Through treaty rights, Indigenous tribes have the right to possess and use lands, which are held in trust by the United States' government on their behalf (proprietor). The right to use includes the right to explore natural resources in culturally appropriated manners for the subsistence and well-being of the group. It also comprises the right to exclude others from accessing their land. In Brazil, to illustrate, Indigenous peoples have perpetual usufruct of their lands, which are recognised through the demarcation process, but not the full ownership.

Summarising the attributes, property rights are understood to be a "bundle of rights", composed of five different attributes. Table 3.2 is an adaptation of Ostrom and Schlager (1996[13]) of the framework of Indigenous property rights. The full owner is the one who can exercise five different rights over land: access, extraction, management, exclusion and alienation. Proprietors cannot alienate land, while possessors cannot pretend to be the sole users of land. That is, possessors cannot exclude others from the use of land, as it happens with holders of non-exclusive Native Title in Australia. Authorised users only have the rights to extract resources and access the land, while the authorised entrant can enter the land but nothing more than that. The entrant has a stronger right that the one of a passant, though.

Table 3.2. Bundle of property rights

	Owner	Proprietor	Possessor	Authorised user	Authorised entrant
Access	X	X	X	X	X
Extraction	X	X	X	X	
Management	X	X	X		
Exclusion	X	X			
Alienation	X				

Source: Bennett, D. and R. Sierra (2014[14]), "Multi-scale dimensions of Indigenous land tenure in the Amazon", http://dx.doi.org/10.1007/s10745-014-9660-x.

Source of law

According to the source of law, there are rights defined and upheld in law (statutory rights) as opposed to rights defined by the Indigenous group by force of customs or traditions (customary rights).

Statutory rights are conferred in different legal instruments, such as treaties, agreements, native title or Constitutional norms. Treaties were used at the time of European settlement to resolve disputes with Indigenous groups in Canada and the United States, and remain valid today. Many treaties contained provisions to relocate the Indigenous group to a reserve somewhere else than the area that they had traditionally occupied. In Australia, the government granted Aboriginal title to Indigenous groups, which confers ownership rights opposable to all but the government. That is, the government has the right of pre-emption and the right to extinguish the title by an explicit legislative act. In these countries, several Indigenous land claims are still being negotiated. Statutory rights are the category analysed in this chapter.

Customary law is the set of beliefs, practices and customs that are accepted and recognised as mandatory by a group or community. Contrarily to written law, it is not codified. Often it is perpetuated through intergenerational transmission of knowledge (myths, storytelling, performances, rites and shared practices). Customary law can be the basis of land possession and in this sense originate formal title to land. The Native Title Act 1993 in Australia, for example, is a response to the aboriginal title doctrine, according to which Aboriginal people have customary rights to land which persist after the sovereignty of Australia. Native title is thus defined as the rights in relation to land and waters possessed under the traditional laws acknowledged, and traditional customs observed, by Aboriginal peoples or Torres Strait Islanders. Throughout this chapter customary land rights are not analysed in depth.

Type of ownership

Type of ownership refers to land being owned privately by individuals, collectively by the Indigenous group or community, or publicly by the government. It is common that the government owns the land but grants perpetual usufruct rights to the Indigenous community, in which case the land remains public.[9] When land claims arise, for instance as identified in Latin America's territorial turn (Finley-Brook, 2016[15]), they have been often solved by granting a collective land title, whose holder is the community.

Division

Land rights can be attributed to individuals or collectively, to a group. Many Indigenous lands entail secure formal entitlement based on community held tenure. But they may be allocated to individuals and families within the group, more informally. For instance, in the Ecuadorian Amazon, families have rights over specific land plots, in which they build their houses and have small gardens (Bennett and Sierra, 2014[14]). Households can sell plots to other members of the community and transfer them to heirs, as well. Moreover, the right subsists when the person leaves the community temporarily; hence not being associated with regular use. These rights are defined by the community and are thus opposable to other community members, but in relation to external actors, i.e. the legal system, the opposable right is the one held collectively over the broader territory. Bennett

and Sierra (2014[14]) found that the communal formal title was only activated in the event of conflicts with external users, such as settlers or park staff. Yet, in the event of internal disputes, they would resort to community leaders, whose decision is typically respected.

Sources: Own elaboration based on Ostrom, E. and E. Schlager (1996[13]), "The formation of property rights", in Hanna, S., C. Folke and K. Maler (eds.), Rights to Nature: Ecological, Economic, Cultural and Political Principles of Institutions for the Environment, Island Press, Washington., Finley-Brook, M. (2016[15]), "Territorial 'fix'? Tenure insecurity in titled Indigenous territories", http://dx.doi.org/10.1111/blar.12489; Bennett, D. and R. Sierra (2014[14]), "Multi-scale dimensions of Indigenous land tenure in the Amazon", http://dx.doi.org/10.1007/s10745-014-9660-x.

Comparison of land rights across countries

United States

In the United States, Indigenous peoples' right to land is recognised in treaties, court decisions and laws (statutory law). Reservations were created through treaties, often by extinguishing Indigenous rights to traditional land. Not all tribes have reserve lands and not all Indigenous groups have been recognised as tribes.

Reservation lands are owned collectively by the tribe but held in trust by the federal government. In terms of property rights, it has all the attributes but alienation: tribes cannot alienate or mortgage land held in trust without the federal government's consent. The federal government has exclusive jurisdiction with regards to these lands and holds the obligation to protect them against interferences by other levels of government or third parties. On trust land, the inherent governmental powers of tribes are presumed, which include civil and criminal jurisdiction and the power to tax (Göcke, 2013[16]). Indian trust land is thus exempted from state codes and state or local taxation. Tribes on reservations have rights to the surface and sub-surface natural resources in it, and thus can hunt, trap, fish and graze livestock. Federal laws require the tribe's consent for third parties to carry out these activities on reservations.

Other key features of the Indigenous land tenure system in the United States are:

- Besides trust land, tribes or individuals may hold land under "restricted fee" title. In that case, they hold title to land but can only transfer it with the government's approval. In practice, the restricted fee is treated in the same manner as trust land.
- Allotted lands are remnants of reservations which had been broken down. They were taken out of trust and passed to individuals. They have thus fee simple title. One issue with these lands is fractionation (see later in the chapter for further discussion).
- Land rights of Alaska Natives are ruled by the Alaska Native Claims Settlement Claim (1971), which divided the state into 12 regional corporations. These corporations have freehold land and rights to sub-surface resources.[10]

Canada

In Canada, Indigenous and non-Indigenous people can hold fee simple land. Indigenous peoples' traditional rights to land are recognised by proclamations, treaties, statutory laws, agreements, settlements and in court decisions. However, the government's historical views of Inuit, First Nation and Métis peoples resulted in differential treatment with regard to land rights. For example, the *Indian Act*, which regulates the management of lands

reserved for "Indians", included most First Nation people, but excluded Inuit or Métis people. While Inuit traditional land rights were officially recognised through later court decisions and land claims agreements, the recognition of Métis traditional land rights is now being contemplated as a result of recent court decisions.

Historical treaty processes in Canada conferred land rights to First Nations, although in exchange for the extinguishment of rights over traditional territories under Indigenous law. As a result, federal reserves were created exclusively for use by First Nations and were regulated by federal laws such as the *Indian Act*. On reserve, First Nations people in Canada have quasi-property rights. Under the *Indian Act*, reserve land is "a tract of land, the legal title to which is vested in Her Majesty, which has been set apart by Her Majesty for the use and benefit of a band". This is an example of bare legal title, where title is in the Crown and land is inalienable, but the "Indian band" holds right of use and occupation and certain other beneficial interests. Once reserve status is granted, the lands cannot be unilaterally diminished or taken away by the federal government. However, First Nations may increase their reserve land base by applying to the government to create an addition-to-reserve. Reserves are exempt from property and estate taxes. Sub-surface resources are generally owned and administered by the respective Province (Göcke, 2013[16]).

The Inuit did not sign any historic treaties with Canada and do not have reserve lands like First Nations peoples. Instead, Inuit and Canada have entered into 4 land claims agreements, covering about 40% of Canada's land mass, including parts of Labrador, Newfoundland, Nunavut and Quebec. The Inuit title is identical to Aboriginal title and includes the right to use the land in any way that respects the use by future generations.

New Zealand

In New Zealand, the Treaty of Waitangi of 1840 set the basis for the recognition of Māori people's right to land. Subsequent legislation put forward the definition of customary and freehold Māori land and established rules for the recognition and transfer of Māori land (Māori Land Act 1993).

Māori freehold land is the legal status of lands owned by Māori individuals under the jurisdiction of the Māori Land Court. The origins of this title cannot be traced to a single legal document but come to be explained historically. The Māori Land Court was created in the 19th century to approve the conversion of customary land into freehold land, owned by individuals or co-owned by groups of individuals.

In the 20th century, this process led to fractionation of Māori land, with smaller tracts of land being co-owned by several individuals.[11] The average Māori land block is only 52 hectares with 100 owners. There are about 2.7 million interests in 27 212 Māori freehold land blocks.

Australia

In Australia, Commonwealth and state governments enacted land rights acts in the 1970s and 1980s. The Commonwealth Aboriginal Land Rights (Northern Territory) Act and the South Australia government grant collective inalienable freehold title to Indigenous people. In the State of New South Wales, the Aboriginal Land Rights Act (1983) has a different configuration. It granted Indigenous peoples the right to claim lands. One hundred and twenty Aboriginal land councils were established; they claim unused or unoccupied Crown land to the government. Once granted, they have the freehold title over land and can sell, lease or subdivide land, pending the approval of a central body, the New South Wales

Aboriginal Land Council.[12]

At the national level, it was the High Court's Mabo Decision in 1992 that recognised aboriginal rights to land, which precedes colonisation. In response to this decision, the Commonwealth enacted the Native Title Act 1993, which provides recognition of pre-existing rights to land and waters. The allocation of rights depends on successful claims that prove the continuity of occupation by an Aboriginal group. Scholars and activists have highlighted the difficulty in proving a continuous, unbroken physical and spiritual connection to the land, given the fact that Australian colonisation has precisely served the purpose to remove Indigenous peoples from their lands and alienate them from their own history (Sutton, 2003[6]).

Federal and state land regimes coexist. The federal regime of Native Title, as per the 1993 Act, grants rights of possession, which can be exclusive or not. It is the right to continue occupying traditional lands to which the traditional owners' group has historic connections to. In this sense, it is a collective right.

Aboriginal land rights regimes vary across states and territories.[13] In the Northern Territory and South Australia, the land rights acts confer collective fee simple title. The collective is inalienable and cannot be mortgaged. It can be leased to third parties but if the lease exceeds a certain amount of years, the government's prior approval is required. The majority of these acts do not confer rights to sub-surface resources. In particular, Northern Territory and South Australia – where approximately 98% of the total amount of collective fee simple land is situated – do not confer sub-surface rights when granting land to Indigenous peoples.

Western Australia is the only state which uses the reserve system. The right to reserves do not include rights to sub-surface resources or the right to veto resource exploitation on this land. Reserves can be diminished, altered or taken away by proclamation of the governor, that is, unilaterally. Indigenous peoples cannot prevent non-Indigenous peoples from accessing and using their lands.

Sweden

Sweden's Reindeer Husbandry Act 1971 does not specifically address land rights issues. The legislative framework nonetheless recognises the right to use the land for the purpose of reindeer husbandry, including the right to take water for the herd's and the herder's survival. Only the members of local economic associations of reindeer husbandry, called *sameby,* are entitled to such rights, which correspond to around 12% of the Sámi population. *Sameby* members also have certain fishing and hunting rights but do not exercise control over fishing and hunting activities in the grazing lands. The majority of the Sámi are not members of a *sameby* and, as such, are legally prevented to practice reindeer husbandry and do not have hunting and fishing rights on the *sameby* land. In other words, they are on equal footing with other Swedish citizens by law.

There is no right of refusal for developments by the Sámi on the lands that they use for reindeer husbandry. The Sámi are typically consulted when large development projects are being proposed on *sameby* lands; however, the methods of this consultation differ. This is so because the Swedish system is based on the notion that different land uses can coexist and that conflicts can be solved locally. Hence, in terms of competing uses for land, they are treated as one of many stakeholders.

Summary

Table 3.3 provides a summary of Indigenous property rights across five OECD member countries (Australia, Canada, New Zealand, Sweden and the United States). These property rights contain different attributes that can vary significantly within and between countries. These rights fundamentally shape the limits and possibilities of Indigenous economic development.

Table 3.3. Indigenous property rights: Comparing the Australia, Canada, New Zealand, Sweden and the United States

	Statutory Indigenous property rights
United States	● **Owner** of lands and sub-surface resources in Alaska (Regional Corporations). ● **Individual owner** of fee simple title (allotted lands). ● **Collective proprietor** of reserve land and restricted fee title.
Canada	● **Collective owner** of land through comprehensive agreements. ● **Collective owner** of land acquired in the market. ● **Collective proprietor** of reserve land. ● **Individual possessor** of reserve land allotted by collective.
New Zealand	● **Individual owner** of Māori land, often in co-ownership.
Australia	● **Collective owner** of land through Commonwealth and state land rights acts (e.g. Northern Territory, South Australia and New South Wales) ● **Collective proprietor** of exclusive Native Title determinations (national). ● **Collective possessor** of non-exclusive Native Title determinations (national). ● **Collective possessor** of reservations in Western Australia.
Sweden	● **Collective authorised user** of land, but only for *sameby* members and with the purpose of reindeer herding.

Box 3.6. Indigenous lands across countries

The amount of land rights conferred to Indigenous peoples differs significantly across countries. The actual amount does not say anything about the legal nature, content, scope and degree of protection of the rights (see sections on recognition, allocation and protection below). It also does not say anything about lands which are claimed by Indigenous groups but not recognised by states.[14]

In the United States, Indigenous peoples make up 2% of the population. As proprietors, they hold land rights to approximately 4% of the country's landmass or around 400 000 km², of which 184 000 km² lie in Alaska (Göcke, 2013[16]).

In Canada, Indigenous peoples represent 4.9% of the total population and hold around 626 000 km² or 6.3% of the total landmass. Most of it lies north of the 60th parallel, while in the southern provinces, which are home to approximately 95% of all Indigenous peoples within Canada, only 37 000 km² are held by Indigenous groups (Göcke, 2013[16]).

In Australia, Indigenous peoples account for 3.3% of the total population. Almost half of Australia's land mass is currently subject to a recognised Indigenous interest and 25% is under native title claim, as such:

- About 27% of Australia's land mass is exclusively held by Indigenous people, including 12% under exclusive native title (proprietor) and 15% under statutory land rights (owner).
- About 23% of Australia's land mass is subject to non-exclusive native title (possessor).

The vast majority of land held by Indigenous groups lies in the Northern Territory, South Australia and Western Australia (more than 90%). In New South Wales, Victoria, Queensland, and Tasmania, where two-thirds of all Indigenous Australians live, Indigenous groups hold very little land (Göcke, 2013[16]).

In New Zealand, Māori groups constitute 16.3% of the total population. Māori freehold land is approximately 5% (about 1.4 million hectares) of the country's land area, predominantly concentrated in the mid to upper North Island. This number, however, only comprises lands held in form of Māori Freehold Title. In addition, Māori tribes collectively hold land obtained via historical claims processes, yet the official records are not easily accessible.

In Sweden, the Sámi people, who are 0.2% of the total population, do not have exclusive rights to occupy the land. What they have is the right to use lands for the purpose of reindeer husbandry (authorised user). The grazing lands for herds are extensive, covering approximately half of Sweden. In these lands, however, many other competing uses coexist.

Note: Data on population as estimated in Chapter 1 of this report.
Source: Own elaboration based on Göcke, K. (2013[16]), "Protection and realization of Indigenous Peoples' land rights at the national and international level", http://dx.doi.org/10.3249/1868-1581-5-1-goecke.

Legal recognition of land rights

Formal recognition by governments of Indigenous land rights is both a historical and an ongoing process. It dates back five centuries in settler societies such as Canada, New Zealand and the United States and is intrinsically connected to the history of colonisation. In Sweden, it goes back to nation-making efforts 400 years ago. It remains to some extent unresolved: ongoing negotiations and judicial claims mean that not all Indigenous groups have had their rights recognised. For the ones that have, states' obligations have not always been fulfilled or implementation has not been satisfactory. These issues can be addressed through treaty revisions. Furthermore, in Latin American countries, even though the 20th century has witnessed the recognition of land rights in constitutions or national laws, the implementation gap is wide (Martínez Espinoza, 2015[17]).

Treaty revisions, specific claims and modern-treaty making (also called comprehensive land claims) have been carried out throughout the 20th century. Treaties are a particular type of agreement that must contain: recognition of the Indigenous group as a "distinct political community" rather than a minority group within the existing state; negotiation of the terms of the agreement that are fair and undertaken in good faith; and inclusion of responsibilities and obligations for both parties, to bind them in an ongoing relationship (Petrie, 2018[18]).

In the United States, not all Indigenous groups have been recognised by the government as

tribes.[15] Among those who have, not all tribes have federal reserves – it is estimated that there are 576 recognised tribes and 326 reserves, whereas some tribes have more than one reserve. The United States ceased negotiating treaties with Indigenous peoples in 1871. Many tribes have been assigned a reservation by treaty but received smaller tracts of land or were removed by force from their lands. For this case, outstanding claims can be postulated in the judicial system. Between 1946 and 1978, claims were arbitrated by the Indian Claims Commission to acknowledge and offer monetary compensation for the loss of Indigenous lands. After that period, the authority was transferred to a federal court of claims, with similar functions.

In Canada, Supreme Court decisions have often been a key factor leading to the recognition of Indigenous land rights not comprised by historic treaties. In 1973, the government began developing and implementing the Comprehensive Land Claims Policy to give effect to these rights through modern treaties. The Inherent Right Policy followed in 1995, providing for the recognition and implementation of the inherent right of self-government. Generally, comprehensive claims are based on Indigenous peoples' traditional use and occupancy of the land. The content of an agreement can include: transfers of land ownership; land, water, heritage, environment and wildlife management; financial compensation; a self-governance agreement; an economic development strategy; and sharing of resource revenue. Since 1975, 19 comprehensive land claims, 6 comprehensive land claims with self-government and 16 self-government agreements have been negotiated (Government of Canada, 2015[19]). This process of land recognition is ongoing with over 50 separate negotiations underway (Government of Canada, 2016[20]). A "whole-of-government approach" to the implementation of modern treaties was established in 2015.[16] At the same time, Canada's policies for recognising and implementing Indigenous rights in negotiated agreements are evolving. Since 2015, Canada has been involved in Recognition Indigenous Rights and Self-Determination discussions with Indigenous collectives. These discussions allow the parties to co-develop approaches to rights implementation, relationship renewal and other shared priorities. Currently, there are over 75 of these discussions underway.

Box 3.7. Modern treaty making: The case of the Cree and Inuit of Northern Quebec

In 1975, the Cree and Inuit of Northern Quebec signed an agreement with the federal government and the province of Quebec regarding land and economic development issues, the James Bay Northern Quebec Agreement (JBNQA). It was the first modern treaty in Canada's history. The treaty established categories of lands, with different use regimes. It offered direct financial compensation for the development of the Hydro-Québec project in Indigenous lands and foresaw the establishment of Indigenous corporations to manage these funds with the purpose of promoting the economic development of the Cree and the Inuit. It also created Indigenous organisations for environmental protection, education, health and social services.

The James Bay Northern Quebec Agreement (1975) is an emblematic case. Among the many interesting aspects, the very process of treaty-making provides some guidance, which the OECD gathered during a study mission to Canada.

- **Signing a pre-engagement agreement**: such an agreement defines the rules and procedures under which negotiation will take place, ranging from the composition of the negotiators' team to the schedule of meetings. Having a timeframe helps to

set expectations, while the joint deliberation about the rules of negotiation renders the process more legitimate.

- **Financial assistance to Indigenous negotiators' team**: Keeping a high-skilled group of negotiators working intensely for what can be long periods of time is costly, and so is producing maps, deeds and other evidence. Indigenous peoples must be granted financial assistance to pursue the negotiation and this support has to be stable. The capacity of the negotiators' team and the resources put at their disposal for technical activities is one of the main ways in which Indigenous peoples can address the power imbalance inherent in negotiating with the government.
- **Legitimate parties capable of decision-making**: The agreement will not advance if the people sitting at the table cannot assume responsibility for what they negotiate. As it was the case in the making of the JBNQA, it is necessary that senior civil servants engaged can honour the commitments made, and that the Indigenous leadership is considered a legitimate representative by their group.
- **Broad consultation process**: Indigenous negotiators and leaders must consult broadly and regularly with the Indigenous population concerned by the agreement. In the JBNQA process, leaders travelled to all the communities explaining the importance of the treaty and asking feedback from people. Consultation must start as early as possible and keep people informed of the process. Not only is consultation a right of the concerned population but it also contributes to greater ownership of the agreement and is likely to facilitate implementation.
- **Compensation for past wrongs**: Treaty-making can be used to address past wrongs. It can encompass land restitution and, if giving back all the land is possible, direct financial compensation. This impossibility may exist because the lands have already been destined to other uses, such as an urban settlement or an infrastructure project. Compensation for past wrongs is one way under which Indigenous peoples can obtain financial resources to develop their lands.
- **Well-defined implementation plan**: The agreement must contain the obligations of the parties and the timeframe and means of implementing these obligations. Treaties that set obligations but remain vague about how they can be fulfilled often fall in an implementation vacuum. The lack of a well-defined implementation plan was considered a drawback of the JBNQA, and so much so that additional agreements redefining terms of implementation were subsequently signed.

While this case study is informative and offers a helpful perspective on how Canada has been negotiating modern treaties with Indigenous peoples for over 40 years, it must be noted that the modern treaty process has been critiqued by Indigenous parties almost continually since its inception. In particular, capacity and financial imbalances at negotiation tables, as well as the rigidity of federal mandates and processes, have been impediments to progress. Over the past several years, ongoing federal policy reform initiatives have sought to address these challenges. These efforts continue today.

Allocation of land rights

Once land rights are legally recognised, there needs to be a procedure for allocating it. Land allocation is the process of indicating which territory belongs to which group, i.e. assigning

land parcels to specific recipients. In countries such as the United States and Canada, treaties assign land to Indigenous groups – they contain the geographic location of the land and are enforceable against others (see section on recognition above). In other cases, the legal recognition (e.g. constitution or national law) does not include the physical boundaries of Indigenous territories; hence, subsequent actions are needed. Land registration, mapping and land demarcation are the three different forms of allocating land discussed in this sub-section.

Allocating land rights remains a challenge for the effectiveness of Indigenous rights around the world. Many authors have stressed the "implementation gap" in Indigenous rights, referring to "the differentiation between formal recognition of the international rights framework, and the lack of [corresponding] administrative and policy practices" (Martínez Espinoza, 2015[17]). In Latin American countries, land demarcation processes have lagged behind the constitutional recognition of Indigenous rights to land. In North America, ongoing land claims show that the recognition process in unfinished business (see section on recognition above).

Land registration

Asserting in legal documents that certain groups or peoples have the right to lands is not enough in itself to secure that these groups or peoples continue to use and live in these lands. In some cases, the group already lives in the recognised lands, and its occupation does not face serious threats. In these cases, the transfer of title (land registration) to the name of the group suffices to perpetuate the current state of affairs. Even then, transferring title is an administrative act that requires certain conditions to be in place, such as the existence of land registry, the convocation of adjacent owners to present any opposable claims, the civil capacity of the group to act as owner, and ensuring that informal rights holders such as tenants are not excluded.

Box 3.8. Land registry in Canada

In Canada, the *Indian Act* required the creation of a separate system of land registration to allow them to register leases, land transfers, amendments, licenses and mortgages and other instruments that may be attached to land. It excludes customary land holdings, which are not recognised by the *Indian Act* and have no legal status but are not uncommon among First Nations. Today, the government manages and operates a single registration database with three distinct systems which accommodates the three main forms of First Nations land tenure. The Indian Lands Registry System (ILRS) only registers rights affecting reserve lands as recognised under the *Indian Act*, and where the government is responsible for lands administration. The First Nations Land Registry System is for registering instruments relating to lands managed by First Nations according to land codes made under the *First Nations Land Management Act*. First Nation Land Management (FNLM) is a government-to-government relationship through which First Nations can opt-out of the 33 sections of the Indian Act related to land and environmental management by government officials, allowing for limited self-government.

Under the terms of full self-government agreements, there is a third system, called the Self-Governing First Nations Land Registry. Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) maintains these three electronic registries for First Nations.

Land registration in separate systems leads to uncertainty and higher transaction costs. Information has to be gathered from different authorities, which may also have competing or incomplete records. The Food and Agriculture Organization of the United Nations (FAO), in guidelines on the Responsible Governance of Tenure, indicates that, when possible, the registry of Indigenous lands should be made in the same system than non-Indigenous lands, to make land registry systems more complete and simpler (FAO, 2012[21]). This in turn would facilitate the analysis of eventually competing claims and the definition of geo-referenced boundaries.

Mapping land

The act of mapping is not free of conflict. Boundary setting reveals disputes about what "traditional territory" means. Traditional territory is not the one used by the group as a place of residence but the one necessary for their social and material reproduction, including here for spiritual purposes. Who has the authority to map is another issue. Co-mapping initiatives have proven to combine the authority and technical expertise of the government with the knowledge of the place and self-determination rights of Indigenous peoples. On the other hand, some understand that Indigenous-led initiatives are best suited because they can produce and maintain knowledge within the community, which supports data sovereignty.

A myriad of mapping initiatives has been created in the past 50 years, with the main purpose to assist Indigenous peoples to claim lands and resources. Alaska and Canada pioneered mapping projects in the 1970s, which documented land use and occupancy patterns. The commonly used method of "map biography" traces the subsistence regime of individuals spatially through time, showing hunting routes, gathering patterns and such. This method was applied in studies with the Inuit of Labrador, the Yukon, the Northern Ontario Cree and in Copper River Basin communities in Alaska, just to mention a few (Chapin, Lamb and Threlkeld, 2005[22]). Mapping with Indigenous peoples in Southeast Asia, Africa and Latin America began in the 1990s, also to produce documentation for land claims, and have ranged from georeferenced maps to sketch maps. Although most projects have pursued a participatory approach, the issue of control has been less advanced (Chapin, Lamb and Threlkeld, 2005[22]).

Demarcation and land titling

Land demarcation is the formal process of identifying the actual locations and boundaries of Indigenous land or territories, and physically marking those boundaries on the ground (Gilbert, 2016[11]). In Latin American countries in general, Indigenous land rights have been granted in constitutional norms but are pending demarcation processes. These been identified as the major impediment to the effectiveness of Indigenous rights in Latin America (Gilbert, 2016[11]).

Land demarcation is a process of allocating previously recognised rights. Land titling procedures provide legal descriptions of the nature of the land and resource rights held, in accordance with laws and land tenure systems. A team of specialists appointed by the government or formed by civil servants, often geographers and anthropologists, is assigned to define the geographic limits of the traditional territory. The traditional territory is the one necessary for the maintenance of Indigenous cultures and livelihoods, in accordance with their traditional ways of life. It reflects the existence of spiritual sites, social reproduction needs and subsistence activities. According to the principle of self-determination, Indigenous groups should have greater authority in deciding about its own

land boundaries. As it is today in many Latin American countries, Indigenous peoples do not have the final word about where their lands are but the team of specialist does.

The procedure for land titling and demarcation can be developed in different ways, which have to be pre-defined by governments, in consultation with Indigenous peoples. But there are some elements that every land titling and demarcation procedure should contain. The former UN Special Rapporteur listed the minimal components as: "(a) identification of the area and rights that correspond to the Indigenous community; (b) resolution of conflicts over competing uses and claims; (c) delimitation and demarcation; and (d) issuance of title deed or other appropriate document that clearly describes the nature of the right or rights in lands and resources". He recommended the creation of a land commission with the specific mandate to facilitate the securing of Indigenous land rights (UN Doc. A/HRC/18/35/Add. 7:36 as quoted in Feiring (2013[23])).

Protection of land rights

States must ensure that Indigenous peoples are protected from coercion and violence in regards to the use of their land. In Latin America, land-related violence against Indigenous peoples is well-documented, particularly in the context of large-scale projects in extractive industries and agribusiness. The 2018 report of the United Nations Special Rapporteur on Indigenous peoples, titled *Attacks and criminalization of Indigenous Peoples Defending their Lands and Rights*, shows how urgent this situation is.[17]

States have a duty to effectively protect Indigenous peoples' land and resource rights. The UN rapporteur recommends that "in order to address the root causes of attacks and criminalisation, collective land rights of Indigenous peoples need to be recognized" (UN Human Rights Council, 2018[24]). According to the UNDRIP and Convention No. 169, the main mechanisms to do so are identification, demarcation, titling or other legal recognition of land (discussed above), along with adequate access to justice and penalties for unauthorised intrusion. Through improved access to justice, Indigenous peoples can claim their right to redress, as discussed in the section about international rights.

Furthermore, states also have a duty to prevent non-Indigenous persons from securing ownership, possession, or use of Indigenous peoples' lands or territories. According to the International Land Coalition, "experience shows that many Indigenous peoples have been tricked or forced to give up their lands to outsiders through fraud or other dishonest means" (Feiring, 2013, p. 20[23]). States must ensure that unauthorised intrusion or use of Indigenous peoples' land or territories is adequately and promptly penalised (Feiring, 2013[23]).

Concerning land related-violence, the UN Rapporteur recommends that states promptly investigate attacks and take measures to provide for effective redress (UN Human Rights Council, 2018[24]). Programmes of protection of human rights defenders and communities are needed to prevent attacks. In the context of project development, there should be mechanisms for consultation with Indigenous peoples and comprehensive impact assessment studies – which is discussed in the third part of this chapter.

Providing Indigenous land rights goes beyond the question of granting title: it involves a complex set of legal, social, economic and political issues. Indigenous property rights are not only about the recognition of land rights, but also concerns land management frameworks that can work for Indigenous peoples. In all, the effective management of land is critical for the realisation of Indigenous development goals as well as broader regional and national ones, which is the topic of the second section of this chapter.

Instruments to mobilise the economic development potential of Indigenous lands

This section examines different land management instruments that can be utilised to mobilise the economic potential of Indigenous lands. Since land rights vary across countries, the possible land management systems will also vary. If an Indigenous community has the right to use lands but no right to sub-surface resources, this community cannot manage licensing for extractive industries on their own, only be consulted about it. If on the contrary an Indigenous group is considered a self-governing nation within the nation, then land management is only one among the many possible responsibilities that they hold, which include deciding on health, education, and infrastructure, among other issues. Therefore, the conditions and instruments discussed in this section cannot always be used by all countries, as it depends on the underlying rights framework. It is a toolbox that States and Indigenous groups can open and use, but not all tools are available to everyone.

Indigenous land management models

Framing land as an asset for economic development means that, once land rights are secured, Indigenous peoples can use the land to foster their self-determined development goals. The clarification and implementation of rights are important, as argued in the previous section, because they set the basic ground rules for these activities to take place, while also reducing uncertainty and preventing conflicts.

Indigenous land management encompasses how and by whom decisions are made about environmental, natural resource, commercial and cultural heritage management activities that take place in Indigenous land by Indigenous communities, bodies, organisations and individuals, on their own or with private stakeholders and government actors (Hill et al., 2013[25]) (Box 3.9). It concerns related fields of intervention that need to be developed such as planning, infrastructure investment and capacity development. Due to the special relationship that Indigenous peoples have with their territory, this task is fundamentally different than the one of managing non-Indigenous land. It is shaped by kinship relations, cultural and spiritual beliefs, and traditional uses for subsistence and respect for the environment.

Management practices mostly refer to land but can also include water. In Australia, for example, co-management models of natural reserves under the Natural Reserve System (NRS) comprise both land and water. There are several hundred Indigenous land and sea management groups across Australia that cover areas under Native Title and national and marine parks (Australia State of the Environment Report, 2016[26]). In Chile, the Rapa Nui Rahui Marine Protected Area (MPA) was created around Easter Island in 2017. The preservation of the Rapa Nui's artisanal fishing practices will be grandfathered into the management plans for the MPA. This will contribute to the preservation of the Rapa Nui's traditional way of life and protect the area from industrial commercial fishing.[18]

Box 3.9. Indigenous use of land

Indigenous use of land can range from cultural to environmental to commercial ones (Table 3.4). Traditional hunting, gathering and craftsmanship are included, but also activities that may require new organisational structures and capacities, such as managing natural parks, monitoring environmental impacts and conducting ecotourism.

Table 3.4. Use of land by Indigenous peoples

Category	Activity
Customary or cultural resource activities	Hunting, gathering
	Ceremony
	Protection and management of culturally significant places
	Transfer and documentation of traditional ecological knowledge
	Documentation and translation of language
	Indigenous knowledge and activities for youth education
	Artistic expression through painting or craft
Natural resource activities	Weed and feral animal control and monitoring
	Fire management
	Monitoring and management of threatened species and ecological communities
	Conservation of natural water bodies
	Soil erosion control and soil rehabilitation
	Native nursery, seed collection and planting
	Visitor and tourist management (e.g. track maintenance, signage)
	Monitoring threats to biosecurity
Land management for improved conditions in settlements	Dust mitigation
	Firewood collection
	Management of community water supplies, rubbish and sewage disposal
	Parks and gardens
	Infrastructure (e.g. building, road maintenance and construction)
	Protection from fire
Commercial economic activities	Retail and tourism-related services
	Metals, minerals and hydrocarbon extraction
	Horticulture (e.g. vegetable garden, orchard) and plantations, and harvesting of plant foods, medicines and seed for sale
	Harvest for commercial wildlife industries
	Pastoral and related activities
	Art and craft production
	Land restoration and other natural resource management services
	Employment in Indigenous and co-managed parks and protected areas

Source: Adapted from Hill, R. et al (2013[25]), *Indigenous Land Management in Australia: Extent, Scope, Diversity, Barriers and Success Factors,* CSIRO Ecosystem Sciences, Cairn.

Typology of land management

The possible arrangements for Indigenous land management can be divided into three ideal types,[19] according to the degree of autonomy granted to the Indigenous community:

- **Self-governance of Indigenous land**: The Indigenous group has been empowered by the state to have a level of autonomy over the management of Indigenous lands and natural resources located within it. This conditional autonomy may derive from the self-government capacity of the group, attributed by a treaty or agreement that addresses nation-to-nation relations. Alternatively, it may arise from specific agreements that hand over regulatory authority over environmental issues from the government to the Indigenous group.
- **Joint land management model:** In this model of joint, shared or co-operative management, also referred to as co-management, the Indigenous group shares the responsibility and the authority over land issues with government authorities. It may arise from the creation of specific institutions, such as natural resources boards and land councils, which are equally composed of Indigenous and non-Indigenous representatives. It may also come from the creation of protected areas, such as parks or nature reserves, with a management model defined as shared. It can eventually be that the government has the authority over natural resources but the Indigenous group participates in the decision-making process of issuing licenses and permits.
- **Co-existence:** In this model, Indigenous groups are considered an interested party in land management issues that affect their designated lands. Their lands may be affected directly or indirectly, for instance, if a project does not occur in their lands but its impacts extend over them. Without autonomy to decide over such issues, they can nonetheless be part of decision-making processes. They may be consulted in administrative procedures, such as environmental licensing, and influence the elaboration of laws, plans and other policy documents.

Different land management models can be observed within the same country, whenever the underlying land rights framework is diverse and multiple. For instance, in Australia, the federal native title regime gives possession of traditionally owned lands, whereas at the state level there can be freehold lands. The boundaries and beneficiaries of these different regimes do not necessarily coincide, but they may do. In the United States, there are collectively-owned trust lands (reserves) and individually owned land under "restricted fee", which have to be governed by different regulations.

Furthermore, case-by-case differences may exist within a certain regime. In Canada and the United States, for instance, because nation-to-nation relations have been regulated by treaties and agreements, conditions and powers are not uniformly attributed. To illustrate, many Canadian land claim agreements granted decision-making powers to Indigenous groups in what regards land use and environmental issues in their territories (Simons and Pai, 2008[27]). In some agreements, Indigenous groups own mines and mineral resources, such as in the Yukon Indian Agreement, while in others they only receive resource royalties, such as in the Nunavut Land Claim Agreement (Simons and Pai, 2008[27]).

Land management tools

Because of this variability of Indigenous land regimes and considering specific geographic, cultural and institutional settings, there are different challenges and tools that can be applied to address them (Box 3.5). In the case of self-governance, there may be ownership rights but restrictions on the right to transfer, which inhibits the use of land as security for credit. Within the framework of joint land management, there may be a lack of sufficient data about traditional livelihoods to make informed decisions about how to manage resources. In regards to co-existence, traditional knowledge may not be sufficiently incorporated into decision-making about land use and natural resource management. This section will discuss different tools available for Indigenous land management, and the lessons and challenges associated with them.

Table 3.5. Tools to mobilise the development potential of Indigenous land

Tools	Problems they address
Land use planning	● Indigenous traditional knowledge, interests and preferences are not considered adequately in the strategic and statutory planning process. ● Lack of clarity about locations for appropriate development that considers socio-cultural, environmental and economic objectives. ● Mismanagement of negative externalities between Indigenous and non-Indigenous lands (pollution, noise, and land use incompatibilities).
Natural resource conservation and management	● Indigenous communities are not involved in the governance of natural resources (land, water, air quality, forests, flora and fauna) on their traditional territories. ● Indigenous communities miss out on business, revenue and employment opportunities associated with conservation management.
Regulation of resource use	● Data about natural resources on Indigenous lands and monetising their value is lacking. ● Competition and over-use of natural resources and lack of control over licensing. ● Traditional knowledge not incorporated into policy and regulatory settings.
Leasing of land	● Inalienability makes it impossible to use land as security when seeking finance for land development.
Acquisition of land	● Indigenous lands that are formally recognised are relatively small and face barriers to development (e.g. remoteness, poor infrastructure). ● Complex and costly judicial and administrative processes to acquire land and lack of funds to do it.
Consolidating and co-ordinating land ownership	● Fragmentation of land ownership due to allocation to individuals and family groups makes it difficult to generate economies of scale and restricts options for development.

Indigenous land use planning

Land use planning refers to a process whereby decisions about different socio-economic activities (agriculture, heavy industry, commercial, retail and housing) should take place. This also includes the conservation of places for environmental and socio-cultural reasons. Societies usually seek to shape and control land uses in ways that achieve economic, social and environmental objectives. It is also an important tool for managing negative externalities such as pollution, noise and congestion. Land use planning usually has two

dimensions: strategic and statutory. Strategic land use planning involves the development of long-term plans regarding land use that usually takes accounts of future demographic trends. The statutory land use system controls development through the zoning of land for different uses and encompasses the administration of these regulations by governments.

Land use planning in a self-governance framework

Indigenous-led community land use planning is possible where Indigenous groups have attribution to manage their own lands – i.e. in the self-governance model. Through this instrument, a community can agree on a common vision for land development, clarify rules about land use and foresee future activities. It makes it clear to them and to external stakeholders what they consider acceptable and desirable to take place in their own community. It is an exercise in being proactive, dictating rules and taking control of their own future.

Taking the case of Canada, the Indian Act establishes that the government is in charge of land and natural resources administration in reserves. However, the government is using different approaches to progressively transfer this responsibility to opting First Nations. Key approaches are the Reserve Land and Environmental Management Program, the First Nations Land Management Regime and lastly a broad self-government agreement that includes land management.[20]

Canada has been funding land management programmes since the late 1980s. In 2005, the government introduced the most recent land management funding programme, the Reserve Land and Environmental Management Program, which offers funding to First Nations for capacity-development related to land and environmental management activities. The programme allows First Nations to function at any one of three levels of increasing responsibility: training and development, operational level or delegated authority. As of 2017, there were 138 active participants: 27 training and development communities, 100 operational communities and 12 delegated authority communities.

The First Nations Land Management Regime, enacted in 1999 is for First Nations that elect to opt out of the land and resources provisions of the Indian Act. In so doing, even though land ownership remains with the government of Canada, the administration of land and natural resources becomes their responsibility. It is a form of sectoral self-government. First Nations receive financial and technical assistance to develop a land code. The land code sets out basic provisions regarding the exercise of rights and powers over land – the umbrella for other land laws. Once a First Nation's land code is ratified through a Community Approval Process, they opt out of the lands-related sections of the *Indian Act* to gain control over their reserve lands, environment and resources. As of October 2018, 122 communities were active in the regime, with 44 in the developmental stage and 78 operating under their own land code.

First Nations have reported significant benefits from entering the FNLM regime. The regime recognises the inherent right to govern reserve lands and resources. In addition, they gain the legal capacity to acquire and hold property, borrow, contract and invest money, be party to legal proceedings, and directly collect and control land revenues and mortgage individual interests. Autonomy also reflects the ability to make laws and regulations in a timely and transparent fashion, and in respect of each First Nation's practices and traditions. This has been translated into more certainty for landholders and more capacity to enforce breaches of the law.

The case of Canada shows that the devolution of land management authority is a process that requires time, resources and capacity. Land administration, as a highly technical issue, needs competent staff, with a dedicated office, with the ability to compile information, produce maps, enact laws and enforce regulations. A non-judicial authority has to be set up to solve eventual disputes regarding land uses, property rights and environmental violations. These processes should be simple and clear, avoiding excessive administrative burdens. Funding streams are currently available from the government but, in the future, investing in autonomous revenue sources may become a necessity. One alternative is taxation from land use activities (titling, transfer, leasing, licensing).

Less clear in this case is the meaning of "community" in "community land use planning". The existing programmes seem to replicate dominant planning practices at the community level, without leaving room for local practices to flourish. As they require the creation of a land code, a land authority, zoning maps and such, they fit Indigenous land use planning into an existing model. The involvement of community members in shaping this model is not evident, either. These land use planning processes should, however, be participatory, involving the broadest possible range of local stakeholders. It is the task for Indigenous communities to find a "third space" of planning that accommodates both the dominant planning practices, which bring certainty and legality, and the traditional practices of land management, based on traditional knowledge (Porter et al., 2017[28]). In practical terms, this task comprises consultation, engagement-building and capacity-building of the local community. Chapter 4 discusses in more details the meanings of community planning.

Inclusion in regional and municipal land use planning

This instrument can apply across self-governance, joint management, and co-existence models. In some jurisdictions, regional and municipal land use plans sometimes do not include formally recognised Indigenous lands. Mechanisms to include Indigenous communities in land use planning at a subnational level can also be weak. Local and regional land use plans contain high-level objectives and policies for growth management, environmental protection, infrastructure and economic development. In Canada and the United States, as reserve lands lie under federal jurisdiction, provinces and municipalities do not necessarily integrate them into their spatial planning frameworks. The image of a "blank" left purposely in regional maps is most compelling. In Quebec, for instance, the territory of the reserves is not portrayed in the province maps and there are no relations between the planning administration and the reserves (OECD interviews, May 2018).

Yet impacts and overlaps are most strongly felt at the local level. Environmental degradation, road infrastructure, energy projects and water management are all issues that likely affect a reserve and its surrounding municipalities or, if remote, lands owned by the regional level of government. Moreover, it is not uncommon that traditional territories cut across municipal or regional lands, cases in which the local authorities have to manage and regulate competing land uses.

Considering these interactions, local governments should develop planning frameworks that are inclusive of Indigenous peoples and/or should invest in joint management of resources or joint venture projects. Taking the example of Canada again, in the South Saskatchewan Region, Alberta, municipalities are required to develop land use assessments that include local histories and heritage sites (Box 3.10). Joint management of resources is addressed in the section of "nature conservation" further below in this chapter.

Box 3.10. Municipal planning and Indigenous heritage: A good practice from Alberta, Canada

The South Saskatchewan Regional Plan (SSRP) requires that municipalities consider the broader implications of land use, growth and development, including on historical resources. Until now, however, these considerations largely excluded pre-settlement Indigenous heritage sites, many of which are more difficult for city planners to identify. These spaces include ceremonial and sacred sites, wildlife corridors, traditional hunting grounds as well as places with significant narrative history.

In April 2016, the City of Lethbridge initiated its Traditional Knowledge and Use Assessment (TKUA) by holding a ceremony jointly hosted by Elders and officials from the Kainai, Piikani and Siksika Nations. Through the TKUA, the municipality is able to work collaboratively with these three nations to create a greater understanding of the local Indigenous heritage of the region. Traditional land use experts from these three nations are working in partnership with a local archaeology firm to identify, document and capture the history of the Siksikaisitapi (Blackfoot peoples) in this region for thousands of years.

The TKUA is part of a larger relationship building process between the City of Lethbridge and its Blackfoot neighbours – and other Indigenous – neighbours in line with the Truth and Reconciliation Commission of Canada's Calls to Action, as well as the UNDRIP. Reflecting the spirit and intent of reconciliation, the TKUA is working closely with the Blackfoot Confederacy to understand and protect this history. In this way, it is the Indigenous nations themselves who are empowered to gather information and tell their histories. The work of the TKUA is an example of reimagining the relationship between municipalities and Indigenous communities and promoting reconciliation at the local level. It also represents a significant step on the part of Lethbridge to acknowledge Indigenous histories as essential and foundational to city planning, rather than something that can be accommodated after development.

Source: Alberta Urban Municipalities Association (2017[29]), *Municipal Planning Hub* , https://www.auma.ca/sites/default/files/Advocacy/Programs_Initiatives/Municipal_Planning_Hub/municipal_planning_hub_-_january_2017_version_to_post_on_hub.pdf.

In Sweden, many of the issues that impact the Sámi remain the purview of the national government (OECD, 2019[30]). Sectoral policies that relate to how land is used impact the Sámi reindeer herding industry; and yet, it is not always clear how they are connected at the regional and local levels. Moreover, while the unique assets of the Sámi for northern development are recognised at a general level, regional strategies for development do not have clear mechanisms through which to support these assets and promote their development and there are limited incentives for the regional level to engage with the Sámi. Nonetheless, recent reforms have resulted in increased competencies for regional planning at a regional level. The Sámi Parliament has expressed the view that regions should adopt a strong spatial vision for development, which engages and includes Sámi perspectives. One way in which this can be achieved is by providing sustainable support for the updating of Reindeer Management Plans and incorporating them into strategic spatial and land use planning, as to influence decision-making.

Conservation and natural resource management

Natural resource conservation and management refer to decision-making frameworks and

processes regarding the protection and sustainable use of water, land, forests, fisheries, flora and fauna. This is important for regional development because these frameworks help develop mechanisms to convert natural resources into economic development opportunities. In the past, Indigenous peoples were excluded from these frameworks. Decisions about the management of fisheries, forests and water resources were taken away from Indigenous peoples during colonisation. The creation of nature reserves and natural parks justified the displacement of Indigenous groups from their traditional territories (Dowie, 2009[31]). More recently, Indigenous peoples have been included in decision-making about the protection and management of natural resources. This may include the joint management of parks, natural reserves and World Heritage sites. In protected areas managed by Indigenous groups, traditional activities and livelihoods coexist with the goal of environmental preservation, as opposed to reserves in which human settlements and subsistence hunting and traditional livelihoods are banned (Dudley, 2008[32]).[21]

Joint management of natural resources

Local government authorities and Indigenous groups can sign an agreement to share functions, powers and duties concerning the management of natural resources. Joint management may cover a whole territory, for instance, a nature conservation area. Alternatively, it may refer to specific resources, e.g. water management of a river basin. It can be more comprehensive, to encompass regulatory powers over all the natural resources of a given territory and how they can be utilised for regional economic development.

The New Zealand Resource Management Act (1991) is an example of the inclusion of Indigenous peoples in environmental decision-making. The act is the main legislative framework for environmental decision-making in New Zealand. Sections 36B to 36E of the Resources Management Act allow for joint agreements between local authorities and Māori groups to share regulatory and managerial functions over natural resources (Fox and Bretton, 2014[33]). They generally relate to land that has been vested back into *iwi* or is a reserve or Crown land. They can stimulate a collaborative approach between local governments and Māori groups, leading to improved, stronger ties between them.

In practice, these agreements have been rarely negotiated. The literature identifies significant barriers for the elaboration of agreements (Fox and Bretton, 2014[33]). For one, the law requires proof of "efficiency" of agreements. The main reason to sign such an agreement is not to speed up processes but to amplify the sphere of concerned authorities, leading to more legitimate and fair decisions. It is unlikely that joint decision-making *per se* will make processes more economically efficient unless Māori groups contribute to the costs of running such affairs, which would be on its turn a barrier for their engagement. Second, authorising parties can cancel the agreement at any stage. In that event, powers and functions would revert to the local government. This implies that governments have an advantage in the event of conflicts. Conversely, if an agreement is signed it can be incorporated into the settlement process, requiring reluctant councils to work with the *iwi*. Despite these difficulties, authors observe a trend in New Zealand towards stronger forms of joint decision-making with *iwi*, which includes agreements (Fox and Bretton, 2014[33]).

In New Zealand, local authorities are also obliged to determine whether a proposed project or activity affects Māori people and land. To better make this determination, many of them have established Māori advisory committees (Fox and Bretton, 2014[33]). Almost a third of local authorities involve Māori in compliance monitoring activities, especially in cases where the resource consent included a specific provision for Māori participation (OECD, 2017[34]). In 2014, through the National Government's freshwater management reforms, a

more effective role is being given for *iwi.* For one, *iwi* will have a place alongside other key parties and interests in alternative collaborative planning processes, described in quality decision-making reform. Second, *iwi* will provide advice and formal recommendations to a council regarding decisions on submissions on freshwater plans and projects. The reform included a statutory requirement for the advice and recommendations to be explicitly considered before decisions are made (Fox and Bretton, 2014[33]).

Instruments to include Indigenous peoples in the management of nature conservation areas

The main instruments by which Indigenous peoples can manage nature conservation areas are agreements, memoranda of understanding or through adapted and new institutions. Agreements can be comprehensive regional agreements or specific land use agreements. In Australia, there are also lease-back agreements, in which the government returns a park or reserve to its Aboriginal owners, and then leases it back from them.[22] Memoranda of understanding (MoU) are another type of formal agreement that sets out the rules and conditions for shared involvement in park planning and management. MoU can be further specified by other instruments, such as joint statements and shared principles. New institutions that can be created are heritage trusts, funds, boards and councils. They should have a cross-cultural, co-operative governance structure composed by Indigenous representatives and governmental authorities. These institutions would normally be responsible for managing funds, enacting plans and enforcing regulations.

Self-governing conservation areas

Indigenous communities may manage the territory according to their own rules and regulations. It means transferring responsibility for the area from the government, either by treaty or settlement, or specifically regarding the authority to manage a given area for environmental conservation purposes. Indigenous and Community Conserved Areas (ICCA) are the umbrella category defined by the International Union for Conservation of Nature (IUCN). It comprises *de facto* voluntary governance arrangements led by Indigenous peoples for conservation purposes, in accordance with customary laws and practices. Indigenous Protected Areas in Australia fit this definition and, in addition to contributing to nature conservation, also provide for job creation through parks ranger programmes (Box 3.11).

Box 3.11. Indigenous Protected Areas in Australia

The Indigenous Protected Areas (IPA) Programme commenced in 1997 in Australia as a formally recognised component of the National Reserve System, supporting Indigenous landowners to voluntarily declare reserves on their freehold land. IPAs occur over areas of land or sea held by traditional owners where the Indigenous communities have entered into an agreement with the Australian government to promote biodiversity and cultural resource conservation.

IPAs rest on a prerequisite of Aboriginal "ownership" of land and waters to be protected, that is, Aboriginal communities must already have a native title or other forms of "ownership" over the area. Marine IPAs may rely on ownership of coastal land, islands and inter-tidal areas, native title, registered marine sacred sites or Indigenous fisheries plans or agreements. Once an IPA has been declared, following initial funding discussions and management planning, subsequent investment proposals can be made to implement a plan of management. IPAs offer resources for land management without the loss of autonomy that may be associated with co-management schemes. As of 2017, there were 75 dedicated IPAs, across 44.6% of the National Reserve System and 9% of Australia's land mass. Over 60% of IPAs are managed by Indigenous ranger groups. The Indigenous Rangers and Indigenous Protected Areas programmes have helped deliver economic, social, cultural and environmental outcomes. Together, they created more than 2 500 jobs through full-time, part-time and casual employment (OECD, 2019[35]).

In the first years of the programme, low amounts of funding limited the conservation outcomes that could be achieved and the availability of ranger positions. That no longer being a central issue, attention now is being directed to supporting capacity for Aboriginal and Torres Strait Islander communities to actively govern IPAs. Increasingly, Indigenous law and practice are guiding the development of conservation planning. The conjoining of ecological protection and Indigenous community decision-making and governance for biodiversity management can achieve long-term sustainability.

Sources: Godden, L. and S. Cowell (2016[36]), "Conservation planning and Indigenous governance in Australia's Indigenous Protected Areas", http://dx.doi.org/10.1111/rec.12394; Ross, H. et al. (2009[37]), "Co-management and Indigenous protected areas in Australia: Achievements and ways forward", http://dx.doi.org/10.1080/14486563.2009.9725240.

Joint management of conservation areas

Co-operative management, also called shared or joint management, involves communities and governments formally sharing the management of the environment and the natural resources within it. It suggests an ideal for participatory management that enhances equity of Indigenous groups and helps to ensure distribution of benefits from conservation (Plummer and Fitzgibbon, 2004[38]; Carlsson and Berkes, 2005[39]). In Australia, Gurig National Park became the first jointly managed National Park in 1981 and since then further co-management arrangements have been adopted in other parks. In Canada, joint institutions for environmental governance have arisen from comprehensive land claims processes. In Sweden, The Laponia World Heritage site has a shared management model between the government and the Sámi Indigenous people. Sámi representatives hold the majority on the board of directors of the organisation, and the management structure has been adapted to traditional Sámi organisational practices and knowledge (Reimerson, 2016[40]). Another example is the Finnmark Estate in Norway which is overseen by a Board

of Directors with 50% of the representation nominated by the Sámi Parliament of Norway. The Finnmark estate has a number of responsibilities including property development, hunting licenses and outdoor recreation.

Challenges and lessons

Establishing the limits of a protected area can be a complex task, given pre-existing property relations and the inter-dependency of natural ecosystems. Taking these elements into consideration, boundary-setting of ICCAs has to incorporate traditional land use activities with economic and recreational activities, and ecological conservation. Boundaries have to be large enough to accommodate the traditional activities deployed by Indigenous peoples on land, such as hunting and fishing, with the goal of preserving the ecosystem. ICCAs have to be considerably large and comprehensive to integrate different natural elements of an ecosystem. For instance, the management of a river used for fishing and protected by surrounding vegetation cannot be excluded from an ICCA in a forest. Here the problem of the third polluter may arise, meaning that activities outside the defined conservation area can generate negative impacts on it. Managing these conflicts requires a clear allocation of responsibilities and mechanisms to co-ordinate decision-making with relevant bodies.

The Indigenous peoples responsible for stewardship should also have sufficient funds to conduct activities. Charging fees for park entry is a way to collect revenues, as for example is the Uluru Park in the Central Desert of Australia. Indigenous peoples can also earn revenue from carbon conservation activities – as stewards, Indigenous peoples are actively contributing to carbon sequestration (WRI, 2017[41]). In addition, ecotourism activities can be pursued, e.g. guided tours and educational activities. Indigenous persons may secure employment in ICCAs as rangers, guides or administrators. The park rangers in Indigenous Protected Areas in Australia are an example of this (Box 3.11). These own-source revenue, business and employment opportunities are highly compatible with the preservation of the environment.

Self-governance and joint management arrangements also requires leadership, planning and administrative capacity. Retaking the example of Australia, the elaboration of management plans by Indigenous stewards in IPAs has required technical support from the government, as the plan must abide by Australian and international laws for protected area management. The plan must at the same time provide ways to include Indigenous customs, law and culture, which requires cultural sensitivity of those involved in it. It is an opportunity for Indigenous peoples to combine the two "ways": scientific planning and traditional knowledge. Capacity building efforts should be a priority in the aftermath of establishing ICCAs (discussed further in Chapter 4).

Regulation of fishing, hunting and sub-surface resources

This section discusses Indigenous peoples' rights to fish, hunt, gather food and extract surface and sub-surface natural resources, for commercial purposes or not. As subsistence activities, they perpetuate social and cultural values and strengthen their connection to the land. As enactments of old traditions, they recreate links with ancestors and retrace the significance of their traditional territories. As productive activities for commercial purposes, they can be a significant source of own-source revenues. The regulation of fishing, hunting and sub-surface resources applies in different ways across self-governance, joint management and co-existence models.

Country frameworks

In terms of the self-governance model, title to sub-surface resources is not necessarily allocated to Indigenous peoples upon conveying land rights. In Australia, the states' land rights legislation which grants collective fee simple title to land does not confer rights to sub-surface resources. The federal government's Native Title provisions recognise traditional owners' occupation of land as it has been held historically, which generates cultural rights, but not the right to access and control sub-surface resources. Under the national and state frameworks, Aboriginal people have fishing and hunting rights.

In New Zealand, Indigenous peoples do not generally hold sub-surface rights to Māori freehold lands. According to the *Crown Minerals Act,* sub-surface resources of national relevance are owned by the Crown, even if situated on privately held land. Yet the transfer of land title ought to include title to sub-surface resources if these resources were known and used by the Māori at the time of the conclusion of the *Treaty of Waitangi* of 1840. Separate acts have regulated Māori's hunting and fishing rights. Māori people have customary and commercial rights. Customary rights refer to hunting, fishing and harvesting for cultural and subsistence purposes, which are granted under New Zealand law. For commercial purposes, under the Sealord Deal of 1992, Māori people were granted 50% of Sealord Fisheries and 20% of all new species brought under the quota system, shares in fishing companies and NZD 18 million in cash.

In Canada, the rights to reserve land generally do not include sub-surface resources, which may be owned and administered by the federal government or by the regional level of government, the province. In comprehensive agreements (modern treaties) that result in the transfer of fee simple land to Indigenous people, sub-surface rights have to be explicitly conferred in the agreement or it is assumed that they were not so. Hunting and fishing rights are granted in reserve and fee simple lands. In the territories traditionally occupied by Indigenous peoples which are not part of reserves or owned as fee simple land, there may still be fishing and hunting rights, exclusive or not. In the James Bay Agreement, for instance, exclusive fishing and hunting rights are attributed in Category II lands, where non-exclusive rights are given in Category III lands. It may also be the case that Indigenous peoples are given permission by private owners to hunt and fish on their lands.

In the United States, conversely, quasi-property rights to reservation lands include the right to sub-surface resources, which are also retained by the government on behalf of the tribe. Indigenous peoples have the right to hunt and fish on reserve lands.

In Sweden, co-existence and joint management models apply, as Sámi people have rights to use the land for reindeer husbandry purposes only; however, they do not have the right to the sub-surface resources. The provision of hunting and fishing rights is assured to those who are members of the cultural and economic associations of reindeer herders, the *sameby*. The *sameby* cannot generate revenues from the commercial exploitation of these rights.

Across these different jurisdictions and land management models, the main issues that emerge are related to knowing the size and value of resources; defining the licensing authority; managing competition for resources; and, allocating property rights related to surface and sub-surface resources. Another fundamental issue is consultation about the rights to access and explore sub-surface resources located in Indigenous lands, e.g. mining, which is the topic of the third section of this chapter.

Size and value of the resource

Indigenous peoples do not always know the size and value of the resources in their land, because of the quality and ownership of data collection. Poor data collection may weaken Indigenous peoples' bargaining power and obscure economic development opportunities. Furthermore, when the data exists, governments have to share it with Indigenous peoples, including the raw data. Alternatively, Indigenous peoples have conducted mapping and Geographic Information System (GIS) exercises themselves, in order to own and control the data.

The quantification of the value of traditional activities matters because of how the dominant planning system allocates value to land. In short, western planning attaches value in terms of highest and best use, which includes consideration about the productivity and exchange-value of land. Indigenous hunting and fishing, when practised for subsistence and cultural reasons, do not convert into goods with an economic value in the market. Their use of land tends to be perceived as less productive than commercial activities, which can be exchanged or produce goods and services in the market. Attributing value to non-commercial activities can help counter the argument that lands used by Indigenous have less value because these activities are not visible in strictly economic terms. This quantification depends upon attributing value to non-economic activities and recognising them as productive uses of land even if outside the market economy.

Licensing authority

The licensing authority may be the state or the Indigenous group. In Canada, Indigenous peoples control the licensing process within reserve land. However, where Indigenous peoples have non-exclusive fishing and hunting rights, the government authorises fishing and hunting by non-Indigenous individuals. This may create conflicts, as Indigenous peoples perceive their rights to be diminished by hunting and fishing from outsiders.

In Sweden, the *sameby* do not regulate the emission of licenses to third persons. The state administers licenses and retains the revenues generated from it. Sámi people who are not members of a *sameby*, i.e. approximately 88% of Sámi in Sweden, have to apply for licenses as any other Swedish citizen. The licensing application is open for Swedish citizens equally. Sámi people outside the *sameby* resent not being granted hunting and fishing rights as Indigenous peoples, carriers of traditional cultural practices. *Sameby* argue that licensing should be under their authority and bring positive economic effects in the form of own-source revenues.

Managing competing resource users

Competing uses of land arise when non-Indigenous with licenses for hunting and fishing compete with traditional practices carried out by Indigenous peoples. In some cases, the number of licenses is not great and the lands are vast, and conflicts do not arise. Yet in some circumstances, as mentioned for Canada and the United States, leisure hunting and fishing are perceived as excessive by Indigenous peoples. There may also be competing uses of land for other purposes, such as roads, forestry and mining, which reduce the land area available for traditional uses. Land encroachments not only limit the size of the hunting area but also cause changes in migration patterns of animals and create dangers for them, e.g. road crossing. By affecting the habitat of animals, these other uses of land also affect traditional hunting. Cumulative land use mapping is a tool that can be used to identify the impact of different activities on the land and on animal habitats and in so doing determine

if these activities are compatible with the preservation of the environment and of Indigenous' traditional ways of life.

Allocation of resource rights

Within a self-governance framework, some Indigenous communities are allocated sub-surface rights and use them to develop own-source revenues. In the Nunavut Agreement, for example, the Nunavut Tunngavik Incorporated (NTI) holds sub-surface rights. NTI had, as of 2009, signed 80 mineral exploration agreements with 15 different companies, granting them rights to explore 20% of sub-surface Inuit owned lands.[23] Besides granting exploration rights to others, Indigenous communities may pursue these activities themselves. In Canada's Northwest Territories (NWT), the 27 Dene First Nations fully own and operate a mining company, called DEMCo. DEMCo pursues mining activities with a strong sense of community engagement and environmental preservation.[24] Chapter 2 includes further discussion on community-owned enterprises.

In New Zealand, the Māori hold percentages of the country's commercial fishing quota and now control close to 30% of New Zealand's fisheries. The quota system sets total allowable catch rates for each species and allocates fishing quotas to owners. The owner can use its quota with its fisheries or lease out the quota to third parties. In Alaska, there is a similar model (Box 3.12). In this system, Indigenous peoples perceive greater benefits from commercial activities that would have been carried anyway. They are also better positioned to influence the design and implementation of the management model.

Within a joint management and co-existence framework opportunities to leverage natural resources is limited. In the case of Sweden, Sámi fishing and hunting rights are strictly defined as cultural practices (OECD, 2019[30]). It is forbidden to take commercial advantage of them. The Swedish policy of linking Sámi identity exclusively with reindeer herding has blocked them from pursuing economic activities that would nonetheless be compatible with their traditional way of life.

Box 3.12. The Western Alaska Community Development Quota Program

The Western Alaska Community Development Quota (CDQ) Program, created in 1992, is an economic development programme associated with federally managed fisheries in the Bering Sea and Aleutian Islands (BSAI). The programme designates a portion of fishery quotas for exclusive use by the 65 eligible western Alaska villages. According to U.S. Census Data, the population of CDQ communities totalled over 27 000 persons from 2000 through 2010. In 2010, approximately 81% of the community members were Alaska Native.

In general, economic terms, these villages are remote, isolated settlements with few commercially valuable natural assets with which to develop and sustain a viable, diversified economic base. As a result, economic opportunities are few, unemployment rates are chronically high, and communities and the region are economically depressed.

The purpose of the programme is to provide western Alaska communities with the opportunity to participate and invest in BSAI fisheries, to achieve sustainable and diversified local economies in the area and to alleviate poverty and provide economic and social benefits for residents.

Six non-profit corporations (CDQ groups) manage and administer the CDQ allocations, investments and economic development projects. CDQ groups use the revenue derived from the harvest of their fisheries allocations to fund economic development activities and provide employment opportunities. Jobs generated by the CDQ Program include work aboard a wide range of fishing vessels, internships with the business partners or government agencies, employment at processing plants, and administrative positions. In the period 2013-2018, the CDQ groups collectively earned $322.4 million in ex-vessel and first wholesale value from their allocations (not accounting for royalty payments) (NOAA Fisheries Alaska Regional Office, 2018[42]).

Source: (NOAA Fisheries Alaska Regional Office, 2019[43])

Land leasing

Land leasing can be done internally, to tribe members or to external actors. This option is only available to Indigenous groups that are proprietor or owners of their lands (self-governance model). It can increase legal certainty for possessors, facilitate the development of productive activities and support job creation. It can also generate revenue and bankable interests to land, thus facilitating access to credit.

Enhancing access to credit

As discussed earlier, full property rights include the right to possess, use, manage, transfer and exclude others from a resource or good. Indigenous lands are usually held in trust by the state or are the common property of an Indigenous group. There is an argument that these collective ownership arrangements and the indivisibility of Indigenous lands constitute a paternalistic approach, which inhibits the effective functioning of markets (Gilbert, 2002[44]). The inability to transfer ownership means land cannot be used as collateral for loans. However, these ownership arrangements help prevent land grabbing and fragmentation and preserve the Indigenous estate.

Development of Indigenous lands is more complex due to common ownership arrangements. Indigenous lands, which are held in trust, require administrative procedures to permit changes in land use. In New Zealand and the United States, individual "restricted fee" or freehold land can be transferred only with the approval of the overseeing authority (Māori Land Court and Bureau of Indigenous Affairs respectively). In the case of New Zealand, approval of 75% of registered Māori owners are also required. Alternatively, land can be transferred to affiliated Māori individuals. In short, this means that Indigenous lands cannot be sold freely in the market, hence are not considered liquid assets and have lower market value than similar non-Indigenous lands.

In New Zealand, Māori freehold land has worse rating arrears than non-Indigenous lands, because of the restrictions on sales but also the multiple ownership structures and an overrepresentation of unproductive lands (Coffin, 2016[45]). With worse rating, access to credit is more difficult or when it is granted the conditions are not the same. It is also a matter of lack of management structures that assist Māori owners in meeting the requirements of financial institutions (Kingi, 2008[46]). In some cases, Māori owners have created a limited liability company to meet such requirements, which include putting assets aside and having independent managers (Kingi, 2008[46]).

In Canada, the inalienability of reserve land cancels out the possibility of using land as collateral to obtain loans and mortgages. Houses in reserve land may be owned, but if the land is not under full ownership, the value of what can be put for equity is significantly lower. It would be only the value of the materials used to build the house, not the value of the house plus the land it sits on. To circumvent this restriction, some First Nations use machinery and equipment as collateral for loans. Even then, the level of credit that Indigenous peoples can access, based on the property on reserve lands, ranks far below those of non-Indigenous people, in what is a clear position of disadvantage.

Even in a system in which land cannot be sold or used as mortgage, bankable interests can be generated, which would improve access to credit for Indigenous people. Bankability is a measure of a bank's willingness to take that asset as security for a loan. Leasing land can increase its bankability. It is a way to maintain the underlying communal title while creating a sufficiently transferable interest to be used as collateral for a loan (Australian Department of the Prime Minister and Cabinet, 2016[47]). Leases can have characteristics which are similar to freehold tenure, for instance, being long-term or renewable. In Australia, depending on the state land rights act, leases can be authorised. The Northern Territory Aboriginal Land Rights Act (1983) requires that traditional owners consent to the lease but does not impose time or price limit on the lease. In Queensland, the trustees of Indigenous lands can create long-term leases.

Leasing to tribe members

Land leasing can take place among tribe members. It gives more legal certainty to possessors of land plots, encouraging them to invest in housing maintenance. For example, the Canadian model of Certificates of Possession creates individual interests in land plots, for residential use. However, there have been some unintended consequences associated with this instrument because some band councils have not imposed restrictions or monitored transfers of these certificates. Certificates can also be issued in the absence of effective land use zoning regimes that means inappropriate or incompatible land uses arise if these certificates are transferred to commercial enterprises.

Leasing may also serve for dedicating land to productive activities. For instance, if there are several co-owners, leasing transfers the right to use and develop the land plot to a single co-owner. This is the case in New Zealand, where a lease agreement can be signed between Indigenous co-owners. Due to the fragmentation of Māori lands, this arrangement facilitates increased economies of scale and opportunities for development.

Leasing out to external actors

Leasing out to external actors creates opportunities to generate own-source revenues for tribes and promote economic development. In Canada and in New Zealand, these provisions exist. In many contexts, however, leasing land is not permitted; for example, the Native Title Act 1993 of Australia forbids traditional owners from doing so.

In Canada, for reserve lands to be available for leasing, the band council has to obtain ministerial approval to "designate" them as such in their land use plans. Leases are long-term (e.g. 50 or 99 years) and transferable. This is an important lever for communities because it opens up land for commercial activities. The Mashteuiatsh community in Quebec and the Millbrook of Nova Scotia have facilitated local business development with this instrument. This enables the band council to earn revenues from rents and create local employment opportunities.

First Nations who have adhered to the provisions of the First Nations Land Management Act may lease out land without ministerial approval (see section on planning above). Under this framework, First Nations opt out of the land provisions of the *Indian Act* and become the management authority over the land. Once a land authority is created and a land code is enacted, the First Nation can lease out land without having to seek approval from the government. This scheme provides far greater powers over land issues than it is the case under the *Indian Act* but on counterpart demands that the tribe develops its own codes and regulations and applies them strictly.

Leasing land to external actors has to be approached with care. For one, the land which is available for leasing must be detailed in community plans and in accordance with the community land code. Planning may avoid that leases take over the territory and disrupt the spatial fabric of the community. Moreover, greater community control over the leases, deciding about who the land is leased to and for which purposes, contributes to generating investments that are aligned with the vision that the community has for itself. Second, the collective appropriation of revenues, at least partially, should be ensured to generate benefits for all, not just for the individual leasers. Third, short- or medium-term rents should be preferred over long-term or perpetual ones as it would facilitate the revision of lease conditions (price and authorised uses). Additional conditions may eventually be set to ensure heritage, cultural and environmental protection.

Land acquisition

Land acquisition is an instrument that can complement Indigenous territories in important ways. When reserves are of modest size, as it happens in Canada and the United States, acquiring land can be a means to expand the housing offer and develop economic activities. Even when the allocated territory is big enough, acquiring freehold land can facilitate access to credit: as reserve land title cannot be sold or mortgaged, it cannot be used as collateral. Lastly, once the land is an important source of wealth, land acquisition can serve to the purpose of generating revenues and consolidating an asset portfolio for the Indigenous community, as governments everywhere do.

Mechanisms to acquire land

There are different ways in which Indigenous peoples can acquire land. The revision of historic settlements may be an opportunity to expand the territory, either by claiming new lands that were not provided before or by demanding lands that had been promised but not actually delivered. Restitution of Māori lands in New Zealand, for example, which has been taking place over the past 25 years, gives back land that had been confiscated by or irregularly alienated to the government in the 19th century. The restitution process has allowed several tribes (*iwi*) to acquire land that once had belonged to them. Indigenous peoples can also be given priority access to surplus public lands that are available for sale (Box 3.13).

In Canada, the federal "additions to reserve" process allows to expand the territory of the reserve (contiguous addition) or create a new reserve (non-contiguous addition). This policy was created in 1972 to fill a gap in the Indian Act. It can be applied in three circumstances: i) where there is a legal obligation or commitment by the government to contemplate reserve creation; ii) where a tribunal decision conferred compensation that can be used in the form of land acquisition; or iii) where a band needs additional reserve land for purposes such as to accommodate community growth or protect culturally significant sites. A band council must submit a reserve creation proposal to the government,

which assesses it according to the criteria of cost-effectiveness, environment protection, third-party interests and concerns related to local government and public access. The process had been regarded as lengthy and opaque by First Nations and local governments. After three years of consultations, in 2016, the government of Canada issued a policy directive in order to streamline the process. The directive instructs that interests be assessed collaboratively, bringing together municipal governments, the band council and other Indigenous groups and third parties. It has also made land selection more flexible, to accommodate for these different interests and concerns during the process. Importantly, the directive allows community additions for economic development purposes, which enables First Nations to invest in projects of economic interest. Legislation introduced in December 2018 will further streamline this process once it comes into force.

Box 3.13. Prioritising Indigenous access to surplus public lands

Indigenous groups may be given priority in acquiring public land. In New Zealand, there is a policy called Right to First Refusal (RFR) for tribes (*iwi*) which have signed a treaty settlement with the government. Upon signing the treaty, an *iwi* can make a list of Crown-owned land that interests them in the long-term. If a Crown agency wishes to dispose of land and if this land is included in such a list, then the Crown agency is obliged to give preference in acquisition to the *iwi*. The property is acquired at market price under the freehold tenure regime. As a matter of fact, the first priority goes to other government departments or local authorities, if they need the land for public purposes such as building a road. The second priority goes to those from whom the land was acquired or its successors. The Indigenous tribe has thus the third priority in acquisition. Still, this policy places tribes in a much better position to acquire land that it is already of their interest.

One caveat in the Right to First Refusal policy is the short time span between the formal offer of land and the decision to acquire it. Tribes are given 20 days to decide about the offer, which for many of them is insufficient to consult widely with the group and to make funds available. To circumvent this caveat, the government of New Zealand designed an online portal, the Crown Property Disposals Portal. This portal allows *iwi* to access detailed information about properties as soon as they enter the disposals process, including maps and locations, land area, covenants and photos. It means that up to 18 months sooner than the formal offer, *iwi* can have access to complete information and take time to make the decision about buying a property or not.[25]

Source: (Land Information New Zealand, 2017[48])

Lastly, Indigenous communities can purchase freehold (fee simple) land in the market. Depending on the location and size of land, prices may be high. This condition is aggravated by the fact that Indigenous communities in many countries struggle to have significant levels of own-source revenue that they can dispose of to make such acquisitions. The option of acquiring fee simple land ends up being used by Indigenous tribes which have been somewhat economically successful and count with significant own-source revenues. The Millbrook First Nation of Nova Scotia (Canada), for instance, has acquired 1 500 acres of fee simple land – the same amount of reserve land. This land, which includes property in Halifax, the capital city of Nova Scotia, has been developed for commercial and residential activities.[26] This asset base generates revenues to the First Nation, which can then be reverted into the general budget, paying for socials services, infrastructure and

community development projects. Tribes in the United States can purchase lands and then request to the Secretary of Interior to convert them from fee simple to trust land. This is an interesting strategy to preserve and expand the Indigenous land base for future generations (King, 2013, p. 211[49]). To illustrate, the Tohono O'odham Nation purchased 130 acres of land in Arizona in 2003 and converted it to trust land.

Consolidation and co-ordination of Indigenous land ownership

In some jurisdictions, such as in New Zealand and the United States, individuals can hold Indigenous lands. The removal of common ownership structures may help encourage responsibility and investments to improve land productivity. However, the experience of New Zealand and the United States indicates that individual ownership does not solve the problem of low productivity in Indigenous lands. Over time, inheritance and transfer of land plots amongst family members' results in multiple co-owners and land fragmentation, which creates barriers to the use and investment in Indigenous lands for social and economic development purposes.

Land fractionation in the United States

In the United States, tribes initially communally controlled reserve land. The General Allotment Act of 1887 assigned land ownership to individual tribe members and held in trust by the Bureau of Indian Affairs (BIA). The act was silent about heirship, that is, if an Indigenous person passed away without a will, which was common, how would land be passed on to their heirs. Given the silence of the act, the prevailing interpretation was to follow the state rules, which dictated that land should be distributed equally among remaining family members. Across a few generations, these rules led to the exponential multiplication of owners and to breaking down land into smaller parcels. This is known as the "heirship problem", or fractionation.

Fractionation is a problem for several reasons. For one, smaller land plots and fractioned co-ownership dramatically hinder the possibility of developing productive activities, such as agriculture. The economic and law literature have long associated Indian land fractionation with lower economic development outcomes on reserve (Russ and Stratmann, 2014[50]). Second, it generates high registry-keeping costs. The BIA has to keep records of all land plots and the costs of doing so are the same regardless of property size and value. The costs of keeping the registry may surpass property values in many cases. Russ and Stratmann (2014[50]) estimate that the complete elimination of fractionation and the associated recordkeeping activities held by the BIA would save USD 6 billion over 10 years in recordkeeping costs alone.

The main strategy adopted by the US government to address this issue has been land consolidation programmes. Land consolidation is the act by which the BIA acquires fractional interests from willing sellers at fair market value (voluntary transfer). The bureau places the acquired land into trusts for the interest of tribes. The current programme is called Land Buy-Back – part of the Cobell settlement signed in 2012. While the best hopes to solve this issue are placed in land consolidation, some commenters notice that voluntary sales have only limited effectiveness (Russ and Stratmann, 2014[50]). Making use of the eminent domain power of tribes (compulsory transfer) could return larger tracts of land to tribes' powers, which could then translate into productive uses for Indigenous land.

Land fragmentation in New Zealand

New Zealand faces a similar situation of land fractionation and absent owners. Māori freehold land represents today 5% of New Zealand. It does not equal to all land owned by Māori people but refers to a specific category of land that lies under its jurisdiction of the Māori Land Court. This came to be progressively since the 19th century, during which different treaties and amendments regulated the matter. The key point here is that Māori freehold land is owned in common in unequal shares, meaning that each owner owns each piece of the land in a share (Boast, 2016[51]). Throughout the years, succession created a situation in which a share of land has multiple co-owners, many of them absent or with an unknown location. There are restrictions on transfers: Māori freehold land can only be transferred to affiliated Māori individuals, to anyone if 75% of registered owners and with the approval of the Māori Land Court.

Succession and fragmentation have engendered a patchwork of small land holdings, more isolated and less "useable". Māori land is of poorer quality than general land in New Zealand, as historically it had been relegated to less fertile areas (Kingi, 2008[46]). Today 80% of Māori land is non-arable. Moreover, the use of 30% of Māori land is severely restricted, meaning land that is locked up under conservation estate or zoned for other uses than economic activity (Coffin, 2016[45]). One barrier for development is the requirement of approval of co-owners to carry out projects such as farming or real estate in a given share of land. Given that there are many owners and some of them are absent or have an unknown address, obtaining this approval is not always easy. Moreover, the voting system works by number of shares, not by the proportion of land owned. It has been observed that owners with small shares tend to be quite conservative and thus outnumber owners with larger shares who had intended to develop productive activities (Kingi, 2008[46]).

New Zealand has recognised in multiple reports and documents that one of the main challenges for Māori development is putting the land to productive uses (Kingi, 2008[46]). In the first half of the 20th century, the government attempted consolidation schemes. After one or two generations, because of succession laws, the shares tended to be fractionated again, thus failing the purpose of consolidation (Boast, 2016[51]). More recently, the government has directed efforts to make data more accessible. The Māori Land Information System was created in 2000, uploading the Māori Land Record on line (Ministry of Justice, New Zealand, 2019[52]). This way, the details of land blocks and their owners could be accessible across the nation, making transfers and voting processes less burdensome. The government has also promoted positive changes to the management structure of lands, which can be organised in trusts or corporations. With an organisation behind, land titles can be managed in a more co-ordinated and strategic way, which can facilitate development. In relation to that, the need for upskilling management staff and farmers has been recognised (Coffin, 2016[45]).

Framework for project development with Indigenous peoples

Whilst the previous section assembled instruments for Indigenous peoples to use land for economic development purposes, this section addresses the situation where other parties pursue activities on Indigenous land, or adjacent to it. It proposes a framework for project development that involves and respects Indigenous peoples. This framework draws mostly from the experiences of the five countries under analysis (Australia, Canada, New Zealand, Sweden and the United States) and brings some elements from Latin America. Taking their experiences as inputs, the findings are not however specific to these countries; rather it is hoped that they can offer lessons which prove to be valid in other contexts.

Project development can be understood as a cycle, which begins with approval by regulatory bodies (licensing), negotiation, implementation, operation and finishes with closure and remediation. This section discusses how the government can enable Indigenous peoples to intervene and participate in the project cycle, i.e. through which mechanisms. Governments are the main interlocutor here, not companies, but the structure of the section is the project cycle, which is led by them. Still, some guidelines and references, of course, apply to companies and Indigenous peoples and their organisations.

Given the high level of variability of land rights across countries, not all tools will apply to every country. Even though this chapter assumes that greater autonomy will lead to greater self-determination, which is a key international principle for Indigenous peoples, it cannot suggest to countries to apply a tool that is ultimately incompatible with their land rights and governance regimes. In summary, Indigenous engagement in the policy-making and decision-making process should:

- Start early in the project development cycle, even before a specific project is designed, to include the planning and regulatory dimension (setting the rules).
- Be a deliberative and negotiated process, not just information giving.
- Carry out negotiations in good faith with the goal of reaching consent.
- Be part of a transparent and clear process where parties have the necessary information to make decisions.
- Respect the timeframes set by Indigenous peoples and their cultural practices.
- Include sincere attempts to share powers and functions, through contracts or agreements.
- Involve government officials that have cultural competency to understand the diversity of Indigenous communities and that appreciate their local knowledge.
- Have agreed and transparent conflict resolution mechanisms.

Project elaboration

In elaborating a project, companies normally carry out feasibility studies, to assess the profitability, viability and risks possibly involved. The cost-benefit analysis model is typically centred in economic aspects borne or benefited by the company. Societal and environmental costs are not always in the picture, let alone costs for other actors such as marginalised social groups and minorities. The regulatory implications of this statement are numerous and have been extensively studied under different angles. Here, one simple point is made: companies have to internalise certain externalities, and governments can provide stronger regulatory frameworks, or enter into voluntary agreements with them for that goal.

Companies must consider in their frameworks for project elaboration and development the respect for and protection of human rights, including cultural and land rights. Some companies include Indigenous representatives in their boards, councils or committees, with the goal of better integrating Indigenous values and interests in their decision-making processes. Companies can also adhere to international guidelines or certifications, which often count with monitoring mechanisms and third-party accreditation (Table 3.6). These guidelines for business development and sustainable production chains instruct about

respect for traditional lands, forms of governance and cultural practices, and render engagement and consultation mechanisms explicit.

Table 3.6. Guidelines for corporate engagement and responsibility

Guidelines and principles	Authoring organisation	Objectives	Target audience
UN Guiding Principles on Business and Human Rights	United Nations, 2011	● To enhance standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities and thereby also contribute to socially sustainable globalisation.	All States and all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.
International Finance Corporation's Performance Standards on Environmental and Social Sustainability (IFC PS)	World Bank, 2012	● To provide guidance on how to identify risks and impacts. ● To help avoid, mitigate and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities. ● To manage environmental and social risks and impacts so that development opportunities are enhanced.	Investors and project developers who are clients of the IFC and the IFC when doing direct project development. Can also be applied by other financial institutions.
OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector	OECD, 2017	● To provide practical guidance to mining, oil and gas enterprises in addressing the challenges related to stakeholder engagement, observing existing standards and undertaking risk-based due diligence.	Companies in the extractive sector.
FSC Principles and Criteria for Forest Stewardship	Forest Stewardship Council, 2015	● To set principles and criteria for certification of environmentally appropriate, socially beneficial and economically viable forest management.	Forest owners and managers that voluntarily abide by the accreditation system.
Principles and Criteria for the Sustainable Production of Palm Oil	Roundtable on Sustainable Palm Oil, 2013	● To set principles and criteria for certification of sustainable palm oil production across the supply chain, which is comprised of legal, economically viable, environmentally appropriate and socially beneficial management and operations.	Actors in the palm oil industry.
Good Practice Guide Indigenous peoples and Mining	International Council on Mining and Metals, 2015	● Good practice for companies where mining-related activities occur on or near traditional Indigenous land and territory, regarding engagement, impact mitigation, agreement-making, compliance and others.	Mining companies and others with an interest in ensuring that mining projects bring long-term mutual benefits to companies and host communities.
Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security	Food and Agriculture Organization of the United Nations, 2012	● To provide guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realisation of the right to adequate food in the context of national food security.	States; implementing agencies; judicial authorities; local governments; organisations of farmers and small-scale producers, of fishers and of forest users; pastoralists; Indigenous peoples and other communities; civil society; private sector; academia; and all persons concerned to assess tenure governance and identify improvements and apply them.
Respecting Land and Forest Rights, A Guide for Companies	Rights and Resources Initiative (RRI), 2015	● To provide senior-level and operational teams at leading companies an entry point to understanding and implementing the VGGT.	Companies.

Operational Guidelines for Responsible Land-based Investment	USAID, 2015	● To offer best practices related to the due diligence and structuring of land-based investments, with the goal of reducing risks and facilitating responsible projects that benefit both the private sector and local communities. ● To help companies identify practical steps to align their policies and actions with provisions of the VGGT, the IFC PS and other relevant instruments.	Although the primary audience for this guide is a private sector company operating in one of the ten New Alliance countries, this guide is intended to more broadly inform land-based investments made by private sector companies operating in developing countries (and in particular, Sub-Saharan Africa).

Note: This list is not exhaustive.
Sources: (UN Human Rights - Office of the High Commissioner, 2011[53]) (International Finance Corporation, 2012[54]) (OECD, 2017[55]); (FSC International, 2015[56]) (Roundtable on Sustainable Palm Oil, 2018[57]) (International Council on Mining and Metals, 2019[58]) (Food and Agricultural Organisation, 2012[59]) (Rights and Resources, 2015[60]) (LandLinks, 2019[61])

Governments can also enter into voluntary agreements with companies or industry sectors to specific measures or performance levels. In Canada, voluntary agreements can be negotiated between governments and corporations, which allow parties with common objectives to address a particular environmental issue (OECD, 2017[62]). In New Zealand, the national government and local authorities have concluded a number of voluntary agreements with individual companies and industry groups to promote sustainable production practices (OECD, 2017[34]). To illustrate, the *Sustainable Dairying: Water Accord*, launched in 2013, sets benchmarks to reduce agricultural pollution of freshwater bodies. It promotes environmental performance targets and requires regular reporting and third-party auditing. The Māori concept of "guardianship" (*kaitiakitanga*) has been integrated into the accord.

Environmental licensing

Environmental licensing is an administrative procedure by which a state's environmental agency decides if a project can be initiated, implemented and operated, on the ground of its environmental impacts. This procedure must include careful assessment of impacts and deliberation of mitigation measures. The goal is to ensure that the impacts are duly assessed, that affected parties were adequately consulted and that mitigation measures have been defined.

Impact assessment and mitigation measures

Impact assessment is the study that measures the environmental impacts that a proposed project would generate in a given territory. The critiques of how this study is currently being done concentrate on three points: little consideration is given to social (including cultural and spiritual) impacts caused by a project; lack of understanding of how different impacts generate a cumulative effect; and narrow definition of affected area. To address these critiques, it is proposed that impact assessment studies examine impacts over larger areas, in interaction with other activities, and in full consideration for the traditional ways of life of Indigenous peoples.

For one, social impacts are often side-lined in impact assessment studies or put aside to constitute a separate study (Box 3.14 defines social impacts). Across the world, studies that consider impacts on Indigenous peoples were found to be "ethnographically thin" (Hanna et al., 2016[63]). Accounts portray the incompleteness of assessments that, for instance, only count as "impact" the menaces to the physical integrity of Indigenous peoples living in the area. Taking the example of Brazil, the impact of the construction of a dam may be measured as the number of persons displaced in reason of the river's flooding. However,

Indigenous peoples who do not live within the inundation area but nonetheless use the river to fish, collect water and perform ceremonies will also have their livelihoods and traditional ways of life severely disturbed. This narrowness has led scholars to propose that ethnographic studies become a component part of impact assessment (Hanna et al., 2016[63]).

Box 3.14. What are the social impacts?

Social impacts are changes to one or more of the following:

- People's way of life – that is, how they live, work, play and interact with one another on a day-to-day basis.
- Their culture – that is, their shared beliefs, customs, values and language or dialect.
- Their community – its cohesion, stability, character, services and facilities.
- Their political systems – the extent to which people are able to participate in decisions that affect their lives, the level of democratisation that is taking place, and the resources provided for this purpose.
- Their health and well-being – health is a state of complete physical, mental, social and spiritual well-being and not merely the absence of disease or infirmity.
- Their personal and property rights – particularly whether people are economically affected, or experience personal disadvantage which may include a violation of their civil liberties.
- Their fears and aspirations – their perceptions about their safety, their fears about the future of their community, and their aspirations for their future and the future of their children.

Source: Vanclay, F. (2003[64]), "International principles for social impact assessment", http://dx.doi.org/10.3152/147154603781766491.

Second, the cumulative impacts of land use changes over time upon Indigenous livelihoods and cultural practices are often not monitored or evaluated. Instead, the evaluation of impacts occurs on a case-by-case basis. One proposal to circumvent this limitation is to develop cumulative impact assessments (Larsen et al., 2017[65]). These would evaluate the different stressors to Indigenous livelihoods in a given area, and assess how, by adding a new project, these impacts would increase. It may be that impacts are increased exponentially or that the project triggers environmental imbalances that are already latent. Likewise, the OECD has already recommended, in a study of New Zealand's environmental performance, to make cumulative impact assessment an integral part of the planning process (OECD, 2017[34]).

Third, the narrow definition of the affected area may be one factor that prevents a correct assessment of impacts and subsequently of mitigation measures. For instance, water pollution may be felt across a whole basin and deforestation may destroy habitats and disturb animals' migration patterns. That is to say, the impacts may extend beyond the area where the intervention is taking place. Furthermore, because of the special relation that Indigenous peoples have to their land, these disturbances may affect their cultural and spiritual practices. It has been documented that rituals, ceremonies and hunting expeditions

depend on the existing equilibrium of the local fauna and flora. The so-called affected area merits further debate and consideration in environmental licensing. To address this issue, governments should include Indigenous representatives in the impact assessment team. They could also make risk assessment meetings more participatory, for instance, through collective mapping exercises that help to identify significant sites and relations. In Australia and Canada, there are interesting experiences of Indigenous peoples conducting such studies themselves or being significantly involved in their elaboration (Chapin, Lamb and Threlkeld, 2005[22]; O'Faircheallaigh, 2007[66]).

By assessing impacts more thoroughly, there will be a better understanding of what it takes to prevent, mitigate and compensate these impacts. Mitigation measures are an important component of environmental licensing: they impose obligations on project contractors that can reduce the negative impacts of the project, be it environmental or social ones. If the assessment fails to identify the social impacts, mitigation measures cannot possibly include them.

The conditions expressed through mitigation measures have to be respected by project proponents. In many countries, operations cannot start until these conditions are met. In some countries, however, a trend has been observed of postponing the fulfilment of conditions or making them flexible, through decisions that put the urgency of the project before environmental and social concerns. This trend has to be averted at all costs, as doing otherwise would render mitigation measures meaningless.

Making sense of consultation

Consultation in environmental licensing has been at the spotlight in recent years. The United Nations, other international organisations, academics and social movements have held extensive debates and produced several documents about the meaning of consultation, in light of the right of participation and also of the FPIC framework. Much could be said here, as interpretations diverge and cases of violation abound. As a generic point, however, it is observed that countries seldom have well-structured, clear and broad consultation frameworks and that Indigenous peoples have reported a lack of real influence over the outcomes of the process, even when they had invested significant resources to be involved in it.

Taking the example of Canada here (although any other example would serve), the OECD has previously noted that an agreement should be reached between the government and Indigenous peoples on the practical definition of consultation (OECD, 2017[62]). One area of priority implementation of consultation is environmental assessment processes at the federal and provincial levels (Papillon and Rodon, 2016[67]). The government of Canada is already taking steps in this direction. An expert report commissioned to deal with this issue proposes several recommendations for implementing a collaborative approach to FPIC in the federal environmental assessment process (Box 3.15). These recommendations have been used to develop a new impact assessment system which includes mechanisms for Indigenous participation and engagement throughout the process (Government of Canada, 2018[68]).

Box 3.15. Expert group recommendations for FPIC in Canada's environmental assessment (EA)

- To be consistent with the principle of collaborative consent, Indigenous organisations should always be invited to collaborate as full partners in the drafting of the relevant legislation, policies and guidelines.
- FPIC assessment should become an explicit objective of EA processes, as defined in the Canadian Environmental Assessment Act. This would formally create an obligation for decision-making authorities to consider FPIC and to foster the conditions for FPIC through collaborative decision-making.
- FPIC should be part of the terms of reference for all EA processes in order to ensure it informs the actions of all interested parties. Specific operational guidelines could be produced to that effect as well. It is especially important that these guidelines be developed in collaboration with Indigenous organisations.
- In the conduct of the EA itself, specific mechanisms should be put in place to engage with Indigenous peoples in a manner that is consistent with FPIC. Emphasis should be put into jointly developing with the communities culturally sensitive and time sensitive sites for dialogue and deliberation. Deliberative sessions should allow for specific meetings with groups like women and youth, which usually do not have a strong voice in public hearings.
- Endorsing FPIC as a guiding principle for EA requires government support for capacity building in Indigenous communities.
- Project proponents have a key role in setting the conditions for this type of dialogue. They need to provide timely, transparent and accessible information as well as a level of engagement that is ongoing.
- Once the consultation/deliberation phase is completed, the Indigenous community should be invited to participate in the preparation of the assessment report, either through the inclusion of a section dedicated to the positions expressed by the community or through a more hands-on collaborative process in the drafting.

Source: Papillon, M. and T. Rodon (2016[67]), *Environmental Assessment Processes and the Implementation of Indigenous Peoples Free, Prior and Informed Consent*, Expert Panel - Reviewing Federal Environmental Assessment Processes.

Time and cost of consultation

Participation costs and time are key factors influencing the quality of consultation. Environmental assessment processes can impose time limits on consultation that may not be well-matched with the decision-making processes and needs of Indigenous groups. In Sweden, for example, when Sámi reindeer herders are moving pastures for the summer, they cannot dedicate time to meetings and development proponents may not take account of this issue. In some cases, the state agency in charge of mediating the negotiation process also operates under this logic. In Bolivia, for instance, the environmental and social affairs commission of the Ministry of Hydrocarbons and Energy has argued that time and budget constraints hamper more inclusive and comprehensive consultations (Schilling-Vacaflor and Eichler, 2017[69]).

Still in relation to time, the sense of urgency imposed by certain matters may hinder effective participation. In water and wastewater management in Canada, for instance, approving projects to deliver safe and clean water to communities is a matter of public health. Indigenous participants mentioned that the urgency in promoting public health often translates into expedited and limited consultation processes, with little opportunity for more meaningful engagement (Black and McBean, 2017[70]).

The adequate time for consultation and participation may be longer for Indigenous peoples. Indigenous leaders and representatives often need to travel long distances to attend meetings and have to take issues back to their group afterwards, to be decided by consensus. Expert legal and technical advice may also be needed to ensure informed decision-making. This also generates costs for Indigenous participants (travel, accommodation, engaging experts and leave from work). In order to ensure effective participation, project proponents or governments may need to contribute to these costs.

Negotiation of benefit-sharing agreements

Benefit-sharing agreements are contract-making opportunities by which Indigenous peoples negotiate monetary and non-monetary benefits with corporations, in the context of project development (e.g. a mining or major infrastructure project). Through benefit-sharing agreements, Indigenous groups can influence project scoping and establishment, operations, and leverage community and economic benefits.

Rules and provisions

Benefit-sharing agreements typically cover labour, economic development, community well-being, environmental, financial and commercial issues (Sosa and Keenan, 2001[71]). Provisions can cover:

- Preferential hiring, Indigenous staffing quotas and seniority in the event of layoffs.
- Capacity building, apprenticeship and training.
- Priority bidding for local entrepreneurs to meet the supply needs of industry and additional efforts to support them in complying with the bidding criteria.[27]
- Cultural recognition programmes, including work-site language protection and local dietary provisions for Indigenous workers.
- Heritage protection: a general prohibition on the accessing of Aboriginal lands, hunting grounds, and burial and sacred sites by non-Aboriginals.
- Environmental provisions, in addition to or in concert with the ones determined at the environmental assessment process.
- Social issues: mental health counselling, financial and infrastructural support for community projects, recreational programmes and special provisions to protect social groups at risk, such as women and children.

Furthermore, members of Indigenous communities should be involved in the assessment studies required for setting environmental and heritage protection conditions. There are many examples in this direction, for instance, in the Ekati Diamond Mine in Canada, community elders have helped to identify burial and hunting sites that require protection (O'Faircheallaigh, 2015[72]).

Besides substantive provisions, benefit-sharing agreements ought to have procedural rules

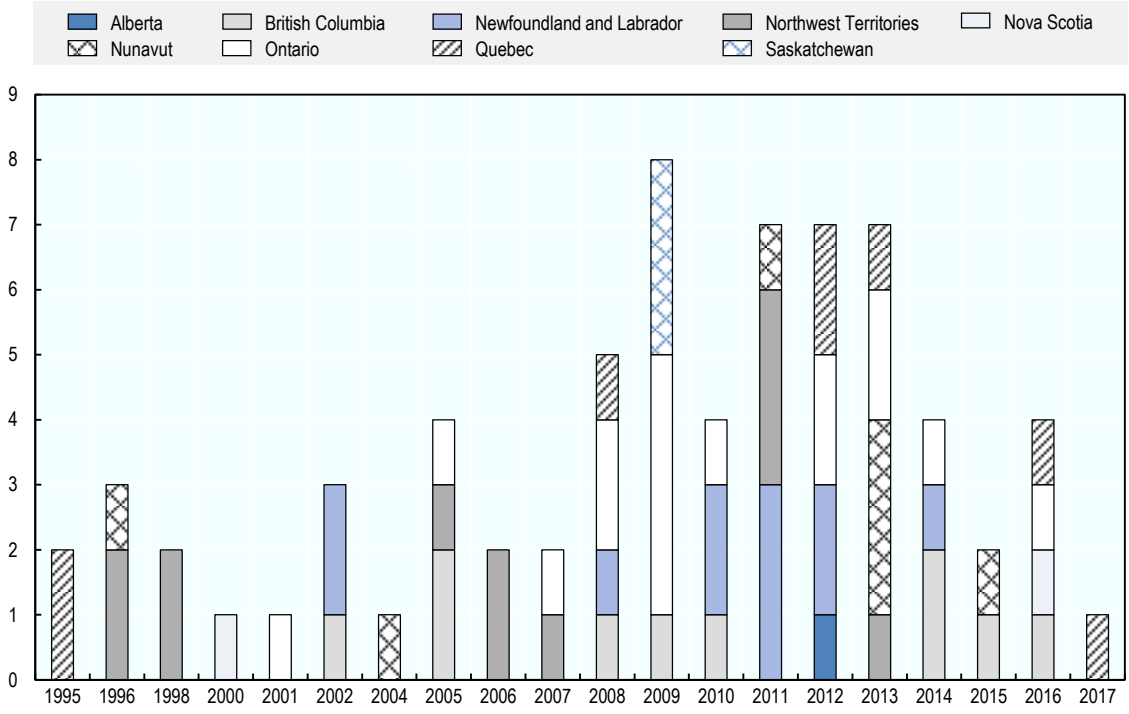
about how the negotiation is being carried, how the agreement will be implemented and how to solve conflicts. Procedural rules should cover:

- Negotiation protocol: authorised representatives of each party, the degree of involvement of third parties e.g. government or regional Indigenous bodies, consultation with community, information-sharing and confidentiality.
- Timeframe of engagement: time granted for consultation, the periodicity of meetings, expected timeline of the process, etc.
- Means of delivering compensation, for instance through community payments, individual claims or specific trust funds.
- Legal provisions about dispute resolution mechanisms, review and amendments.
- Monitoring and enforcement of the agreement, e.g. by creating a monitoring committee, conducting assessment studies or other means.

Two models of benefit-sharing agreements: Australia and Canada

In Canada, benefit-sharing is decided via Impact and Benefit Agreements (IBA) [28]. As of 2017, 510 agreements had been signed between Indigenous groups and mining companies, among IBAs, memoranda of understanding and surface lease agreements. Of these, 410 are still active. Counting just the number of active Impact and Benefit Agreements, there are 71, signed between 1995 and 2017. The distribution across provinces and territories is as below:

Figure 3.1. Impact and Benefit Agreements active in Canada, across provinces and territories, 2017



Source: Data provided by Natural Resources Canada.

In Australia, they are called Indigenous Land Use Agreements (ILUA). ILUAs are voluntary agreements made between a native title group and others interested in the use of land and water (Native Title Tribunal, 2019[73]). ILUAs provide an opportunity for governments to agree with native titleholders and industry on aspects of native title without the need for a current determination of native title or to agree on practical aspects of determined native title rights. Once registered, ILUAs are binding to all persons holding native title in the agreement area. These agreements can regulate the development of new projects, issues of access to an area, protection of cultural heritage and other matters. Through them, Indigenous groups can negotiate benefits, such as shared revenues, protection of sacred sites, preferential employment opportunities and support to Indigenous business development.

ILUAs were introduced in 1998 in Australia, as a result of amendments of the Native Title Act; 1 264 agreements have been signed since 1999. Excluding the agreements on access, information sharing, consultation protocol with the government, extinguishment of native title and community matters, the number drops to 508 (Figure 3.2). These are the ones about mining, oil/gas exploration and infrastructure development. Whereas in 1999, only two agreements were registered, the numbers have been growing ever since. The year of 2005 represented the peak of ILUA negotiations related to development (60). The state in which most agreements have been signed is Queensland (299 in total), which can be explained by the high degree of mining and extractive activities there. Northern Territory and Western Australia, where most of the Aboriginal population is, are next, with 51 and 77 agreements respectively. New South Wales is, among the jurisdictions where ILUAs have been signed, the one with the lowest number, only 4.

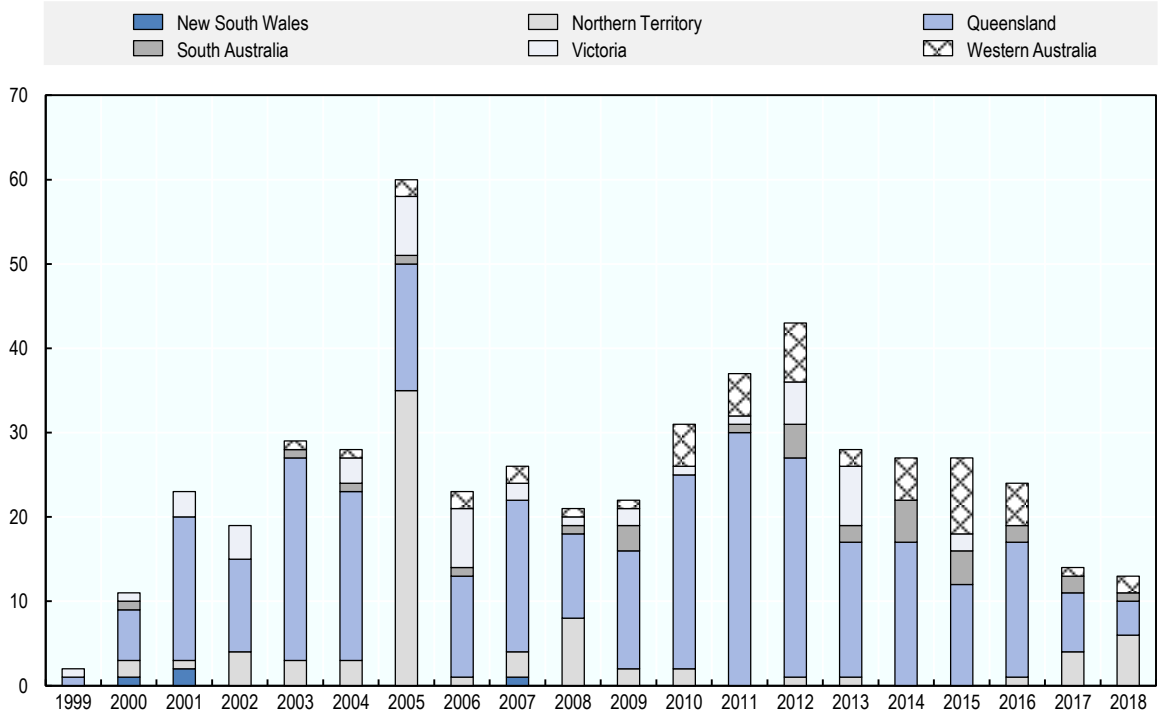
Getting ready: Community deliberation and negotiation protocol

A number of basic features strengthen Indigenous participation in benefit-sharing agreements. The first is having sufficient information at the beginning of the process to develop an informed position about how the project can support achieving the community's objectives for development. Indigenous leaders will require time to engage and consult with their community to develop this negotiating position.

The second is agreeing upon a negotiation protocol with the company that establishes timeframes, responsibilities and conditions of dialogue. Also called memorandum of understanding, the negotiation protocol will identify the negotiators on both sides, establish communication channels and define grievance mechanisms. A provision about financing participation and dialogue may also be included. Although the process leading to signing the memorandum may be time-consuming, it may actually save time in the long-run, as positions and procedures are clearly defined. The company knows with whom to engage, which prevents multiplication of negotiation instances and avoids internal fractioning of the Indigenous community. The community on their turn benefits from having a clear departure point, against which to measure progress and to develop alternative proposals if need be.

The third is establishing mechanisms to co-ordinate negotiation where multiple communities or tribes negotiate agreements with the same company. For instance, they can establish rules about sharing information, meet regularly to discuss their positions and share staff to form the negotiation table.

Figure 3.2. Number of ILUAs signed per year, per state



Note: The year in which the agreement was lodged for registration with the Native Title Tribunal is taken as a proxy for a signature date. Given that the procedure of registration is mandatory, it is expected that once the agreement is signed there will not be significant delays to send it to registration.
Source: Own elaboration from data provided by the Native Title Tribunal.

The fourth is defining an appropriate role for government in these negotiations. Governments may elaborate guidelines that refer to the content of negotiation protocols and how negotiations can be adapted to the decision-making processes of Indigenous groups. Such guidelines would clarify for both parties which are the leading practices and which achievements can be expected. Industry bodies can also provide this type of guidance, by adopting voluntary guidelines or certifications that include the dimension of fair and in good faith negotiation with Indigenous people. The International Council on Mining and Metals and the Forest Stewardship Council have adopted such tools (Table 3.6).

Defining benefits

Indigenous groups can accrue financial compensation and non-monetary compensation. Financial compensation can take the form of royalties (based on the value of mineral output or output), tax on profits, single up-front payments, annual fixed payments, equity participation or shareholding. These resources can be collected by the Indigenous governing authority, if existing, or by the responsible government level, with approval from the local Indigenous community. The holder of royalties should enter into an agreement with the community about how they will be spent and shared.

Another possibility is to allocate revenues to investment funds or trusts (discussed further in Chapter 2). An investment fund is a fund that invests its money in assets that earn income, or that due to other strategies is able to increase its capital stock. It is considered a

good practice because it can generate autonomous financial resources to support sustainable regional economic development for the future, beyond the duration of the project (Söderholm and Svahn, 2014[74]). There are nonetheless operational costs of having fund-based tools. Funds can be administered independently by a foundation or community trusts; jointly by a business task force or a management committee; or directly paid to Indigenous corporate entities (Limerick et al., 2012[75]). Administrators have to develop a plan of investments, which is to be approved by the community.

Accountability and transparency in financial management are essential for the long-run viability of the agreement. In Reducing Emissions from Deforestation and Forest Degradation (REDD+) projects in several African, Asian and Latin American countries, this has proven to be a challenge (Pham et al., 2013[76]). Moreover, some arrangements yielded corrupt practices and elite capture (Pham et al., 2013[76]). If funds are to be managed in a decentralised manner, the responsible Indigenous organisation, board, trust or foundation needs to count with sufficient autonomy and financial management capacity.

Non-monetary compensation refers to benefits that are not given in cash. It can range from employment opportunities, training and business development to infrastructure construction and provision of services. These provide for the community's needs in the long-term, in a more sustainable fashion.

More and more agreements have been designed to provide a combination of the two types of benefits. It has been recognised that monetary compensation, while often legally required, seldom ensures that lives and livelihoods of affected communities are adequately restored (Loutit, Mandelbaum and Szoke-Burke, 2016[77]). Community-wide benefits are more sustainable in the long run because they build up the infrastructure and the skills that allow Indigenous peoples to take advantage of employment opportunities that are brought by the investment.

In Canada, for instance, the *Raglan Agreement*, signed in 1995 between the Société Minière Raglan du Québec Ltée and five Inuit Groups in northern Quebec, emphasises the importance of cultural sensitivity in employment as a key means of retaining Aboriginal employees. Specifically, the agreement seeks to encourage social harmony within the workforce by promoting inter-cultural understanding through cross-cultural training for all supervisors and managers, inviting local artists to perform outside of working hours at the project site, organising sports events between employees and residents and ensuring access to traditional food sources.

In Australia, the *Argyle Diamond Mine Participation Agreement*, signed in 2004, supersedes the 20-year-old "Good Neighbour Agreement". It is the result of a re-negotiation process, conducted in a far more participative manner and supported by ethnographic and genealogical studies. In the Management Plan Agreement, Rio Tinto Ltd. commits to helping traditional owners establish businesses and developing good management practices. Where appropriate, an Argyle employee would help the business on an ongoing basis for three years. This case demonstrates how community development agreements can help local businesses to develop.[29]

Examples of benefit-sharing agreements in mining projects and the associated benefits are listed in Table 3.7.

Table 3.7. Selection of benefit-sharing mechanisms in mining

Country/Region/ Mine	Description	Investments funds (tax)	Joint venture	Local procurement	Training of staff	Employment of locals
Weipa bauxite mine, Queensland, Australia	ILUA with the Aboriginals and the state government. Company funds infrastructure and employs Indigenous people.	X		X	X	X
Northern Saskatchewan Region, Canada	Joint venture with government, industry and local communities focusing on local employment, local procurement and staff training.	X	X	X	X	X
Escondida copper mine, Antofagasta Region, Chile	Escondida Foundation seeks to improve the quality of education, strengthen the civil society and develop productive capacities. Also focus on training and procurement.	X	X	X	X	X
Red Dog zinc and lead mine, Alaska, United States	Agreement between the company and the Northwest Arctic Natives Association (NANA). Funds used to finance education, prioritised construction projects, and job creation.	X	X	X	X	X

Source: Söderholm, P. and N. Svahn (2014[74]), *Mining, Regional Development and Benefit-Sharing,* Lulea Technological University.

Making sure the agreement is implemented

Another element to be negotiated is the implementation of the agreement. In the past, the absence of action plans and monitoring mechanisms has led to inefficient or absent fulfilment of the obligations set up in agreements. Governments can require companies to show an action plan that demonstrates how the agreement will be upheld. For that to happen, the government must have some sort of oversight or authority over the process. Moreover, governments can create a monitoring committee to assess progress in the implementation of the agreement. Alternatively, they can provide assistance for Indigenous groups and organisations to set up their own monitoring committees.

Moreover, action plans must include provisions on the phasing out of operations. The cessation of activities is a phase of the project cycle and as such one that should be prepared for in advance. The phasing out plan may include provisions about lay-off, training, business development support and future use and maintenance of community infrastructure. The closure plan can be required in state legislation, as it is in Alaska, and communities can be involved in its elaboration (Box 3.16).

Box 3.16. Community input into Red Dog Mine closure plan

The Red Dog mine in northwest Alaska was developed under an innovative operating agreement between Teck Alaska and the NANA Regional Corporation, a Native corporation owned by the local Inupiat people. The operation has injected more than a half-billion USD into the local economy and over 50% of its current employees are NANA shareholders.

Although mining at Red Dog is expected to continue for another 20 years, the State of Alaska law requires the operation to develop and fund a comprehensive closure plan. Teck and NANA Corporation worked together to get stakeholder input. That effort began with the development of reports describing the technically viable closure options. The options were presented at a series of public meetings, and an Inupiat-language DVD was produced and provided to all of the homes in the directly affected communities.

Two multi-stakeholder workshops were organised to review the options and provide feedback on stakeholder preferences. About 65 people attended the first workshop and 45 attended the second. The participants included representatives of the communities of Noatak and Kivalina, a subsistence harvesting committee comprised of elder hunters from the region, Teck and NANA staff, state regulators, non-governmental organisations (NGOs) and technical specialists.

The workshops applied a number of innovations designed to help participants provide considered and clear feedback. Participants were grouped according to their primary interests and each group was asked a series of questions that reflected their own perspective. For example, the elder hunters were asked "will this option protect subsistence uses of the area?", whilst the regulators were asked "will this option protect downstream water quality?". Answers were gathered from each group and compiled to show group preferences. Individuals were also polled and their preferences compiled. The group and individual results showed clear preferences that became the basis of a Closure and Reclamation Plan filed in 2008 and accepted by the state in mid-2009.

Source: SRK Consulting (n.d.[78]), *Community Input Into Red Dog Mine Closure Plan*, https://www.srk.com/en/newsletter/social-assessment-engagement-and-advice/community-input-red-dog-mine-closure-plan.

Conditions for a fairer negotiation process

The negotiation of benefit-sharing agreements can yield difficulties. Power imbalances may compromise the ability of Indigenous groups to reach favourable agreements. These are groups which typically have fewer financial resources, less technical capacity and less human capital available to invest in demanding negotiation processes with governments and mining companies (Black and McBean, 2017[70]). This section elaborates on these difficulties and provides some indications of what governments can do to strengthen the Indigenous position.

Access to information is foundational for Indigenous peoples to participate in decision-making processes. Information has to be up-to-date and freely accessible, without the need for registration of personal data or payment. It has to be accompanied by supporting documents, such as guidebooks or booklets, to render it more comprehensible. If necessary, information should be available in the Indigenous language and a public official that speaks the Indigenous language should be put at disposal to clarify questions.

In addition, the confidentiality of benefit-sharing agreements works against Indigenous peoples. It weakens their bargaining power because the terms and conditions of previous agreements signed with other Indigenous groups remain unknown. It may create divisions amongst Indigenous groups, as one may perceive that benefits have been unequally allocated. It prevents the Indigenous group from seeking assistance from third parties, even if only for informational purposes. As a whole, it means that Indigenous groups cannot learn from past experiences.

Governments can address this problem by making key aspects of benefit-sharing agreements available. They can keep online databases of signed agreements. In Australia, for instance, the Native Title Tribunal has the complete list of registered ILUAs, with the date of signature, the name of the parties, state and date of commencement.[30] The content of agreements is not however disclosed. In Canada, IBAs also remain confidential. Whilst it is true that some clauses of agreements may need to remain confidential, for example, the ones on market shares and amount of monetary compensation, other clauses could and should be freely disclosed.

There may be disputes about which organisation is legitimate to represent the Indigenous group. In Sweden, for example, agreements are negotiated between companies and *samebys*, which are economic associations of reindeer herders. The Sámi people that are not involved in this activity are hence excluded from the negotiation process. Ideally, this point would have been addressed in the pre-negotiation stage, when the memorandum of understanding is signed (see section above). In some instances, governments can act as a faithful intermediary, pointing out to companies the Indigenous organisations that represent communities in each area. In other cases, Indigenous national or regional bodies would be best placed to have this role.

In summary, governments can create opportunities to strengthen the negotiation power of Indigenous groups, by:

- Providing all the necessary information on environmental conditions, sub-surface resources, land uses, competing economic interests and other elements that Indigenous groups may not be aware of.
- Referring companies to a legitimate regional or national Indigenous organisation that can serve as the contact point with local groups.
- Elaborating a common template of agreement from which Indigenous groups can draw upon to start negotiations.
- Facilitating workshops among Indigenous negotiators and leaders to share experiences and good practices in agreement-making.
- Creating an online platform that maps and registers signed agreements.

In conclusion, Indigenous peoples must be able to negotiate project development with companies from a position of strength. This requires clarity about rules and fair negotiation procedures. Governments must be at a position of oversight, which should not be mistaken with interfering in the negotiation. They can provide standards and guidelines about how to act. They need to make information available, assist when needed and publish relevant information. They should also monitor the implementation of agreements and make companies accountable for what they had agreed.

Indigenous communities can get support not only from the government but also from other communities that had been involved in similar negotiation processes in the past. By sharing information and experiences they can be much more prepared. Indigenous organisations are another source of knowledge and many of them have developed negotiation workshops, leadership courses and community toolkits on benefit-sharing agreements.

On the side of companies, the bottom line is negotiating in good faith. It includes respecting the timelines and conditions set by Indigenous peoples, adopting transparent rules of conduct, sharing information on a regular basis, holding meetings in accessible language and location, supporting financially the Indigenous negotiation team and being truly open to discussing alternative proposals. Box 3.17 provides a list of leading practices on agreement-making for companies.

Box 3.17. Leading practices on benefit-sharing agreement-making for companies

1. Conduct extensive research and consult widely to identify all communities, and the individuals who will represent them, in the negotiation process.
2. Develop a pre-negotiation agreement, such as a memorandum of understanding, that establishes, among other things, the negotiation framework and funding for each stage.
3. Commence culturally sensitive orientation programmes and/or negotiations training to ensure meaningful negotiations and approval of the final agreement.
4. Ensure community participation in the agreement-making process, including informed decision-making during negotiations and involvement in completing impact assessments.
5. Benefit sharing means more than financial compensation for use of the land or displacement; it includes non-monetary benefits, such as employment opportunities, training of locals, business development support, infrastructure and provision of services.
6. There must be strong, accountable governance arrangements in the agreement to facilitate effective implementation. A system of ongoing monitoring and review with mechanisms would allow for adjustment of the terms of the agreement when necessary.
7. The agreement must plan for project closure and legacy issues. Agreements should include action plans for dealing with expected and unexpected closure at the outset and create a closure taskforce at the time of execution of the agreement.

8. As far as possible, agreements should not be confidential, consistent with the objectives of transparency, accountability and good governance. Confidentiality provisions can weaken the capacity and power of local communities by prohibiting them from communicating with the media and other stakeholders for advice, support and information.

Source: Loutit, J., J. Mandelbaum and S. Szoke-Burke (2016[77]), *Emerging Practices in Community Development Agreements*, Columbia Center on Sustainable Investment, Columbia University.

Notes

[1] Treaties and conventions, general principles of law and custom are primary sources of international law. Judicial decisions and juristic writings are subsidiary sources.

[2] The practice of the Human Rights Committee generally acknowledges that: "Groups identifying themselves as Indigenous peoples generally fall under the protection of article 27 as 'minorities', [and]… constitute 'peoples' for the purposes of article 1 and are beneficiaries of the right of self-determination" (Scheinin, 2004[80]).

[3] This convention revised the 1957 Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (C107). The C107 articulated the importance of recognising the right of ownership over traditionally occupied lands and the right to use and participate in the management of natural resources on Indigenous territories (Articles 12, 13 and 14).

[4] For a more complete explanation on the contents and implications of FPIC processes, refer to: FAO (2016[79]) and UNDP (2013[81]).

[5] This situation is commonplace. Urbanisation and industrialisation have demanded extensive amounts of land, which cannot be easily reverted to exclusive Indigenous occupation anymore. In Canada, for example, the national parliament in the capital city of Ottawa seats on traditional lands of Algonquin Anishinabe First Nation.

[6] More on Treaty Land Entitlement claims at: Simons and Pai (2008[27]).

[7] This is due to differences in how international treaties are applied into domestic law. Some countries enable the direct acceptance of international treaties into domestic law (monist), whilst others require changes to domestic legislation (dualist).

[8] Further, land rights can be held in perpetuity or be time limited. Typically, Indigenous lands are held in perpetuity. In the absence of time-limited arrangements, this distinction is not useful in practice. This is why it was not included in the table.

[9] Usufruct rights are the right to use something (e.g. land) and enjoy the fruits of it.

[10] Information retrieved from: (Resource Development Council, 2019[82])

[11] For a more detailed account of this historic process, see (New Zealand History, 2019[83])

[12] For a useful comparison between the New South Wales Aboriginal Land Rights Act (1983) and the Native Title Act (1993), see: https://www.aboriginalaffairs.nsw.gov.au/pdfs/land-rights/170110-native-title-fact-sheet-1-comparison-of-land-rights-and-native-title-final.pdf.

[13] For a more complete analysis see (Wensing, 2014[84])

[14] The LandMark platform maps out Indigenous and community lands across the world, both the ones acknowledged by governments and those which are not (http://www.landmarkmap.org/). The project Native Land maps out Indigenous territories, languages and treaties across North America, parts of South America and Australia (https://native-land.ca/).

[15] According to the guide *Tribal Nations and the United States: An Introduction* "Federal recognition of a tribe means United States' acknowledgement of a tribe's political status as a government. The process of attaining federal recognition is long, complex, and extremely stringent. The three ways for tribes to become federally recognised are: act of Congress; decision of a US court; and federal administrative procedure… to the Bureau of Indian Affairs (BIA)" (National Congress of American Indians, 2015[85])

[16] As part of this initiative, the Canadian Government has issued a *Statement of Principles on the Federal Approach to Modern Treaty Implementation*, which provides guidance on the approach to treaty implementation for government departments, as well as a *Cabinet Directive on the Federal Approach to Modern Treaty Implementation*. Please find links to the Statement of Principles https://www.aadnc-aandc.gc.ca/eng/1436288286602/1436288386227 and Cabinet Directive https://www.aadnc-aandc.gc.ca/eng/1436450503766/1436450578774.

[17] Even though the countries most debated in this chapter do not figure in the map of violence produced by the UN Rapporteur, violence records show a worrisome situation in Latin America, Africa and Asia.

[18] Information retrieved from: (Fondation Bertarelli, 2017[86])

[19] Ideal types are simplified models. They express pure typologies, which rarely exist in the world. That is, within countries more than one type can co-exist and there may be alternatives to them. It is a conceptual tool that enables analysis and comparison of different Indigenous land management practices.

[20] Information on these three programmes retrieved from (Indigenous and Northern Affairs Canada, 2017[87])

[21] Category V of the International Union for Conservation of Nature (IUCN) framework refers to "Protected landscape/seascape" while Category VI entails "Protected area with sustainable use of natural resources".

[22] Information retrieved from (NSW Environment & Heritage, 2018[88]).

[23] Information retrieved from (Johnson, 2009[89]).

[24] In the words of DEMCo's CEO, in a 2015 interview: "Before we do anything, we sit down with the community and go through everything that we're doing. That's what they want. They want that engagement, that conversation and being able to participate. (…) I think Dene participation will help develop a responsible legislative and regulatory framework. First Nations don't want to start big initiatives just to make money and then ruin the land and the environment and the water. It's a balanced approach that has got to ensure that the positive and negative impacts of mining and exploration are well understood". Retrieved from: (Corporate Knights, 2015[90]).

[25] Information retrieved from: (Land Information New Zealand, 2017[48]).

[26] King cites examples from the United States (2013, p. 211[49]): the Oneida Nation in New York, the Shakopee Sioux in Minnesota, the Cherokee in Oklahoma and the Sycuan Band of the Kumetaay Nation in California.

[27] Noting that Indigenous entrepreneurs do not always meet the criteria set in companies' tendering processes, in terms of financial capacity and skills, IBAs have included additional criteria to support them. Sosa and Keenan (2001[71]) have identified ways that governments can support Indigenous participation in bidding: "a) requiring the mining company to provide information about the company's tendering process; b) requiring the mining company or government to give or fund

workshops on how to prepare tenders; c) providing extensions to Aboriginal businesses in the preparation of tenders; d) requiring that the company assist Aboriginal businesses to secure financing by, for example, providing them with letters of intent or conditional contracts; or by encouraging Aboriginal and non-Aboriginal enterprises to form joint ventures; e) requiring that the company give Aboriginal businesses advance payments in order to help them to initiate contracts; f) allowing aboriginal businesses to use the company's infrastructural services, such as roads and airstrips, and g) "unbundling" contracts, that is, dividing complex contracts into smaller, simpler components that are tailored to specific Aboriginal businesses".

[28] This topic has extensive literature. See, for a comparative approach: O'Faircheallaigh (2015[72]).

[29] The two examples were retrieved from Loutit, Mandelbaum and Szoke-Burke (2016[77]).

[30] Available at: (Native Title Tribunal, 2019[91])

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