

Deepening Rights Study Methodology

Framework of Analysis:

The purpose of this study is to map the distribution of the “bundle of rights” to forest resources which are codified in legally-binding documents and regulations and are held by communities in 30 selected countries. We have developed a framework for this analysis that allows us to collect consistent data and compare the results across countries’ forest tenure regimes.

The following questions were answered:

1. What are the statutory tenure regimes regulating the rights of communities to forest resources in each of the selected countries?
2. Which communities are granted rights under these regimes?
3. Do communities have the right to access forest resources under the identified regimes?
4. Do communities have the right to use and benefit from (withdraw) forest resources under the identified regimes? Are these rights limited to subsistence use, or can the community also use resources for commercial purposes?
5. Do communities have the right to manage these resources under the identified regimes? How is this right exercised? Are communities formally represented in the administrative bodies that govern the area demarcated by the identified regimes? Are communities the only entity responsible for managing the forest resources they have access to?
6. Do communities have the right to exclude others from accessing or using forest resources within the area demarcated by the identified regimes?
7. Do communities have the right to lease, sell, or use forest resources as collateral?
8. Are the rights granted to communities by the law guaranteed for a limited or unlimited period of time?

9. Can states extinguish any of these rights without providing compensation and following due process of law¹?

In order to collect consistent data on multiple countries some assumptions had to be made and a number of important definitions were used in doing so.

Assumptions:

The data is based on legally-binding documents and regulations. It does not include information about implementation and does not consider rights recognized under customary tenure systems. It also does not include tenure regimes that are established by the government under non-legally-binding policy instruments.²

This analysis does, however, considered non-legally binding documents (decrees, executive orders, etc.) when they further implement or clarify the conditions under which rights, guaranteed by a constitution or other legislation, should be exercised. In these cases, the tenure regime in question is based on a legally-binding document and these policy instruments just provide details on how the regime should be implemented. Supporting literature and expert opinions have helped us to interpret and clarify the provisions of legally-binding documents.

A complete understanding of the complex distribution of the “bundle of rights” held by communities will only be possible when the implementation of the laws and regulations establishing them are also considered. However, due to limited time and resources, it was not possible to do so in this study. Where possible the area (in millions of hectares) under each regime is included to provide context on the implementation of the regimes.

¹ Due process of law is the principle that a government must respect all of the legal rights accorded to a person in keeping with established laws.

² For instance, the Joint Forest Management (JFM) agreements in India were implemented by *Circular No. 6-21/89-P.Pan* which is an executive order that is not legally-binding. Therefore, we did not include JFM when we analyzed tenure regimes in India.

We are convinced, however, that understanding the statutory distribution of the “bundle of rights” to forest resources held by communities is an important first step in evaluating the global picture of community rights to forest resources. Here are some reasons why:

1. Communities can only exercise their rights if they are aware they exist. Knowing what statutory rights they have is a pre-requisite for their implementation.
2. “Bad” law cannot lead to “good” implementation. It is important that communities understand the law in order to be able to evaluate it critically. A better understanding of the law also plays a critical role in guiding and informing effective pro-community advocacy.
3. A global analysis of the legislation and policy instruments used by many different countries allows for the identification of best practices and establishes a basis for comparative analysis.

This study focuses on statutory tenure systems only. Customary tenure systems are not included in the scope of our analysis. This is not because statutory tenure systems are more important than customary tenure systems, but because official view shapes policies and their implementation and it is possible to measure and compare progress over time.

Whenever significant implementation issues (e.g. the inability of communities to comply with the complexities of legal processes) or conflicts between statutory and customary rights were found with consistency, they were noted and are described in the comments presented in the country profiles section. This information was not used in our aggregate results or comparative analysis.

The data is based on national-level legislation only. Subnational tenure regimes were not taken into account, as it is difficult to access the relevant subnational legislation. It is equally difficult to find local experts with knowledge about specific regional arrangements and agreements who can verify the accuracy of the collected data. It is known, however, that in some countries community rights to forest

resources may vary widely depending on the state or subnational entity involved in tenure regime administration and oversight (e.g. Australia, India and Malaysia).

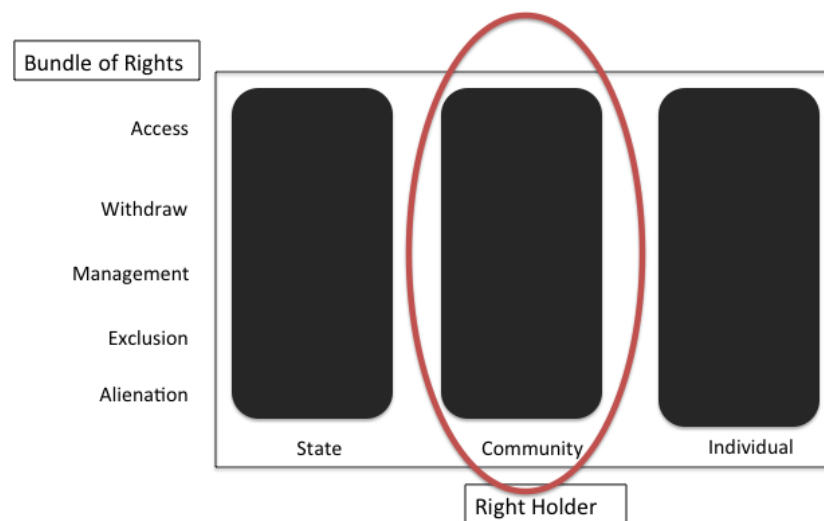
Tenure rights to forest resources are conceived of as a “bundle of rights”. These rights range from *access* and *withdrawal* rights to *management*, *exclusion*, and *alienation* rights.³ For *access*, *exclusion* and *alienation* rights it was determined whether or not the law guarantees or does not guarantee these rights. In the case of *withdrawal* rights, a distinction was made between subsistence use rights and commercial use rights. For management rights, a distinction was made between regimes where a community manages the resources directly and regimes where a community does not have the right to manage *per se*, but has a seat (normally alongside government and private sector representatives) on the administrative body that manages the forest resources or area demarcated by the tenure regime in question.

The unit of analysis to measure the distribution of the “bundle of rights” is the community, therefore only collective property rights are considered. The forest tenure rights held by the state (including subnational and municipal governments) or individuals within or outside communities are not considered in this study.⁴ The main reason not to include individual rights is methodological. In many of the identified regimes, particularly where the state recognizes pre-existing customary rights (e.g. Indigenous Territories in Latin America, Native Titles in Australia, and lands under the Recognition of Forest Rights Act in India) the allocation of individual rights to forest resources is done according to traditional rights and customs. As consequence, the accordance of rights individuals varies greatly from community to community, making it virtually impossible to measure them systematically across countries.

³ Larson, Anne M., Deborah Barry, Ganga Ram Dahal, and Carol J. Pierce Colfer, eds. 2010. *Forests For People: Community rights and forest tenure reform*. London, UK: Earthscan. See also: Schlager, Edella and Elinor Ostrom. 1992. “Property-rights regimes and natural resources: A conceptual analysis.” *Land Economics* 68(3): 249-262.

⁴ For more information on this see Barry, Deborah and Ruth Meinzen-Dick. 2008. “The invisible map: community tenure rights.” Paper presented at the 12th Biennial Conference of the International Association for the Study of the Commons (IASC), Cheltenham, UK, 14-18 July, 2008.

In some countries, households and individual rights to forest resources are becoming increasingly important. In China, the latest reforms have strengthened the rights of individuals in detriment to those of the collectives. Furthermore, it was also found that some countries guarantee access or subsistence use of forest resources to the local population on an individual basis instead of at the community level. These individual rights regimes are described in the country profiles but are not considered in the aggregate results or comparative analysis.



When more than one scenario exists within one tenure regime, the data is based on the best-case scenario.⁵

Definition of Terms

- **Community** is defined as a group of people who share a common interest or purpose in a particular forest and share the forest as a common resource.⁶
- **Access right** is the right held by a community to enter a forest area.⁷
- **Withdrawal right** is the right held by a community to use and benefit from non-timber forest resources and timber resources from the forest area.⁷ A

⁵ For example, in the case of the Australian Native Title tenure regime, the law differentiates between "Exclusive Native Title" and "Non-Exclusive Native Title". We consider the former when assessing whether the law grants exclusion rights to Aboriginal and Torres Strait Islanders within the forest area governed by this tenure regime.

⁶ Hence the resident-based community may overlap with the community of interest or be a subset of it, or vice-versa. There may also be local communities embedded in larger communities. See Larson et al. 2010: 13.

⁷ See Larson et al. 2010: 12. See also Schlager and Ostrom. 1992.

community may have a withdrawal right for subsistence and/or commercial purposes.

- **Management right** is the right held by a community to regulate internal use patterns or transform the resource.⁷ The management right is exercised within the limits of the other rights and is not conditional to the right to withdraw timber resources for commercial purposes. For example, if a community can only withdraw non-timber resources for subsistence purposes, we still consider that it has the right to regulate internal use patterns and transform the non-timber resources for its subsistence.
- **Exclusion right** is the right held by a community to decide who can use the resources and who cannot.⁷
- **Alienation right** is the right held by a community to sell, lease, or use the land as collateral, including the sale of all other rights.⁷
- **Revocability** refers to a state's ability to extinguish the rights accorded to communities in the 'bundle of rights' without due process of law and compensation.
- **Non-timber forest products** are goods derived from forests that are tangible and physical objects of biological origin other than wood.⁸
- **Timber forest products** are wood resources used for production of goods, services, and energy.⁹
- **Tenure systems** are systems that define who owns particular resources, for how long, and under what conditions.¹⁰
- **Statutory tenure systems** are the tenure systems applied by governments and codified in legally-binding law.¹¹
- **Customary tenure systems** are the tenure systems determined at the local level and are often based on oral agreements.¹¹

8 Adapted from Food and Agriculture Organization of the United Nations (FAO). 2010. Global Forest Resources Assessment: Main Report. Rome, Italy: FAO.

9 Adapted from FAO. 2010.

10 Adapted from FAO. 2002. Land Tenure and Rural Development. FAO Land Tenure Studies 3. Rome, Italy: FAO. Page 7. See also Sunderlin, William D., Jeffrey Hatcher, and Megan Liddle. 2008. From Exclusion to Ownership? Challenges and opportunities in advancing forest tenure reform." Washington DC: Rights and Resources Initiative. Page 3.

11 Sunderlin et al. 2008:3.

- **Forest** does not have a standard definition. We used each country's definition of forest to analyze its community tenure regimes.

Data Collection

The data was collected in two phases. The first phase was a desk study during which we conducted a review of the academic literature and relevant legislation for each country in order to identify community tenure regimes and the rights held by communities to forest resources within these regimes.¹²

During the second phase the preliminary data regarding each country was submitted to at least two people with relevant expertise, who verified its accuracy, provided feedback, and suggested further information where it was needed.¹³

This verification guaranteed that the data was as complete as possible and that it was based on the most up-to-date laws and regulations. The feedback and comments from local experts also helped us to better understand the historical context and current debates around each of the identified tenure regimes.

Collecting the necessary data for this study was quite challenging. Due to the wide geographic scope of the study, obtaining relevant and up-to-date laws and regulations was not easy. Documentation was not always available online, especially for African and Asian countries, and so the assistance of those with regional expertise and connections, country-specific experience, and local knowledge was necessary. In many cases these contacts were able to provide us with the documentation and advice that made this study possible. Although the Rights and Resources Initiative maintains a thorough network of contacts and collaborators located in countries all over the world, finding contacts with suitable expertise who were willing to review the preliminary data regarding each country was more complex and time consuming than was initially foreseen. The good will and help of

12 During this phase of the study we have analyzed over 80 legal instruments.

13 The only exception was Venezuela, where we could not find experts who were willing to assist us in reviewing the preliminary data we had collected. More than 80 reviewers assisted us with this phase of the study.

public officials, academics, local lawyers, and tenure experts around the world allowed us to overcome these challenges and provide sound legal analysis based on the most current conditions in each country.

Data Coding

For each question that we attempted to answer in this study there is a corresponding rating in the each of the country profiles, and next to it you will find the supporting legal reference and rationale. A score is assigned to each depending on the rights held by communities in accordance with the scale described below:

- For **most data** points:
 - “0” = the law does not guarantee the right
 - “1” = the law guarantees the right
 - “n/a” = Not available

- For data on **withdrawal rights**:
 - “0” = the law does not guarantee the right
 - “1” = the law only guarantees subsistence withdrawal right
 - “2” = the law allows commercial withdrawal right depending upon management plans and/or licenses and environmental and other legislation limits

- For data on **management rights**:
 - “0” = the law does not guarantee the right
 - “1” = the law guarantees a community the right to participate on the management board
 - “2” = the law guarantees the right to manage within management plans, and limits of environmental and other legislation

Data Comparison

Data was compared at the tenure regime level and not at the country level. The reason for this is that in most of the countries considered in this study, more than

one tenure regime was identified, many of which accord different rights and often do so to different groups or populations. For example, in Brazil, a total of eight tenure regimes were identified. These regimes vary greatly in their scope, rights accorded, and demographics included. Considering the diversity of regimes and rights evaluated, creating a country index aggregating the data per country would be very complex and might obfuscate the important differences that were found to exist between the rights held by different groups of Indigenous Peoples and communities in each of the individual tenure regimes.