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Making land management
work for Indigenous
economic development

**Lorena Figueiredo,
Chris McDonald**

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Making land management work for Indigenous economic development

By: Figueiredo, L., and McDonald, C.

This paper establishes an analytical framework for understanding and assessing Indigenous economic development and well-being in a place-based context. It identifies the importance of flexibility in geographic scale for organising policies for Indigenous communities, development objectives that reflect the self-determined and informed choices of Indigenous peoples, and implementing strategies for development based on the identification of local assets.

Key words: Indigenous peoples, land of use governance, benefit sharing, self-determination, land rights, duty to consult

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Executive Summary

- Land governance encompasses how public policies influence land use (e.g. legislative frameworks, regulatory and tax systems, and public investment).
- Examining Indigenous land use issues from a governance perspective helps to build an understanding of how different policies influence land use and regional development outcomes, and how Indigenous peoples shape these processes.
- Indigenous lands can be defined as territories and waters occupied and used by Indigenous groups, in accordance with their traditional way of life. Land is critical to the reproduction of livelihoods, health, language, culture, identity and spiritual values of Indigenous peoples.
- Legal rights for Indigenous peoples fundamentally shape their access, ownership and use of land. These rights, expressed in international law, cover self-determination and the duty of states to consult with the intent of obtaining free, prior and informed consent.
- States have different regimes for recognising Indigenous land rights in domestic law and therefore varied regimes under which land is governed. Three ideal types of Indigenous land management are identified, along with the challenges and lessons associated with each:
 - **Self-governance of Indigenous land:** The Indigenous group has been empowered by the State to have authority over the management of Indigenous lands and natural resources located within it;
 - **Joint land management model:** The Indigenous group shares the responsibility and the authority over land issues with government authorities (e.g. a National Park); and,
 - **Co-existence:** Indigenous groups have designated use rights and are considered an interested party in land management issues.
- Across these three types conflicts over land use may arise. To prevent and address them, well-functioning governance systems are necessary. They also serve to better allocate and distribute resources. Policy makers need to consider power asymmetries between Indigenous communities and governments and corporations, and the efficacy of mechanisms to negotiate treaties and benefit-sharing agreements.
- Indigenous land governance should also create opportunities for Indigenous peoples to determine their development path and participate in decision-making processes that affect them. These elements can support the implementation of regional and rural development policies that are more inclusive of Indigenous peoples.

1. Introduction

This paper provides some initial considerations about Indigenous lands, their connection to regional economic development and how different forms of management can foster such links. It draws on academic and policy literature about land rights, land management and natural resources, with examples of mechanisms, challenges and good practices. The objective of this paper is to set the foundations to understand how Indigenous land management works across different countries.

Indigenous lands are defined as the territories and waters that Indigenous peoples traditionally use or occupy. Traditional use or occupation is the one according to cultural practices and customs, and which is necessary to the continuous reproduction of Indigenous livelihoods and beliefs. There is no official international definition of Indigenous peoples, the fundamental criterion being self-identification. Besides self-identification, and considering the diversity of Indigenous peoples, some common features are historical continuity with pre-colonial societies, strong link to territories and surrounding natural resources, and forming non-dominant groups of society with distinct language, culture and beliefs. For more on the issue of identification, see another Working Paper in this series: *Indigenous economic development and well-being in a place-based context*.

The paper is divided in four sections. The first one discusses how land can be an asset for community economic development in a way that integrates economic, natural and cultural values, and gives some indication about the specificity of Indigenous lands. The second section outlines the nature of Indigenous land rights and sets the international rights framework around this issue. The third section identifies key features of models for governance of Indigenous land use, together with common challenges and lessons for the future. Different institutional arrangements of self-governance, shared management and participation in decision-making are discussed. The fourth section refers to how revenue-sharing agreements in the context of natural resources extraction projects may be used in the benefit of Indigenous peoples.

2. Land as an asset and how it is governed

Land use matters for many of the most important policy questions of our time: environmental sustainability, CO₂ emissions and biodiversity, and public health, for example. Land is also a critical asset for community economic development and is a major contributor to national wealth. In OECD countries, land and buildings constitute by far the most important share of wealth, making up 86% of total capital stock (roughly evenly split between land and property), with a corresponding value of USD 249 trillion (OECD, 2017^[1]). Thus, any changes to the value of land and property have important consequences for the distribution of wealth and for investment. Beyond this, land is a rich source of natural resources and land ownership in turn can impact access to subsoil rights for resource exploitation. Land use also matters because people feel attached to land and have cultural links to it. Given these dynamics, how land is owned, managed and regulated is an often complex policy issue, with wide ranging and potentially long term consequences for communities. Further, once land is developed in a particular way, it can be very difficult to change these uses in the future.

The manner in which land is owned, used and managed is a critical factor for individual and collective well-being, environmental sustainability, economic growth and social inclusion. This is particularly important for Indigenous Peoples because of how land is linked to Indigenous culture, identity, spirituality, ways of life, history and self-determination. Rights over land – be they either individually or collectively held – enable Indigenous peoples to realise the development and/or preservation potential of land and related natural resources, including the ability to negotiate benefits with investors to create sustainable business and employment opportunities.

While land rights fundamentally structure a group's self-determination, they alone do not determine how this critical resource is managed. Wider governance frameworks including legislation on environmental protection, rights to consultation and natural resource exploitation also shape how land is used and managed. Beyond this, there are partnerships, norms and other institutional factors that interact to shape such practices. Therefore, making land management work for Indigenous economic development is a matter of both legal frameworks, norms and broader institutional/governance relationships.

Land as an asset—economic, natural and cultural values

In classical economics, land was considered to be “the original and inexhaustible gift of nature” (Turner, 1977, p. 2^[2]) and was counted as one of the three basic factors of production, along with labour and capital. It was and is fundamental to virtually all productive activity, and to a great deal of goods and services. Its total supply was held to be relatively fixed by nature¹ and could not be augmented or diminished in response to higher or lower prices for it (Samuelson and Nordhaus, 1989^[3]). Yet while the supply of land in a physical sense is fixed, the supply of land for different uses is not. Almost everywhere, it is determined by policies and regulations.

Land combines characteristics of resources that are used by all (“public goods”) and resources such as forests and pastures whose consumption by some may prevent others from using them (“common pools”). However, it can also be reserved for private use which can generate substantial positive or negative effects on others (“externalities”). The precise boundaries between its public, common and private characteristics are chiefly a function of

how property rights are defined and how they interact with other forms of regulation such as environmental laws and regulations. The impact of land uses on individuals or communities requires specific governance mechanisms to mediate rights to development to ensure that one individual or group's actions do not cause unintended consequences for others. This is a critical issue for Indigenous communities, particularly where their collective or individual rights over land are not well defined or where fair and transparent mechanisms to prevent and manage land use conflicts are missing.

Much of the wealth derived from land takes the form of surplus value ("resource rents"), but land also has value in its natural state (landscapes, biodiversity and eco-system services). Households use it for housing and "consume" it in the form of natural amenities. Firms use it in production of goods and services. The state does all of these things in various ways and uses it to provide public goods – a role that has become more prominent as a result of growing awareness about the role of land management in everything from flood prevention to sustaining biodiversity and producing energy from renewable sources. The economic valuation of some of these uses is relatively straightforward, but the valuation of others (particularly amenities) remains much more controversial. There is often a lack of balance in how these various uses are valued by societies and addressed in public policy – e.g., compensation for maintaining lands and environments with rich biodiversity.

Moreover, land has social and cultural value. Access to or ownership of land can orient power relations including rules for leadership, marriage, inheritance and group belonging. Land has spiritual or religious meaning in many societies. Akin to natural state, the social and cultural aspects of land can be difficult to assess and measure under an economic perspective, as they relate to immaterial goods such as heritage, kinship, social prestige, religion and belief.

Indigenous lands can be defined as territories and waters traditionally occupied and used by Indigenous peoples. These territories include spaces for housing and social events, for cultivating food, harvesting and hunting and sacred spaces for rituals and connection with their ancestry. It commonly belongs to the Indigenous group as a collective, which often includes deceased members and spirits. Nonetheless, individuals or families may in some cases own or occupy specific plots of land, having the rights to use and transfer them to others in the community.

The relationship of Indigenous peoples with their territories is marked by spiritual and cultural beliefs and is thus fundamental for cultural reproduction (Small and Sheehan, 2008, p. 110_[4]). The lands traditionally occupied by Indigenous peoples go beyond the area used for the material reproduction of the group (housing, horticulture, hunting, grazing and social gathering) to include broader social aspects such as rituals, spiritual practices and symbiosis with nature. Immaterial, non-commercial aspects are very important in the conceptualisation of Indigenous land.

This unique relationship with land makes land rights crucial to their survival and identity as a group. Indigenous lands compose a matrix of rights, obligations and community relationships with ethical, spiritual and customary grounds. The manner in which land is thought about and used by Indigenous communities goes beyond that of conventional conceptions as land as an economic asset. Given this, it is important that governance arrangements and legal frameworks work for Indigenous communities too.

How land is governed

How land is governed is fundamental to the rights of Indigenous peoples over their traditional lands, which are a key asset for community and economic development, on their own terms. The remainder of the paper examines these rights frameworks in detail. However, it is also important to consider where Indigenous land rights fit within the overarching system for which land is governed in a country. Countries have at once spatial and land use planning systems to manage how land is used, alongside a number of sectoral policies that also impact land use in such areas as energy, infrastructure, agriculture and forestry. There are further a number of policies – especially fiscal policies – which may not target how land is used but that nevertheless impact upon it (e.g., agricultural subsidies).

In general across the OECD, there is a nested hierarchy of spatial plans from the national, regional and down to the local levels. National level plans tend to give very general direction for spatial developments in a country including the location of major infrastructure connections, areas of cross border flows and mapping of areas of national importance for environmental protection or resource exploitation. As such, national level plans can intersect with sectoral policies in such areas as energy and forestry etc. Regional plans tend to provide a greater level of detail in such thematic areas as the environment, transportation and housing. Finally, local level plans – those at a municipal or community level – provide the greatest amount of detail on permissible uses for plots of land, mapping for example the placement of sewer lines and roads, determining where housing can be built and where public amenities should be provided for forecasting future need.

The manner in which Indigenous peoples and interests are reflected in planning at each of these scales will differ. In some countries, such as Sweden, the national government has identified the reindeer herding practices of the Indigenous Sami people as a matter of national interest and access to grazing lands – which cover around half of the Swedish territory – are critical for protection of this interest. However, at the same time, Sweden's national interests include valuable minerals in the sub-soil, and subsequently mining activities, which can often detract from the practice of reindeer herding. Hence, there is a need to manage these often competing uses in a manner that is fair and transparent.

Indigenous rights to land and self-determination indicate that the voices of Indigenous peoples are included in decision making on land use issues. These rights are – or at least should be – reflected in the framework legislation for major infrastructure and resource exploitation. This framework legislation structures the rules of engagement for consultation and veto power, managing competing uses and assessing compensation.²

Indigenous communities being diverse, the manner in which interactions are structured within planning systems and sectoral policies differs considerably. Indigenous communities in urban areas will face different conditions and have different interactions with the governance of land use in a country than those that are rural and remote. There are long held critiques that overarching systems of land use governance are not adequately sensitive to or compatible with the governance and use of land by Indigenous peoples (Porter et al., 2017^[5]; Jojola, 2008^[6]; Porter and Barry, 2016^[7]).

Furthermore, land tenure policies have had long-lasting, often undesired impacts on Indigenous land development. In the United States, for instance, the Dawes Act of 1887 authorised the fractioning of Indigenous land into individual allotments. The small size of allotments has, over the years, led to fractioned ownership, aggravated by the fact that Indigenous co-owners cannot use or possess a property jointly. This ‘checker board’ pattern prevents owners to make productive use of their lands (Shoemaker, 2014^[8]).

The need to better address these issues has led to a growing field of Indigenous planning which examines how land can be more effectively managed both by Indigenous communities and peoples but also how the majority system of land governance in a country can be more cognisant of desired Indigenous outcomes (Natcher, Walker and Jojola, 2013^[9]; Jojola, 2008^[6]). As described by Porter et al. (2017^[5]), this entails a ‘third’ space for Indigenous planning to connect with state-based planning including interactions with business and industry (Figure 1). It is envisaged that facilitated partnerships, collaboration, institutional/statutory connectors between the two planning systems has the potential to generate dialogue, reconciliation and collective action. As will be discussed in the following sections, difference types of Indigenous rights regimes structure opportunities for this 'third' space to develop.

Figure 1. A 'third' space for Indigenous planning



Adapted from: Porter L. et al (2017^[10]), Indigenous Planning: from Principles to Practice, Planning Theory & Practice, vol. 18(4), p. 639-666.

3. Land rights of Indigenous peoples

International rights of Indigenous peoples

Treaties and conventions, general principles of law and custom are primary sources of international law. Judicial decisions and juristic writings are subsidiary sources. The main treaties and conventions of international law on Indigenous peoples' rights are the Convention 169 of the International Labour Organisation (ILO), the United Nations International Covenant on Civil and Political Rights (ICCPR) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The ILO Convention and the UN Covenant have binding effects for ratifying states, while the UN Declaration expresses a political commitment from the states that vote in favour of it, which is not legally binding.

The main rights ensured by these documents that matter for land use issues are land rights, but also right to self-determination, right to development, right to remedy and the right to participate in decision-making. Cultural rights, which involve language, spiritual beliefs and practices such as hunting and fishing, are also relevant.

The ICCPR has two provisions that touch upon land rights: the right of all peoples to self-determination (Article 1) and the protection afforded to 'minorities' to enjoy their own 'culture' (Article 27). Without an explicit mention to 'indigeneity' or to land rights, these provisions have nonetheless been used to support the recognition of Indigenous peoples' rights and claims to land (Scheinin, 2004^[11]).³

The ILO's 1989 Indigenous and Tribal Peoples Convention (**C169**), which has been ratified by 22 countries, recognises the right of Indigenous peoples to maintain their cultural and political integrity. This Convention revised the 1957 Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (**C107**).⁴ The ILO 169 Convention is the only binding treaty that explicitly recognises Indigenous peoples' rights under international law, including a right to collective forms of property ownership (Gilbert, 2016, p. 107^[12]).

The United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), adopted in 2007 by 144 states, provides the most comprehensive treatment of Indigenous rights as yet. It explicitly recognises that Indigenous peoples have the **right to self-determination**, which is to "freely determine their political status and freely pursue their economic, social and cultural development" (article 3). This right contains an economic aspect, related to subsistence and control over natural resources (Gilbert, 2016, p. 242^[12]). It also has a procedural dimension, of participation in any decision that affects their territory.

The right of participation corresponds to governments' duty to provide **free, prior and informed consent** (FPIC) (articles 19 and 32). States, including sub-national governments, have the obligation to consult and cooperate in good faith with Indigenous groups in order to obtain their free and informed consent, prior to the approval of any project affecting Indigenous lands and resources. While involving Indigenous peoples at an early stage, the process of dialogue and negotiation should extend over the course of the proposal, from planning to implementation and follow-up. More than being informed about a proposal, Indigenous peoples have to be given the possibility to influence the outcome of decision-making and to suggest alternatives to it.⁵

Another important right that relates to the right to self-determination is the **right to development**, recognized in the ILO C169 (art. 7) and the UNDRIP (art. 32). Under this right, Indigenous peoples should be able to control the direction of their development and decide their priorities and strategies in their own terms.

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

If conflicts or disputes over land rights arise, Indigenous groups have the right to seek remedies for their situation. The **right to redress** – recognised in article 6 of ILO 196 and article 10 of UNDRIP – comprises different types of remedies, such as land restitution, fair and just monetary compensation, material assistance or official apology. In general, whenever land restitution or relocation is possible, it should be preferred over monetary compensation, given the especial relation that Indigenous peoples have with their territories. Redress can take form of judicial claims for land, too. For instance, in Canada, when land promised under treaty is not reserved or only partially attributed to an Indigenous group, the group is entitled to file a judicial claim that obliges the State to fulfil its obligation. This provision is assured under the Treaty Land Entitlement process.⁶ Box 1 provides an overview of conflict resolution mechanisms that enable the right to seek redress.

Box 1. Conflict resolution mechanisms

Citizens have the right to seek and obtain remedy whenever a right is violated, or an obligation is unfulfilled. The main conflict resolution mechanism is adversarial, which is the judicial system. Judicial procedures should have clear rules, reasonable length and moderate costs, including the costs of hiring a lawyer. Some countries have acts and institutions that guarantee free legal aid to low-income and marginalised individuals or groups.

Indigenous groups have resorted to litigation as a strategy to recognise land rights and obtain redress, which includes but is not limited to financial compensation. Litigation has had varying degrees of success. In common-law countries such as Canada and Australia, landmark decisions have consolidated doctrines of a pre-existing Indigenous title to land. In Latin American countries, the low degree of implementation of decisions often deters Indigenous groups from enjoying the material benefits of a given favourable decision.

There also exist alternative dispute resolution mechanisms, which are based on dialogue and consensual agreement-making. Mediation and conciliation are examples of such mechanisms. This model has been applied with success to community and family disputes, especially where consensual collective decision-making has tradition. Still, it is less effective when the balancing of power is eschewed among parties, and when fundamental rights are concerned.

Governments sometimes support the development of community-based justice programmes in Indigenous communities. In Canada, the *Aboriginal Justice Strategy* supports community-based justice programmes and related capacity-building efforts. In Australia, programmes of mediation training enable the creation of mediation services for remote Indigenous communities. One example is the *Yuendumu Mediation and Justice Committee*, a community-led mediation program in the Northern Territory.

Source: Own elaboration.

Under international law, Indigenous peoples' sovereignty over their traditional territories extends to the natural resources existent in them (articles 14 and 15 ILO Convention 169).⁷ It includes the right to own, use, develop and control these resources, both renewable and non-renewable ones, such as timber, fish, water and minerals. Where states retain ownership over sub-surface rights, Indigenous peoples have the right to be consulted with the intent to obtain their free, prior and informed consent regarding the development of these resources. They also have the right to participate in the benefits of resource exploitation and receive compensation for damages (article 15.2 of Convention 169).

Indigenous land rights

“Land” can be interpreted as encompassing the buildings that sit on it, the air above it and the underground, including water and, sometimes, sub-surface natural resources. “Land” translates into the legal framework as property rights, which express a relation between an individual or a group that holds right to land and the others who do not.

Indigenous land rights can be classified according to the source of law, attribute, history of occupation, type of ownership and division Table 1).⁸ According to the source of law, there are rights defined and upheld in law (statutory rights), as opposed to rights defined by the Indigenous group by force of customs or traditions (customary rights).

Table 1. Classification of Indigenous land rights

Classification of Indigenous Land Rights	
Attribute	Possess, use, transfer, manage, and exclude
Origin (source of law)	De jure: Statutory and recognised, or statutory but not demarcated De facto: Customary
History of occupation	Traditional occupation or relocated by governmental decision or treaty
Type of ownership	Private, public, or collective
Division	Individual / household or communal land plots

Source: own elaboration

Rights upheld in law have been conferred by different legal instruments, such as treaties, agreements, native title, or Constitutional norms. Treaties were used during the colonialization period to settle disputes with Indigenous groups in the United States and Canada, and remain valid today. Many treaties contained provisions to relocate the Indigenous group to a reserve somewhere else than the area that they had traditionally occupied. In Australia, the government conferred aboriginal title to Indigenous groups, which confers ownership rights opposable to all but the government. That is, the government has the right of pre-emption and the right to extinguish the title by an explicit legislative act. In these countries, several Indigenous land claims are still being negotiated. In Latin American countries in general, Indigenous land rights have been granted in Constitutional norms, with pending recognition processes. Recognition means that Indigenous lands have to be demarcated in order to be fully attributed to the group. Land demarcation is the formal process of identifying the actual locations and boundaries of Indigenous land or territories, and physically marking those boundaries on the ground (Gilbert, 2016_[12]). Pending demarcation processes have been identified as the major impediment to the effectiveness of Indigenous rights in Latin America (Gilbert, 2016_[12]).

Type of ownership refers to land being owned privately by individuals, collectively by the Indigenous group or community, or publicly by the government. It is common that the

government owns the land but grants perpetual usufruct rights to the Indigenous community, case in which the land is public.⁹ When land claims arise, for instance as identified in Latin America's territorial turn (Finley-Brook, 2016^[13]), they have been often solved by granting a collective land title, whose holder is the community.

Land rights can be attributed to individuals or collectively, to a group. Many Indigenous lands entail secure formal entitlement based on community held tenure. But they may be allocated to individuals and families within the group, more informally. For instance, in the Ecuadorian Amazon, families have rights over specific land plots, in which they build their houses and have small gardens (Bennett and Sierra, 2014^[14]). Households can sell plots to other members of the community and transfer them to heirs, as well. Moreover, the right subsists when the person leaves the community temporarily; hence not being associated with regular use. These rights are defined by the community and are thus opposable to other community members, but in relation to external actors, i.e. the legal system, the opposable right is the one held collectively over the broader territory. Bennett and Sierra (2014^[14]) found that the communal formal title was only activated in the event of conflicts with external users, such as settlers or park staff. Yet, in the event of internal disputes, they would resort to community leaders, whose decision is typically respected by all.

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

In summary, property rights are a "bundle of rights", composed of different attributes. Table 2 is an adaptation of Ostrom and Schalgler (1996, p. 133^[15]) to the framework of Indigenous property rights. Full owner is the one who can exercise five different rights over land: access, extraction, management, exclusion and alienation. Proprietors cannot alienate land, while claimants cannot pretend to be the sole users of land. Authorised users only have the rights to extract resources and access the land, while the authorised entrant can enter the land, but nothing more than that. The entrant has a stronger right than the one of a passant, though, as defined in the right of passage.

Table 2. Bundle of property rights

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

Source: Bennett, D. and R. Sierra (2014^[14]), *Multi-Scale Dimensions of Indigenous Land Tenure in the Amazon*, Hum Ecol (2014) 42:551–563, DOI 10.1007/s10745-014-9660-x.

Impact of international rights upon national laws

The international rights described above impact national laws and obligations differently, depending on the nature of the document from which they arise. By nature, declarations are documents that express political commitments for nations who vote in favour of it. Countries can vote in favour or against it, or abstain from voting; they do not sign or ratify it. A certain number of votes in favour are required for a declaration to enter into force. Countries can always opt in or out of a declaration afterwards. In some cases, states have reconsidered their initial positions. For example, Canada, which had objector status to the UN declaration, has since adhered to it (May 2016). These countries do not have new legal obligations, but the declaration provides a context for the development of domestic policies.

Treaties express rights and obligations that ratifying states are responsible for. When a treaty or convention is made, countries first sign it, which indicates support for its principles and the intention to ratify it. The ratification is an internal process by which the treaty is approved by the national parliament or congress. For that to happen, countries usually enact a national law or statute. In some countries, however, that is not necessary, as the internal approval expressed in the ratification process automatically turns the international treaty into a source of national law.¹⁰ This stronger degree of responsibility partially explains why less than 30 countries ratified the ILO conventions, in comparison to 144 adhesions to the UNDRIP.

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

In sum, the recognition of Indigenous rights differs considerably among countries in different countries, according to the ratification or adhesion status to different instruments and to the degree of incorporation of these provisions in national laws. It also varies due to distinct historical legacies and political and social factors.

Table 3 indicates, for a selection of countries, in which ones cultural rights, land rights, the distinct status of Indigenous people, the right to self-government and the right to be consulted have been formally recognised in law and statutory instruments. It summarises the results of an academic research by Queen's University in Canada. The recognition of land rights, for instance, is defined as such:

- **Yes:** Country has recognized the Indigenous peoples' rights and/or title to lands in statutory instruments (constitutions, legislation, proclamations, treaties, court decisions).

- **Partial:** Country has policy related to Indigenous land usage rights / privileges, but without legislative base; or, country has policy of, or legislated, usufructuary rights of Indigenous peoples to land under the state's authority.
- **No:** Country has not recognized land rights / title of Indigenous peoples.¹¹

Table 3. Legal recognition of Indigenous rights in selected countries, as of 2010

Country / Rights	Australia	Canada	Denmark	Finland	Japan	New Zealand	Norway	Sweden	USA
Recognition of land rights	Yes	Yes	Yes	No	No	Yes	Partial	Partial	Yes
Recognition of self-government rights	Partial	Yes	Yes	Partial	No	Partial	Partial	Partial	Yes
Upholding historic treaties and/or signing new treaties	No	Yes	No	No	No	Yes	No	No	Yes
Recognition of cultural rights (language, hunting/fishing, religion)	Yes	Yes	Yes	Yes	Partial	Yes	Yes	Yes	Yes
Recognition of customary law	Partial	Yes	Yes	No	No	Yes	No	No	Yes
Guarantees of representation /consultation in the central government	Yes	Yes	Yes	Yes	Partial	Yes	Yes	Partial	Yes
Constitutional or legislative affirmation of the distinct status of Indigenous people	Partial	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Support/ratification for international instruments on Indigenous rights	Partial	Partial	Yes	Partial	Partial	Partial	Yes	Partial	No
Affirmative action	Yes	Yes	No	No	Partial	Partial	No	No	Yes

Note: Please refer to the source for the full definition of the categories and detailed methodology.

Source: Multiculturalism Policy Project, (2011^[16]), *Multiculturalism policy Index: Indigenous People*. Queen's University, Kingston, Canada, available at: <http://www.queensu.ca/mcp/Indigenous-peoples>

Corporate responsibility and Indigenous rights

According to the OECD, corporate responsibility refers to the actions taken by businesses to nurture and enhance their symbiotic relationship with the societies in which they operate. It refers to the function of business activity itself, to yield adequate returns to owners of capital, but also to raise general welfare and living standards in the process. In this sense, corporate responsibility goes beyond conducting business. Businesses have to obey the various laws which are applicable to them and, as a practical matter, often have to respond to societal expectations that are not written down as formal law.¹²

Businesses are responsible for respecting human rights, wherever they may be developing projects. The *UN Guiding Principles on Business and Human Rights* state that businesses must respect human rights independently of the compliancy of the local State in protecting those rights. The *Guidelines for Multinational Enterprises* of the OECD establish that enterprises should pay specific attention to the human rights of vulnerable and minority groups, including ethnic minorities and Indigenous peoples (paragraphs 40-46). Enterprises should avoid causing or contributing to adverse human rights impacts, and carry out due diligence when impacts are caused. National Contact Points have been created in several

countries to monitor compliance to these guidelines and offer mediation. The emphasis is not on judging companies but on promoting a real process of improvement in business conduct.

Moreover, international lending institutions can set requirements to potential borrowers. The European Bank for Reconstruction and Development (EBRD) and the International Finance Corporation (IFC) require companies to obtain free, prior and informed consent from Indigenous communities in relation to projects funded by them (Lewis, 2012^[17]). Another example is the World Bank's Environmental and Social Framework (2016^[18]), which requires borrowers to conduct social assessment studies, engage in meaningful consultation and promote sustainable development opportunities to Indigenous peoples.

Furthermore, industry associations can adopt sector-wide principles and good practice guides, to inspire businesses practices. Corporations can adhere to these guides and principles, or they can develop their own sets of commitments, adapted from these guides. The Forest Stewardship Council, which counts with a permanent Indigenous Peoples committee, has developed criteria for certification which include, for instance, the duty to consult with Indigenous peoples affected by forestry activities.¹³ The *Good Practice Guide of the International Council on Mining and Metals* sets principles of good engagement, such as early and broad involvement, clear communication and others, and also has a toolkit for companies (ICMM, 2013^[19]). The social and environmental criteria developed by the *Roundtable on Sustainable Palm Oil* in 2013 abide to the principles of just land acquisition and fair representation of Indigenous peoples (RSPO, 2013^[20]).

Corporations may set up their own voluntary codes of commitment and statements of policy (Table 4). They are often motivated by concerns with corporate reputation and the long-term viability of projects (the so-called "social license to operate"). Corporations that adequately consult with affected communities may come across as more legitimate and responsible actors, whilst enjoying higher financial returns in the long run (Gilbert, 2016^[12]). These voluntary approaches signal willingness of corporations to respect human rights. Yet, to assure that this is actually the case, well-functioning systems that can promote accountability and address grievances are necessary.

Table 4. Guidelines for corporate engagement and responsibility

Guidelines and Principles	Authoring organisation	Objectives	Target audience
UN Guiding Principles on Business and Human Rights	United Nations, 2011	To enhance standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.	All States and all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.
International Finance Corporation's Performance Standards on Environmental and Social Sustainability (IFC PS)	IFC, 2012	- To provide guidance on how to identify risks and impacts - To help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities. - To manage environmental and social risks and impacts so that development opportunities are enhanced.	Investors and project developers who are clients of the IFC and the IFC when doing direct project development. Can also be applied by other financial institutions.
OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector	OECD, 2017	To provide practical guidance to mining, oil and gas enterprises in addressing the challenges related to stakeholder engagement, observing existing standards and undertaking risk-based due diligence.	Companies in the extractive sector.

FSC Principles and Criteria for Forest Stewardship	Forest Stewardship Council, 2015	To set principles and criteria for certification of environmentally appropriate, socially beneficial and economically viable forest management.	Forest owners and managers that voluntarily abide to the accreditation system.
Principles and Criteria for the Sustainable Production of Palm Oil	Roundtable on Sustainable Palm Oil, 2013	To set principles and criteria for certification of sustainable palm oil production across the supply chain, which is comprised of legal, economically viable, environmentally appropriate and socially beneficial management and operations.	Actors in the palm oil industry.
Good Practice Guide Indigenous Peoples and Mining	International Council on Mining and Metals, 2015	Good practice for companies where mining-related activities occur on or near traditional indigenous land and territory, regarding engagement, impact mitigation, agreement-making, compliance and others.	Mining companies and others with an interest in ensuring that mining projects bring long-term mutual benefits to companies and host communities.
Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)	Food and Agriculture Organization of the United Nations, 2012	To provide guidance to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all and to support the progressive realization of the right to adequate food in the context of national food security.	States; implementing agencies; judicial authorities; local governments; organizations of farmers and small-scale producers, of fishers, and of forest users; pastoralists; indigenous peoples and other communities; civil society; private sector; academia; and all persons concerned to assess tenure governance and identify improvements and apply them.
Respecting Land and Forest Rights A Guide for Companies	Rights and Resources Initiative (RRI). 2015.	To provide senior-level and operational teams at leading companies an entry point to understanding and implementing the VGGT.	Companies.
Operational Guidelines For Responsible Land-Based Investment	USAID 2015	- To offer best practices related to the due diligence and structuring of land-based investments, with the goal of reducing risks and facilitating responsible projects that benefit both the private sector and local communities. - To help companies identify practical steps to align their policies and actions with provisions of the VGGT, the IFC PS and other relevant instruments.	Although the primary audience for this guide is a private sector company operating in one of the ten New Alliance countries, this guide is intended to more broadly inform land-based investments made by private sector companies operating in developing countries (and in particular, Sub-Saharan Africa).

Note: This list is not exhaustive.

Source: All the documents mentioned in the list.

Implementation of rights

Once land rights are recognised, they ought to be implemented. Implementation concerns how policies, laws and instruments are informed by rights and how these rights are enforced and promoted, or not.

The implementation of land rights includes carrying out land delimitation processes, creating institutions to manage lands and the revenues from it, paying due compensations, creating national frameworks for consultation, among others. In this sense, it refers not only to the laws that grant land rights, but also to a wide range of laws and regulations that govern the use of Indigenous lands, directly or indirectly. From the licensing process to benefit-sharing mechanisms, different provisions contained in legal frameworks of infrastructure and resource extraction affect Indigenous lands; hence, if and how they are implemented matter.

Low levels of implementation have been considered one of the central challenges for the effectiveness of Indigenous rights throughout the world. James Anaya stated that, by the year of 2015, “the conditions of Indigenous peoples and the relevant domestic legal and

policy regimes were far from what the [United Nations] Declaration aspires to establish” (2015, p. 3_[21]). More than the lack of domestic legislation to protect Indigenous rights, often times it was observed “the existence of legislation and regulatory practices that were inconsistent with those rights” (Anaya, 2015, p. 3_[21]). Many authors have stressed the “implementation gap” in Indigenous rights, as Manuel Espinoza has in the case of Latin America (2015_[22]). This gap refers to “the differentiation between formal recognition of the international rights framework, and the lack of administrative and policy practices by Latin American states” (Espinoza, 2015_[22]).

In this sense, providing Indigenous land rights goes beyond the question of granting title; it involves a more complex set of legal, social, economic and political issues. Tenure security involves, more than recognition of land rights, land management frameworks that can work for Indigenous peoples. These frameworks comprise land demarcation processes, natural resources exploitation regulation, nature conservation challenges, the duty to consult and the role of corporations. In all, the effective management of land is critical for the realisation of Indigenous development goals as well at broader regional and national ones.

4. Indigenous land management

Indigenous land management refers to a wide range of environmental, natural resource and cultural heritage management activities that take place in Indigenous land, carried out by Indigenous communities, bodies, organisations and individuals, on their own or with private stakeholders and government actors (Hill et al., 2013^[23]). This task is fundamentally different than the one of managing non-Indigenous land, due to the special relationship that Indigenous peoples have with their territory. This relationship is shaped by cultural and spiritual beliefs, traditional uses for subsistence, and respect for the environment.

Management practices mostly refer to land but can also include water. In Australia, for example, co-management models of natural reserves under the Natural Reserve System (NRS) comprise both land and water. In Chile, the Rapa Nui Rahui Marine Protected Area was created around Easter Island, in 2017. The preservation of the Rapa Nui's artisanal fishing practices will be grandfathered into the management plans for the MPA. This will contribute to the preservation of the Rapa Nui's traditional way of life and protect the area from industrial commercial fishing.¹⁴

Table 5 provides a list of different Indigenous land use activities, from cultural to environmental to commercial activities. These activities can refer to traditional activities such as hunting, gathering and craftsmanship but also to activities that may require new organisational structures and capacities, such as managing natural parks, monitoring environmental impacts and conducting ecotourism. In some cases, Indigenous communities become responsible for land use planning, zoning and licensing, whereas in other cases these activities remain under the control of government authorities.

Table 5. Indigenous Land Use Activities

Category	Activity
Customary or cultural resource activities	Hunting, gathering
	Ceremony
	Protection and management of culturally significant places
	Transfer and documentation of traditional ecological knowledge
	Documentation and translation of language Indigenous knowledge and activities for youth education
Natural resource activities	Artistic expression through painting or craft
	Weed and feral animal control and monitoring
	Fire management
	Monitoring and management of threatened species and ecological communities
	Conservation of natural water bodies
	Soil erosion control and soil rehabilitation
	Native nursery, seed collection and planting
	Visitor and tourist management (e.g. track maintenance, signage)
Land management for improved conditions in settlements	Monitoring threats to biosecurity
	Dust mitigation
	Firewood collection
	Management of community water supplies, rubbish and sewage disposal
	Parks and gardens
	Infrastructure (e.g. building, road maintenance and construction)
	Protection from fire

Commercial economic activities	Horticulture (e.g. vegetable garden, orchard) and plantations Bush harvest of plant foods, medicines and seed for sale Harvest for commercial wildlife industries Pastoral and related activities Art and craft production Cultural ecotourism Land restoration and other natural resource management services Employment in Indigenous and co-managed parks and protected areas
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*Adapted from: Hill, R. et al (2013^[23]) *Indigenous Land Management in Australia: Extent, scope, diversity, barriers and success factors*. Cairn: CSIRO Ecosystem Sciences. 94p. e-ISBN: 978-1-922173-95-9.*

A starting point for land management systems is the recognition of use or ownership rights to land or to the exercise of traditional activities in land (Section 1.4). Without this, it is not possible to talk about management of Indigenous lands. In this sense, land use rights or property rights are the basis for management or co-management of lands, seas, waters, wildlife and other natural resources and cultural heritage.

Since land rights vary across countries (Section 1.4), land management systems can also vary. If an Indigenous community only has the right to use lands, without the right to subsoil resources, this community will not probably manage licensing for extractive industries on their own but will be consulted about it. If on the contrary an Indigenous people are considered a self-governing nation, then land management is only one among the many possible responsibilities that they hold, which include deciding on health, education, zoning and infrastructure, among other issues.

Furthermore, these arrangements can vary within countries, in a case-by-case manner. In Canada and the United States, for instance, because nation-to-nation relations have been regulated by treaties and agreements, conditions and powers are not uniformly attributed. To illustrate, many Canadian land claim agreements granted decision-making powers to Indigenous groups in what regards land use and environmental issues in their territories (Simons and Pai, 2008^[24]). However, in some agreements, the Indigenous group has the ownership of mines and minerals, such as in the Yukon Indian Agreement, while in others the group only receives resource royalties, such as in the Nunavut Land Claim Agreement (Simons and Pai, 2008^[24]).

The possible arrangements for Indigenous land use management can be divided in three ideal types,¹⁵ according to the degree of autonomy granted to the Indigenous community:

- **Self-governance of Indigenous land:** The Indigenous group has been empowered by the State to have a level of autonomy over the management of Indigenous lands and natural resources located within it. This conditional autonomy may derive from the self-government capacity of the group, attributed by a treaty or agreement that addresses nation-to-nation relations. Alternatively, it may arise from specific agreements that hand over regulatory authority over environmental issues from the government to the Indigenous group.
- **Joint land management model:** In this model of joint, shared or cooperative management, also referred to as co-management, the Indigenous group shares the responsibility and the authority over land issues with government authorities. It may arise from the creation of specific institutions, such as natural resources boards and land councils, which are equally composed by Indigenous and non-Indigenous representatives. It may also come from the creation of protected areas, such as parks or natural reserves, with a management model defined as shared. It can eventually

be that the government has the authority over natural resources but the Indigenous group is participates in the decision-making process of issuing licenses and permits.

- **Co-existence:** In this model, Indigenous groups are considered an interested party in land management issues that affect their designated lands. Their lands may be affected directly, or indirectly, for instance if a project does not occur in their lands but its impacts extend over them. Without autonomy to decide over such issues, they can nonetheless be part of decision-making processes. They may be consulted in administrative procedures, such as environmental licensing, and influence the elaboration of laws, plans and other policy documents.

Self-governance of Indigenous land

In self-governance schemes, the Indigenous group has been empowered by the state to have autonomy over the management of Indigenous lands and natural resources located within it.¹⁶ The main instruments through which autonomy can be granted are treaties, legal frameworks, covenants, or agreements about specific issues such as land management, nature conservation, land acquisition, registrable heritage, hunting and fishing, or wilderness protection.

Treaties and agreements have typically attributed self-government powers to Indigenous groups, by recognising them as nations within the nation-state. The United States has signed more than 500 treaties with Native Americans and Alaska Natives. These treaties are remainders of the colonisation period and although enforcement has been inconsistent, they remain legally binding. On the one hand they limited the extent of Indigenous land, but on the other hand they granted autonomy for the Indigenous to self-govern their reserves, as well as offered protection and social services.

Alternatively, it may arise from specific agreements that hand over regulatory authority of environmental issues from the government to the Indigenous group. In this case, the Indigenous group does not have power to control all issues that affect them, but they do have the power to regulate environmental issues, which are directly connected to land use. In Canada, for example, Indigenous groups have by-law powers to develop comprehensive land use management schemes. The Nisga'a Treaty illustrates a case of environmental self-governance over a large area (Richardson, 2008^[25]). In the United States, the Environmental Protection Agency can grant Indigenous tribes powers to set environmental standards, issue permits and manage environmental programmes within reservation boundaries (Richardson, 2008^[25]). The US Supreme Court further decided that Indigenous groups can set higher environmental standards for water quality and extraction than state-wide ones.

The area to which these agreements correspond may be the totality of the lands attributed to the Indigenous people, or a just portion of them, e.g. a reserve or natural park. Either way, the term “Indigenous and community conserved areas” (ICCAs) can be used. This term gained prominence after the Convention of Biological Diversity of 1992 (Ross et al., 2009^[26]). The essential characteristics of ICCAs are (Dudley, 2008^[27]):

- The relevant ecosystem closely relates to an Indigenous people culturally (e.g., because of their value as sacred areas), because they support their livelihoods, and/or because they are their traditional territories under customary law.
- Such Indigenous peoples are the major players (“hold power”) in decision making and implementation of decisions on the management of the ecosystems at stake,

implying that they possess an institution exercising authority and responsibility and capable of enforcing regulations.

- The management decisions and efforts of Indigenous peoples lead and contribute towards the conservation of habitats, species, ecological functions and associated cultural values, although the original intention might have been related to other objectives.

For such arrangements to be operational, functioning institutions need to be in place, equipped with enough financial resources and competent staff, and operate within a clear legal framework. The main institutions involved in these arrangements are Indigenous local governments and councils, regional councils and land management agencies, but also land councils, land trusts, and Indigenous corporations. In Canada, for example, under the First Nation Land Management Act, the Indigenous nation has to create a competent institution to manage land issues, often called Land Authority.

The Canadian First Nation Land Management Act (FNLMA), enacted in 1999, allows First Nations to gain control over their own land management regimes. By signing the FNLMA, they opt out of the land and resources provisions of the Indian Act. In so doing, even though land ownership remains with the government of Canada, the administration of land and natural resources becomes their responsibility. They receive regular financial and technical assistance to develop a land code and create a managing authority, such as the Land Authority. The **Land Authority** develops laws, regulations and policies on the matter. As of 2016, 95 First Nations have abided to this regime.¹⁷

First Nations have reported significant benefits from entering the FNLMA regime.¹⁸ First of all, the inherent right to govern reserve lands and resources is recognised. In addition, they gain the legal capacity to acquire and hold property, to borrow, contract, invest money, be party on legal proceedings, directly collect and control land revenues and mortgage individual interests. Autonomy has also meant ability to make laws and regulations in a timely and transparent fashion, and in respect of each Nation's practices and traditions. This has been translated into more certainty for land holders, and more capacity to enforce breaches of law.

The Aboriginal **Land Councils** in Australia's Northern Territory are another example of self-governance authority over land and resources. Established under the Aboriginal Land Rights (Northern Territory) Act 1976, there are four land councils, each one responsible for a different area.¹⁹ They are sub-divided into regions. The councils are composed by 75-90 elected representatives of the different Aboriginal communities over which they have jurisdiction. They also have an executive body, which is composed of 7-9 delegates elected by the regions.

The main role of Land Councils is to consult with traditional landowners and Aboriginal Peoples in matters related to land and natural resources. They provide legal assistance for Aboriginal people to claim traditional land. They also support them in managing traditional lands and seas, including issuing permits for entry, fishing, hunting, filming and other activities. They have legal power to negotiate with governments and private companies over projects on Indigenous land on their behalf.

Challenges and lessons of self-governance

In the previous section the characteristics, instruments and institutions for self-government of Indigenous lands were discussed. In order to make better use of their regulatory powers, Indigenous peoples have to address several challenges (Table 6).

Some challenges arise from how protected areas are established, e.g. how extensive they are, how competing land uses are addressed, and which resources have to be shared with external areas. Indigenous groups cannot always adopt comprehensive land use schemes over wide enough areas. Even when they do, they may be adversely affected by environmental pollution promoted by third parties elsewhere. It may be the case that several Indigenous groups have to pool together to manage a single protected area, as it occurs in Australia under the Indigenous Protected Areas Programme (IPAP).

Other challenges are of organisational nature, such as ensuring that Indigenous peoples have sufficient and regular funds to manage their lands, and that they have the technical capacity to do so. More often than not, they have resorted to additional public funds and technical support in order to better exercise their regulatory powers (Richardson, 2008^[25]). Beyond access to funds, Indigenous groups should be able to invest in skills and projects that can generate autonomous resources and internal capacity. Institutional challenges can also refer to issues of transparency, participatory decision-making and legitimacy of the managing institutions. The composition of Indigenous institutions should be representative of the different areas and/or peoples. Consultation and access to information frameworks may need to be developed.

Table 6. Sample challenges of self-governance

Category	Examples
Environmental / Spatial	• Conflict with non-Indigenous parcels located inside reservations or protected areas • Competing land uses • Small areas are given to Indigenous groups in the context of a wider ecosystem (forests, ground water, aquifers) • The problem of third polluters (industrial activity in proximity to Indigenous lands)
Organisational /Institutional	• Enough, regular financial resources • Technical capacity and competencies of Indigenous institutions • Transparency and accountability in the use of revenues • Legitimacy of the institution that represents the Indigenous people • Gathering meaningful input from all members of the community • Effectively combining Indigenous and non-Indigenous systems of knowledge • Negotiating with multiple Indigenous groups

Source: Own elaboration.

In Australia, for example, the Dawal Wuru Aboriginal Corporation established a traditional use of marine resources agreement (TUMRA) to manage marine areas in their country. They developed a crocodile monitoring and management model, which involves a range of stakeholders. Aboriginal rangers ensure safety and environmental preservation, tourism enterprises offer guided tours of the reserve, and commercial ventures explore crocodile meat and eggs. This self-governance model, successful in making Indigenous and non-Indigenous stakeholders work in close collaboration nonetheless listed, as of 2014, several challenges for operation (AIATSIS, 2014^[28]):

- divisions and disputes between government and traditional owners who want to be custodians of their traditional lands and waters while simultaneously developing enterprise opportunities;

- knowledge and skills of traditional owners to lead or contribute to guided tours;
- logistical issues related to monitoring and removing crocodiles while keeping the public safe; and,
- building a database that has the spatial capacity for enterprise development and that can also incorporate natural and cultural knowledge and values.

This example shows that even well-designed models face challenges to remain operational. These challenges may range from skills development to building integrated databases, to dealing with conflicting interests over a protected area. One of the goals of the current OECD project is to identify challenges across a variety of cases and contexts in a more systematic fashion, as well as to offer policy recommendations on how to address them.

Joint land management model

Indigenous peoples have long been called “guardians” of the natural environment, yet they have been often excluded from nature conservation frameworks. In the past, the creation of nature reserves and natural parks justified the displacement of Indigenous groups from their traditional territories (Dowie, 2009^[29]). More recently, there has been an increase in co-operative management of protected areas and natural resources, particularly as Indigenous peoples have settled grievances with governments.

Co-operative management, also called shared or joint management, involves communities and governments formally sharing the management of the environment and the natural resources within it. It suggests an ideal for participatory management that enhances equity of Indigenous groups, and helps to ensure appropriate distribution of benefits from conservation. It has its roots in academic critique and practical solution-finding, regarding who ought to be involved in management, from a position of legitimising community rights and reconciling competing property claims (Plummer and Fitzgibbon, 2004^[30]) (Carlsson and Berkes, 2005^[31]).

The areas for which cooperative management are established can be parks, natural reserves, Indigenous protected areas, World Heritage sites, or the whole territory of the Indigenous group. In 1981, Gurig National Park became the first jointly managed National Park in Australia and since then further co-management arrangements have been developed for other parks. In Canada, joint institutions for environmental governance have arisen from comprehensive land claims processes. In Sweden, The Laponia World Heritage site has a shared management model between the government and the Sami Indigenous people. Sami representatives hold the majority on the board of directors of the management organisation, and the management structure has been adapted to traditional Sami organisational practices and knowledge (Reimerson, 2016^[32]).

Establishing the limits of the protected area is a complex task. It requires a comprehensive view of environmental ecosystems, and consideration for existing and often competing land uses and for the boundaries delimited by Indigenous territories. Taking these elements into consideration, many protected areas that entail co-management or self-management by Indigenous groups are defined under categories V and VI of the International Union for Conservation of Nature (IUCN) framework (Dudley, 2008^[27]). Category V refers to “Protected landscape/seascape” while Category VI entails “Protected area with sustainable use of natural resources”. These categories refer to protected landscape areas in which traditional activities and livelihoods can coexist with the goal of environmental

preservation, as opposed to the model of closed-off reserves in which human presence is banned.

The main instruments by which joint management can be established are agreements, memoranda of understanding or through new institutions. Agreements can be comprehensive regional agreements, as in the Canadian case (Box 2), or specific land use agreements. In Australia, there are also lease-back agreements, in which the government returns a park or reserve to its Aboriginal owners, and then leases it back from them.²⁰ Memoranda of understanding (MoU) are another type of formal agreement that sets out the rules and conditions for shared involvement in park planning and management. MoU can be further specified by other instruments, such as joint statements and shared principles. New institutions that can be created are heritage trusts, funds, boards, and councils. They ideally have a cross-cultural, cooperative governance structure composed by Indigenous representatives and governmental authorities. These institutions would normally be responsible for managing funds, enacting plans and enforcing regulations.

Box 2. The Inuvialuit Final Agreement (1984)

The *Inuvialuit Final Agreement* (IFA) has been operating since 1984 in Canada, between six Inuvialuit communities and the federal government. Even though the Final Agreement does not provide for regional self-government as desired by the Inuvialuit, it has proved to be flexible and a good basis for ongoing negotiations and evolving management arrangements. For example, the Inuvialuit have since then extended their management of parks, wildlife and natural resources. A number of institutions deal with the various components of environmental management. These structures are in most cases managed by equal numbers of government and Inuvialuit representatives.

The Inuvialuit possess exclusive and preferential harvesting rights to game, except for certain migratory species. At the local level, six exclusively Inuvialuit Hunters and Trappers Committees (HTCs) promote Inuvialuit involvement in sustainable wildlife use. They are collectively represented on the Inuvialuit Game Council (IGC). The IGC has responsibility for allocating quotas for the harvesting of wildlife among the Inuvialuit communities, as well as advising the two Wildlife Management Advisory Councils. The power to regulate, allocate and control public access and Inuvialuit participation in management rests with these governmental councils, together with the Fisheries Joint Management Committee. In the end, harvesting and game hunting are regulated by the government councils and committees, whereas the local HTCs and IGCs, which are Indigenous bodies, are left with the more limited powers of enforcing regulations and providing data.

The IFA also establishes a system of regional environmental planning and development control. The environmental impact assessment process goes through two agencies in which the Inuvialuit have rights to participate. The Environmental Review Board (EIRB) reviews major development proposals referred by the Environmental Impact Screening Committee (EISC). The EISC and the EIRB both have seven members: three Inuvialuit and three government representatives and a chairperson chosen by the federal government with Inuvialuit approval.

In all, there has been a high degree of Inuvialuit integration and participation in the co-management bodies. This can be attributed to universal fluency in English, cultural comfort in working with non-Inuvialuit, trust in technical resource staff and the chairs of the co-management bodies, and confidence in the strength of the IFA's provisions in protecting Inuvialuit interests in land and resources.

Adapted from: Nettheim, G., G. Meyers and D. Craig (2002^[33]), *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*. Canberra, Australia: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, pp. 438-442.

In the following sub-section, the successes and challenges for co-operative management are explored. Although many authors have written about the benefits of co-operative management arrangements (e.g. (Plummer and Fitzgibbon, 2004_[30])) some challenges do arise from the different ideas and worldviews and ideas about how to conserve resources, appropriate representation and management processes, and in the application of Indigenous knowledge to management.

Challenges and lessons of joint management models

Co-management protected areas have been facing many challenges, especially with the proliferation of similar models across the globe. To some authors, rigid, universally applied prescriptions undermine the power of locally negotiated arrangements which are context-sensitive and flexible enough to adjust responses (Lockwood et al., 2010_[34]). They have also attempted to the fact that governments often engage in the short-term, lacking a strong regulatory framework, regular funds, and a strategic long-term vision (Lockwood et al., 2010_[34]). Indigenous groups often lack the skills and capacity needed to engage in formal institutions, and have limited tools to push for stronger recognition of traditional knowledge in management practices.

The main challenges of the co-management of natural parks in Canada have been summarised by Weitzner and Manseau (2001_[35]). These challenges are representative of common difficulties joint management models may face:

- **Sovereignty, nation-to-nation relations, authority and control:** different perspectives on who owns and has jurisdiction over the land, how to balance authority and control between different parties, and who should have the final say in decision-making, particularly in light of increasing recognition of Indigenous rights to ancestral lands through the court system, and the settlement of far-reaching land claims that recognize a form of Indigenous sovereignty.
- **World-views, values and conservation:** different world-views, values, and ideas about what conservation means and how it should be carried out, particularly in relation to national parks; lack of a shared understanding of what a national park comprises, and what local resource use rights are allowed.
- **Balancing representation and decision-making process:** who is represented on the board depends on each context; Indigenous groups brought in the preference for consensual decision-making.
- **Fairness and cooperation in meetings:** there are differing processes, cultures, and styles; how to appropriately integrate different ways of conducting meetings has to do with the number of times people meet face-to-face per year, the degree of formality of the structures, and how long members have worked with each other. There are also issues of language and technical jargon, which often strikes as inadequate and unable to reflect Indigenous realities and world views.
- **Recognition of traditional knowledge as a valid source of knowledge:** most park management boards in Canada did not use traditional knowledge as extensively, for a variety of reasons, including: no further consultation with aboriginal people besides participation in boards; lack of a solid traditional knowledge base in cases where people either have been prohibited from using resources in the park for an extensive period of time, such as in Kluane; or do not have a long history in the

area, as in Tuktut Nogait; no methodology for how to appropriately collect and use traditional knowledge in decision-making.

These challenges can be translated into lessons. In reviewing the Canadian experience with comprehensive land use agreements, Nettheim and colleagues (2002^[33]) offer important lessons to achieve regional agreements that can remain operational in the long run (Box 3).

Box 3. Review of Canadian experience with regional agreements

- **Willingness:** negotiation involves compromise. Negotiations must be bona fide, with the participating parties committed to settling outstanding grievances and claims.
- **Timing:** comprehensive Regional Agreements cannot be negotiated quickly. The negotiating parties must be patient and adopt a long term policy focus.
- **Communication:** the cultural differences between Indigenous and non-Indigenous society can make it very difficult for the parties to understand each other's values and needs. Consequently, negotiation must be buttressed by a program of education and information so as to bridge different negotiating positions.
- **Information and research:** disagreements over use of Indigenous peoples' land are more likely to be resolved where there is a good information base about the contented issues. Environmental, social and economic studies can help to identify the major issues and allow participants to evaluate the merits of the options under negotiation.
- **Bargaining power:** to ensure a fair settlement, Indigenous peoples must be able to speak from a position of strength. Indigenous peoples need access to expert advice and financial resources to enhance their capacity to negotiate fair settlements.
- **Unity:** parties to negotiations must be legitimate and effective representatives of their constituencies. Representation must be determined by Indigenous communities and organisations. Negotiations can be frustrated where a party is factionalised and does not speak with one voice. Where a sub-group feels marginalised in negotiations, there will be difficulties in implementing final settlements.
- **Experience with settlement and development:** the degree of existing poverty and despair among the claimants and the relative urgency of development pressures will shape compromises that are necessary or acceptable to them.
- **Knowledge of existing models and precedents:** the demonstration effect of other settlements can influence negotiating positions.
- **Public attitudes:** public support for claims, either locally or nationally, can lead to significant strategic alliances.

Adapted from: Nettheim, G., G. Meyers and D. Craig (2002^[33]), *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*. Canberra, Australia: Aboriginal Studies Press for the Australian Institute of Aboriginal and Torres Strait Islander Studies, p. 452-3.

Co-existence model

In this third model, Indigenous peoples participate in decision-making processes that can affect their lands and livelihoods. Even though they do not control or take direct part in the management of land and natural resources, they can exert some influence over it. As citizens,²¹ Indigenous peoples have the right to access information and participate in governance. They might also enjoy the higher standard of consultation set in the Free, Prior and Informed Consent framework (Section 1.3), depending on how (and if) this standard is operationalised in their country.

Participation in decision-making comprises different mechanisms by which Indigenous peoples are consulted and can influence the elaboration of policies, plans, laws and other documents. It can also refer to administrative procedures such as approval of projects, licenses and permits. The objective is to promote dialogue and achieve more rigorous and legitimate public decisions. Formal consultation mechanisms organised by governments include: public surveys, ballot initiatives, public notice-and-comment, public hearings, citizens' forums, advisory bodies, review boards²² and working groups.

In addition, there are informal consultation processes. They can happen at any time of the policy cycle but often do so at the early stages of policy elaboration. Draft and proposals can be circulated to interested parties and concerned groups, for comments. Small meetings can be organised to share information and opinions. These mechanisms have the advantage of being flexible and inexpensive, motivating regular interactions. It could promote concerted decisions and strengthen ties among the different stakeholders. On the other hand, it is less accountable and transparent than formal mechanisms, and can lead to exclusion of some groups from the process, exchange of favours and corrupt practices.

Mechanisms of participation in decision-making can also be organised by civil society groups or citizens themselves. One way to do so is by starting petitions. In some countries, petitions that reach a given number of signatures have to be debated in the Parliament or local legislative assembly. Another strategy is lobbying, by which citizens and/or organised groups can approach elected officials and influence law-making. To illustrate, the *Russian Association of Indigenous Peoples of the North* has been, since its creation in the 1990s, consistently lobbying for the interests of Indigenous peoples at all levels of government (Semenova, 2008^[36]). Civil society groups can also organise surveys and research projects, to acquire knowledge and use it to influence public decisions. They can organise meetings and invite public authorities to participate, sharing documents and opinions with them. These mechanisms have all great potential. Shortcomings may be weaker levels of responsiveness by the government, and uncertainty around the outcomes that can be reached.

Across these different mechanisms, the issue of who engages is important. In ballot initiatives, for instance, only registered voters can participate. In public hearings, participation may be restricted by the choice of time, location and language in which the meeting is conducted. In lobbying, only representatives with knowledge of the legislative process and the actors involved in it can meaningfully engage. In environmental licensing processes, the definition of the area affected by the project may determine which groups can intervene as interested parties. In all, different mechanisms may, by default or intentionally, limit the range of participants. Still, governments need to consult as widely as possible, to ensure that different views are taken into account. If the law does not define so, scoping exercises to identify and collate relevant stakeholders may be useful.

Participation in decision-making can and should occur at different levels – international, national and sub-national. At the international level, for instance, six Indigenous organisations have Permanent Participation status in the Arctic Council. This status ensures that they participate actively and are consulted in all deliberations and activities of the Arctic Council, which is a high-level intergovernmental forum for political discussions on Arctic issues. Still, Indigenous organisations reported limited financial resources and little availability to travel as constraints to fully engaging in the Council.²³

Examples of mechanisms

Public hearings are quite a common mechanism. Many state legislatures conduct public hearings to inquire into and report on specific Indigenous issues. The Parliament of South Wales in Australia, for example, conducted in 2016 a series of inquiries on aboriginal economic development, which informed a discussion paper that was, on its turn, open for comments.²⁴ Federal governments also carry out public hearings to decide on matters of national interest. In Canada, for instance, a federal committee conducted public hearings with nine Indigenous groups from the Northwest Territories in 2017. The objective was to collect testimonies on how the federal government has handled outstanding, specific claims and on-going land claims, including self-government agreements.²⁵

Working groups are forums dedicated to raise awareness and provide recommendations on specific issues. Many working groups on Indigenous issues are international, such as the United Nations Working Group on Indigenous Populations and the Working Group of Indigenous Peoples in the Barents Euro-Arctic Region. Working groups can also be established within civil society, for instance an environmental association may form a working group to develop Indigenous knowledge and establish a network of Indigenous scientists. Universities may create working groups to analyse the situation of Indigenous students and suggest projects and programmes to improve it. Governments may also form working groups in which members of the government and Indigenous representatives are equally represented, with the goal of working together to develop recommendations, e.g. on natural resources management models and licensing processes.

Another mechanism is consultation in the environmental licensing process. In many countries, companies have the duty to conduct prior consultation with Indigenous communities that may be potentially affected by the project in consideration, and/or have legitimate interest in it. In Colombia, for instance, the company applying for license has to inform local groups about the breadth, impacts and measures of the project. The law does not specify how the consultation has to be done: it can be a simple publication in official journal or a briefing delivered to the community. It does not establish phases for participation to take place, either (Ávila, 2016^[37]). Consequently, participation is limited to information and is not extensive to the whole environmental licensing process.

Conditions and principles for effective participation in decision-making

This sub-section presents some of the key challenges and related conditions for Indigenous participation. The main limitations to effective engagement of Indigenous communities and representatives in decision-making processes are: socio-economic conditions at the community level; access to information; capacity of Indigenous communities and public officials; time and sense of urgency; and limited decision-making control (Black and McBean, 2017^[38]).

Socio-economic conditions refer to the lower levels of education, income, employment and health that many Indigenous peoples face around the world. Financial limitations reduce a

community's ability to engage, since there are fewer resources available to travel or commute to meetings, as well as less time to spend in non-remunerated activities. Lower educational levels and lack of professional knowledge within communities may hinder the ability to understand complex issues and communicate effectively in oral debates.

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

Another basic requirement for this model to work is Indigenous community capacity. The fact that many Indigenous peoples have well-developed internal decision-making processes does not make external processes straightforward to them (Schilling-Vacaflor and Eichler, 2017^[39]). Indigenous peoples are often placed in meetings in which technical language and a non-Indigenous style of discourse prevail, together with unfamiliar formal procedures. These problems can be mitigated by governments conducting meetings based on consensus, with accessible language, and in respect of Indigenous peoples' schedules.

Public officials also need to develop capacity to understand Indigenous issues. In a study of Indigenous participation in water management in Canada, participants stressed the need for public practitioners to better understand community-specific issues, including cultural and historical differences from community to community (Black and McBean, 2017^[38]). To participants, a better comprehension of Indigenous culture and history and increased respect for Indigenous ways of knowing and doing would allow for more meaningful engagement (Black and McBean, 2017^[38]). In all, cultural sensitivity training may form the basis for mutual respect and understanding.

Time is also a pressing issue. In the environmental licensing process, given that companies strive for quickly obtaining license to operate, tight consultation schedules may be imposed on local communities. In some cases, the state agency in charge of mediating the negotiation process also operates under this logic. In Bolivia, for instance, the environmental and social affairs commission of the Ministry of Hydrocarbons and Energy has argued that time and budget constraints hinder more inclusive and comprehensive consultations (Schilling-Vacaflor and Eichler, 2017^[39]). It may further be that Indigenous communities are engaged in specific activities that take over their schedule. In Sweden, for example, when Sami reindeer herders are moving pastures for the summer, they cannot dedicate time to meetings, and development proponents may not take account of this issue.

Still in relation to time, the sense of urgency imposed by certain matters may hinder effective participation. In water and wastewater management in Canada, for instance, approving projects to deliver safe and clear water to communities is a matter of public health. Indigenous participants mentioned that the urgency in promoting public health often translates into expedite and limited consultation processes, with little opportunity for more meaningful engagement (Black and McBean, 2017^[38]).

Last but not least, Indigenous groups often have little control over how the decision-making process is structured. In many cases, participation of Indigenous group is carried out in a piecemeal fashion, project-by-project. They may be excluded from the initial stages of strategic planning, too. Indigenous peoples can rarely influence the structure of the participation process, and have little access to the dedicated funds. Also, some procedures

have been considered too rigid, turning participation into a merely formal requirement, with little room for substantive dialogue (Black and McBean, 2017^[38]). In all, Indigenous communities are left with little sense of engagement and control.

Reflecting on these challenges and related conditions, the OECD has principles for open and inclusive decision-making (Box 4). The OECD principles are well-suited to reflect the needs and conditions for an effective participation of Indigenous groups. To illustrate, the “consultation fatigue” often faced by Indigenous groups demands coordinating efforts and avoiding duplication (Principle 7). Yet, specific conditions that arise from having a different culture and language should be taken into account. For example, the adequate time for consultation and participation may be longer for Indigenous peoples (Principle 4). This is so because Indigenous leaders and representatives often need to travel long distances to attend meetings, and have to take issues back to their group afterwards, to be decided by consensus.²⁶

The main goal of participatory decision-making processes is to have quality discussions that can engender legitimate decisions. Participation has to be more than a formal requirement – a “box to tick” (Black and McBean, 2017^[38]) – to become a mechanism that can promote shared understanding, influence decisions and generate positive outcomes for the stakeholders involved. Time, capacity, financial resources, access to information, clear communication, early and inclusive consultation, co-ordinated efforts, mutual respect and understanding, all these elements have to be put at service of a better, more strategic and meaningful engagement.

Box 4. OECD Principles for open and inclusive decision making

1. **Commitment:** Leadership and strong commitment to open and inclusive policy making is needed at all levels – politicians, senior managers and public officials.
2. **Rights:** Citizens’ rights to information, consultation and public participation in policy making and service delivery must be firmly grounded in law or policy. Government obligations to respond to citizens must be clearly stated. Independent oversight arrangements are essential to enforcing these rights.
3. **Clarity:** Objectives for, and limits to, information, consultation and public participation should be well defined from the outset. The roles and responsibilities of all parties must be clear. Government information should be complete, objective, reliable, relevant, easy to find and understand.
4. **Time:** Public engagement should be undertaken as early in the policy process as possible to allow a greater range of solutions and to raise the chances of successful implementation. Adequate time must be available for consultation and participation to be effective.
5. **Inclusion:** All citizens should have equal opportunities and multiple channels to access information, be consulted and participate. Every reasonable effort should be made to engage with as wide a variety of people as possible.
6. **Resources:** Adequate financial, human and technical resources are needed for effective public information, consultation and participation. Government officials must have access to appropriate skills, guidance and training as well as an organisational culture that supports both traditional and online tools.
7. **Co-ordination:** Initiatives to inform, consult and engage with civil society should be co-ordinated within and across levels of government to ensure policy coherence, avoid duplication and reduce the risk of “consultation fatigue”. Co-ordination efforts should not stifle initiative and

innovation but should leverage the power of knowledge networks and communities of practice within and beyond government.

8. **Accountability:** Governments have an obligation to inform participants how they use inputs received through public consultation and participation. Measures to ensure that the policy-making process is open, transparent and amenable to external scrutiny can help increase accountability of, and trust in, government.

9. **Evaluation:** Governments need to evaluate their own performance. To do so effectively will require efforts to build the demand, capacity, culture and tools for evaluating public participation.

10. **Active citizenship:** Societies benefit from dynamic civil society, and governments can facilitate access to information, encourage participation, raise awareness, strengthen citizens' civic education and skills, as well as to support capacity-building among civil society organisations. Governments need to explore new roles to effectively support autonomous problem-solving by citizens, CSOs and businesses.

Source: OECD (2009^[40]), *Focus on Citizens: Public Engagement for Better Policy and Services*. Paris: OECD Publishing, ISBN 9789264048867.

5. Benefit-sharing mechanisms

Benefit-sharing agreements are contract-making opportunities by which Indigenous peoples negotiate monetary and non-monetary benefits with corporations, in the context of project development (e.g. a mining or major infrastructure project). Through benefit-sharing agreements, Indigenous groups can exert some influence in defining the conditions for its entering into operation. It is important that they are able to do so in a manner that respects and ensures the continuous reproduction of their traditional ways of life.

The ILO Convention 169 states that Indigenous groups should receive benefits from the exploration of natural resources in their soil or sub-soil (article 15.2). The jurisprudence of regional human rights courts instructs the same, and so do different regulatory policies on project implementation issued by the World Bank, the Asian Development Bank and the Inter-American Development Bank.²⁷ According to the World Bank's Operational Policy on Indigenous Peoples, benefits have to be shared when natural resource extraction occurs on their traditional territories, at least as extensively as benefits shared with any title holder, and in a culturally appropriated manner.

When it comes to the operationalisation of benefit-sharing, three main points have to be addressed: what can be understood by “benefits” and “costs”; which instruments can be used to distribute funds; and how can benefits be managed.

The costs to Indigenous groups concern implementation, transaction and opportunity costs. Implementation costs refer to environmental and social losses brought by the implementation of the project, such as deforestation, biodiversity loss, social disruption and disturbance of sacred sites. Transaction costs include the time, energy and capacity required from the community to be involved in negotiations with project managers. Opportunity costs refer to foregone profits from the best alternative forest and land use. Most Indigenous groups exercise harvesting and game hunting activities, and some license these rights to third parties, obtaining revenues from it. Many groups cultivate food and herd animals; activities which both provide subsistence and have commercial interests. Moreover, forest conservation can be in itself an economically viable measure. A report from the World Resources Institute (2017^[41]) concluded that investing in securing Indigenous forestland tenure is a relatively cost-effective measure for climate change mitigation when compared with other carbon capture and storage measures, such as gas-fired power plants.

The benefits that Indigenous groups can accrue are financial compensation and non-monetary compensation. Financial compensation can take the form of royalties (based on the value of mineral output or output), tax on profits, single up-front payments, annual fixed payments, equity participation or shareholding. These resources can be collected by the Indigenous governing authority, if existing, or by the responsible government level, with approval from the local Indigenous community.

Another option is to allocate revenues to investment funds or trusts. An investment fund is a fund that invests its money in assets that earn income, or that due to other strategies is able to increase its capital stock. It is considered a good practice because it can generate autonomous financial resources to support sustainable regional economic development for the future, beyond the duration of the project (Söderholm and Svahn, 2014^[42]). Funds can be administered independently by a foundation or Traditional Owner-controlled trusts; jointly by a business task force or a management committee; or directly paid to Indigenous corporate entities (Limerick et al., 2012^[43]).

It has been recognised that monetary compensation, while often legally required, seldom ensures that lives and livelihoods of affected communities are adequately restored (Loutit, Mandelbaum and Szoke--Burke, 2016^[44]). For this reason, more and more agreements have been designed to provide a combination of the two types of benefits (Box 5). Non-monetary compensation can range from employment opportunities, training and business development to infrastructure construction and provision of services. It is important that services and infrastructure meet community's needs in the long-term, in a sustainable fashion. Companies can commit to hiring locally and conducting regular training activities, including for skills transferable to other occupations and projects.

Box 5. Non-financial benefit-sharing examples

The **Raglan Agreement**, signed in 1995, was the first Impact Benefit Agreement (IBA) in Canada to be negotiated and signed directly between a mining company and the Aboriginal group that would be ultimately affected by the mining operation. The Raglan Agreement emphasizes the importance of cultural sensitivity in employment as a key means of retaining Aboriginal employees. Specifically, the agreement seeks to encourage social harmony within the workforce by promoting inter-cultural understanding through cross-cultural training for all supervisors and managers, inviting local artists to perform outside of working hours at the project site, organizing sports events between employees and residents, and ensuring access to traditional food sources.

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

Adapted from: Loutit J, J Mandelbaum and S Szoke--Burke (2016^[44]), *Emerging Practices in Community Development Agreements*, Columbia Center on Sustainable Investment, Columbia University.

Examples of benefit-sharing agreements

One model of benefit-sharing is the Impact and Benefit Agreements (IBA) in Canada. IBAs are negotiated between resource-sector corporations, Indigenous communities and sometimes governments, to minimise environmental and socio-economic impacts of resource exploitation. Corporations can be required to provide additional environmental impact assessments and regular environmental monitoring, in exchange of developing their projects. Because IBAs are confidential, parties entering new negotiations are typically unaware of precedent negotiations, which can weaken the claims of Indigenous communities (Richardson, 2008^[25]).

A similar mechanism is Indigenous Land Use Agreements (ILUA) in Australia. ILUAs are voluntary agreements made between a native title group and others interested in the use of land and water. Once signed by all applicants, ILUAs are binding to the parties. These agreements can regulate the development of new projects, issues of access to an area, protection of cultural heritage and other matters. Through them, Indigenous groups can negotiate benefits, such as shared revenues, protection of sacred sites, preferential employment opportunities and support to Indigenous business development.

Examples of benefit-sharing mechanisms in mining projects are listed in Table 7

Table 7. Selection of Benefit-sharing Mechanisms in Mining

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

Source: Söderholm, P. and N. Svahn (2014^[42]), *Mining, Regional Development and Benefit-Sharing*, Lulea Technological University.

Challenges and related leading practices

The elaboration of benefit-sharing agreements can yield difficulties. For one, power imbalances may compromise the ability of Indigenous groups to reach favourable agreements. These groups typically have less financial resources, less technical capacity and less human capital available to invest in demanding negotiation processes with governments and mining companies.

One challenge is the definition of the affected area, and of the specific groups to be included in the agreement. For instance, a mining project may directly impact Indigenous lands in which the project takes place, while it may also cause environmental damages in other areas, e.g. water pollution (the problem of the “third polluter”). Besides that, it may be necessary to establish which organisation is legitimate to represent the Indigenous group. In Sweden, for example, agreements are negotiated between companies and Sami villages, which are economic associations of reindeer herders. The Sami people that are not involved in this activity are excluded from the negotiation process.

Some agreements are confidential, such as the Canadian IBAs. Confidentiality clauses prevent Indigenous group from seeking assistance from third parties, even if for informational purposes only. It also weakens their bargaining power, because the terms and conditions of previous agreements signed with other groups are at best unclear. As a whole, it means that Indigenous groups cannot learn from past experiences.

Another important question to be addressed during the elaboration of the agreement is how funds will be collected and allocated. There are also establishment and operating costs to having fund-based benefit sharing mechanisms. Accountability and transparency of the state and companies are necessary elements for the long-run viability of the agreement. In REDD+ projects of forest management in several Latin American, African and Asian countries, this has proven to be a challenge (Pham et al., 2013^[45]). Moreover, some arrangements yielded corrupt practices and elite capture (Pham et al., 2013^[45]). If funds are to be managed in a decentralised manner, the responsible Indigenous organisation, board,

trust or foundation needs to count with sufficient autonomy and financial management capacity.

From these challenges, and based on the extant literature, leading practices arise (Box 6):

Box 6. Leading practices on benefit-sharing agreement-making for companies

- I. Conduct extensive research and consult widely to identify all communities, and the individuals who will represent them, in the negotiation process.
- II. Develop a pre-negotiation agreement, such as a memorandum of understanding, that establishes among other things the negotiation framework and funding for each stage. Commence culturally sensitive orientation programs and/or negotiations training to ensure meaningful negotiations and approval of the final agreement.
- III. Ensure community participation in the agreement-making process, including informed decision-making during negotiations and involvement in completing impact assessments.
- IV. Benefit sharing means more than financial compensation for use of the land or displacement; it includes non-monetary benefits, such as employment opportunities, training of locals, business development support, infrastructure and provision of services.
- V. There must be strong, accountable governance arrangements in the agreement to facilitate effective implementation. A system of ongoing monitoring and review with mechanisms would allow for adjustment of the terms of the agreement when necessary.
- VI. The agreement must plan for project closure and legacy issues. Agreements should include action plans for dealing with expected and unexpected closure at the outset and create a closure taskforce at the time of execution of the agreement.
- VII. As far as possible, agreements should not be confidential, consistent with the objectives of transparency, accountability and good governance. Confidentiality provisions can weaken the capacity and power of local communities by prohibiting them from communicating with the media and other stakeholders for advice, support and information.

Source: Loutit J, J Mandelbaum and S Szoke--Burke (2016^[44]), *Emerging Practices in Community Development Agreements*, Columbia Center on Sustainable Investment, Columbia University.

6. Conclusion

This paper developed a framework to assess land governance for Indigenous economic development across different countries, whilst recognising that Indigenous communities are widely diverse and responsible for determining their own development path. It is based on the notion that land is a source of wealth and power, and that Indigenous lands are particularly important for the preservation of Indigenous cultures and livelihoods. The governance of Indigenous land has to meet somewhere in between traditional planning systems and Indigenous community governance, fostering mutual understanding and forming partnerships, collaborations and shared institutions.

To understand land governance, it is first necessary to analyse how land rights are defined. In international law, main documents for Indigenous rights are the Convention 169 of the International Labour Organisation and the United Nations Declaration on the Rights of Indigenous Peoples. These documents reaffirm among others the rights to self-determination, development, land, redress, culture and language of Indigenous people, as well as the right to be consulted about project development. The main actors of international law are international organisations, states and Indigenous peoples, but also corporations, as holders of social responsibility. States adapt international law provisions into their legal systems, by enacting laws and recognising rights and implementing policies.

Indigenous land rights are the rights that Indigenous peoples have to continue occupying their traditional territories and/or allocated lands, e.g. reserves in Canada. States have often allocated rights to confined portions of land, whose extension Indigenous groups have claimed to be much smaller than their traditional territories. Land rights may derive from statutes, such as agreements, treaties, constitutions and other laws, or they may be customary, by force of customs or tradition. For their full recognition, demarcation processes may be pending, in which the actual territory of an Indigenous group is delimited and registered in their name. Indigenous land rights are typically collective, but internally to the group land plots may be redistributed to families or individuals.

Land rights, or property rights are composed of five attributes: access, extraction, management, exclusion, and alienation. Full owners of the land enjoy the five attributes. Property rights of Indigenous peoples are often defined as perpetual usufruct rights, meaning that the Indigenous group can access, extract resources, manage uses and exclude others from using the land, but cannot sell or transfer it to others. In this case, the state is the holder of the full ownership rights. Given the diversity of land regimes around the world, examples can be found of different allocations of attributes.

The governance of Indigenous lands can be divided into three models, or ideal types:

- **Self-governance of Indigenous land:** The Indigenous group has been empowered by the State to have a level of autonomy over the management of Indigenous lands and natural resources located within it. This conditional autonomy may derive from the self-government capacity of the group, attributed by a treaty or agreement that addresses nation-to-nation relations. Alternatively, it may arise from specific agreements that hand over regulatory authority regarding environmental issues from the government to the Indigenous group.
- **Joint land management model:** In this model of joint, shared or cooperative management, also referred to as co-management, the Indigenous group shares the

responsibility and the authority over land issues with government authorities. It may arise from the creation of specific institutions, such as natural resources boards and land councils, which are equally composed by Indigenous and non-Indigenous representatives. It may also come from the creation of protected areas, such as parks or natural reserves, with a management model defined as shared. It can eventually be that the government has the authority over natural resources but the Indigenous group is involved in the decision-making process of issuing licenses and permits.

- **Co-existence:** In this model, Indigenous groups are considered an interested party in land management issues that affect their designated lands. Their lands may be affected directly, or indirectly, for instance if a project does not occur in their lands but its impacts extend over them. Without autonomy to decide over such issues, they can nonetheless participate in decision-making processes. They may be consulted in administrative procedures, such as environmental licensing, and influence the elaboration of laws, plans and other policy documents.

These models indicate that different levels of autonomy and participation can be agreed upon. It varies with context, the history of the place and how past systems had been set up. It also has to do with the willingness of involved stakeholders and the incentives associated with different models. Regardless of varying circumstances, in all three models Indigenous peoples should be granted the opportunity and the conditions to determine their path of development and to have influence over matters that affect them.

In any of these models, conflicts amongst competing land uses arise. Natural resources extraction by companies and adjacent owners may impose pressures on traditional land uses and practices adopted by Indigenous groups. The preservation of the social and cultural value of land, e.g. sacred sites and dynamic equilibria of natural ecosystems, may be disrespected by invasive activities. Common goods may be over-exploited, generating the so-called tragedy of the commons. The imperatives of environmental preservation may also enter into dispute with extractive activities.

To address and prevent conflicts, but also to minimise risks and allocate resources, well-functioning management systems are necessary. The power imbalance between Indigenous community on the one side and governments and corporations on the other side needs to be compensated, or at least minimised. The main conditions identified in the literature for that to happen are: rule of law, enough financial resources, time to meaningfully engage, capacity to negotiate positions and access information, overcoming language barriers, transparency in communication, cultural sensitivity of non-Indigenous practitioners, flexibility to adjust conditions over time, incorporation of Indigenous traditional knowledge into decision-making, willingness to coordinate efforts, legitimacy of institutions, and broad enough representation of Indigenous communities.

Another way to clarify relations and prevent conflicts arising from competing land uses is for Indigenous groups to sign agreements with governments and corporations, in order to negotiate advantages and compensation from land use. Benefit-sharing agreements in extractive projects can provide monetary and non-monetary benefits to affected communities. Leading practices for benefit-sharing agreements are to: consult widely to identify all affected communities; sign a pre-negotiation agreement; conduct culturally sensitive orientation programs and negotiations training; involve communities since an early stage and include them in strategic decision-making; offer non-monetary benefits, such as employment opportunities, skills training, business development support, infrastructure and provision of services; establish a system of ongoing monitoring and review; plan for project closure and legacy issues; and sign non-confidential agreements.

Notes

¹ Of course, even the classical economists knew that this was not strictly true. For centuries, land has sometimes been created by drainage, and the fertility of the existing land can be depleted by over-cropping.

² When a given framework legislation does not adequately recognize or protect Indigenous land rights, or if the application of the rules results in violation of rights, Indigenous groups may resort to the judicial system. Litigation on land rights is a growing global phenomenon. See Box 1.

³ The practice of the Human Rights Committee generally acknowledges that: “Groups identifying themselves as indigenous peoples generally fall under the protection of article 27 as ‘minorities’, [and]... constitute ‘peoples’ for the purposes of article 1 and are beneficiaries of the right of self-determination.” (Scheinin, 2004^[11]).

⁴ The C107 articulates the importance of recognising the right of ownership over traditionally occupied lands and the right to use and participate in the management of natural resources on Indigenous territories (articles 12, 13 and 14).

⁵ To a more complete explanation on the contents and implications of FPIC processes, refer to: FAO (2016^[46]), *Free Prior and Informed Consent: An Indigenous peoples’ right and good practice for local communities*, Manual for Project Practitioners; and UNDP (2013) *Guidelines on Free, Prior and Informed Consent*.

⁶ More on Treaty Land Entitlement claims at: Simons and Pai (2008^[24]).

⁷ For a more complete history of the concept of Indigenous peoples’ sovereignty over land and natural resources in the UN system, see: <https://www.humanrights.gov.au/news/speeches/indigenous-peoples-permanent-sovereignty-over-natural-resources>

⁸ Further, rights can be held in perpetuity or be time limited. Typically, Indigenous lands are held in perpetuity. In the absence of time-limited arrangement, this distinction is not useful in practice. This is why it was not included in Table 1.

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

¹⁰ Such is the difference between monist and dualist countries.

¹¹ Information retrieved from: <https://www.queensu.ca/mcp/indigenous-peoples/decision-rules>

¹² Information retrieved from: <http://www.oecd.org/corporate/mne/corporateresponsibilityfrequentlyaskedquestions.htm>

¹³ See more: <https://ic.fsc.org/en/what-is-fsc/what-we-do/empowerment-of-people/pipc>.

¹⁴ Information retrieved from: <https://www.fondation-bertarelli.org/president-bachelet-creates-an-mpa-around-easter-island/>

¹⁵ Ideal types are simplified models. They express pure typologies, which rarely exist in the world. That is, within countries more than one type can co-exist and there may be alternatives to them. There is nonetheless conceptual relevance in such simplification.

¹⁶ The Cambridge Advanced Learner’s Dictionary defines autonomy as: “The right of a group of people to govern itself or to organise its own activities.” And it defines independence as “freedom from being governed or ruled by another country” and “the ability to live your life without being helped or influenced by other people.”

¹⁷ Information from: <https://www.aadnc-aandc.gc.ca/eng/1327090675492/1327090738973>

¹⁸ The benefits have been assessed by an independent consultancy firm (KPMG) in 2009 on the cost and benefits of FNLM by surveying 17 First Nations who had been operational for several years. The study was requested by the former Aboriginal Affairs and Northern Development Canada. The results are listed in the *First Nations Land Management Readiness Guide* (AANDC, 2013^[47]).

¹⁹ There are four land councils in the NT: [Northern Land Council](#), [Central Land Council](#), [Tiwi Land Council](#) and Groote Eylandt the [Anindilyakwa Land Council](#).

²⁰ Information retrieved from: <http://www.environment.nsw.gov.au/jointmanagement/jointmanagementoptions.htm>

²¹ It is assumed that Indigenous peoples enjoy full citizenship rights, being granted at least the same basic rights than any other individuals in the country.

²² Permanent review boards with decision-making powers may actually constitute a type of co-management institution, as long as power is distributed equally among Indigenous and non-Indigenous actors (Section 1.5.2). See for instance the *Mackenzie Valley Environmental Impact Review Board*, established in 1998 in Canada's Northwest Territories: <http://reviewboard.ca/about>.

²³ Information retrieved from: <https://www.arctic-council.org/index.php/en/about-us/arctic-council/faq>. For a more nuanced analysis on the role of Indigenous Permanent Participation representatives in the Arctic Council, refer to: <https://worldpolicy.org/2017/04/05/Indigenous-peoples-and-environmental-decision-making-in-the-arctic-council/>

²⁴ Information retrieved from: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=1691>

²⁵ Information retrieved from: <http://www.cbc.ca/news/canada/north/land-claims-public-hearing-yellowknife-1.4366440>

²⁶ For more on the intermediary role played by Indigenous leaders and representatives, see the Policy Paper on community capacity and multi-level governance of this OECD series.

²⁷ See Åhrén, M (2016^[48]).

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