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# Models for Recognizing Indigenous Land Rights in Latin America

Roque Roldán Ortega

October 2004





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# Foreword

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The history of the Americas did not begin with the discovery by Christopher Columbus. The people of the Americas had already lived thousand of years of impressive development, including those of science and technology; the forgotten history of that continent.

In many ways, this paper represents an important dimension in filling history's gaps through the lens of land rights. The continent was populated by many nations that functioned in harmony with nature, had a variety of cultures and languages, and developed many different socio-economic systems (nationally and locally). These nations were sovereign and recognized from Alaska to Patagonia.

Many nations grouped actively around an important metropolis (e.g., Tikal, Machu Picchu), others were mainly agricultural societies and deeply attached to and, dependent on, the land. However, in all of them, we know they had very advanced and well established *institutional arrangements and organizations* (formal and informal), created and nurtured with the view to respond to the needs and challenges of the time. With a variety of forms of governance, these societies did assign rights and responsibilities to the different actors and groups in order to maintain an acceptable level of social cohesion, to establish important political consensus

around economic and social issues, and to create the capacity for the integration of the material and the non-material dimensions of peoples' lives.

Some of the above became important traditions, which we find even today in many parts, including the territories inside the developed countries of North America.

Central to those indigenous traditions was land and, therefore, land tenure systems and rights were essential to the people's welfare in many respects—in particular, land as a major economic asset, an instrument of inheritance, and a symbol of social status. But land was also sacred and essential to people's spiritual development. In all those societies, it is very rare to find a vacuum in both the legal, or customary arrangements, as regards the assignment of land titles and land rights—whether these are expressed formally or informally.

Once the Conquistadores realized that there was not much gold to take away from the Americas, they clearly saw economic and social power, and substantive material gains, from the land. This created a major pressure to assign rights in forms and manners that would benefit those Conquistadores. Whole valleys and huge chunks of nations were assigned to individuals, without respect for existing

customary laws, rules and regulations. They created and, at the same time, superimposed their own colonial system of legislation on the top of what was already a sophisticated and effective system of land tenure.

Thus, these societies experienced an imposition of one system of governance over another. Physical force and non-discriminating forms of enforcement were the foundations of the Conquistadores' new forms of governance.

In today's reality, we know that the peoples from these nations have not vanished, nor have their ways of empowerment, assignment of rights, or other forms of institutional arrangements vanished either. Therefore, we witness in many countries a great deal of complexity in relation to the access, management, usufruct and control of land assets.

As the political systems of some countries are now becoming more democratic or open to listening and embracing the views of minorities (e.g., power, ethnic), these issues of land rights have clearly come up to the surface of the political life. Issues of sovereignty, customary law and, simply, of traditional norms—from the national to the household levels—are being put on the table of what is clearly a complex *social dialogue*. In some instances, these dialogues have even caused the demotion of several presidents in Latin America.

The paper in front of you is an excellent source of basic information, sharing an easy and practical understanding about land tenure/titling, in the same sense discussed above. In addition, the paper represents a genuine attempt to:

- *First*, recognize the existence of these complex land rights and land titling systems across Latin America, often ignored in the public debate, unless policy makers confront an immediate problem.
- *Second*, study the content at the country level, so that international experiences and comparisons may spark a move towards policy coherence and legislation that will ultimately benefit indigenous peoples and those poor people who live from the land.
- *Third*, demonstrate that land is not only a physical asset with some economic and financial value, but an intrinsic dimension and part of peoples lives and belief systems. The end is not necessarily a material product or a level of economic productivity.

The phenomena addressed in this paper are not unique to the Americas. In my own experience of several years working in the confines of the Sahelian countries' agricultural sector (e.g., Senegal, Mali, Niger, Gambia), the juxtaposition of customary arrangements, colonial arrangements, and post-colonial arrangements was really evident. The lack of coherence in the land tenure and land titling policies in the mid-eighties constituted one of the main sources of poverty—particularly for women—and of unsustainable agricultural practices. Many agricultural programs and strategies failed because of issues of titling and tenure. Development institutions tried many forms of interventions: agrarian reforms, resettlement programs, privatization of land, and the like. The performance of many of these interventions was mixed.

Titles over the land represent also a form of productive asset that determines the cash



income of the owner and her/his ability to have access to credit. In most societies, having a title over a good piece of the land is a major source of credit collateral. Thus, if you do not have land, then your access to credit is very limited. It was, in fact, out of these titles over the land that many landlords (absentee ones) became bankers and industrialists. For the poor, even tenure and titling of a small plot in rural, or urban, areas represents a major source of welfare for her/his and future generations. The market prices value mainly (not always) what is formally owned.

Not less important is the land titles' role in the development of individual and social identity. Land is a source of social power and social self-worth. In many societies, part of the land has sacred meaning and great spiritual value. Thus, whenever governments or the private sector move people away, or alienate them, from those sacred sites, this process is almost always accompanied by social disruption, instability and conflict.

While for landlords the land is just a productive asset, for indigenous peoples it is much more than that.

If the main aim of development institutions is to alleviate poverty, it is clear that issues of land tenure and land titling in the context of indigenous peoples cannot be overlooked. Thus, any future debate on land titling demands focus on the fact that those titles are a significant instrument to take people out of poverty and a major source of economic growth, particularly in agrarian economies.

However, this is not all. There is also a human rights dimension to all of the above. And it is essential to understand this human rights dimension of land rights, not just as a legal obligation, but as a key element of economic and social development. Land laws in both developed and developing countries have affected the poor and the powerless the most, particularly women. These rights over the land affect other human rights; e.g., *The Right To Food* (security of food supplies), *The Right To Housing* (capacity to own a house), *The Right To Health* (the use of medicinal plants) and *The Right To Development*, to name a few.

This paper should be read by development practitioners and policy makers.

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# Preface

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Over the past several years, the international community has become increasingly aware of the vital importance of the legal recognition of indigenous land rights to the cultural survival, economic development and self-determination of indigenous peoples and their communities. As far back as 1981, for example, the United Nations Subcommittee on Racism, Racial Discrimination, Apartheid and Decolonisation sponsored a special International NGO Conference on Indigenous Peoples and the Land in Geneva, Switzerland which was attended by over 300 indigenous leaders and NGO representatives from all parts of the world. The purpose of the meeting was to bring to the attention of the international community the disparate legal, political and economic conditions under which indigenous peoples lived and their struggles to survive as culturally distinct peoples and communities. *“The root cause of the crisis,”* the statement which resulted from the International NGO conference declared, *“is the denial of the right of [indigenous peoples] to their land. Their land and resources are plundered by vested interests and particularly by transnational corporations seeking maximum profits. The constant grabbing of more of their land and the denial of self-determination is destroying their traditional value systems and the very fabric of their societies.”* (World Federation of Democratic Youth, 1981, p.10).

A year following this conference, in 1982, the UN Human Rights Commission’s Sub-

Commission on Prevention of Discrimination and Protection of Minorities established a special Working Group on Indigenous Populations, the purposes of which were to review current national legislation in relation to the human rights and fundamental freedoms of indigenous peoples and recommend new international standards for the recognition and protection of indigenous peoples rights. From the beginning, the issue of indigenous land rights was on the agenda of the UN Working Group, and during the 1985 session of the Working Group, a group of indigenous leaders from the Amazon region of South America focused particular attention on the collective rights of indigenous peoples to their lands, territories and natural resources. Jose Uranavi, the President of the newly formed Central Organization of Indigenous Peoples and Communities of Eastern Bolivia (CIDOB) and representing the Coordinating Council of Indigenous Organizations of the Amazon Basin (COICA), related the following to the members of the UN Working Group at the 1985 meeting:

*Our defense of the land and natural resources is for the cultural and human survival of our children, and is the foundation of a moral security for peoples who have different languages and customs... We indigenous peoples think and plan in terms of the territory, not only the individual plot; in this way, we assure the access*

*of the community to the diverse resources of the forest (wood, soil appropriate for agriculture and cattle, and wild fauna)... For us, the first thing is to secure our land which belongs to us by right, because we are the true owners of the land and natural resources. We indigenous peoples know that without land there can be no education, there can be no health and there can be no life. —Uranavi, 1985, p. 20*

Continuing along a similar path, in the second half of the decade of the 1980s, the international environmental community began to acknowledge the increasing significance of indigenous peoples' traditional knowledge and land use practices to the new notion of "sustainable development." The World Commission on Environment and Development, for example, conducted consultations with indigenous leaders from throughout the world and in its well-known 1987 report, *Our Common Future*, highlighted the great loss to humanity posed by the disappearance of indigenous peoples and their traditional knowledge and experience. "The starting point for a just and humane policy for such groups," the report of the World Commission wrote in a section titled "Empowering Vulnerable Groups":

*. . . is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life—rights they may define in terms that do not fit into standard legal systems. These groups' own institutions to regulate rights and obligations are crucial for maintaining the harmony with nature and the environmental awareness characteristic of the traditional way of life. Hence the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in*

*resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their area.*

—World Commission on Environment and Development, 1987, pp. 115–116

Finally, in 1989, the International Labor Organization (ILO), which at the time was the only UN agency with a special convention in relation to indigenous peoples, revised its Convention 107 of 1957 and created a new Convention (ILO Convention 169) which countered the "integrationist" or "assimilationist" philosophy of the previous convention and called for respect for both the cultural integrity of indigenous peoples and their communities and for their co-participation in national society and development decision-making. Land rights, which assumed an important role in both conventions, are especially highlighted in the latter convention.

ILO Convention 169 states that the term "indigenous lands" should be conceived as the total environment of the areas that indigenous peoples occupy and use. It also defines the conditions for compensating indigenous peoples for the exploitation of subsoil wealth contained on their lands, and calls for the participation of indigenous peoples in the utilization, administration and conservation of natural resources contained on such lands. (See: ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries, 1989.)

All of the above provides an international perspective for understanding the significance of the current paper by Colombian lawyer and indigenous rights specialist Roque Roldán Ortega on the current situation of indigenous

land rights in the constitutions, legislative regimes and administrative institutions of Latin American countries. Roque Roldán Ortega is eminently qualified to write on this subject given his several decades of experience as the head of the Office for Indigenous Affairs of the Colombian Agrarian Reform and Colonization Institute (INCORA), his position as Director of the General Office of Indigenous Affairs of the Colombian Ministry of the Interior, and his founding and leadership of the non-governmental Center for Indigenous Peoples Cooperation (CECOIN) in Bogota in 1985.

Roque Roldán Ortega has played an historically important role in the recognition and titling of numerous indigenous *resguardos* in his native Colombia. He has also provided active and critical support to numerous indigenous and Afro-descendant organizations in their successful struggle to reform the Colombian Constitution in 1991 and to produce post-Constitutional legislation protecting the land, territorial and natural resource rights of both indigenous peoples and Afro-Colombian populations. Background to this experience is contained in his book, *Indigenous Peoples of Colombia and the Law — A Critical Approach to the Study of the Past and Present*, published in English by the Gaia Foundation, COAMA and the ILO in 2000.

Roque Roldán Ortega also has had extensive experience in providing technical advice in the area of indigenous legislation and administrative procedures relating to indigenous land regularization to several other Latin American governments. He has also worked as a consultant with such

international agencies as the ILO, the Organization of American States, the World Bank, and numerous bilateral agencies in reviewing legislative reforms relating to the recognition of indigenous lands and recommending changes in administrative procedures for the more efficient and just regularization and titling of such lands. He is also currently involved in a very important project sponsored by the COICA in preparing general guidelines for indigenous land regularization and natural resources control throughout the lowland regions of South America.

From the perspective of the World Bank, Roque Roldán Ortega's paper is also important because over the past decade, and especially since the introduction of the World Bank's Operational Directive on Indigenous Peoples in 1991, the World Bank has been involved in financing several land administration programs in Latin American countries, many of which contain indigenous land regularization components. Both the original World Bank Operational Manual Statement on "Tribal Peoples in Bank-financed Projects" (OMS 2.34) and its current Operational Directive on "Indigenous Peoples" (OD 4.20) contain special directives for protecting the land rights of indigenous peoples. The latter document, in fact, states under the section on the requirement for Borrowers to prepare Indigenous Peoples Development Plans that "when local legislation needs strengthening, the Bank should offer to advise and assist the borrower in establishing legal recognition of the customary or traditional land tenure systems of indigenous peoples." It also notes that "where the traditional lands of indigenous

peoples have been brought by law into the domain of the state and where it is inappropriate to convert traditional rights into those of legal ownership, alternative arrangements should be implemented to grant long-term, renewable rights of custodianship and use to indigenous peoples." Finally, it states in the same paragraph that "these steps should be taken before the initiation of other planning steps that may be contingent on recognized land titles." (See OD 4.20, paragraph 15 (c), 1991.)

In the year following the introduction of OD 4.20, Alaka Wali (an anthropologist who had done fieldwork among the Kuna Indians of Panama) and I published a desk review of 13 World Bank-financed projects under supervision or preparation which contained special land regularization programs for indigenous populations in lowland South America. The review looked at the achievements and operational problems of these programs, especially in countering the potentially negative effects of road construction, land settlement and resource extraction activities on the lands, natural resources and cultures of forest-dwelling indigenous groups in several South American countries. One of the major findings of this review was that although these land regularization programs were instrumental in physically demarcating and in some cases collectively titling large areas of indigenous lands, they also contained many outstanding problems especially in terms of the nature of legal frameworks, procedural problems in regularizing such lands following demarcation, and follow-up activities in terms of controlling land invasions and protecting

the natural resources contained on such lands (see Wali and Davis, 1992).

Since the publication of this report, there have been numerous other projects financed by the World Bank which contain indigenous peoples' land regularization programs or are stand-alone land administration projects targeted at indigenous peoples. To date, there have been some evaluations of individual projects, including one very important review done by Enrique Sánchez Gutiérrez and Roque Roldán Ortega of a Bank-financed land regularization program for indigenous and Afro-descendant communities on the Pacific Coast of Colombia (see Sánchez Gutiérrez and Roldán Ortega, 2002). However, there has still not been a systematic comparative study of the lessons learned from the entire portfolio of indigenous land regularization programs financed by the World Bank since the introduction of OD 4.20 in 1991.

In all of the above senses, the present report by Roque Roldán Ortega poses a special challenge in terms of the need both to better understand the current legislative frameworks of Latin American countries in relation to indigenous peoples land rights, as well as to provide support for the sorts of actions which international donors have or could be taking to assist these countries in actually implementing such legislation. In taking up this challenge, the World Bank would not only be responsive to the international focus upon indigenous peoples land rights which was first highlighted by international agencies in the decade of the 1980s and is contained in its own operational directive in relation to indigenous peoples, but it would also assist its borrower countries in

preparing the legal and institutional conditions for the cultural survival, ethno-development and protection of the lands and natural resources of indigenous peoples and their communities in the years ahead. The current report by Roque Roldán Ortega provides an

excellent historical framework for such future analytical and operational work on indigenous land and natural resource rights and is worthy of close attention by the World Bank and other international development agencies.

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# 1 A Short History of Indigenous Legal Treatment in Latin America

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The official policy of all the Latin American states towards their indigenous populations from independence until at least the 1930s was one of assimilation. They used a variety of coercive means to obtain this goal, from forced conversion to Christianity and compulsory use of Spanish to outright war. State authorities were particularly keen to abolish the institutions of collective territorial property and communal government of the native peoples of the Americas.

The justification for this strategy of eliminating native peoples as separate entities was national unity. Its philosophical underpinning was a conception of indigenous societies as savage and backwards, inimical to the project of building solid and prosperous national societies based on economic liberty and representative democracy. As one republican ideologue put it, national unity was only to be found in a society characterized by “a single religion, a single tongue, and a single lineage.”

Starting in the 1940s, the relationship between Latin American governments and their indigenous populations began to change. In April of 1940, the First Interamerican Indigenist Congress was held in the Mexican city of Pátzcuaro, which generated the Pátzcuaro Agreement, largely based on the indigenous policies of the government of Lázaro Cárdenas. This did not represent a fundamental change in the strategy of assimilating indigenous peoples;

rather, it signaled a recognition that the most expeditious and constructive way to ensure their integration into national societies was to provide better education, technical training, and financial assistance to the traditionally marginalized indigenous populations.

The approval in 1957 of the International Labor Organization’s Convention 107, which lays out norms for the protection and integration of indigenous peoples in independent countries, reinforced the strategic approaches codified in the Pátzcuaro Agreement. All the independent countries of Latin America and the Caribbean ratified this convention, thereby incorporating it into their national legal framework, as well as making it part of their international responsibilities. Following the spirit of the convention, some of the new agrarian laws adopted by countries in the region under the US-led Alliance for Progress included modest proposals for focusing attention on the numerous land claims of the region’s native peoples.

The agrarian reforms undertaken widely throughout Latin America in the 1960’s, although not very successful, did result in the first important examples of recognition of indigenous land claims since the colonial era. In addition, the popular mobilization among *campesinos* that accompanied these reforms helped strengthen the indigenous movement in many countries. As social scientists finally

discredited the notion that indigenous societies were stuck in a backwards phase of human development, the indigenous movement throughout the region also gained the support of other sectors of society.

Starting at the beginning of the seventies, this new vision of relations between the state and indigenous peoples began to be integrated into new constitutions as they were adopted by the various countries. The Panamanian Constitution of 1972 took the first timid steps in this direction, while the Peruvian Constitution of 1979 laid out a clearer vision. Other constitutions with a new focus on indigenous issues followed: after waging war against their indigenous populations, new constitutions in Guatemala in 1985 and Nicaragua in 1987 evinced a clearer recognition of indigenous rights; these were followed by constitutions codifying more progressive indigenous policies in Brazil (1989), Colombia (1991), Paraguay (1992), Argentina (1994), Bolivia (1995), Ecuador (1998), Venezuela (1999), and Mexico (2001). With the exception of Panama and Nicaragua, all the other countries mentioned above have also ratified ILO Convention 169, the Convention concerning Indigenous and Tribal Peoples in Independent Countries (see Box 1), which updates ILO 107 by recognizing, among other indigenous rights, the very close relationship between traditional lands and cultural identity for indigenous peoples.

The situation in other countries of Latin America is mixed. Some, like Honduras and Costa Rica, haven't recognized indigenous rights in their constitutions, but they have ratified ILO Convention 169. Chile has neither recognized indigenous rights in its constitution nor ratified the convention, yet it has a law that establishes norms for the protection and development of the indigenous population, and

<b>Box 1</b>	
<b>Status of ILO 169 Ratification</b>	
<i>Ratified</i>	<i>Not Ratified</i>
Argentina	Belize
Bolivia	Chile
Brazil	El Salvador
Colombia	Guyana
Costa Rica	Nicaragua
Ecuador	Panama
Guatemala	Suriname
Honduras	Uruguay
Mexico	
Paraguay	
Peru	
Venezuela	

Source: ILO website.

it has created an institution, the National Corporation for Indigenous Development (CONADI) to do so. Four other countries—Guyana, Suriname, Uruguay, and El Salvador—have no legal recognition of indigenous rights as of 2003 when this review was done.

Today, there is substantial variation in the degree of legal recognition of indigenous rights across the Latin American region. Broadly speaking, the countries of Latin America can be divided into three groups, according to their legal treatment of their indigenous populations:

**Superior legal framework:** These countries have made a high-level commitment, through either their constitution, international agreements (such as ILO 169) or both, to indigenous rights, and they have followed through with a regulatory framework and concrete actions to ensure those rights, including legal recognition of indigenous lands. This group includes Bolivia, Brazil, Colombia, Costa Rica, Panama, Paraguay, and Peru.

**Legal framework in progress:** These countries have made a high-level commitment, through

either their constitution, international agreements (such as ILO 169), or both, to indigenous rights, but they have not followed through with an adequate regulatory framework, and they generally have not made significant progress in recognizing indigenous land rights as the other countries have. This group includes Mexico, Guatemala, Honduras, Nicaragua, Venezuela, and Argentina.

**Deficient legal framework:** These countries have not entered into any high-level commitments on indigenous rights at the legal level, and they have made little effort to respond to indigenous requests for legal recognition of their land claims. This group includes El Salvador, Guyana, Suriname, and Uruguay.

<b>Box 2</b>		
<b>Typology of Indigenous Legal Regimes</b>		
<i>Superior legal framework</i>	<i>Legal framework in progress</i>	<i>Deficient legal framework</i>
Bolivia	Argentina	El Salvador
Brazil	Guatemala	Guyana
Colombia	Honduras	Suriname
Costa Rica	Mexico	Uruguay
Panama	Nicaragua	
Paraguay	Venezuela	
Peru		



# 2 Description of Indigenous Land Tenure Regimes in Selected Countries of Latin America

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In this section, we will review the current legal frameworks for indigenous land tenure in selected countries, illustrating the range of experience in this issue across Latin America. In the following section, we will look more closely at several countries that are relatively advanced in terms of legally defining indigenous land tenure.

## **Countries with a Superior Legal Framework**

These countries—Bolivia, Brazil, Colombia, Costa Rica, Panama, Paraguay, and Peru—all have high-level judicial instruments (constitutions or international agreements) recognizing indigenous land rights, as well as some national legal and regulatory framework operationalizing the high-level instruments. These countries provide the best practice models for land legalization, despite their shortcomings. Nevertheless, there are important differences between them, which the following country by country discussion will make apparent.

### *Bolivia*

Although it has the largest proportion of indigenous population in South America, and despite a powerful popular movement, Bolivia only recently began to offer legal redress to indigenous land claims. The first measures were taken as a result of popular mobilization of

the Amazonian and Chaco indigenous groups at the end of the 1980s and early 1990s, when the national government issued a series of executive decrees recognizing some areas as being under indigenous control and possession. Some sectors of Bolivian society regarded these decrees as unconstitutional. The constitutional reform of 1994 contained a clear recognition of the special rights of indigenous people and communities, including the character as legal incorporation (*personería jurídica*) of indigenous groups, their right to full ownership of their ancestral lands, and their autonomy to exercise their own traditional forms of internal government and administration.

In 1996, the National Agrarian Reform Service Law was promulgated; along with the regulations later issued for that law, it defines the institutions and procedures for legal recognition of indigenous lands. Despite serious obstacles, caused by the bureaucratic requirements of the law, budgetary limitations, the country's political crisis, and opposition to the delimitation of indigenous lands, Bolivia has managed to recognize some 5.4 million hectares of indigenous lands to date. The 1996 law, however, was considered flawed by indigenous groups for several reasons: the technical rules for deciding land allocations, for example, led to smaller areas than the indigenous groups claimed, and gave priority to titling agricultural colonists on indigenous-claimed land, leading to the fragmentation of indigenous land claims. A

mass protest in 2000 led to the correction of some of the flawed regulations. Serious obstacles to indigenous titling remain in Bolivia, including the complexity of the bureaucratic procedures required for land recognition, as well as the inability of indigenous communities to define their own administrative and management models for their lands.

### *Brazil*

At the beginning of the 20<sup>th</sup> century, in reaction to the harm inflicted on indigenous groups as a result of official policies promoting the exploitation and settlement of the country's tropical forests, Brazil adopted constitutional provisions aimed at establishing a paternalistic system in which indigenous people would be protected by the state. It is generally believed that this policy was inspired by a military officer with humanitarian interests, General Cândido Mariano Silva Rondón, after whom the state of Rondonia was later named. A series of institutions devoted to protecting Brazil's indigenous people were created: first the Indian Protection Service (SPI), around 1911, that was disbanded in 1967 when massive corruption in the agency was exposed; followed by the National Council for Indian Protection (CNPI) some years later and then the National Indian Foundation (FUNAI) in 1968. In 1988, Brazil adopted a new constitution that stipulated that all indigenous lands in the country would be demarcated within a space of five years. Article 231 of the Brazilian constitution states that indigenous people have primary, inherent and unalterable rights to their lands they permanently inhabit and use for productive activity, preservation of natural resources and cultural and spiritual well-being. Indigenous lands are the property of the State; however, the regularization process recognizes and

formalizes indigenous rights and specifically guarantees perpetual usufruct by indigenous people of their lands.

In 1995, Brazil adopted new legislation revamping the process of indigenous lands regularization. This was Decree 1775 which replaced the previous set of rules and regulations, Decree 22. The addition of a civil administrative grievance procedure and a 90 day period of contention, during which non-Indians can challenge the identification and delimitation of indigenous lands, was protested by national and international NGOs, particularly because decree was retroactive and because of concerns that already delimited lands would be reduced in size. Despite the protests, the vast majority of claims and grievances to date against existing indigenous lands have been dismissed, and the primacy of indigenous rights upheld.

The resulting demarcation and recognition of indigenous lands has been truly impressive. In total, some 103.7 million hectares, or more than 12% of the national territory of Brazil, have been recognized as indigenous lands, possessed by indigenous groups representing only 2% of the national population. Serious problems remain, however. Many indigenous lands continue to be invaded by landless *campesinos* or miners, and some of the lands that have been recognized are tied up in court with legal challenges from third parties. Another issue of concern is that 15 years after the passage of the new Constitution, the Indian Statute, which is in clear contradiction to the Constitution, remains in force.

### *Colombia*

In Colombia, the new constitution adopted in 1991 was the first to clearly recognize the



special rights of indigenous peoples. Even before this high-level juridical support to indigenous land recognition, however, Colombia had had an active program of recognizing indigenous lands, a product of its execution of the agrarian reform laws that were passed starting in the 1960s. At first these lands had the character of simple provisional reserves; later the concept of indigenous reservations (*resguardos*) was adopted from the old Indian Law, which guaranteed the indigenous communities full ownership and a high degree of autonomy in management of their lands.

The Colombian judicial framework grants many rights to the indigenous peoples, which are aimed at guaranteeing the protection of their social and cultural integrity. In 1989 the Colombian Government ratified Convention No.169 of the International Labor Organization (ILO) concerning the rights of indigenous and tribal peoples (Law 165, 1994.) The Political Constitution of 1991 defines the Colombian nation as multi-ethnic and pluri-cultural, and advanced the right of indigenous peoples to manage the political and administrative affairs of their territories. In addition, indigenous peoples are defining their own plans for land-use and environmental management, which provide the framework for the sustainable use of natural resources in their territories, based on their traditional knowledge

The 1991 Political Constitution also opened the space for the creation of a new territorial division within Colombia, the Indigenous Territorial Entity (ETI). The proposed law regarding the establishment of the ETIs has been approved by the Senate and is currently being discussed in Congress. In the meantime, indigenous authorities in the *resguardos* are legally responsible for land-use and social

programs in these indigenous territories, and they receive state funds for their own health, education and social programs.

In 2001, the Colombian Government presented a reform to two articles in the Political Constitution, to guarantee the stability of state funds for social investment in territorial entities including indigenous *resguardos*. Law 715 of 2001 was subsequently enacted, to regulate the distribution of these funds, and their use. The same law establishes that indigenous *resguardos* will receive a specified percentage of the available funding each year, to be used for education, health, housing, drinking water and productive projects.

### *Costa Rica*

Costa Rica does not have specific norms on indigenous peoples in its Constitution, and it only ratified ILO 169 in 1993. Nevertheless, like other countries in the region, Costa Rica has historically established programs to benefit the indigenous population. In 1973, the National Indigenous Affairs Commission (CONAI) was created and made responsible for dealing with indigenous demands, including land claims and the task of “integrating indigenous communities into the process of development.” Four years later, the Indigenous Law of Costa Rica (Law 6172 of 1977) was issued, which gave more support to the territorial claims, separate cultural identity, and administrative autonomy of indigenous groups. It also decreed that indigenous reserves are inalienable<sup>1</sup>, imprescriptible<sup>2</sup>, untransferable<sup>3</sup>, and exclusively reserved to the indigenous communities that inhabit them. Although there has been serious criticism of the existing legal protections for indigenous people, and although the state has been working on a new legal

formulation that would be more consistent with ILO 169 and current thinking on indigenous rights, Costa Rica has made significant progress in recognizing indigenous lands under the existing legal framework. Various decisions of the country's Supreme Court have also contributed to defining an acceptable degree of autonomy for indigenous communities in management of their legally-recognized lands.

### *Panama*

The Constitution of 1972, for the first time in Panamanian history, declared that indigenous lands must be given as property, and not under some type of usufruct arrangement. Using this disposition, the Legislative Assembly has recognized indigenous lands through a special law for each indigenous group, in which the legal figure of the *comarca* or collective landholding is created. To date, six *comarcas* have been created in Panama, covering more than 20% of the national territory. Each is governed by an executive decree, which gives the indigenous group wide latitude for administering its lands, under the general rules established in the legislative act creating that *comarca*. Interestingly, Panama has not ratified ILO 169, although it had previously ratified ILO 107 in 1971. Nevertheless, its model of land regularization and indigenous rights is recognized as innovative and effective, respectful of indigenous autonomy and supportive of community initiative.

### *Paraguay*

In 1981, Paraguay passed the Indigenous Communities Statute (Law 904), which gave indigenous peoples certain rights, including the right of legal incorporation and the right to obtain the land necessary for their survival and

development. In 1992, the country adopted a new Constitution which recognizes the special rights of the indigenous population and recognizes them as ethnic groups with a separate culture identity. One year later, Paraguay ratified ILO 169.

Like other constitutions in Latin America, the Paraguayan Constitution gives indigenous lands the attributes of being inalienable, unmortgageable<sup>4</sup>, and imprescriptible. The constitution and the Indigenous Community Law also guarantee indigenous groups a high degree of autonomy in the management of their lands and conduct of their internal affairs. Unfortunately, these general laws have not been supported by a body of regulations that defines precisely what powers the indigenous communities have, resulting in the potential for conflict between the communities and the national government and its specialized agencies.

In practice, experience with the implementation of these higher-level legal norms has been mixed. With the passage of the Indigenous Communities Statute, the state created the Paraguayan Indigenous Institute (INDI), a dependency of the Ministry of Defense; INDI has wide powers to enforce the guarantee of indigenous rights, including land rights. On land rights, INDI acts in close collaboration with the Institute of Rural Wellbeing (IBR), the agrarian reform agency in Paraguay. INDI has received some financial support from the government, as well as from some churches and humanitarian agencies. Nevertheless, excepting for some small areas that indigenous communities have managed to retain over the years, the lands they claim have to be purchased from current owners, at high cost; if the owners are not interested in selling willingly, they must

be expropriated by an act of Congress. A recent study showed that in the Eastern Region of the country, where according to the law the communities require a minimum of 240,000 hectares, only slightly more than 66,000 hectares had been passed to them by 2002; in the Western Region, where they should have at least 1.2 million hectares, they have only been given about 972,000 hectares. This same study shows that after an unsuccessful attempt on the part of the government in 2002 to reduce INDI's functions and programs, its budget and staff were cut. The resulting situation is even more problematic for the indigenous communities, since some of the land that has already been given to them has not yet been fully paid for, and INDI's current insolvency could preclude finalization of the payments.

### *Peru*

Peru has a long and rich legislative history in favor of indigenous rights, and in particular land rights. The constitutional provisions in Peru that recognize indigenous rights are probably the earliest in the Americas. The country also ratified ILO 107 and, in 1994, ILO 169. It was also the first country to adopt special legal regimes for the governing of indigenous communities, in the 70s and 80s. The first Law of Native Communities was adopted in 1974; a later law on the same topic is still in force. The 1979 Constitution recognized indigenous lands as inalienable, unmortgageable, and imprescriptible; the current Constitution (1993) represents a step backward on this issue, weakening the legal treatment of indigenous lands by making them subject to being bought and sold. Despite serious obstacles, gaps, and ambiguities in the treatment of different indigenous issues, including the land legalization model and the

internal governance of indigenous communities, the relatively long and rich experience of Peru in this area is worth close examination.

### **Countries with a Legal Framework in Progress**

These countries have made a high-level commitment to indigenous rights, in their constitution or the adoption of international legal agreements or both, but they have not followed through with an adequate regulatory framework. Despite this, they offer some interesting insights into the process of land regularization. The countries included in this section are Ecuador, Guatemala, Honduras, Mexico, Nicaragua, and Venezuela.

### *Ecuador*

In 1998, Ecuador approved its current constitution and at the same time ratified ILO 169. Like the Venezuelan Constitution (see below), the Ecuadorian Constitution guarantees a wide gamut of indigenous rights; as in Venezuela also, the Ecuadorian Constitution uses the future tense to refer to indigenous rights, which seems to imply that further action by the national legislature is necessary in order to fully establish those rights. Even before approving the new Constitution, Ecuador managed to regularize a significant extension of indigenous lands, utilizing the existing agrarian legislation. Because of the lack of specific indigenous procedures for land recognition, these lands were titled not to legally recognized ethnic groups or communities, but rather using whatever form of organization, or lack of organization, the groups had at the moment the titles were granted. Thus, indigenous lands have been titled to individuals, cooperatives, Centers ("*Centros*") or Associations of Centers

(Centers are an organizational form introduced by religious missionaries among some indigenous groups), Communes (a legal figure established by several laws in 1937, characterized by communal ownership), and ethnic territories. The only one of these that has any relationship to the indigenous tradition is the Commune, but this was only used in the highlands, and not in the Amazon, where the vast majority of the titled land was located.

The lack of legal norms associated with the titled entities led to the application of the Civil Code provisions for communal property being applied to these titles. While the new Constitution says that indigenous lands are inalienable and cannot enter into the free market in property, it appears to require that the characteristic of inalienability be granted through a subsequent law passed by the legislature, such that all the lands that have been titled would need an additional legal action in order to become inalienable. As can be seen from this analysis, the Ecuadorian legislature urgently needs to issue the laws necessary to support the constitutional declarations on indigenous rights, including not only the specification of an appropriate procedure for titling indigenous lands, but also a legal framework for the incorporation of indigenous groups and a model for land management after lands are titled to those groups.

### *Guatemala*

The Constitution of 1985, which is still in force, recognizes the right of indigenous communities to the lands they have historically utilized and proclaims the responsibility of the state to provide state-owned lands for those groups that need lands “for their development.” In practice,

neither the constitutional provisions nor the ratification of ILO 169 by Guatemala in 1996 has led to much progress on this issue. Guatemala has relied on its body of agrarian laws to distribute lands to indigenous communities, which has led to land being granted in a hodgepodge of forms, depending on the particular law being used or the government agency involved. Because of this, some lands have been issued under individual titles, while others have been titled as “collective agrarian patrimony” or in the form of cooperatives. Since most of these titles required payment by the new title holders, the titles were precarious, subject to being revoked if the payments were not made on time. It appears that very few indigenous families were able to obtain their definitive titles in the end, after completing payments spread out over a period of 10 to 15 years.

These lands distributed under the agrarian reform laws have not afforded indigenous communities the ability to manage their territories and their internal affairs according to their own traditions, as opposed to civil law. For the vast majority of the communal lands that the indigenous communities still control, they have only very precarious titles, or no titles at all. The only alternative model for legal possession of their land is in the form of a non-profit civil association under the Civil Code, a modality that exposes them to all the risks of private property and of the free market in land, which can be brought about at the behest of any one of the members of the association.

In the 1995 peace accords that put an end to the civil war in Guatemala, the government committed itself to forming a commission with indigenous representation to propose procedures and institutional mechanisms for

guaranteeing indigenous land tenure, as well as defining the use and management of natural resources on indigenous lands. While the members of the commission have been named, there has been little additional progress to date.

The 1999 Law of the Land Fund, according to its preamble, was intended to operationalize the promises about indigenous land titling made in the peace accords, but in effect it has only three dispositions that concern the indigenous population: it promises technical assistance to indigenous groups in obtaining legal incorporation (*personería jurídica*); it promises that the Land Fund will not to be applied to lands held by indigenous groups; and it also protects indigenous sacred and ceremonial sites from acquisition under the program. It does not, however, define procedures for indigenous land legalization, leaving Guatemala without any specific legislation doing so, despite the commitments in the Constitution and the peace accords.

### *Honduras*

In its Constitution of 1982, Honduras recognizes the responsibility of the state to “establish measures for the protection of the rights and interests of the indigenous communities that exist in the country, and especially of the lands and forests in which they live.” The Agricultural Sector Modernization and Development Law (Decree 31-92), passed in 1992, promised to title community lands to indigenous communities for free, but this provision has never been applied.

In 1995, Honduras ratified ILO 169, and in 1997 the state decreed the “creation of a commission to prepare a draft law to regulate issues related to the indigenous and tribal populations.”

Nevertheless, there has been very little progress in recognizing indigenous land rights. While some land has been adjudicated to indigenous communities in the last few decades, this has been done using the general agrarian reform laws, and not under a special land regime better suited to their traditional landholding practices. Serious contradictions between the agrarian reform laws and other regulations, especially those governing forests and environmental issues, have further slowed and weakened any progress toward adopting a real policy to recognize indigenous territorial rights in the country. The very few properties that have been adjudicated in favor of indigenous peoples, through the efforts of missionaries or, more recently, under the agrarian reform laws, have been granted as regular property under the civil code, which impedes the autonomy of the communities in managing their lands.

### *Mexico*

Historically, Mexico has been a leader on indigenous policy-making in Latin America. The 1917 Constitution, product of the first revolution of the 20<sup>th</sup> century in 1910, guarantees a wide range of rights to *campesinos*, within a framework of communal lands. Article 27 of the original text recognizes “communal property for tribes and peoples who *de facto* or *de jure* will retain their communal status, and who will continue to enjoy in common the use of the lands, forests, and waters that belong to them or that have been returned to them under the law of 1915.” Later, the concepts of tribes and peoples were replaced by the concepts of *ejidos* and communal populations which are still in effect today. From then on, the *ejido* was the official form of collective production of *campesino* communities, within which ethnicity was obscured.



From the beginning of the 19<sup>th</sup> century, there is documentary evidence of indigenous groups that insisted on the return of their ancestral lands and the recognition of their own forms of communal property. In 1990, Mexico was the first Latin American country to ratify ILO Convention 169. In 1992, Article 27 of the Constitution was reformed, allowing the parcelization and privatization of the *ejidos*, and the fourth Article recognized the multicultural composition of the country's indigenous population

In 1996, the Agreements of San Andrés were signed in Chiapas, and both sides of that conflict committed to the construction of a new national compact defined by the cultural differences between Mexico's citizens. Nevertheless, the expectations of the indigenous peoples were not fulfilled. The proposed law on "Indigenous Rights and Cultures," sent to Congress in 2001, was substantially modified, especially in terms of the autonomy, responsibility, and rights of the indigenous peoples. The Law characterizes indigenous peoples as entities of public interest, rather than legal entities, and it does not define important concepts such as territory, habitat, and lands. It also maintains the reform of Article 27, which allows for the alienation of ejidal lands.

### *Nicaragua*

In 1987, Nicaragua made great strides forward in formal recognition of indigenous land rights on the Atlantic Coast with the passage of a new constitution and the Autonomy Law (Law 28 of 1987). These legal instruments granted political and administrative autonomy to the Atlantic Region of Nicaragua, where the majority of the indigenous population lives, and they committed the national government to

recognizing the indigenous claims to the land they have traditionally occupied. Sixteen years later, Nicaragua has not recognized more than 5% of the lands claimed by indigenous groups. Although the Autonomy Law defines indigenous lands as inalienable, intransferable, unmortgageable, and imprescriptible, the recognition of indigenous lands that has occurred has been carried out under the normal agrarian laws, without any special regimen that integrates traditional indigenous usage and norms. While this may not affect the intangibility<sup>5</sup> of these lands, it clearly puts the indigenous groups in a vulnerable position in which they could easily lose their lands, either *de jure* or *de facto*. In December 2002, after a long struggle by the indigenous groups, the National Assembly approved a law which both defines the procedures for recognizing indigenous lands and provides a model for the administration and management of those territories. It is not clear whether there is political will in Nicaragua at this point to enforce this law.

### *Venezuela*

Venezuela adopted its current constitution in 1999, and it gives full recognition to indigenous rights. In 2002, the country also ratified ILO 169. Before this time, the state had recognized indigenous lands under the usual procedures for titling lands to *campesinos*. These lands were given in collective form, but since no legal recognition of indigenous groups existed, they were given to groups of particular individuals by name. In the absence of legislation providing for their management, these lands came under the Civil Code, and this imposed serious limitations on their use by indigenous groups. The new constitution, like the Ecuadorian, describes indigenous rights in the future tense,

leading to the conclusion by some that these rights must be embodied in specific laws by the national legislature before taking effect, and to date this has not happened. The Law for Demarcation and Guarantee of Habitat and Lands for Indigenous Peoples, passed in 2001, did not do so, although it did define some concepts and new strategies of the state on indigenous issues. Currently, the National Assembly has before it a new draft law, called the Law of Indigenous Peoples, introduced by indigenous legislators in November of 2002, which would define not only the procedures for recognizing indigenous lands, but also indigenous autonomy, the authority of indigenous representatives and their relationship to the state, as well as providing the administrative model for the legally recognized indigenous territories.

### **Countries with a Deficient Legal Framework**

These countries have not entered into higher-level agreements on indigenous land rights, and they have made little or no effort to respond to indigenous demands for legal recognition of their land claims. They include El Salvador, Guyana, and Suriname.

#### *El Salvador*

El Salvador is a good illustration of a country in which the legal framework protecting indigenous rights is tenuous. The 1983 Salvadoran Constitution establishes equal treatment for all people, regardless of nationality, race, gender, or religion. The Constitution also recognizes the existence of indigenous national languages which should be respected and protected by law. It also states that “the artistic, historic, and archaeological

treasures of the country form part of the Salvadoran cultural heritage, which is placed under the protection of the state and is subject to special laws for its conservation.” There is no explicit recognition in the Constitution of the existence of ethnic groups, indigenous peoples, or separate cultures as part of the national population, but the clauses mentioned above could help form a vague case for legal acceptance by the Salvadoran state of various cultures within the national polity. El Salvador did ratify ILO Convention 107 in 1958, but this document alone is not sufficient to support a policy of land recognition for indigenous peoples.

#### *Guyana*

Guyana’s 1980 Constitution, like El Salvador’s, contains general assurances of the importance of the different communities that comprise the national population, and along with its 1996 constitutional reforms and Legislative Act #11 of 2000, establishes the obligation of the state to create a Commission for Ethnic Relations. The Commission’s responsibility is to fight discrimination against and promote the development and equality of opportunity for persons belonging to the country’s minority ethnic groups. Several additional laws—the Amerindian Law of 1951, amended in 1976 and subsequently, and the Law of the Amerindian Lands Commission, passed in 1966—did establish legal recognition of indigenous land rights. However, the procedures, requirements, and institutions that these laws establish are so cumbersome, incomplete, and ambiguous, and grant so much discretion to the executive branch while leaving the indigenous groups without any ability to intervene in the process, that in practicality they have had very little effect. Guyana has never passed the laws

required to establish the above-mentioned Commission for Ethnic Relations, and it has not ratified ILO 169.

### *Suriname*

Laws dating to its period as a Dutch colony decree that indigenous settlements and Maroons<sup>6</sup> be respected, but this respect appears to have been more a question of common courtesy than a legal treatment. Suriname gained its independence in 1975, and its Constitution of 1987, reformed in 1992, does not explicitly recognize the ethnic or cultural diversity of the population, although it does prohibit any type of discrimination.

In 1992, to put an end to an armed uprising that had divided the country, the government and

rebel groups signed the “Agreement for Conciliation and National Development.” In this document, the government promised to pass a law recognizing the territorial claims of indigenous groups living in tribal communities, generating the institutions and procedures to ensure land titling and land access for both subsistence and market-oriented exploitation by indigenous groups. In this same agreement, the government promised to initiate a national dialogue on the ratification of ILO 169. None of these promises were ever fulfilled, and to date, Suriname lacks even the minimal legal framework necessary to recognize the existence of its indigenous peoples, let alone to guarantee their rights.



# 3 Common Problems in the Legal Framework for Recognition of Indigenous Lands

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There are many common threads among countries in the preceding discussion, both in the elements that lead to successful legal frameworks for the support of indigenous lands, and those that lead to less successful outcomes. Common problems affecting the legal framework for indigenous lands in Latin America include the following:

- **Failure to develop the body of laws necessary to operationalize the rights guaranteed by the constitution or international treaties.** For example, in Ecuador, while the Constitution guarantees indigenous land rights, no law has been passed to define how they are to be granted. The only course of action available is to use the Civil Code, which is actually in conflict with some constitutionally guaranteed characteristics of indigenous land, such as inalienability.
- **Time-consuming, overly complex, or poorly conceived procedures for gaining legal recognition of indigenous lands.** In Bolivia, for example, the procedures required in order to resolve conflicting land claims and assign indigenous land rights are extremely slow and burdensome. In the case of Peru, indigenous groups seeking their lands must first be legally incorporated, a procedure that can itself take as long as gaining the recognition of the indigenous territory.
- **Imprecision in the writing of indigenous legislation.** In many cases, the legislation uses terms that are not defined, and which are imprecise in meaning, or to which different definitions have been given in different cases. Examples of this problem include the use of the concept of “autonomy” and the mention of “renewable” and “non-renewable natural resources,” all of which can be interpreted in various ways.
- **Failure to carry out adequate consultation with indigenous communities.** While a few states, such as Ecuador, Colombia, and Peru, have tried to define participation in a meaningful way, most states have not engaged in meaningful consultation with indigenous communities over issues that are in their vital interest. Often consultation is in reality simply the act of informing indigenous representatives of programs that are already approved and about to begin, without giving them time to study the proposals, inform their own communities, or properly comment on them.
- **Lack of legal definition of ownership rights over, and use and administration of, natural resources in indigenous territories.** There is nothing intrinsically difficult about precisely defining the rights indigenous peoples have over natural resources on their lands. Nevertheless, in the vast majority of

the Latin American countries this legal definition is either ambiguous or completely lacking. A contributing factor to this situation is probably the desire of states not to lose control over the income from concessions of valuable natural resources. Where indigenous land rights are not recognized, rights over natural resource use are unlikely to be legally defined. Conversely, where indigenous land rights are well defined, such as in Colombia and Panama, indigenous rights over natural resources have been recognized without great controversy.

- **Lack of adequate legal definition of the management of indigenous territories that overlap with national parks or other protected areas.** In many countries, the

areas that harbor the most important biodiversity are the ancestral lands of indigenous peoples. Since the region's legal system cannot recognize two titles to the same land, there is often a conflict between areas that have been declared some type of protected area by the national government, but which are claimed as ancestral territory by indigenous people. While a clear solution would be to recognize indigenous land with restrictions that would preserve its biodiversity values, states have been reluctant to do so, perhaps because, as mentioned above, they fear losing control of the invaluable natural resources of those areas. Nevertheless, recently Colombia and Bolivia have made some progress towards resolving these contradictions, which gives hope that they are not insoluble.

# 4 Case Studies in Indigenous Land Tenure and Its Implications for Natural Resources Management

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In this section, we will focus in on four of the countries with superior legal frameworks for indigenous land tenure—Colombia, Costa Rica, Panama, and Peru—and examine how the differing bodies of law in each country contribute to or undermine the ability of indigenous people to manage their natural resources. The laws governing land rights recognition in these countries have several key characteristics which determine the degree of security and authority the indigenous people exercise over the land the state has recognized as theirs. These include the following:

- **Land tenure regime:** The character of the right over land that has been recognized, which can range from outright (fee simple) ownership through several types of restricted ownership to simple use rights (usufruct)
- **Territorial recognition:** Recognition of land in a form that corresponds to the concept of an indigenous territory, as defined by ILO 169
- **Natural resources rights:** The sorts of rights over natural resources ownership, administration, and use granted as a consequence of the land right
- **Tenure security:** The degree of security of the type of land title

- **Autonomy:** The amount of autonomy in managing their own affairs that is accorded to an indigenous group as a consequence of their land rights, including legal recognition as an indigenous group (*personería jurídica*), and their ability to use their own traditional legal and justice systems
- **Legal recourse:** The legal actions to which they have recourse in order to defend their lands.

These characteristics also shape the ability of indigenous peoples to participate actively in the conservation of the ecosystems and natural resources on their lands, and they have been repeatedly identified by indigenous organizations as the key attributes necessary for their acting as effective agents of conservation.

Below, we examine each of these characteristics for each of the countries and analyze the implications for indigenous management of their lands. This information is summarized in Box 3.

## Land Tenure Regime

In **Costa Rica**, the laws and regulations that treat the subject of indigenous land tenure refer to indigenous lands as “reserves.” Traditionally, in Latin America this word has referred to lands dedicated to a specific purpose, but over which the state retains final ownership. During the

**Box 3**  
**Key Characteristics of Indigenous Land Tenure, by Country**

	<i>Costa Rica</i>	<i>Panama</i>	<i>Colombia</i>	<i>Peru</i>
Land tenure regime	Fee simple.	Fee simple.	Fee simple.	Fee simple over agricultural lands; usufruct over forest lands.
Territorial recognition	Territories, according to ILO 169, but in practice very few of the recognized indigenous areas could be described as territories.	Not legally defined, but in practice indigenous lands function as territories.	Territories, according to ILO 169. In practice, indigenous lands are recognized as reservation lands; courts have supported full indigenous control as a communal territorial space.	Territories, according to ILO 169. In practice, indigenous lands do not function as territories, due to reduced size, limited rights over forest land, and the fact that lands can be bought and sold.
Natural resources rights	Resource property rights not addressed in indigenous laws; forest property rights according to Civil Code; guaran teed exclusive rights in use and administration of resources on their lands.	No clear legal definition. In practice, wide power to administer and use natural resources on their lands.	No clear legal definition, but the courts have supported exclusive rights of indigenous communities to administer and use the natural resources on their lands.	Legally, the state owns all renewable and non-renewable resources. Indigenous communities have exclusive rights to use resources on their land. Communities share responsibility for administration of resources with the state.
Tenure security	Strong tenure security; no apparent contradictions with other laws.	Very strong tenure security, since each comarca is created by its own individual law.	Strong tenure security; no apparent contradictions with other laws.	Laws provide for strong tenure security, but in practice, government norms and plans are detrimental to the security of collective landholdings.

*(continued)*

**Box 3 (continued)**  
**Key Characteristics of Indigenous Land Tenure, by Country**

	<i>Costa Rica</i>	<i>Panama</i>	<i>Colombia</i>	<i>Peru</i>
<b>Autonomy</b>	Legal incorporation of indigenous groups is recognized; customary law for internal affairs; wide powers to administer their lands and community affairs.	Legal incorporation of indigenous groups with <i>comarcas</i> is recognized; wide powers to administer their lands and internal affairs according to customary law; recognition of <i>comarcas</i> as political and administrative entities.	Legal incorporation of indigenous groups is recognized; wide powers to administer their lands and internal affairs according to customary laws; reservations are seen as political and administrative entities.	Legal incorporation of indigenous groups is recognized; formally, wide powers to administer their lands and internal affairs according to customary laws, but in practice the state exercises substantial control.
<b>Legal recourse</b>	Same rights as other citizens. Various institutions charged with defending indigenous rights.	<i>Comarca</i> authorities are public servants and can initiate judicial actions. Various institutions charged with defending indigenous rights.	Indigenous groups can initiate judicial actions. Various institutions charged with defending indigenous rights.	Same rights as other citizens. Little judicial record of upholding indigenous rights. Various institutions charged with defending indigenous rights.

first phase of indigenous land recognition in Costa Rica, it appears that recognized lands fulfilled this traditional role as reserves. But Law 6172 of 1977 decrees that indigenous lands are “the property of the communities,” and subsequent Supreme Court decisions have confirmed the full ownership of their lands by indigenous communities.

Similarly, in **Panama** in the years preceding the Constitution of 1972, recognition of indigenous territories was carried out under the legal concept of reserves, and the law made clear that final ownership rested with the state. Some of

the Kuna territories in San Blas were recognized in this fashion. The 1972 Constitution, however, guarantees indigenous communities “the reservation of the necessary lands, and communal ownership of those lands, to achieve their social and economic development,” and all the laws that have created *comarcas* have done so recognizing full indigenous ownership.

In **Colombia**, all lands that are recognized to indigenous peoples are recognized in the form of *resguardos*, or indigenous reservations, a legal concept that dates to colonial times and which has been given full recognition in the

Constitution. Historically, these reservation lands have always been seen as belonging to the indigenous groups. The highest tribunals in Colombia have repeatedly acknowledged the full ownership of the indigenous peoples of their lands.

In **Peru**, the current Constitution clearly recognizes the different sorts of property in land (individual, communal, and associative), but does not state which type is appropriate for indigenous communities. The first Law of Native Communities (1974) clearly stated that indigenous communities would have full property rights over their lands. But the second Law, which is still in force, makes an exception for forest lands, which are to be “ceded in usufruct” to indigenous groups, while ultimate ownership is reserved to the state.

### **Territorial Recognition**

Three of the four case study countries (Costa Rica, Colombia, and Peru) have ratified ILO 169, and consequently have formally accepted that indigenous groups are to be considered peoples and that their lands should be recognized under the legal concept of territories as defined in that Convention. While there is not complete consensus on what this actually means, for purposes of this paper, we consider that the status of peoples means that indigenous groups are associations that are perpetual and not transitory, in contrast to legal associations such as cooperatives, which can be established and dissolved over time. The legal concept of indigenous territory is one in which indigenous peoples retain full ownership of their lands. Territories have the character of being inalienable, unmortgageable and imprescriptible, so that indigenous territories, like the peoples that own them, are perpetual in nature.

Among our case studies, **Costa Rica** and **Colombia** have ratified ILO 169, and have fulfilled their obligations vis-à-vis this international agreement by embodying in their laws or constitutions language guaranteeing that indigenous lands are inalienable, unmortgageable and imprescriptible, making them virtually untouchable legally. Although **Peru** has also ratified ILO 169, its current constitution gives indigenous people the right to buy and sell their lands, and although it states the imprescriptible character of the lands, limitations occur in the event that lands are abandoned; the territoriality of indigenous lands proclaimed in ILO 169 is not therefore supported by Peruvian law. **Panama** is a particularly interesting case, in marked contrast to Peru. While Panama has not ratified ILO 169, the body of laws that has supported the establishment of the *comarcas* clearly demonstrates that Panama, more than any other Latin American country, recognizes the territorial nature of indigenous lands and the status as peoples of indigenous communities. This can be deduced from the size of the territories recognized to them, their authority over use and management of their natural resources, and from the autonomy of their self-government within their territories.

### **Natural Resources Rights**

The majority of indigenous peoples living in forest areas depend on the natural resources of their lands to fulfill their subsistence needs. Hunting, fishing, gathering of forest products, and small garden plots still form the basis of their household economy. The security and permanence of their control and use of the natural resource base is actually more important to most indigenous groups than direct ownership of the land itself. The demand for

ownership, in fact, derives from the need to ensure their access to these resources, so it is of particular importance to examine how the different national-level legal regimes handle this aspect of indigenous ownership.

In **Costa Rica**, the legal norms do not expressly state whether the state or the indigenous groups control natural resources on indigenous lands. The Indigenous Law and the Forestry Law seem to indicate, however, that at least the forest itself would belong to the titled indigenous communities, since titled lands are considered to be under private ownership, which includes the ownership of forests on those lands. The indigenous law has two other key provisions that govern natural resources rights. One says that “the communities will have full legal power to acquire rights and contract obligations of any type,” while the other states that “only these indigenous people will be able to construct houses, fell trees, exploit timber resources or plant crops for their own benefit.” These provisions demonstrate that the indigenous communities have wide administrative power over natural resources on their land, and that the right to utilize those resources is exclusive to their communities.

In **Panama**, it is not yet clear if the state recognizes the authority of indigenous communities over natural resources on *comarca* lands. The Constitution defines the goods and rights of the State without referring to forests and wildlife, which would seem to imply that on private lands, the titleholder would have the right to those natural resources. The laws that recognize the *comarcas* do not explicitly define authority over natural resources, and the Organic Law (*carta orgánica*) of most of the *comarcas* also do not address this topic. However, the Organic Law of the Emberá-Wounaan *comarca* in the Darién states that “the

natural resources that exist in the *comarca* are the collective patrimony of the Emberá-Wounaan people.” Under the assumption that this provision is not meant to give a right to the Emberá-Wounaan that other indigenous groups do not enjoy, this statement clearly indicates an intention to grant indigenous communities control over at least some natural resources. Finally, all the laws and regulations of the *comarcas* do grant a high degree of autonomy and authority to the indigenous communities in the administration, management, and use of natural resources on their lands.

In **Colombia**, neither the Constitution nor the laws clearly designate whether the indigenous people or the state has ownership of natural resources in indigenous territories. Nevertheless, the Constitutional Court has interpreted provisions in the Constitution and ILO 169 to conclude that indigenous groups do own natural resources on their lands, unequivocally stating that “the recognition of the right of collective property of the *resguardos* by indigenous people includes their ownership over renewable natural resources.” In terms of administration, management, and use of natural resources, the Constitution itself gives administrative authority to the indigenous authorities, also stating that one of their explicit functions is to “ensure the preservation of the natural resources” on their lands. Additionally, the regulations that establish the management and governance systems of the *resguardos* recognize specific responsibilities of the indigenous authorities in natural resource management, which should be carried out according to the customs and use patterns of the communities.

**Peru** is one of the Latin American countries that categorically decrees in its body of law that both renewable and non-renewable natural resources



are the “patrimony of the Nation,” and that the state is sovereign in the use of those resources. Both the Law of Native Communities and the Law of *Campesino* Communities give local communities exclusive rights to utilize the natural resources on their lands and a certain amount of decision-making power over those resources, but they are severely constrained within the limits of their traditional use patterns. Formally, the responsibility for administering those resources is shared between the local communities and the state.

### Tenure Security

There are many elements that contribute to the relative security of land tenure, but here we will focus on two: whether the titles have been given following the proper regulations and procedures for that purpose, and whether those norms that govern land recognition are in conflict with other laws or regulations within the legal regime of a particular country.

**Costa Rica** is a simple case in which the responsibilities and procedures for indigenous land recognition are clearly stated in the body of law and regulations. There do not seem to be any serious contradictions or ambiguities between these responsibilities and procedures and other laws and regulations, such as could lead to legal questioning of titles granted to indigenous groups.

In **Panama**, the Constitution defines as the responsibility of the state the recognition of the land claims of indigenous groups. The state has chosen to fulfill this responsibility through the emission of a special and specific law for each *comarca*, which has served to make these titles very secure. One small area of ambiguity, however, is the lack of definition of rights and responsibilities when an indigenous area

overlaps with a protected area, which is not an uncommon problem; this could in some cases affect the rights indigenous groups have in those areas.

In **Colombia**, the procedures for recognizing indigenous lands have been defined in a body of law dating back to the 19<sup>th</sup> century and including constitutions, international agreements, and the various agrarian laws, with their special provisions for indigenous communities. The legal solidity of the *resguardos* created under this body of law has been tested in various court cases, and these cases have been uniformly resolved in favor of the indigenous communities. As in the case of Panama, there is a slight ambiguity in the case of lands that are both protected areas and indigenous lands; while a number of legal judgments have clearly established the supremacy of indigenous titles, indigenous rights over natural resources use in those cases are unclear.

In **Peru**, as in Colombia, there is a relatively long history of recognition of indigenous land rights, as described above. In addition to the procedures that have been defined by the law for recognizing indigenous lands, indigenous groups seeking title must first establish their legal incorporation through an entirely separate process. These two legal procedures are so complicated and burdensome that it can take years, even decades, to complete them. All the titles that have been granted to indigenous communities in Peru to date have followed these procedures, which would seem to ensure that the tenure they grant is quite secure. But two factors mentioned previously may impinge upon the seeming solidity of the titles. One is the fact that the communities have only use rights over forested lands, and not ownership rights. The other is the open contradiction



between the responsibility for perpetual protection of indigenous land rights guaranteed by ILO 169 and the provisions in the Constitution of 1993 that allow for the dissolution of any sort of association, including indigenous groups, which would directly impact their land rights.

### **Autonomy**

The autonomy demanded by indigenous peoples as essential to their being able to exercise their fundamental rights is nowhere legally defined, but the following conditions are commonly supposed to comprise it:

- The ability of indigenous groups to legally incorporate, so that they can exercise their rights and contract obligations as a group
- The ability to use their traditional legal norms and system of justice
- The ability to decide their own form of internal government and to manage their relations with external groups
- The ability to participate in analyzing and deciding on issues that affect the group's interests.

In **Costa Rica**, the Indigenous Law states that "indigenous communities have the legal capacity to acquire rights and contract obligations of all kinds." It further adds that "the population of each one of the reserves constitutes a single community, administered by an executive council, representative of the entire population...The reserves will be governed by the indigenous people using their traditional communal structures or the laws of the Republic that are applicable."

In the case of **Panama**, all the provisions that govern the autonomy of indigenous peoples are

found in the various laws and regulations creating and administering the *comarcas*. These uniformly recognize the legal incorporation of the indigenous communities; the ability of the communities to administer their territories according to their own norms and traditional authorities; their right to manage and use their natural resources, subject to applicable national law; and their right to participate in initiatives related to the improvement and development of their communities. Although the laws of the *comarcas* and their Organic Laws recognize the application of ordinary legal procedures within the indigenous territories, traditional authorities are recognized as having a role to play in those areas of conflict over which they have traditionally had authority. The *comarcas* are seen as political and administrative entities tied to the political structure of the state, and their authorities are seen as fulfilling a public function.

In **Colombia**, by law and by tradition, indigenous communities are seen as inherently possessing legal incorporation, without having to formally apply for that status. To gain recognition of this status, they simply have to present documentation of the naming of their leaders, a document which also serves to give legal recognition to those leaders. This is true for all indigenous communities, with or without *resguardos*. Those with reservation lands are acknowledged to have these further rights: the right to choose their own authorities; to administer and govern their territory through those authorities and to manage and use its natural resources; to exercise rights and contract obligations in relation to the administration of their territories; to maintain relations and enter into agreements with outside entities, public or private, in issues related to the interests of the communities; to define their own programs for the development and improvement of their

communities; and to fulfill those legal functions that have traditionally corresponded to them.

In **Peru**, the Constitution states that “native and *campesino* communities have legal existence and incorporation. They are autonomous in their organization, their communal work, and the use and free disposition of their lands, as well as in their economic and administrative functions, within the framework of the law.” The various laws that govern indigenous and *campesino* affairs give them ample capacity for decision-making in their internal affairs, including that of elaborating their own statutes for the organization and functioning of their communities. The regulations of the Law of Native Communities establish the General Assembly of community members as the maximum authority in those communities and states that the “method of decision-making will be consistent with the traditions of the community.” Furthermore, the Constitution grants to indigenous authorities the right to “exercise jurisdictional functions within their territories in accordance with customary law, so long as this does not violate the fundamental rights of the individual.”

Although the law apparently gives indigenous people in Peru a great deal of autonomy, the reality is somewhat different. The state has created such a complex body of regulation of these general provisions in the law that in fact it exercises a great deal of control over indigenous communities in their internal governance and their development initiatives. This is especially true in the management of natural resources in the indigenous territories.

### **Legal Recourse**

There are various factors that influence the stability of property title to land within any

legal system. In addition to the factors examined above in the section on tenure security, another important factor are the legal instruments or legal recourse to which the titleholders have access to prevent the violation of their property rights, or that help them re-establish their rights in the case of violation. Below we will examine the situation of legal recourse in each of the case study countries.

Like all other citizens, indigenous people in **Costa Rica** have the right to turn to the courts to defend their rights, acting in this case as a legally recognized group and not merely as individuals. For more than three decades, the state in Costa Rica has empowered various institutions to act on behalf of indigenous communities to protect or promote their rights. Among the most important is the National Commission for Indigenous Affairs, or CONAI, which is comprised of the President of the Republic, different universities, ministries, and representatives of the indigenous communities. One of the several functions of this body is to “guarantee respect for the rights of indigenous minorities, ensuring that the state enforces the individual and collective land rights of the Indians.”

In **Panama**, the law gives the indigenous authorities the right to defend their land rights through legal action. Panama has also created various institutions with the responsibility to ensure the rights and defend the interests of indigenous people. Without doubt, the most important of these is the Indigenous Affairs Commission of the Legislative Assembly, which oversees the study and design of indigenous land proposals, as well as generally defending the fundamental rights of indigenous peoples. Another recently-created institution is the National Council on Indigenous Development (CNDI), part of the president’s office, which is a

consultative and deliberative body on policies and public actions regarding indigenous people.

In **Colombia**, indigenous communities have some very strong instruments at their disposal to assure the protection of their territorial property rights, or to vindicate those rights in the case that they are violated. These include the widely-recognized legal solidity of the institution of the *resguardo*; the existence of efficient legal resources for making claims through the court system, introduced by the 1991 Constitution; the strong public consciousness about indigenous rights, as manifested in a series of legal decisions in favor of indigenous rights by the Constitutional Court over the years; and the recent establishment of administrative bodies with responsibility in the defense of the fundamental rights of indigenous peoples, including land rights. Nevertheless, the internal conflict within Colombia which has existed for decades and has recently worsened, has affected many indigenous areas, and this puts at grave risk the effective control of many of the indigenous communities over their territories.

In **Peru**, indigenous communities can utilize the legal recourse that all Peruvian citizens have to defend their fundamental rights. Peru has also created several institutions specifically dedicated to defending indigenous rights. Among these are the Public Defender, which has a special program for the defense of the Native Communities of the Amazon; the Technical Secretariat of Indigenous Affairs (SETAI), under the Ministry for the Advancement of Women and Human

Development; and the Indian Affairs Commission, a multi-sectoral group in which various government agencies and representatives of indigenous communities participate. An important challenge in terms of legal recourse for indigenous people in Peru is the limited and unsuccessful experience they have had in this field, since there is no history of the judiciary upholding their rights in the past.

### Conclusions

As the case studies amply illustrate, the legal situation of indigenous land rights in the countries of Latin America is highly varied. There is no single pattern of legal rights that guarantees a successful outcome on the ground for indigenous land tenure; rather, different combinations of rights can yield strong or weak results, depending on the context and the extent of political will. Nevertheless, the case studies do show that legal systems more strongly support indigenous land rights when they take into account not only land ownership itself, but also the security of that ownership and whether it is conceptualized within the framework of the concept of an indigenous territory. Land rights are also stronger when the legal system concurrently recognizes other rights over natural resources on indigenous lands and the rights of indigenous peoples to manage their own affairs. Recognizing the land rights of indigenous peoples then is not a simple question of granting title, but involves addressing a more complex set of interrelated legal, social, and political issues in order to be effective and secure.



# Notes

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1. *Inalienable*: Incapable of being lawfully alienated, surrendered or taken away by another.
2. *Imprescriptible*: Incapable of prescription. (*A property which is held in trust is imprescriptible; that is the trustee cannot acquire a title to it by prescription; nor can the borrower of a thing get a right to it by any lapse of time*).
3. *Untransferable*: Incapable of being transferred from one person to another.
4. *Unmortgageable*: Not susceptible of being mortgaged or given as collateral to access credit.
5. *Intangibility*: Something that cannot be touched.
6. The Maroons are the descendants of Black slaves brought as plantation laborers from Africa to Surinam in northeastern South America, starting in the last half of the seventeenth century. The ancestors of the major Bush Negro tribes escaped from the plantations of coastal Surinam to the forests of the interior in the late seventeenth and early eighteenth centuries. There they developed distinctive societies reflecting a blending and adaptation to local conditions of various African socio-cultural patterns, and incorporating strong Amerindian influences in their material culture—for example, horticultural practices, hunting and fishing techniques, crafts such as basketry, the use of therapeutic plants, and so forth.



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