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## **ASEAN Guidelines on Recognition of Customary Tenure in Forested Landscapes**

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## BACKGROUND OF THE GUIDELINES

Across Southeast Asia, 300 million people live in rural areas, and up to 70 million people rely on forests for their livelihoods, nutrition, and food security.<sup>i</sup> Urban communities can also rely on forested landscapes for economic and social wellbeing. However, rural and forested areas can fall under various land and forest categories determining diverse types of tenure arrangements. Most of these areas are often home to diverse and heterogeneous groups of women, men, and youth comprised of smallholder farmers, forest-dependent communities, fishing communities, peasants,<sup>ii</sup> and Indigenous Peoples<sup>iii</sup> (collectively referred to as “Indigenous Peoples and local communities” within these guidelines). Indigenous Peoples may be referred to in different countries by such terms as “Indigenous ethnic minorities,” ethnic minorities, ethnic groups, “aboriginals,” “Adat,” “hill tribes,” “minority nationalities, or “tribal groups.”

Indigenous Peoples and local communities<sup>iv</sup> across Southeast Asia have a deep connection to their land, therefore representing a holistic view of a forested landscape that encompasses spirituality, life, culture, and the biotic and abiotic components within an ecosystem. This holistic view also encompasses the relationships, interconnections, and value systems between and within an ecosystem.<sup>v</sup> This understanding of forested landscapes is extremely relevant for customary tenure. Customary tenure systems of forested landscapes incorporate forested land and expand to include rivers, watersheds, mangrove forests, dynamic food systems, and the varying cultural values and relationships attributed to specific locations by Indigenous Peoples and local communities. Customary tenure embodies the relationships between people and the land, which are dynamic, adaptive, and flexible. National forest definitions are different across ASEAN Member States (AMS) and often differ from the more holistic way Indigenous or local communities view forested landscapes and natural resources.

The extent of areas and rights exercised by Indigenous Peoples and local communities are not fully documented. A global baseline report<sup>vi</sup> by the Rights and Resources Initiative on the analysis of trends in the distribution of forest tenure from 2002-to 2017 shows that forest area designated for and owned by Indigenous Peoples and local communities increased significantly over the past 15 years-by, at least 147 million hectares globally. The global baseline consists of 15 countries across Asia. Seven are ASEAN Member Countries (Cambodia, Indonesia, Lao PDR, Thailand, Myanmar, the Philippines, and Viet Nam). In these seven countries, the percentage of forests designated for Indigenous Peoples and local communities increased from 1.07 percent of all forests to 2.41 percent between 2002 and 2017.<sup>vii</sup> The area of forests owned by Indigenous Peoples and local communities increased from 0.02 percent to 2.44 percent in the same period.<sup>viii</sup> However, the ownership data only represents those from Indonesia and the Philippines. They are the only countries of the seven to have laws supporting forest ownership. Governments overwhelmingly maintain legal and administrative authority over more than 93 percent of forestlands.

Progress on recognizing the lands designated and owned by Indigenous Peoples and local communities in ASEAN countries has been slow. It does not represent the true extent of their customary territory. In five ASEAN countries (Indonesia, Lao PDR, Myanmar, the Philippines, and Thailand), rights to only 10 percent of all lands, including non-forested landscapes, customarily owned by Indigenous Peoples and local communities, are legally recognized.<sup>ix</sup> This legal recognition is highly nuanced and may not equate to full ownership over customary territories, favoring temporary concessions or other land use management and use regimes. The remaining 72 million hectares, 20 percent of the total land area in these countries, lack any form of ownership rights altogether.<sup>x</sup> Much of these areas are contested by Indigenous and local communities who have traditionally relied on these areas for their livelihoods and cultural integrity and have little to no protection of those rights under national law.

Across forests and forested landscapes in the region, Indigenous Peoples and local communities are engaged in traditional occupations around farming, fisheries, and forestry, in the latter more on harvesting, gathering, and selling of non-timber forest products (NTFPs). Farming by Indigenous Peoples and Local Communities is generally rotational agriculture, commonly known as swidden agriculture. There is growing evidence that swidden farming systems, if viewed as part of a broader landscape and over a longer time frame, are sustainable and sources of resilient and adaptive livelihoods.<sup>xi</sup> Swidden ecosystems can sequester nearly 40 times as much carbon as they emit when provided with adequate fallow periods of roughly ten years.<sup>xii</sup> Swidden practices are intimately bound to national laws that can either support or undermine their ecological contributions. Some national policies have categorized this centuries-old farming system as primitive, destructive, and unsustainable. In contrast, others recognize swidden as a complex national item of intangible cultural heritage and can contribute beneficially to environmental and economic targets. There can often be conflicting policies around swidden agricultural practices within a country and across government ministries.

The need for Guidelines on Customary Forest Tenure Recognition arises in response to clear gaps in realized customary forest tenure recognition, contradictory national positions towards Indigenous and local knowledge, systems, and practices, inadequate implementation, and the need to enhance forest governance in ways that promote existing forest stewardship, biocultural diversity and sustainable practices.

In preparation for developing these Guidelines, national and regional case studies and multi-stakeholder technical seminars and policy dialogues and discussions were organized and participated in by multiple actors from the ASEAN and beyond between June 2021 to March 14, 2022. The highlights of these studies and discussions are summarized below:

- 1.) There are national laws, regulations, and policies that recognize the customary tenure of communities, especially Indigenous communities, in various ASEAN countries. These national laws, regulations, and policies may support the recognition of customary land and even traditional uses and practices on customary land. However, they often fail to fully align with existing land use/practices on the ground, which are heterogeneous, complex, and diverse. Identified causes for this misalignment are the following:
  - a. When laws are passed, in many cases, they are kept idle, and operationalization steps are not taken. When measures are taken to operationalize, the purpose and intent of the laws are grossly distorted;
  - b. National and provincial laws are not updated or amended to harmonize with new laws, new data-supported evidence, or conducive with local governance structures for operational purposes;
  - c. New policies and laws are not integrated with the governing law and structures because they are resisted by political and executive structures at different levels (i.e., local, provincial, state, national);
  - d. The level of authority or jurisdiction is not clearly defined. There are contentions and conflicts between local structures and state structures and/or within and between agencies, departments, and ministries of governments;
  - e. While laws and levels of governance are made to run in parallel, new contradictory laws may be passed, which create confusion, paralyze the implementation of laws that are favorable to communities, or criminalize traditional practices;
  - f. New departments, institutions, agencies, or ministries are not created to achieve, enable or operationalize the objectives of the new laws and policies. If created, they are often defective, with little authority and low capacity undermining their ability to execute functions adequately. Further, institutions created have no cultural match – structurally and competencies of the bureaucracy.

- 2.) Many countries in the region, including Cambodia, Laos, Vietnam, Indonesia, and the Philippines, have laws and policies on customary tenure recognition. However, these vary regarding their effectiveness, coherence, coverage, and the level of protection or autonomy afforded to communities. National governments have recognized only portions of the lands and territories of the communities, and those recognized come with different forms (i.e., collective, communal, and individual tenure systems), rights, and limitations; the policy is not supported by an implementation mechanism, administrative machinery or due diligence and monitoring system; the law itself does not give clear operational instructions for government and rights holders; there is also a lack and/or absence of platforms and coordinating mechanisms that support equitable multi-stakeholder dialogue, inter-and intra-actor conflict resolution between community, private and state actors, or accommodate customary land and natural resource management within the Food, Agriculture and Forestry (FAF) sector as well as across other sectors.
- 3.) REDD+ was identified as a major facilitating factor in the region for recognizing customary tenure and Free Prior and Informed Consent (FPIC) as an integral safeguard of customary rights. An opportunity for customary tenure recognition in REDD+ lies in developing national safeguard frameworks and guidelines and safeguard information systems. Recognizing and protecting the customary rights of Indigenous Peoples and local communities through participatory mechanisms and securing FPIC are essential for the effective and rights-based implementation of REDD+ that upholds a community's right to self-determination.
- 4.) Land contexts are localized, and *there is no common model or approach for promoting the recognition of customary tenure*, unlike that of social forestry. Many of the models of social forestry relate to customary tenure. Social forestry has, to some extent, facilitated limited recognition of parcels of forests that are part of customary forest tenure systems. Granting limited rights over these parcels can give communities interim tenure security over forests that are owned customarily and allows them to manage legally, benefit from and protect these areas. The process of clarifying tenure for social forestry can increase customary tenure security, even if partial, in areas that previously had none. Yet, social forestry also can negatively impact customary forest tenure systems, creating tenure holes where tenure is formally granted in certain areas or plots and not in others. A fit-for-purpose social forestry approach that recognizes the extent of diverse tenure landscapes is critical to avoid undermining dynamic, adaptive, and culturally dependent customary tenure systems.
- 5.) A regional standard that illustrates a simple, step-by-step guide on formalizing, recognizing, and protecting customary rights in ASEAN is absent. For customary forest tenure, access and ownership are still conditional and restricted in several cases. Cases of encroachments in customary land and forests threaten customary rights and impede traditional livelihood, customary conservation, and resource management practices. Formal documentation or government accepted evidence for customary law or land rights are not readily available or hard to procure. Political support may be absent from relevant government agencies, while civil society support (particularly funding) is limited. Due to large-scale public and private sector megadevelopment projects, Indigenous Peoples and local communities are vulnerable to conflicts and even dispossession as a result of elite business interests.
- 6.) Only selective customary rights and selective areas of land that are used under customary tenure systems are formally recognised regarding the use and access of forests and natural resources, as compared with all other activities supporting customary rights and traditional occupations. There is insufficient protection over Indigenous Peoples' and local communities' livelihoods throughout ASEAN practices such as shifting cultivation, and traditional forest

management and conservation are identified as contributors to deforestation and unsustainable development. National priorities, such as climate change targets and the like, often directly negatively impact forest-dependent communities. ASEAN member states have varying priorities and policies which require identification and streamlining through equitable, participatory multi-stakeholder engagements to ensure shifting cultivation and sustainable traditional, agricultural, and conservation practices of forest-dependent communities are protected and supported. Customary Tenure in Forested Landscapes is essential for communities' food security and livelihoods, performing environmental services critical to other important goals, such as climate change mitigation and adaptation, environmental protection, and biodiversity conservation.<sup>xiii</sup>

- 7.) Rapid development in Indigenous Peoples' and forest-dependent communities' territories, including coastal mangrove areas, as large-scale development by state and private business interests, leads to community dispossession and the extensive degradation of the natural resource base upon which communities depend for survival and livelihoods. The lack of enforcement, FPIC, or due process leaves Indigenous Peoples and local communities vulnerable to adverse impacts by business activities that threaten their territorial and cultural integrity.
- 8.) The communities' plans and priorities are not considered during the research, development, implementation, and monitoring of such projects. The absence of establishing levels of authority, jurisdiction, and the powers of a community is the critical problem. In most of these projects, the full right to provide or withhold FPIC is not respected or upheld. FPIC is a key self-determination mechanism in place for a community to come together and collectively decide their development aspirations. In connection with this, the establishment and/or expansion of national parks and conservation areas in territories of Indigenous Peoples and forest-dependent communities without their FPIC, largely made by governments pursuant to internationally agreed targets, violates internationally recognized human rights and undermines local and time-proven contributions to biodiversity conservation. This situation has restricted community access and tenure rights and, for some communities, resulted in eviction from state-protected areas in some countries.
- 9.) There is a need to support the revitalization of Indigenous customary land and natural resource practices which have been historically marginalized, criminalized, and even actively assimilated through state and non-state activities. Indigenous Peoples collectively represent a rich and diverse wealth of intangible and tangible forms of cultural heritage in their ways of life, artisanry, and livelihoods which are intimately tied to promoting a better environment and relationship with the earth. Community-led initiatives need to be fully recognized, supported, and scaled up. Regarding land ownership, there are considerable ambiguities in the CLMV countries on the extent and treatment of public and private domains in land and related resources. With ambiguity comes negotiation and the ability of state gatekeepers to derive private benefit in non-transparent land deals.<sup>xiv</sup> Given this, one can imagine the complexity and layers of the tenure systems in uplands, grazing lands, coastal mangrove areas, and geographically isolated areas in the region. These areas are, since time immemorial, governed by customary tenure systems rooted in community norms, customary institutions, and practices that predate colonial times. Governments often consider such community land as vacant, idle, or state-owned property.
- 10.) Community organizing is vital for recognizing customary tenure and FPIC. Customary tenure and FPIC are not only dependent on the official recognition by the government alone, but it also requires strong solidarity, participation, and unity among the community members themselves and representative Indigenous and local organizations to uphold, practice,

respect, and protect their customary land and natural resources used for the sustainability.<sup>xv</sup> It is important to note that the pressure points/firm stances from networks of Indigenous communities and organizations will play very important roles in ensuring the FPIC process happens. This includes facilitating exchanges between communities in neighboring ASEAN countries to encourage sharing best practices and their subsequent integration into national policy.

- 11.) Community participation should be ensured in policy formulation, harmonization, implementation, and monitoring to ensure that grassroots concepts of customary tenure are adequately captured in state policies. The equitable participation and inclusion of Indigenous and local community members, researchers, and organizations in relevant community tenure-linked research and data-gathering are important at community and government levels. This engagement is important in the process of formulating definitions of community tenure, identifying gaps in relevant data, filling the necessary data gaps, documenting implementation progress, formulating policy, FPIC, capacity building, identifying culturally appropriate methodologies, the establishment of mechanisms and relevant institutions as well as all activities, directly and indirectly, concerning the well-being and rights of Indigenous Peoples and local communities amongst others.

## ASEAN POLICY CONTEXT

There is no specific policy framework related to the recognition of customary tenure at the regional level. However, sustainable forest management is a priority within the policy framework of the ASEAN Food, Agriculture, and Forestry (FAF) vision and strategic plan (2016-2025). The latter acknowledges the importance of forest tenure rights for Indigenous Peoples and local communities to achieve this goal. This FAF vision and strategic plan are supported by the Plan of Action (PoA) for the ASEAN Cooperation on Social Forestry (2020-2025) being implemented by the ASEAN Working Group on Social Forestry (AWG-SF). The plan has been adopted by the 20<sup>th</sup> ASEAN Senior Officials on Forestry (ASOF) meeting. The social forestry sub-sector has, by far the most explicit plans related to recognition of customary forest tenure under *STRATEGIC THRUST 1: ENHANCING SUSTAINABLE FOREST MANAGEMENT and the Action Program: Enhancement of Forest Management involving community living within and surrounding the forest for the sustainability of Forest and Prosperity of the People.*<sup>xvi</sup> The AWG-SF is an established WG under the ASEAN ASOF, which is mandated to provide policy recommendations/oriented research on social forestry within the context of sustainable forest management and responding to the emergence issues on the impact of social forestry. The working group is also mandated to develop and regularly review its Plan of Action (PoA) for ASEAN Cooperation on Social Forestry and identify key priority areas of social forestry that contribute to the Strategic Plan of Action for ASEAN cooperation in forestry 2016 – 2025.

In 2020, the AWG-SF's plan of action for the ASEAN Cooperation on Forestry identified two priority activities under Strategic Thrust 1, Activity 1.1.3a concerning customary tenure and Free, Prior and Informed Consent (FPIC). First, there is a need to review customary and statutory tenure arrangements at the national level, including access and use rights, of Indigenous and ethnic peoples, local communities, forest dwellers, and other forest-dependent communities. This is to ensure that they are recognized, respected and protected by effective legislation. It is vital to mainstream the principle of FPIC in forestry-related decision-making efforts. The priorities mentioned above are an important entry point for continued dialogue and discussion among relevant stakeholders on customary tenure recognition and FPIC in the forestry sector.

Social forestry models are not necessarily based on customary tenure; thus, customary tenure is not to be equated with social forestry or community forestry. However, as a flagship program for the ASEAN Member States (AMS), social forestry opened national discussions on tenure reform and its associated rights, including FPIC. Social forestry refers to a broad range of forest management models



that place local people at the center of decision-making processes. The objectives of social forestry range from protecting forests and providing for the households' subsistence needs to producing commercial timber and harvesting non-timber forest products.

In the ASEAN region, social forestry is officially referred to as community forestry, village forestry, community-based forestry, or community-based forest management and Community Protected Areas. It is an essential aspect of tenure rights, sustainable forest management, and climate action. Cambodia, Indonesia, Myanmar, the Philippines, Thailand, and Viet Nam have set national targets for transferring forest land to Indigenous Peoples and local communities, a collective target of slightly more than 30 million hectares (15 percent). As of mid-2019, all six countries are making steady progress towards their national targets. Viet Nam reached its national target in 2016.<sup>xvii & xviii</sup>

In the region, recognition of customary tenure systems and associated rights for Indigenous Peoples and local communities take place within the backdrop of complex land and natural resources utilization policies. These include land administration systems largely developed during colonial periods, which favor a political and economic elite and render communities invisible on lands, forests, and natural resources falsely attributed as being state-controlled or state-managed.

Below is a short overview of the ASEAN Member States, their laws, enabling conditions, and existing policies over land and customary tenure. Information was gathered through a series of consultations, workshops, and reports written by national Indigenous and local community organizations and NGOs working on issues of land tenure, human rights, and customary knowledge and tenure systems. The cases have been selected to provide a broad and diverse image of issues linked to customary tenure in forested landscapes across the ASEAN region.

### **Cambodia**

Cambodia is the only country in the Mekong region with a law allowing Indigenous Peoples to access Community Land Titles, though these provide limited access (Land Law of 2001 and the Sub-decree No. 83 on Procedure of Registration of Land of Indigenous Communities, 2009). Sub-decree No.83 provides the framework by which Indigenous communities can acquire the collective title, of which there are three stages. However, the application process is cumbersome. To gain their collective land title, Indigenous communities must first be recognized as an Indigenous community by the Ministry of Rural Development, then gain their legal entity through the Ministry of Interior (MoI), before finally having their land surveyed and the title issues by the Ministry of Land Management, Urban Planning and Construction with final approval from the Ministry of Environment (MoE). The MoE can prevent the granting of CLT in forested areas and areas considered important for biodiversity conservation, including protected areas that often overlap with Indigenous Peoples customary territories. As of 2021, in 20 years since the CLT process was made available to communities, the MoI has recognized 150 Indigenous Peoples Communities as legal entities, but only 34 communities have successfully gained their Community Land Titles out of more than 600 communities.

**Box 1. Customary Tenure of Indigenous Kui in Bangkeoun Phal village, Romtom commune, Rovieng district, Preah Vihear province.<sup>xix</sup>**

Bangkoeun Phal village is located in the Romtom commune of Rovieng district in Preah Vihear province. It is a Kui Indigenous community with a total population of 854, 445 are women, belonging to 184 households. The Indigenous Kui in Bangkoeun Phal has practiced and continued to assert/claim their customary land and natural resource use and management systems, which has led to their partial recognition in different government policies. In 2014, The traditional elders' group of the village was officially recognized by the Ministry of Interior as the legal entity, "Indigenous Peoples Community Committee," for Collective Land Title management. In 2012, the Choam Pen Community Protected Area was recognized officially by the Ministry of Environment for the total forest land of 3,422 has.

For the village of Phal, customary tenure is closely tied to community livelihoods and food security. The community produces sufficient food for their consumption in line with their traditional cuisines. In the peak season, villages were able to sell surplus harvest for extra income. However, food shortages were noted during the dry season, worsened by widespread deforestation and illegal hunting from external actors.

While the government recognized the customary tenure of this community, the form in which they have been recognized does not fully represent Indigenous customs, culture, world views, and respective understandings and definitions. The government also reserves the right to take back the lands and forests that were given to the community. Rights are also limited. A Community Protected Area is provided for 15 years and can be extended based on the performance of the community and are vulnerable to be taken back by the state.

Communities and Indigenous Peoples can also manage lands, forests, and natural resources through Community Forestry schemes: Community Protected Areas, Community Forestry, and Community Fisheries but with limited rights. Several key statutory mechanisms recognize customary arrangements granting communities rights to access, use, manage, protect, and sustainably benefit from forest resources. Laws governing land allocation for concessions allow limited protection for customary users,<sup>xx</sup> which includes a lack of alienation rights available to communities in forestlands.<sup>xxi</sup> Laws are often partially implemented or neglected altogether due to weak state institutions and administrative capacities across the country.<sup>xxii</sup> A plurality of state law and customary norms and institutions can result in conflict if not properly synergized in a coherent and culturally sensitive manner. Long-held customs of rule and informal patron-client relationships can shape the way laws and policies are implemented on the ground.<sup>xxiii</sup>

In terms of FPIC, there is no term used in Cambodia's current laws, policies, and regulations yet. However, the term is used more in relation to a consultation where decision-makers are external to the community rather than an essential consent generating and self-determination activity. There is also no specific recognition of customary claims in the 2005 Sub-decree on Economic Land Concessions. Estimates suggest that Indigenous Peoples and local communities in Cambodia customarily own 0.9 million hectares or 5.3 percent of the country's national territory. A third of these lands lack tenure rights.<sup>xxiv</sup> In 2017, only six percent of forested lands were designated for Indigenous Peoples and local communities.<sup>xxv</sup>

## **Indonesia**

Indonesia's Forestry Law 41 (1999) divides forests into state and private forests. Forestlands without private entitlements are state forests.<sup>xxvi</sup> Approximately 40 percent of all villages in Indonesia, 40,859 villages (2009), are within or around a forest zone.<sup>xxvii</sup> This proximity is linked to forest dependency.<sup>xxviii</sup> The Forestry Law 41 (1999) provides the basis for social forestry programs in Indonesia. Under these programs, local communities obtain forest management licenses while land ownership remains with the state. Social forestry programs include community forest, community

plantation forests, and village forests.<sup>xxxix</sup> Local regulations and informal tenure arrangements have been used to revive existing customary practices and forestland rights.<sup>xxx</sup>

### **Box 2. Adat forests.**

Another scheme of social forestry includes *Adat* Forests (*Hutan Adat*), which are forests that *Adat*, or customary, communities have customarily governed. When *Adat* Forest are designated by the Ministry of Environment and Forestry, the ownership of the forest changes from the state to the *Adat* communities, to obtain such ownership for *Adat* Forest, *Adat* communities first must be recognized as an ‘*adat*’ community by the local government through local regulations. There are two types of local regulations: they can either directly determine *Adat* communities and their territory (stipulation) or begin a procedure for recognition (regulation), in which case a Regent decree is required to complete the local recognition process. In 2022, the Designation of *Adat* Forests has increased by roughly 76,156 hectares (87 units/communities) managed by nearly 45,000 families, and another 1.1 million hectares of indicative *Adat* Forest are expected to be stipulated this year.

The creation of *Adat* Forests was a correctional policy resulting from the Constitutional Court decision no.35/2012 (commonly referred to as MK 35). The intention behind MK 35 was restitutorial, to give ownership back to *Adat* communities over customary and historic forests claimed by the state based on the pre-MK 35-Forestry Law. This decision changed the content of the existing Forestry Law. It categorized *Adat* Forest (Customary forests of *Adat* communities) as Private Forest no longer pertaining to the category of State Forest. *Adat* Forests cannot be revoked or terminated.

In addition, to support *Adat* communities’ tenure rights claims, communities together with CSOs such as Badan Registrasi Wilayah Adat (BRWA), Aliansi Masyarakat Adat Nusantara (AMAN), HuMa, and Koalisi Hutan Adat have collectively initiated the participatory mapping and documenting of *Adat* territories. These CSOs set up a voluntary registry to consolidate this spatial and social data.<sup>xxxii</sup> Data are regularly produced and updated to inform the relevant government ministries. To date, other than the 76.156 hectares which have been designated, 1.090.755 Hectares of forest have been mapped by the Government of Indonesia as the indicative area of *Adat* Forest through Map of *Adat* Forests and Indicative Areas of *Adat* Forests.

A territorial map produced through participatory processes is helpful in claiming rights and ownership over traditional territories. Reference maps can be overlaid above the existing forestry map to determine the extent of Customary Forest coverage. With field verification, Customary Forest’s designated function (conservation/protected/production) can be determined. However, the recognition-through-local-regulation prerequisite can act as a bottleneck for implementing Customary Forest. It is a high-cost process that often renders it inaccessible for the *Adat* communities without external facilitation or support. As customary territory maps are the basis for object-of-rights recognition within the local regulation (such as customary territory), collaborative multi-stakeholder approaches are essential for implementing customary forest policies and facilitating dialogue between relevant stakeholders and institutions.

While land ownership remains with the state, a collection of statutory mechanisms recognize customary arrangements in Indonesia.<sup>xxxiii</sup> Constitutional rights support the recognition of the existence of customary tenure and customary law under the Indonesian 1945 Constitution (UUD 45),<sup>xxxiii</sup> the Basic Agrarian Law (UUPA) Number 5 the Year 1960,<sup>xxxiv</sup> and Social Forestry regulations,<sup>xxxv</sup> all recognize traditional communities and customary rights as long as these remain in existence and consistent with national principles and regulations. At present, Indonesia has

recognized 176 Adat communities through sub-national legislation. Models of Social Forestry recognize customary tenure: Adat forest, and to a limited extent, Village Forest, Community Forest, Community timber Plantation, and Partnerships. A separate law, the Protection and Management of Environment,<sup>xxxvi</sup> and its implementing regulation<sup>xxxvii</sup> recognize Local Wisdom and importance in delivering justice, community welfare, and preserving the environment and natural resources.

The Ministry of Environment and Forestry first recognized community rights through the Decree on Special Purpose Zone in 1998. It included the acknowledgment of traditional agroforestry systems. The rights given to communities are usually for access, withdrawal for subsistence, commercial use, and occasionally rights to manage forested lands. Exclusion, alienation, and compensation rights are much less common.<sup>xxxviii</sup> The forested areas are de facto collectively owned and operated by customary communities in customary territories. They do not share the statutory definitions of state forest, private forest, or area for other uses.<sup>xxxix</sup> In 2016, Indonesia streamlined its process of transferring forests to local communities. This led to a marked rise in the area of social forests.<sup>xl</sup>

There is no comprehensive legal umbrella that ensures the rights of Indigenous Peoples are fulfilled in Indonesia. A Draft Bill on Indigenous Peoples is expected to fill this gap and protect the existence and the rights of Indigenous Peoples in the country. This draft bill has been discussed since 2009, been included in the National Legislation Program (Prolegnas) on multiple occasions since 2012 but has not yet been passed. The government has instead prioritized and fast-tracked other laws, such as the Job Creation Bill (OMNIBUS law), which, with its implementing regulations, could potentially violate the rights of Indigenous Peoples and undermine environmental safeguards. In Indonesia, it is estimated that only 4.46<sup>xli</sup> of 44.6<sup>xlii</sup> million hectares of land customarily owned and governed by Indigenous Peoples and Local Communities have legal recognition of their tenure rights.

### **Lao PDR**

In Lao PDR, forest governance is highly centralized, with most forestlands claimed by the state.<sup>xliii</sup> The new Land and Forest Laws adopted in 2019 could provide opportunities to recognize customary tenure. In this circumstance, customary tenure arrangements would apply to land types managed collectively and held privately.<sup>xliv</sup> However, there is a need to define more specific operational rights under Article 130,<sup>xlv</sup> ‘Acquisition of the Right to Use Customary Land.’ Article 130 affirms the State’s acknowledgment of historical land use by people, using land to generate their livelihood and wellbeing, inhabiting forested land, and to whom land-use certificates should be issued.<sup>xlvi</sup> Lao PDR has some laws that provide a path to recognize customary tenure. However, they have been described as being generally weak or poorly implemented.<sup>xlvii</sup>

Under Article 44, ‘use of forest land,’ the State tasks the Ministry of Agriculture and Forestry (MAF) and Ministry of Natural Resources and Environment (MoNRE), and other agencies to conduct surveys, data collection, re-locate the forest land, and then issue land-use certificates. MAF Order 54 on Customary Rights and Use of Forest Resources lists customary uses of forests, forestland, and forest products do not require a permit.<sup>xlviii</sup> However, the tenure rights of forest-dependent communities and shifting cultivation farmers may not be fully protected by Article 130 as it states that land use must be regular and developed for over 20 years. Swidden cultivation necessitates leaving land fallow for at least three years. In this context, a lack of knowledge and understanding of traditional practices can render multifunctional shifting cultivation landscapes illegal and marginalize and even criminalize those who practice them. Fallow plots require extended fallow periods, with incremental environmental, sustainable agricultural production, and forest management benefits. Laws should consider working with communities, not limiting their practices to identify optimum periods that national laws can support.

The Lao PDR government has improved policies aimed at unity, eradication of ethnic poverty, and creating equality for all ethnic groups in the nation. Most procedures are not specific about ethnic groups, and there are no articles that specifically state the rights and interests of ethnic groups. FPIC is practiced as an information dissemination tool and development approach suitable under the responsible agriculture investment and community resources management framework.<sup>xlix</sup> In Lao PDR, Indigenous Peoples and local communities are estimated to have their legal tenure rights recognized on 0.02 million hectares of land, and five million hectares remain to be identified.<sup>l</sup> Only 0.1 percent of the forests in Lao PDR are designated to Indigenous Peoples and local communities.<sup>li</sup>

**Box 3. Examples of Customary Laws and Practices of Ethnic groups in Lao PDR.<sup>lii</sup>**

50 ethnic groups in Lao PDR can be further categorized into more than 200 ethnic subgroups. These 50 ethnic groups are geographically dispersed and historically referenced in terms of three topographic locations: the Lao Loum (lowlands), Lao Theung (mid-lands), and Lao Soung (uplands). All ethnic groups practice customary land and resource management systems, which are uniquely adapted for their geographic locations. These systems have been adaptive and developed over generations as part of their traditional ways of life, underpinned through ritual, moral codes, and customary practices. Each ethnic group has customary laws and regulations for village land and forest protection. According to the review of statutory law and customary law in the Xechamphone Ramsar site by IUCN 2013<sup>liii</sup>, which covers the Lao-Tai and Mon-Khmer, the following customary laws applied for forest land management:

- Sacred Forest: The sacred forest of the community is believed to be a sacred place for the guardian spirit that protects all members of the community. As such, they need to be treated with dignity and respect.
- Spiritually Protected Areas: Religious beliefs have established traditional laws that apply directly and indirectly to the villagers' conservation. Forest spirits are believed to punish those who encroach on protected lands, hunt forbidden animals, and live an immoral life.
- Cemeteries: Cemeteries are traditionally protected areas where the village does not allow hunting of big animals and any activities in this forest area. Some villages allow hunting small animals and collecting NTFP but must get permission from the village authorities. It is forbidden to enter any form of finding food in this forest for other villages.
- Non-Spiritual Communal Protected Areas: Cutting a big tree is prohibited in this forest. Small trees can be, but only for personal and family use. Cutting any tree for commercial purposes is not allowed. Hunting in the forest is also regulated, as hunting big animals is prohibited, but hunting small animal is permitted. Violations will be punished and fined (IUCN 2013)<sup>liv</sup>

Customary laws can be carried and expressed through ceremonies and rituals, such as Hmong-Mien and Sino-Tibetan ceremonies to worship the spirit of the soil. The ceremony asks for the rain to produce good upland yields and promotes practices that maintain soil quality for long-term use. Local ethnic communities understand and practice customary laws, enjoying them through de facto means, as there is a lack of enforcement and knowledge regarding state laws in Lao PDR (IUCN 2013).<sup>lv</sup> Government policies on increasing forest cover and promoting land-based investments make customary tenure vulnerable. This is because local communities have limited access to land and forests to sustain their living.

## Malaysia

In Peninsular Malaysia, customary land tenure systems hold significant influence and are still practiced, especially in rural society.<sup>lvi</sup> The Malaysian government owns 98 percent of the forests, and private entities own 2 percent.<sup>lvii</sup> Each state government has autonomy over its forest resources.<sup>lviii</sup> In Malaysia, the Federal Constitution (Sabah and Sarawak) under Article 161A (5) provides the reservation of land for Indigenous Peoples and the recognition of customary territories. The Sabah Land Ordinance and Sarawak Land Code 1958 recognize native customary Rights of the Indigenous People of Sabah and Sarawak. There is also formal recognition of customary tenure under the

National Land Code 1965 and the Civil Law Act of 1965.<sup>lix</sup> There is some recognition of customary arrangements, but no recent legislation provides substantial protection.

In Sabah, land tenure and rights are clarified in the Land Ordinance. It recognizes Native Customary Rights. In Sarawak, rights and tenure are legislated in the Land Ordinance and Land Code (1958) and its prior amendments, which set out Native Customary Lands and Reserves.<sup>lx</sup> To address the presence of local communities within forest reserves, those with high dependency towards forests, the Sabah Forestry Department may issue Occupation Permit to them. This is in line with the concept of Sustainable Forest Management (SFM), which is to address social aspect as well. This is however is on case by case basis on certain areas where the community is proven to have high dependency on forests for their livelihood. The cost of the permit is calculated per hectare and paid for annually.<sup>lxi</sup> Final decisions regarding the area and duration of the permits lie with the Sabah Forest Department. However, the community does participate in this process. The Sabah Forest Department's formal acknowledgment of forest communities and their traditional claims to land is a positive development. Communities in Sabah can also apply for an Indigenous reserve and gain communal property rights in this way. This differs from the communal title in that the community cannot transfer these rights to other parties. Land use is restricted, and a Board of Trustees must be established to manage the reserve.<sup>lxii</sup>

On FPIC, there is currently no national law or policy relating to the FPIC of *Orang Asal*, the Indigenous Peoples groups in Malaysia. However, there are FPIC or community consent protocols based on the customary institution of the communities. The recognition of FPIC by the private sector is on a case-to-case basis.

### **Myanmar:**

The State of Myanmar “is the ultimate owner of all lands and all-natural resources above and below the ground.”<sup>lxiii</sup> Approximately 25 percent<sup>lxiv</sup> of Myanmar’s land area is classified as forestland. It falls under the Ministry of Natural Resources and Environmental Conservation administration.<sup>lxv</sup> A significant-sized area of Myanmar is not titled, adding to the precarity of customary tenure. In Myanmar, Indigenous Peoples and local communities hold tenure rights to 0.16 million hectares or 0.24 percent of the country.<sup>lxvi</sup> A further 20.7 million hectares of customary Indigenous and local community lands lack legal recognition.<sup>lxvii</sup> Unregistered land is considered at the state's disposal, including customary land claimed by communities.<sup>lxviii</sup> In 2012, the state officially relabelled them as ‘virgin, fallow and vacant’ when these lands are actually customary village property.<sup>lxix</sup>

Many stakeholders understand that the majority of the land is held through customary or informal tenure arrangements.<sup>lxx</sup> Customary tenure systems in Myanmar vary depending on geography, resource base, ethnicity, the extent of market integration, population density, and history.<sup>lxxi</sup> Customary tenure is widespread throughout the country, particularly in upland areas, where shifting cultivation is common.<sup>lxxii</sup> Customary systems have persisted through violence. However, they have been eroded and undermined in recent decades.

In Myanmar, the National Land Use Policy (2016) recognizes customary land rights for ethnic communities. Part 8 on land use rights of the ethnic nationalities states: “Customary land use tenure systems shall be recognized in the national land law.” However, the policy is only a statement of intent<sup>lxxiii</sup> as it lacks a legal framework for its application which was under discussion until the military take-over in February 2021. The current legal framework does not provide any form of protection of customary tenure rights, except in limited form through Community Forests and Community Protected Areas. Only 1 percent of the forests in Myanmar are designated for Indigenous Peoples and local communities.<sup>lxxiv</sup>

In 2018, Myanmar issued a new Forest Law, a Community Forestry Strategy, and Community Forestry Instructions. These collectively improved the legal and institutional framework for community forestry and emphasized forest enterprise development and income generation.<sup>lxxv</sup> Still, as of 2019, there is no statute to acknowledge customary systems or village land and resources held within their commons.<sup>lxxvi</sup> There is political resistance hindering the attainment of legal status for such recognition.<sup>lxxvii</sup> This political resistance counters some official state strategies. The 2018 Agriculture Development Strategy and Investment Plan recognizes the importance of shifting cultivation. It states: “The recognition, documentation, and registration of customary land rights, often of a communal nature and sometimes established under shifting cultivation and agroforestry systems, is not only necessary to protect the land rights of smallholders but also for success in national reconciliation efforts.”<sup>lxxviii</sup>

The Community Forest Instruction (1995) allowed local communities to get some land tenure rights. However, it was not until provisions in the Farmland Law (2012) that communities could register land by becoming legally incorporated entities/associations.<sup>lxxix</sup> Lands held under customary tenure can be found within the permanent forest estate (PFE),<sup>lxxx</sup> especially shifting cultivation land, sacred forests, and community-managed forests.<sup>lxxxi</sup> The Conservation of Biodiversity and Protected Areas Law (2018) designates community-protected areas as areas that are intergenerationally preserved and used by Indigenous Peoples and local communities to conserve traditional beliefs and customs or sustainably use resources.<sup>lxxxii</sup>

The Community Forest Instruction (2019 and earlier versions 2016, 1995) provides the most common way to recognize collective claims to forested areas. A community forest certificate includes a lease between 15 - 30 years that can be extended.<sup>lxxxiii</sup> The Community Forest Instruction (2016) permits community enterprises to sell timber and NTFPs with the intention to generate income and reduce poverty.<sup>lxxxiv</sup> There is the need to align activities linked to enterprise building, traditional practices, and the conservation of biodiversity together, as these do not have to be mutually exclusive processes. The 5<sup>th</sup> national report of Myanmar to the CBD (Ministry of Natural Resources and Environmental Conservation, 2014) indicated that shifting cultivation in upland areas is seen as a key threat to biodiversity. This view is in direct contrast to the official position of the State of Myanmar and modern scientific evidence-based research, which demonstrates how shifting cultivation is ecologically appropriate and can lead to a conducive environment for biodiversity.<sup>lxxxv</sup>

**Box 4. Relevant principles in exercising consultation and/or consent processes as an obligation under national and sub-national laws, including international obligations.<sup>lxxxvi</sup>**

The State of Myanmar has no national legal requirement or framework for FPIC.<sup>lxxxvii</sup> Decision-making is centralized. Ethnic Nationality representatives feel it is insufficient, or a complete lack, of consultation, let alone a procedure that resembles FPIC prior to private sector projects being initiated.<sup>lxxxviii</sup> The information being provided to Indigenous communities is often biased in favor of private entities.

The implementation of FPIC requires the systematic identification of Indigenous Peoples in state law and the recognition of their collective right, including those to FPIC processes.<sup>lxxxix</sup> References of ‘indigenous peoples’ are only found in a handful of administrative documents and in Article 5 of the 2015 Ethnic Rights Protection Law. Article 5 provides that ‘indigenous peoples’ (in Burmese – ta-ni tain-yin-tha, which is not defined in law) should receive complete and precise information about extractive industry projects and other business activities in their areas before project implementation so the negotiations between the groups and the state/companies can take place.<sup>xc</sup>

Ethnic nationality Civil Society Organizations (CSO) are discussing how Article 5 of the Law should be implemented. However, FPIC is insufficiently understood at the state level even though there exists a progressive awareness of the concept among CSOs and Indigenous communities who are increasingly exposed and made aware of this right of theirs. There is an overall lack of information of FPIC practices in Myanmar, particularly regarding how Indigenous Peoples have implemented their right to give or withhold consent, which hinders reflection and evaluating existing practices.<sup>xcii</sup>

The Ethnic Rights Protection Law mentions FPIC in relation to all development projects, projects extracting natural resources, and business affairs implemented in regions of ethnic groups. It also mentions a Grievance Redress Mechanism (GRM) for ethnic groups at regional and national levels, along with obligations to implement international mechanisms.

The principles governing the functioning of the GRM are:

1) Deal with grievances at lowest level possible: communities usually have an effective (traditional and/or culturally appropriate) mechanism for grievances although there still needs to be a mechanism for recording the grievance and the result; 2) The GRM needs to be impartial and be able to deal objectively with grievances involving parties with different power levels; 3) The GRM needs to work and report promptly as well as be predictable and transparent by indicating expected number of days for each stage of the GRM process; 4) The GRM needs to be continually available but cannot be costly; 5) There needs to be a mechanism to record a grievance against a grievance officer; 6) Communication materials or information on the GRM should be provided in a language that is understood by the community; 7) KPIs/Targets should be identified with input from the community to ensure that grievances are received, acknowledged, and closed out in a timely manner and reflective of the expectations of the community/users.

All processes under the GRM are currently suspended due to instability, and there is no information dissemination of the available mechanisms to communities.<sup>xciii</sup> Cooperation between the state and Indigenous Peoples is essential to develop comprehensive FPIC guidelines in-line with UNDRIP provisions and their incorporation into national legislation.<sup>xciii</sup> The state will need to enforce the guidelines on FPIC for any project that will be implemented in customary Indigenous territories, including actions linked to international climate change agendas.<sup>xciv</sup> Clear and transparent information sharing on benefit-sharing during the consultation and full participation of project-affected communities is essential to support their self-determination.<sup>xcv</sup> These will need to be coupled with comprehensive risk assessments to mitigate the negative impacts of mega-development projects in customary Indigenous territories.<sup>xcvi</sup>



## **The Philippines:**

Forestlands and natural resources in the Philippines are owned by the state. With consent from the government, private individuals and entities may use forestland for traditional forestry purposes, pasture, agriculture, and other pursuits under both short-term permits and long-term leases.<sup>xcvii</sup> The Philippines' cultural diversity is recognized by the 1987 Constitution. The Philippines' Indigenous Peoples Rights Act (IPRA) (1997) recognized four bundles of rights emanating from ownership of ancestral domains and 36 specific rights of Indigenous People. However, even with this highest formal recognition, many challenges remain, and some of these specific rights still need implementing rules and regulations. As customary tenure systems are also part of protected areas, key biodiversity areas, watershed areas, tourism areas, agriculture, cultural heritage areas, and economic zones, challenges continue to evolve. A national government agency with regional, provincial and local offices is responsible for supporting and protecting Indigenous Peoples' rights, issuing ancestral domain titles, affirming Ancestral Domains Sustainable Development and Protection Plan (ADSDPP), and facilitating and certifying that a project proponent has secured the FPIC of the Indigenous Peoples. If the proposed project site is within the ancestral domain, after the FPIC process, the National Commission on Indigenous Peoples (NCIP) issues a Certification Precondition (CP) and facilitate a Memorandum of Agreement between the project proponent and the Council of Elders to ensure the IPs recognition and benefits from the project. Further, in those areas with proposed project not within the ancestral domain/ land, after the FPIC or field-based investigation, the NCIP issues a "Certificate of Non-Overlap" (CNO).

### **Box 5. Indigenous Peoples, Ancestral domains and the Conservation of Biodiversity**

On a per-hectare basis, the Philippines homes more biodiversity than any country on Earth.<sup>xcviii</sup> There are also an estimated 14-17 million Indigenous Peoples in the Philippines, representing 110 distinct Indigenous ethnolinguistic groups. Under the IPRA, Indigenous Peoples in the Philippines are expressly guaranteed the rights to their ancestral domains through five bundles of rights: (1) right to ancestral domains; (2) right to cultural integrity; (3) right to self-governance and empowerment; (4) right to social justice and human rights; and (5) right to enter into and execute peace agreements. Some 75 percent of areas with forest cover in the Philippines are located within ancestral domains.<sup>xcix</sup>

Ancestral domains and Protected Areas overlap by 1,4 million hectares, while the overlap between Key Biodiversity Areas (KBAs) and ancestral domains with Certificate of Ancestral Domain Titles (CADTs) is 1,3 million hectares (96 CADTs out of 128 KBAs). Indigenous Peoples' territories are vital for the continued conservation of biodiversity. A total of 29 percent of KBAs not under formal forms of protection are in territories occupied by Indigenous Peoples. There are nearly 10 million people living in the KBAs of the Philippines.<sup>c</sup> Indigenous Peoples and local communities customarily own 10.7 million hectares across the country. However, over 4.3 million hectares of these lands, corresponding to 14.4 percent of the country, lack any form of legal recognition.<sup>ci</sup>

Over 23 percent of Indigenous and local community lands are potentially at risk due to high developmental pressures in the future.<sup>cii</sup> Aligning national and regional biodiversity goals with the pursuit of inclusive, culturally representative, and gender-sensitive customary tenure policies over forested landscapes will be key for climate resiliency and mitigation in ASEAN.<sup>ciii</sup>

There are several forms of consent for communal use in the Philippines. The national integrated protected area system awards tenure rights to communities within protected areas. These are protected areas community-based resource management agreements. Under the IPRA, the National Commission on Indigenous Peoples issues permanent communal titles within ancestral lands following specific IPRA guidelines.<sup>civ</sup> In the Philippines, 10 percent of the forests are designated to Indigenous Peoples and local communities, with a further 30 percent owned by Indigenous Peoples and local communities.<sup>cv</sup> As for the year 2021, the communities manage over 1.6 million hectares of

forestland under CBFM Agreements managed by 1,958 organized communities.<sup>cv</sup> Executive Order 263 remains the basis for recognition of CBFM<sup>cvii</sup>, while executive Order 318 (2004) reinforces and strengthens CBFM as the main strategy for forest conservation and development. The rights of Indigenous Peoples to their ancestral lands and domains are recognized and respected in all forestry undertakings.

In other upland areas classified as forestlands, the state has also issued Certificate of Stewardship Contract (CSC) to individuals or family under the then Integrated Social Forestry Program (ISFP). This grants a 25-year tenure and can be renewed for another 25-years subject to performance evaluation. However, the issuance of CSCs has been stopped in 1996 as the Philippines changed their forest management strategy into CBFM. The CBFM has integrated all the people-oriented forestry programs/projects including the ISFP.<sup>cviii</sup>

## Thailand

All forestlands in Thailand are state-owned under the Forest Law (1941). In 2019, Thailand passed the Community Forest Act B.E. 2562, which, for the first time, Thailand created an official umbrella law to recognize community forestry. Before 2019, people could submit a request to the Royal Forest Department (RFD) to register a community forest under the Reserved Forest Act. If the RFD's Director-General approved the request, the registration would be valid for 10 years. However, the rights of local people were not clearly defined or fully granted.<sup>cix</sup> There is an absence of statutory recognition of customary rights in Thailand. The Community Forest Act B.E. 2562 could provide an avenue to recognize the full extent of a community's traditional tenure rights. The Community Forest Act provides a legal foundation to recognize local communities' rights to manage their forests, including creating mechanisms for decision-making. Only 3 percent of the woods in Thailand are designated for Indigenous Peoples and local communities.<sup>cx</sup>

### Box 6. Special Cultural Zone.<sup>cx</sup>

In 2010, the community of Hin Lad Nai, located in the Northern province of Chiang Rai, Thailand, became one of four Thai villages identified as a "special cultural zone." This recognition came three decades after government logging concessions were first granted and two decades after the total ban on logging. In the years since 80 percent (3,000 has) of the forest has regenerated, and hundreds of hectares are now sustainably cultivated by the village. The community has over 200 edible plant species at its disposal. This regeneration directly results from implementing their traditional knowledge systems, including rotational agriculture. Rotational agriculture is protected in the Ministry of Culture's list of Cultural Heritage. However, the Ministry of Environment still considers the practice illegal.<sup>cxii</sup>

The laws most relevant to Indigenous Peoples in Thailand are the National Land Policy Committee (NLPC) Law on 12 April 2019; the Community Forestry Law on 24 May 2019; the National Park Law on 29 May 2019; and the Wildlife Preservation and Protection Act on 24 May 2019. The National Park Law imposed stricter penalties on forest use and further limited the rights of farmers and Indigenous Peoples in forested landscapes.<sup>cxiii</sup> There was also limited time to document and conduct communities' land-use surveys. Park authorities had to complete the documentation of community land-use and livelihood practice surveys under articles 64 and 65 within 240 days (8 months). The given timeframe makes the full and effective participation and FPIC of the 3,973 communities living in forest areas questionable. Registered communities can temporarily live and use their land for up to 20 years. There is an option for renewal if the community is not violating the agreed rules and regulations. Decision-making is predominantly in state-dominated councils.<sup>cxiv</sup>

Community forests can only exist outside protected areas. For generations, communities have been practicing community forestry beyond the defined forestlands and for reasons other than conservation, which are not recognized in the Act. Despite documented positive outcomes of

Indigenous Forest management in Thailand,<sup>cxv</sup> the lack of legal recognition of their Indigenous identities and no representative Indigenous body within government institutions obstructs the collective advancement of Thailand's Indigenous groups' rights. In December 2020, the Network of Indigenous Peoples in Thailand (NIPT) released their draft bill (the Council of Indigenous Peoples in Thailand Bill)<sup>cxvi</sup> to be proposed to parliament. More than 1.6 million hectares of land customarily owned by Indigenous Peoples and local communities in Thailand lack secure tenure rights.<sup>cxvii</sup>

### **Viet Nam**

In Viet Nam, the 2017 Forest Law recognized communities as forest *owners* compared with the term *forest users* under the old law. The Forest Law has also recognized sanctuary forests as special-use forests and water source protection forests and prioritizes forest allocation to communities with customs, traditions, religions, or spiritual values in connection with forests. In terms of consultation, the Grassroots Democracy Ordinance (2007), first defined in 1986: "*People know, People discuss, People do, People check,*" provides specific requirements on peoples' consultation as well as the content needed for discussion and decision-making by the local people, however, how upland and geographically isolated communities participated in this process is not documented. Only 8 percent of the forests in Viet Nam are designated for Indigenous Peoples and local communities.<sup>cxviii</sup>

#### **Box 7. Challenges to recognizing customary tenure in Viet Nam:<sup>cxix</sup>**

- Legal frameworks in Vietnam do not recognize individuals or community ownership over the land; any form of customary tenure recognition would not be the recognition of land ownership but recognition of a certain set of rights on the use of land.
- A lack of ownership prevents communities from financially benefiting from their forests and protecting their lands, excluding them from being compensated when the forests are recovered or reallocated by the State to other entities, particularly private companies.<sup>cxx</sup>
- There are two major legal documents in relation to customary tenure recognition, particularly the Land Law 2013 and Forest Law 2017, which pose conflicting provisions. In the Land Law 2013, spiritual land consists of land with communal/clan temples, shrines, pagodas, and churches (Art. 160), while in the Forest Law 2017, the spiritual forest is a forest associated with beliefs, customs, and practices of forest-dependent communities.
- The Land-use rights of land users in Vietnam are officially recognized through the issuance of Land use right certificates (LURC). Customary tenure practices are rarely documented, making it difficult for communities to obtain a LURC for a plot of land.
- During the last two decades, rapid industrialization and economic growth have put increasing pressure on lands in Vietnam. Land inequality is predicted to be widening further in the region with the structural changes towards industrialization and reduction of agriculture's share in the national economy.<sup>cxxi</sup> The allocation of forests and land to individuals and companies for commercial purposes has weakened communal tenure. In many provinces, severe land conflicts between SFEs and local residents are ongoing.<sup>cxxii</sup>
- Land Law 2013 has a provision that allows the Government to acquire individual land use rights for "socio-economic development for national and public benefits." Ethnic minorities' customary tenure system not recognized through LURC is at risk of customary territories being expropriated without consultation and fair compensation. A new draft of a decree on agricultural land accumulation and concentration includes provisions that grant the Government authority to appropriate lands it deems do not have adequate conditions for being LURC.
- Public opinion views ethnic minorities' customary practices, such as shifting cultivation, as backward and require modernizing.<sup>cxxiii</sup> Policies and programs created or influenced by this misconception may attempt to alter the cultures and practices of minority groups leading to their assimilation. Consequently, few examples of Indigenous communal right-holding systems in Viet Nam remain, except in very remote villages. The view that ethnic minorities and customary resource practices need modernizing goes against data demonstrating their suitability to difficult environmental conditions.<sup>cxxiv</sup>

As part of the efforts to create a land fund for allocating land and forest to EM and strengthening the efficiency of the State Own Forest Agriculture Enterprises (SFAE), GoV runs an extensive program to restructure SFAEs.<sup>cxxv</sup> Under this program, 402,612ha of forest land was identified for reallocation. Up to 2018, more than 85 percent of the 402,612ha identified for reallocation was still held 'temporarily' by SFAEs or by local authorities. The key barriers to the land allocating/re-allocation include (i) lack of political will at the provincial level and among SFAEs to move forward in allocating land to ethnic minority communities, mostly related to their vested interests in the land; (ii) the lack of capable ethnic minority community representative bodies which have sufficient knowledge and skills to have an effective dialogue with authorities and SFAEs to reclaim customary lands; and (iii) the absence of clear technical guidance for an effective customary land allocating process in law and sub-law legal documents.

Customary tenure systems in Viet Nam have developed over centuries among the different ethnic groups throughout the country. They have been heavily impacted by war and state centralization and collectivization processes.<sup>cxxvi</sup> Despite all of these changes, the geographical isolation of many ethnic minority communities has meant that customary practices have persisted in practice while severely weakened by law. In many communities, these practices continue to play a more significant role in regulating community access to land and resources than state law.<sup>cxxvii</sup> Currently, customary tenure systems persist mainly among communities living in forest areas in the upland regions of the country, where the vast majority of Viet Nam's ethnic minorities are found.<sup>cxxviii</sup>

#### **ASEAN:**

Two ASEAN Voluntary Guidelines, the Guidelines on Promoting Responsible Investment in the Food, Agriculture, and Forestry,<sup>cxxix</sup> and the Guidelines for Agroforestry Development, contain agreed approaches on customary tenure and supporting FPIC. The Guidelines on Promoting Responsible Investment for FAF addresses the most common risk from large-scale private sector investments and land disputes that adversely affect all stakeholders, particularly Indigenous Peoples and local communities. It covers ten areas of best practice, including respecting legitimate tenure rights and the right to FPIC of Indigenous Peoples. It is primarily aimed at the public sector in ASEAN, the regional bodies and supporting secretariats and national and local governments, and secondly, encouraging civil society organizations (CSOs), private sector, and development organizations to use the Guidelines.

Of more relevance to the forestry sector and tenure is the Guidelines for Agroforestry Development which has three principles related to Customary land tenure and FPIC: Principle 8: Recognize and respect local knowledge, traditions, and choice; Principle 9: Support gender equity and social inclusion; Principle 10: Ensure safeguards and tenure rights.

**Furthermore**, of relevance to women, youth, and other marginalized groups of customary tenure system rightsholders and users, the AMAF's Approach to Gender Mainstreaming in the Food, Agriculture, and Forestry Sector, ASEAN Guidelines on Gender and the ASEAN Socio-Cultural Community Blue Print 2025 promote gender equality and women and girls' empowerment, gender mainstreaming, including in ASEAN policies, and the promotion and protection of human rights for all throughout their life cycle.

## **DEFINITION AND SCOPE OF CUSTOMARY TENURE**

Customary tenure is a set of rules, practices, and norms defined over time by a community or communities that govern the allocation, use, access, exclusion, and transfer of land, forests, fisheries, and other natural resources.<sup>cxxx</sup>

The United Nations Food and Agriculture Organization (FAO)<sup>cxxxix</sup> defined customary tenure as a set of rules and norms that govern a community's relationship and use of forest, land, fisheries, and other natural resources. It is a set of socially legitimate, informal, and de facto rules and norms that regulate community allocation, use, access, and transfer of these natural resources.

In defining customary tenure, Indigenous Peoples<sup>cxxxix</sup> emphasize the concept of guardianship<sup>cxxxix</sup> as a basis for defining rights as they rectify inequality both internally and externally in the community. For Indigenous Peoples, customary tenure is guided by their worldview. Living things, including humans, an interrelated community, and guardianship and spiritual relationships to lands and territories are distinctive features of their worldview. This unique holistic relationship calls for the co-responsibility for the well-being of all human beings, non-human life, and respect for nature.

#### *Scope and Scale of Customary Tenure*

Customary tenure applies to Indigenous Peoples,<sup>cxxxix</sup> local communities, including farmers, peasants, fishers, and forest-dependent communities –*and the women, men, and youth comprising these groups*– who have customary practices over land and natural resources. In a forested landscape, the forests, shifting cultivation or rotational farming areas, mangroves, pastures, orchards, individual agricultural plots, bodies of water, boundary areas, burial sites, and worship areas can all be part of one customary tenure system.

In terms of scale, customary tenure systems are complex. They involve nested systems of land rights governed by the notion of collective stewardship of their territory.<sup>cxxxix</sup> These can include collective, communal, and individual tenure systems, often with many overlapping land management and land-use systems. Customary tenure systems are also diverse, dynamic, adaptive, rarely defined and often reflect the country's cultural and ethnic diversity.<sup>cxxxix</sup>

Customary tenure is further characterized as:

- While customary tenure is not always synonymous with collective tenure, it is often implemented on a communal scale where group boundaries, *women, men, and youth* rights-holders of specific areas or natural resources, and overlapping rights are well-known.
- Customary tenure is inter-generational, with the concept of collective ownership of lands, forests, and other resources passed down from one generation to the next. Men, women, and youth are regarded as inheritors of these collective resources. All play crucial roles in meeting their communities' livelihood and food security needs.
- Customary tenure systems usually involve different rights (access, use, control, manage transfer) for different resources.
- Equity is inherently present in the values and principles that guide customary norms and practices of the vast majority of Indigenous Peoples and Local Communities. However, customary tenure systems are not always equitable, sustainable, and representative in practice. Sometimes securing customary tenure rights might disadvantage communities or certain community members (including women and other vulnerable groups). The value of equity in customary tenure systems must be safeguarded.
- Communities have used land and forests for generations working under customary rules, demonstrating that many of these practices are sustainable and resilient.
- Customary tenure is interlinked with customary law and customary governance systems, which are firmly grounded on the ethics and morality of what an individual or a community perceives as right and wrong and may align or clash with gender equality and non-discrimination principles enshrined in national, regional, and international legal instruments. However, customary governance systems and laws are also adaptive, dynamic, and evolve over time and need to be engaged as such through equitable participatory and inclusive procedures.

- Customary tenure within the notion of guardianship is seen as sharing of responsibilities based on competencies. Self-serving individualism is absent, and rather, customary tenure serves as a unifying motive and a motive for serving equity. Within this frame, the more rights are given to specific individuals (whether over family, clan, or community property), there is more significant the responsibility for the individual/s.
- Customary tenure recognition fosters national unity, peace, and development.
- Countries have laws, regulations, and policies that recognize the rights of communities over land and natural resources. Still, none is fully aligned to how these are practiced and sustained at the community level. Most do not adequately and explicitly integrate foundational (constitutional and international human rights) principles of gender equality and non-discrimination as applied to intra-community rights for women, youth, and other marginalized members.
- A core element of sustaining customary tenure systems is the communities' and Indigenous People's right to decide whether or not to allow certain activities, interventions, and development in their areas or refer to the Right to FPIC. These rights and their associated procedures are essential for upholding and supporting a communities' right to self-determination and the autonomy, responsibility, and leadership associated with these processes.

### *Recognition*

Under these Guidelines, recognition of customary tenure systems and rights emanating from such recognition may take various forms and are not limited to state authorities' formalized manner of recognition upon issuance of a legal document as evidence or proof of the community's rights. It is as varied as the spectrum of overlapping rights within these systems. Recognition ranges from documentation of customary tenure systems to informal arrangements between communities and Indigenous Peoples with authorities. Formalization of statutory tenure rights can take many forms, from land titling to registration or co-management agreements with local authorities. However, even if formalization does take place, there may be further risks to the security of community lands. It is critical to go beyond formalization toward full recognition, enforcement, and protection, as formalization itself does not ensure that rights are recognized, guaranteed, or implemented on the ground.<sup>cxxxvii</sup>

There is often a bundle of rights practiced by the communities associated with customary tenure systems at the community level. These rights are not fully recognized under the national laws or, worse, are found to be inconsistent with national statutes in the region.

## NATURE OF GUIDELINES

The Guidelines are voluntary and shall not conflict with existing national laws and regulations or binding international treaties.

## OBJECTIVES OF THE GUIDELINES

The objectives of the Guidelines are to encourage the ASEAN Member States, developmental organizations, and the private sector on the following:

- a. **To establish a clear and comprehensive regional approach to the recognition of customary tenure that is gender-responsive, socially inclusive, and supports transgenerational equity; to invite ASEAN member states to commit to strengthening governance, policy coherence, research, and monitoring attitudes and legal frameworks at national and sub-national levels, consistent with regional and international principles on the power of tenure, food security, gender equality, social inclusion, and sustainable development.**

These Guidelines complement the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security (VGGT),<sup>cxxxviii</sup> ASEAN Guidelines on Promoting Responsible Investment in Food, Agriculture, and Forestry (ASEAN-RAI), the ASEAN Agroforestry Guidelines, the AMAF's Approach to Gender Mainstreaming in the Food, Agriculture, and Forestry Sector, and the ASEAN Guidelines on Gender and the ASEAN Socio-Cultural Community Blueprint 2025. It supports the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) and the inspirational 2050 Biodiversity Vision: living in harmony with nature<sup>cxxxix</sup> by the United Nations Convention of Biological Diversity (UN CBD). It aligns with key international human rights treaties like, but not limited to, the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

- b. **To establish ASEAN standards for customary tenure to facilitate the complementarity of national policies and ensure that these safeguard communities' ability to meet livelihood and food security objectives and engage in sustainable forest management, including as achieved by advancing gender equality and social inclusion goals.**

The standards may provide a clear gender and socially inclusive definition of community/community member, a clear definition of customary tenure<sup>cxl</sup> and domain and what these entail in terms of rights and coverage, and for whom; streamlined gender-responsive and easily accessible process through which communities can apply for customary tenure, a dedicated office, or a one-stop-shop that communities can approach to facilitate the process of applying for formal customary tenure recognition, that is accessible to all community members regardless of ethnic, gender, marital status, or another status.

- c. **To facilitate a framework for engagement with Indigenous Peoples and Local Communities at the national level while acknowledging the national circumstances of each ASEAN member state.**

ASEAN member states, the private sector, and civil society organizations, including women's organizations, are highly encouraged to support programs, activities, research, and projects that support Indigenous Peoples and local communities, particularly women and youth, to document, claim, protect and manage their own customary tenure systems and associated rights, including rights to traditional Indigenous and local knowledge systems and practices and the exercise of the right to FPIC. In this manner, the capacities of Indigenous People and

local communities are strengthened to benefit equitably and engage in national and regional economies that could guarantee their food and nutrition security, food safety, gender equality, social inclusion, as well as the sustainable use of natural resources. A framework for engagement includes setting up institutions that are locally competent, culturally attuned, and appropriate and are accountable to the Indigenous Peoples and local communities, particularly to the women and youth in these groups.



## INTENDED USERS

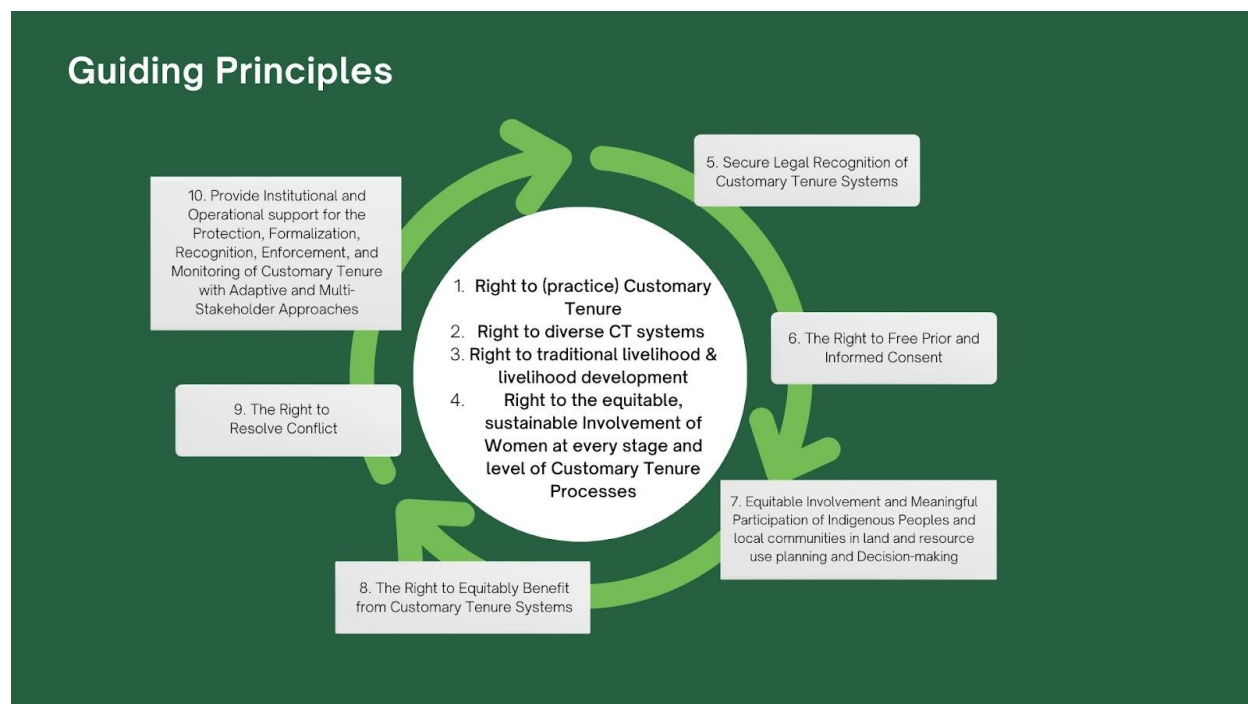
The intended primary users of the *Guidelines* are ASEAN Member States' policymakers and frontline government and local government offices engaging with Indigenous Peoples and Local Communities and/or implementing activities/interventions/research/development projects on or involving their customary lands, territories, and natural resources.

Secondary users are domestic and foreign investors, local and international non-governmental organizations, and academic institutions. Civil society groups and community-based organizations can also use the *Guidelines* as references for advocacy and knowledge sharing.

The *Guidelines* should apply to all countries. The terms "customary tenure systems," "recognition," "local communities," and "Indigenous Peoples" will be defined based on various national contexts, consistent and affirming the framework set by these *Guidelines* and international human rights treaties.

## GUIDING PRINCIPLES

The following is a set of guiding principles towards achieving the recognition of customary tenure in forested landscapes that were consolidated from the common experience and understanding regarding the status of tenure over lands, forests, and natural resources of Indigenous Peoples and Local Communities lands, territories, and resources. These principles articulate the foundation and core elements of customary tenure recognition in the region.



The principles in the diagram above illustrate them as interlinked. Customary Tenure in Forested landscapes requires a holistic approach that integrates an adaptive multi-stakeholder strategy which fosters equity, dialogue and attention to intersectionality. When adopted collectively, the principles provide a framework of actions that facilitate the protection, formalization, recognition, enforcement, and monitoring of customary tenure in forested landscapes. Inclusivity, participation, gender responsiveness and the sensitivity to structures that entrench the marginalization of Peoples and groups of Peoples (religious, ethnic, genders) permeate through every principle. While interconnected and mutually inclusive, the principles can be grouped as follows:

- *Principles 1-4 form the core foundational principles, which recognize the necessity for rights linked to customary tenure, cultures, and identity, the livelihoods of Indigenous Peoples and Local Communities, and the equitable inclusion of members of these groups pertaining to all genders.*
- *Principle 5 is a guiding principle for implementing institutional and legislative change conducive to a context of legal pluralism if existing legal frameworks are challenging.*
- *Principles 6 and 7 highlight essential overarching tools, actions, safeguards, and processes vital for enabling equity and self-determination at every stage of customary tenure recognition. These include the right to FPIC and information, participatory gender-responsive and intergenerational land and resource planning across all sectors, the necessity of equitable decision-making in governance procedures, and further emphasis on gender inclusiveness and sensitivity to intersectionality respectfully.*

- Principles 8 and 9 introduce equitable benefit-sharing, compensation, access to justice and culturally appropriate grievances, and conflict resolution mechanisms.
- Principle 10 provides enabling conditions. It highlights capacity building, collaboration, open and continued dialogue, a conducive institutional and operational environment, and an adaptive and reflective strategy amongst all stakeholders for customary tenure recognition and tenure reform processes.

No.	GUIDING PRINCIPLES
1	<b>PRINCIPLE 1. <i>The Right to Customary Tenure:</i></b> Recognize that Indigenous Peoples and local communities, including people of all genders and youth in these groups, have the right to customary tenure systems and their protection and enforcement through forms that support the continuation of their unique and diverse practices and life-giving relationships to lands, forests, mangroves, fisheries, and natural resources.
2	<b>PRINCIPLE 2. <i>The Right to Local and Cultural Diversity in Customary Tenure Systems:</i></b> Respect, recognize and uphold the diversity of customary tenure systems, corresponding customary governing structures, traditions, and local knowledge systems of all Indigenous Peoples and local communities, whatever their identity, gender, location, cultural and religious values.
3	<b>PRINCIPLE 3. <i>The Right to Traditional Livelihoods and Livelihood Development:</i></b> Legally recognize and protect the traditional livelihoods and social and economic enterprises of Indigenous Peoples and local communities linked to customary tenure and their associated bundle of rights linked to lands, forests, mangroves, fisheries, and natural resources in forms which contribute to food and livelihood security, traditional conservation practices and sustainability.
4	<b>PRINCIPLE 4. <i>The Right to equitable and sustainable Involvement of Women:</i></b> Take active measures to ensure women are meaningfully able to engage participate and where possible lead processes to secure customary tenure rights at all levels of decision-making, management and planning, collectively integrating inclusive gender perspectives and intersectionality in the design, approval, implementation and monitoring of policies and programs for the recognition of customary tenure.
5	<b>PRINCIPLE 5. <i>Secure Legal Recognition of Customary Tenure Systems:</i></b> Ensure that customary tenure claims and the corresponding customary governance systems of Indigenous Peoples, local communities, and the women, girls, and youth in these groups are protected, formalized, enforced, and monitored through culturally appropriate and adequate legal instruments, institutions and legislation.
6	<b>PRINCIPLE 6. <i>The Right to Free Prior and Informed Consent:</i></b> Recognize Indigenous Peoples' and local communities' right to FPIC with freely available, accurate, and unbiased information to self-determine and collectively decide activities within their customary tenure systems.
7	<b>PRINCIPLE 7. <i>Equitable Involvement and Meaningful Participation of Indigenous Peoples and local communities in land and resource use planning and Decision-making:</i></b> Actively implement integrated, participatory and equitable gender-responsive and intergenerational land and resource use planning, involving Indigenous Peoples and local communities in their formalization, documentation, monitoring as well as in the establishment of multi-sectoral coordination mechanisms regarding land and resource use planning processes through culturally and gender-sensitive forms that incorporate have the key self-determination right to participate in decision-making.
8	<b>PRINCIPLE 8. <i>The Right to Equitably Benefit from Customary Tenure Systems:</i></b> Recognize Indigenous Peoples' and local communities' right to benefit from development activities within their customary tenure systems and receive adequate compensation and reparations for loss and damage.
9	<b>PRINCIPLE 9. <i>The Right to Resolve Conflict:</i></b> Recognize that Indigenous Peoples and local communities have the right to use customary laws, their grievance mechanisms, justice systems, and peace-building processes <sup>cxli</sup> while facilitating access to formal grievance mechanisms <sup>cxlii</sup> to achieve accountability and justice in non-discriminatory, gender-sensitive, and accessible forms.
10	<b>PRINCIPLE 10. <i>Provide Institutional and Operational support for the Protection, Formalization, Recognition, Enforcement, and Monitoring of Customary Tenure with Adaptive and Multi-Stakeholder Approaches:</i></b> National and sub-national governments should work with Indigenous and local organizations and communities in strengthening or establishing Indigenous Peoples' and local communities' affairs offices and support technical capacity building activities through the use of adaptive, collaborative, deliberative, and reflective multi-stakeholder approaches <sup>cxliii</sup> in adhering to the principles for recognizing customary tenure on forested landscapes their continued implementation and monitoring.

***PRINCIPLE 1. The Right to Customary Tenure: Recognize that Indigenous Peoples and local communities, including people of all genders and youth in these groups, have the right to customary tenure systems and their protection and enforcement through forms that support the continuation of their unique and diverse practices and life-giving relationships to lands, forests, mangroves, fisheries, and natural resources.***<sup>cxliv</sup>

Acknowledging that customary tenure applies to a whole system of interlinked and interdependent relationships between Indigenous Peoples, local communities, and the women, girls, and youth in these groups and the lands, forests, fisheries, mangroves, and natural resources in their territories. Customary tenure systems and their protection under law form are an integral part of the life and culture of communities. This is partly due to how land and territories intimately relate to all aspects of a community's social, economic, cultural, and spiritual identity and intra- and inter-community relationships. Customary tenure systems are the foundation of Indigenous and local knowledge systems and associated traditional practices, which form the basis of their governance and natural resource management systems. Thus, the recognition of customary tenure shall take into consideration the diverse, unique, and culturally dependent relationships, both tangible and intangible, and shall not focus solely on material or utilitarian understandings of land and natural resources.

Communities manage forests, coastal mangrove areas, food systems, water bodies, and other natural resources together in integrated systems through their customary governing institutions. New policy frameworks relevant to these practices shall be sensitive and conducive to their continued practice, integrity, and longevity. The right to 'territories and areas conserved by Indigenous Peoples and local communities' (more commonly referred to as ICCAs) that are managed on either a landscape or territorial basis, often through customary tenure and governance systems, should be recognized as instrumental in the protection and continued conservation of biodiversity and natural resources.

Furthermore, as natural capital is the core productive asset of Indigenous and local communities, their economic and social activity is intertwined with its continued conservation; their incomes and well-being depend on the utilitarian and nonmaterial values derived from nature. The mutual dependence between Indigenous Peoples and local communities on ecosystems and natural resources, with which they share a complex historical, and cultural relationship, is maintained through adaptive and resilient practices and institutions.

***PRINCIPLE 2. The Right to Local and Cultural Diversity in Customary Tenure Systems: Respect, recognize and uphold the diversity of customary tenure systems, corresponding customary governing structures, traditions, and local knowledge systems of all Indigenous Peoples and local communities, whatever their identity, gender, location, cultural and religious values.***

This *Guideline* recognizes the scale – plural rights and multi-dimensional nature – of customary tenure, including their economic, cultural, and social elements. Indigenous and local communities represent a rich diversity of cultural practices, traditions, knowledge systems, and governing institutions over various land types and uses, which customary tenure systems implicate. State and sub-national governments should support culturally appropriate solutions to ensure the security of customary tenure over forested landscapes in forms that support other land uses such as grazing, fishing, agriculture, and other livelihood use to contribute sustainably to national and regional development targets. There are also varying ways in which different actors relate to forests. While some view them as resources and inanimate areas of wilderness, other groups of people view forests as dynamic food systems, which include rotational agroforestry systems (swidden), sources of NTFPs, and other agroforestry practices.

Any recognition process<sup>cxliv</sup> shall consider the inherent diversity between the highlands, lowlands, and coastal customary tenure systems across ASEAN and the varying bundle of rights attributed to

them by Indigenous Peoples, local communities, and the women, girls, and youth in these groups. In the same manner, customary tenure systems based on/cultural and religious values should be recognized, supported, implemented, and monitored.

This diversity must be appropriately reflected in all policies, programs, data gathering, and public information. With this recognition, the process of determining customary tenure systems for the purpose of legal recognition, policy, development programs, implementation, and monitoring shall be primarily led by and equitably include Indigenous Peoples and local communities.

***PRINCIPLE 3. The Right to Traditional Livelihoods and Livelihood Development: Legally recognize, and protect the traditional livelihoods and social and economic enterprises of Indigenous Peoples and local communities linked to customary tenure and their associated bundle of rights linked to lands, forests, mangroves, fisheries, and natural resources in forms which contribute to food and livelihood security, traditional conservation practices and sustainability.***

Livelihoods and food security are closely intertwined with customary tenure for Indigenous Peoples and local communities. The main source of food and incomes of communities – including medicinal, cultivated, and wild harvest crops, fish, bush meat and livestock, timber, and non-timber forest products – are firmly rooted in the sustainable use of the natural resources that can be found within their customary lands and territories. Hence, any challenges to their use of customary lands pose a risk to their ability to produce food, generate income, maintain their collective well-being and meet their social and economic needs. The wide variety of food available to communities within their customary territories enables them to achieve a diverse diet and food security.

However, in recent years there has been a growing shift to store-bought and processed food, as communities lose control of customary lands from which they collect and produce food while the arrival of new industries established within their customary territories, such as plantations or development projects, push community members to find employment.<sup>cxlvi</sup>

The recognition of customary tenure must include the recognition of an associated bundle of rights – which must be gender-sensitive and equitable – concerning access, use or withdrawal, governance, exclusion, due process, compensation, and duration. The majority of small Community Forest Enterprises and Community-Based NTFP Enterprises in ASEAN are built around communities exercising prior and preferential rights to forests and natural resources, such as NTFPs. Customary tenure systems often provide a traditional local model for regulating and sustainably managing NTFPs and other natural products. NTFP accounts for an estimated 25 percent of the income of almost a billion people and forms the base of community forest enterprises in ASEAN countries.<sup>cxlvii</sup> Safeguarding the community’s rights to use, harvest, gather and develop these resources results in sustained and increased production, diversified incomes, and reduced pressure on the forests and natural resources.

***PRINCIPLE 4. The Right to equitable and sustainable Involvement of Women: Take active measures to ensure women are meaningfully able to engage participate and, where possible, lead processes to secure customary tenure rights at all levels of decision-making, management, and planning, collectively integrating inclusive gender perspectives and intersectionality in the design, approval, implementation, and monitoring of policies and programs for the recognition of customary tenure.***

In line with the implementation of ASEAN Guidelines on Gender, the ASEAN Socio-Cultural Community Blue Print 2025, and the ASEAN Ministers on Agriculture and Forestry (AMAF’s) Approach to Gender Mainstreaming in the Food, Agriculture, and Forestry Sector,<sup>cxlviii</sup> equal

participation of women in the decision-making process at all levels shall be given due respect and recognition. However, in the context of recognizing customary tenure, emphasis on empowering women as decision-makers is highlighted as traditional gender-defined roles<sup>cxlix</sup> pose risks to women in claiming tenure rights. Women usually work in an informal and negotiated way to assert their tenure rights. At the same time, men generally hold positions of authority and make decisions on access, use, and management of customary resources.

The CEDAW General recommendation No. 34 on the rights of rural women succinctly presents State party obligations in relation to specific dimensions of the rights of rural women, which are relevant for customary tenure in forested landscapes. These include, but are not limited to, the right for rural women to participate in and benefit from rural development; the right to access and benefit from social security; the right to education; the right to decent working conditions, equal pay, and equal value of their work contributions; the right to participate in decision-making at all levels and community-level discussions; the right to land and resource; have state policies implement policies that support rural women, farmers, protect their natural commons and protect rural women's traditional and eco-friendly agricultural knowledge; and the right to adequate living conditions.<sup>cl</sup> Ensure that supportive measures facilitate equal participation of women and men in all decision-making processes, policy discussions, capacity building<sup>cli</sup> activities. Such supportive measures should be based on gender-related data collected during the design, implementation, and monitoring of such activities.

***PRINCIPLE 5. Secure Legal Recognition of Customary Tenure Systems: Ensure that customary tenure claims and the corresponding customary governance systems of Indigenous Peoples, local communities, and the women, girls, and youth in these groups are protected, formalized, enforced, and monitored through culturally appropriate and adequate legal instruments, institutions and legislation.***

Given the diversity and uniqueness of customary tenure systems, recognition shall consider the specific needs, interests, and aspirations of Indigenous Peoples and local communities and the women, girls, and youth in these groups. However, incorporating and embedding these systems into the existing statutory land tenure rights regime is challenging. Customary tenure systems should be identified, and the multiple and overlapping rights should be documented, amended where conflicting, and mapped to guide the recognition process, ensuring that the rights of women and girls, in particular, are protected and not eroded in the process.

Local and customary laws for different groups, written or otherwise, can co-exist with the current state laws. Noting that coherent and consistent legal frameworks can come from multiple sources of law (legal pluralism) thus, national or sub-national legal recognition processes should not be limited to only one source of law as there can be different sources of law and authority recognized by a state. However, ensuring a conducive legislative environment for customary tenure is necessary to harmonize the multiple applicable laws and ensure the hierarchy of laws favors customary tenure. Conflicting or contradictory laws may impede, hinder, or undermine the protection, formalization, and enforcement of customary tenure. They should be amended and rectified through participatory and inclusive processes with experts in Indigenous Peoples' and local communities' rights and with communities themselves fostering dialogue and action.

Establishing favorable conditions to attract responsible and equitable investments in ASEAN FAF sectors necessitates a clear policy and regulatory framework, both nationally and sub-nationally, for claiming and securing customary tenure rights. Recognition is appropriate if it uses various legal instruments to recognize the rights of Indigenous Peoples and local communities, particularly the women and youth, to autonomously manage and govern their lands, forests, and natural resources.

Acknowledging that if recognition is made through formal processes such as communal land titling, social forestry arrangements, and co-management agreements with the state, amongst others, AMS shall endeavor procedures that are faster, streamlined, affordable, and more efficient and that do not extinguish or diminish de facto legitimate customary tenure rights.

Finally, the presence of legal certainty and clarity around the management, ownership, and rights will support communities' existing human and financial investments and likely lead to their substantial increase in develop and sustainably manage their lands, forests, fisheries, and natural resources.

***PRINCIPLE 6. The Right to Free Prior and Informed Consent: Recognize Indigenous Peoples' and local communities' right to FPIC with freely available, accurate, and unbiased information to self-determine and collectively decide activities within their customary tenure systems.***

Encourages state and sub-national governments to promote Indigenous Peoples' and local communities' rights to freely pursue and self-determine their economic, social, and cultural development priorities by exercising their right to FPIC. The principle also encourages state and sub-national governments to recognize that FPIC aligns with and facilitates sustainable national development goals. The right to FPIC requires special procedural attention and necessary skills to ensure accurate and unbiased information on the tangible and intangible risks and benefits are readily available and provided to communities in culturally accessible and appropriate forms at all stages of a project's implementation, including its conceptualization and all stages after.

Encouraging all AMS, in line with the recommendations of the AWGSF,<sup>clii</sup> to *Develop national guidelines on FPIC through a collaborative and equitable multi-stakeholder approach ensuring the full and effective participation of Indigenous Peoples and local communities; Develop and implement national policies that take into account the UN Voluntary Guidelines on the Governance of Tenure (VGGT) and REDD+ Cancun safeguards.*

The right to FPIC is an iterative process. It includes the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions, and customs. FPIC should be simple and an inexpensive process with standard costing based on domestic regulations.

***PRINCIPLE 7. Equitable Involvement and Meaningful Participation of Indigenous Peoples and local communities in land and resource use planning and Decision-making:*** Actively implement integrated, participatory and equitable gender-responsive and intergenerational land and resource use planning, involving Indigenous Peoples and local communities in their formalization, documentation, monitoring as well as in the establishment of multi-sectoral coordination mechanisms regarding land and resource use planning processes through culturally and gender-sensitive forms that incorporate have the key self-determination right to participate in decision-making.

State and sub-national governments shall recognize the diverse array of land and resource use practices associated with customary tenure. Recognition must be fair, transparent, gender-responsive, and equitable, ensuring particular attention is given to intergenerational equity, gendered practices, and those practiced by other vulnerable groups. Associated land and resource use planning shall actively and equitably involve Indigenous and local communities, particularly the women, girls, and youth in these groups, in their formalization, documentation, and monitoring, as well as in the establishment of relevant institutional mechanisms to ensure land and resource planning are conducive with customary tenure. Traditional Indigenous and local land and resource

use practices, including shifting cultivation, operate within a dynamic and multifunctional landscape and require statutory legal frameworks which are supportive and culturally appropriate.<sup>cliii</sup>

The full recognition of customary tenure systems includes recognizing customary institutions<sup>cliv</sup> and decision-making rights across all processes. Formal land and resource use planning could potentially divide lands, forests, and fishing areas between or among different Ministries. Compartmentalizing holistic territorial governance could disrupt effective customary tenure systems and undermine sustainable management. Given this, an integrated participatory land and resource use planning process is important, which incorporates the multiple perspectives of land and resource use across genders, knowledge, and generations within a community. The UN-Habitat has developed a tenure-responsive strategy.<sup>clv</sup> The Tenure Responsive Land Use Planning is a GLTN tool for simultaneously solving land-use planning and tenure security challenges. Through its application, local people can take charge of their own development vision in a more participatory, gender-sensitive, and tenure-responsive fashion, using practical, local processes and fit-for-purpose approaches to strengthen their knowledge, capacity, and development through land-use planning.

The land use process is an effective safeguard against policies promoting large-scale development projects<sup>clvi</sup> that can undermine a communities' customary tenure rights and their ability to meet their livelihood and food security objectives. In instances where rights overlap with corporate/ private rights (e.g., leases and concessions), the AMS are encouraged to resolve the matter with urgency and require an undertaking from such private/corporate rights showing how they will comply with the recognition of customary tenure rights.<sup>clvii</sup>

This principle also encourages national and sub-national governments, as well as non-state parties, to promote inclusive, equitable, full, effective, informed, active, and culturally appropriate participation of Indigenous Peoples and local communities, particularly women and youth, in all aspects of decision-making, may affect their rights, developmental priorities, cultural integrity and lives more broadly. Participation in decision-making shall incorporate appropriate procedures to integrate existing customary governance procedures, ensure information is accessible and transparent, respect the right to self-determination, and ensure procedures do not contravene constitutional provisions for equality and non-discrimination.

Participation and recognition processes must build on the fundamental concepts of development within diverse culture and identities, a stronger focus on botequalitiesty of opportunities and outcomes (or lack thereof), as well as a focus on the entrenched structural factors that lead to inequality, such as discrimination based on ethnicity, gender, and age.

Acknowledging that the consultation process, FPIC, should not be viewed as a checklist but as a genuine activity that supports a communities self-determination rights. The lack of appropriate, timely, and clear modalities for the participation of Indigenous Peoples and local communities is a root cause of social, economic, and environmental vulnerabilities and discrimination and exploitation.

Encourages the promotion of a bottom-up approach to agenda-setting and program development by encouraging the Member States to work directly with communities, enabling them to draw from inter-generational knowledge, gender perspectives, long-standing customs, and traditions in governing resources within their forested landscapes. The full and effective participation of Indigenous Peoples and Local Communities as practiced carries with it their representation in policy-making bodies and other local legislative bodies.

***PRINCIPLE 8. The Right to Equitably Benefit from Customary Tenure Systems: Recognize Indigenous Peoples' and local communities' right to benefit from development activities within their customary tenure systems and receive adequate compensation and reparations for loss and damage.***



Recognizing that the right to benefit and share in the profits from the use of the lands, forests, fisheries, and natural resources is part of the bundle of rights associated with recognizing customary tenure. The right to equitably benefit carries with it the right to negotiate the terms and conditions for the use and benefits, both monetary and non-monetary, and the right to receive just and fair compensation for any loss and damage which they may sustain as a result of any project or development affecting their customary tenure systems. The rights related to equitable benefits should be equally enjoyed by all community members, regardless of gender, age, or other social status.

Recognizing that states shall ensure responsible FAF investments that recognize the communities' right over customary tenure systems and their self-determined developmental priorities. The right to equitably benefit from customary tenure requires the strict implementation of FPIC, accurate and sensitive social and environmental impact assessments, gender and intergenerational equity, as well as a functioning due diligence and accountability mechanism for achieving justice. It can also consider establishing a special cultural zone for food production and gathering within the customary areas to ensure that communities will always have access to food at all times.<sup>clviii</sup>

In sustainable forest management, FAO studies demonstrate communities need the right not only to manage the land but also to productively utilize that land for benefits such as financial revenues and livelihood generation. While stronger legal provisions have aided subsistence benefits for forest communities, they have brought few income benefits due to limited recognition and weak protection of community rights, and limiting regulatory frameworks.<sup>clix</sup>

***PRINCIPLE 9. The Right to Resolve Conflict: Recognize that Indigenous Peoples and local communities have the right to use customary laws, their grievance mechanisms, justice systems, and peace-building processes<sup>clx</sup> while facilitating access to formal grievance mechanisms<sup>clxi</sup> to achieve accountability and justice in non-discriminatory, gender-sensitive, and accessible forms.***

Recognizing, that Indigenous Peoples and local communities shall have the right to use their own grievance mechanisms, institutions, justice systems,<sup>clxii</sup> peacebuilding processes, customary laws, and practices within their respective communities and to integrate them with national legal systems corresponding to internationally recognized human rights. Access to dispute resolution should be non-discriminatory, equitable, and accessible to all—regardless of gender, ethnicity, age, or another status.

Encouraging all to minimize potential conflict by supporting investments utilizing culturally sensitive approaches;<sup>clxiii</sup> practicing fair and just business practices with small producers, landowners, and stakeholders of all genders; practicing inclusive and collective approaches (not only inclusive growth), and implementing mutually beneficial, equitable benefit-sharing arrangements through the required FPIC Indigenous Peoples and local communities.

Under this principle, all are encouraged to take measures to safeguard the rights of Indigenous Peoples, and Local Communities to the customary tenure areas they may no longer exclusively occupy but to which they have historically had access for their subsistence and traditional activities, particularly Indigenous Peoples who are shifting cultivators.

The right to resolve conflict requires the immediate cessation of criminalizing Indigenous Peoples and Local Communities' traditional practices, knowledge systems, and territorial defense. AMS should take efforts to bring a near end to extrajudicial killings and the criminalization of Indigenous Peoples and local communities defending their territories and their natural environment and take measures to prosecute the perpetrators of violence and human rights violations.

It is also suggested that conflict resolution should consider acceptable alternative dispute resolution schemes in AMS context in addition to traditional and judicial means. Further, legal assistance has to be provided to the IPs and local communities when appropriate.

***PRINCIPLE 10. Provide Institutional and Operational support for the Protection, Formalization, Recognition, Enforcement, and Monitoring of Customary Tenure with Adaptive and Multi-Stakeholder Approaches: National and sub-national governments should work with Indigenous and local organizations and communities in strengthening or establishing Indigenous Peoples' and local communities' affairs offices and support technical capacity building activities through the use of adaptive, collaborative, deliberative, and reflective multi-stakeholder approaches<sup>clxiv</sup> in adhering to the principles for recognizing customary tenure on forested landscapes their continued implementation and monitoring.***

Lack of recognition and the absence of Indigenous and local community dedicated institutions in public policies can be traced to the absence of a dedicated office for Indigenous Peoples' and local communities' concerns. The welfare and well-being of Indigenous Peoples and local communities require a deeper understanding of their cultural, spiritual, economic, social, and historical issues. There is a need for a national level focal point closely affiliated to Indigenous and local people with dedicated activities that consider these distinct issues, social, economic, and structural barriers to empowerment and all forms of community well-being, including access to economic opportunities and government services. Such government offices and focal points should be gender-responsive, equally serving all genders from local and Indigenous communities.

Noting that every country has its own government structure/office(s) dealing with Indigenous Peoples and local communities, thus, a review of its institutional responsibilities vis-à-vis its capacity may be needed for internal strengthening and gender sensitivity. Moreover, social welfare offices are crucial as customary tenure issues cut across sectors and political boundaries, enhancing the national office's coordination and collaboration approaches with the land, environment, forest, fisheries, and agriculture.

Support capacity-building programs from regional, national, sub-national, and community levels to facilitate an accurate understanding of customary tenure systems, the interconnected knowledge systems, cultural diversity, and gendered dynamics and foster a greater understanding of their importance. Encourages AMS to develop capacity-building programs to support understanding<sup>clxv</sup> and implementation of these *Guidelines*; Encourage AMS, private sectors, and civil society organizations to support programs, activities, and projects directly engaging with communities to document,<sup>clxvi</sup> & <sup>clxvii</sup> formalize, claim, protect, manage, enforce and monitor customary tenure and associated rights, including rights to Indigenous and local knowledge systems and practices and the exercise of FPIC.

Capacity-building at the national level shall include raising awareness within and outside the communities on laws on customary tenure, the bundle of rights and its attendant rights (alongside equity and non-discrimination principles and provisions), documenting existing customs and best practices to guide present and future policies and programs, and improving communities' economic leverage by supporting gender-responsive livelihood activities, foster intergenerational equity, are culturally appropriate and developed by and with the communities, among many others.

Community organizing is vital for the recognition of customary tenure and FPIC for communities. Customary tenure and FPIC are dependent on their official recognition by government bodies. Both require strong solidarity, participation, and unity among the community members themselves to uphold, practice, respect, protect, formalize and monitor their customary lands, forests, fisheries, and natural resources for sustainability. The availability and access to unbiased, informative, and

transparent information is a prerequisite to the practice of FPIC and a right linked to a communities' self-determination.

The recognition of customary tenure is a dynamic learning process, largely defined by national circumstances and the presence of a political will. Thus, an adaptive approach allows time, continued discussions and negotiations, and platforms that create a space for feedback from various stakeholders and take measures to address them. The approach enables incremental changes and experiential learning.

Adopting a bottom-up approach is consistent with the intent and scope of customary tenure recognition from its formalization to its protection, enforcement, implementation, and continued monitoring. As such, the AMS shall work directly with communities and enable them to draw from inter-generational knowledge, gendered perspectives, and long-standing customs and traditions in managing resources. Multi-stakeholder approaches, including multi-stakeholder forums, require sensitivity to existing power inequalities should they foster an environment of trust and equitable transformative solutions.<sup>clxviii</sup> Two key dimensions for achieving equitable approaches to multi-stakeholder forums are intensity and embeddedness.<sup>clxix</sup> The Center for International Forestry Research (CIFOR) defines intensity "as the degree to which an [multi-stakeholder approach] includes local peoples as part of a forest-landscape solution" and embeddedness "as the degree to which an [multi-stakeholder approach] and/or its goals or objectives are embedded or entangled in wider societal or governmental programs and processes."<sup>clxx</sup>

Intensity refers to the degree to which the focus on and structure of a multi-stakeholder approach increases participation, understanding, targeting, and addressing identified inequalities.<sup>clxxi</sup> This includes the need for a multi-stakeholder approach to foster social inclusion and the equitable distribution of access to participation, land, and resources, and decision-making among stakeholders.<sup>clxxii</sup> Intensity also includes the actions taken to respect varying systems of knowledge.<sup>clxxiii</sup> On the other hand, embeddedness engages within broader processes of environmental, economic, political, and social change.<sup>clxxiv</sup>

These guidelines aim to foster a spirit of continued dialogue across all relevant stakeholders. There is a growing recognition that to sustainably manage, use and conserve the world's forests, landscapes, and natural resources, actions and investments must be pursued in a manner that recognizes and respects the land, territorial, and resource rights of Indigenous people Peoples and local communities. The wide range of social and environmental frameworks, standards, and certification systems that have been developed to support such efforts to date have largely been uncoordinated. Absent from these is a common set of globally recognized principles grounded in international human rights law and the aspirations of Indigenous Peoples and local communities. In recognition of this adaptive and evolving process, ASEAN members with these Guidelines and their applications in the local to national contexts will also complement and enhance standards that were created in consultation with Indigenous and local community members, such as the Land Rights Standard.<sup>clxxv</sup> Complementation and joint measures to adopt and ensure that the common principles and standards are included in the policy. State-led actions will redound to more significant improvements in implementing customary tenure in forested landscapes.

## GUIDE TO IMPLEMENTATION

**The following are identified approaches to guide the implementation of the Guidelines:**

1. Effectively communicating the *Guidelines*. A coherent, comprehensive, and innovative communication strategy with outreach action is required. The communication strategy will promote awareness, effective engagement, and gender sensitivity and build momentum for its implementation. Communications strategy shall seek to support the active engagement of

all relevant stakeholders at the national and sub-national levels, including local authorities, productive sectors - such as the agriculture, forestry, fisheries, tourism, infrastructure, energy and mining, civil society, women's organizations, youth, academia, and local Indigenous Peoples and local communities. This may also include supporting high-level political engagement to raise awareness to all relevant groups and stakeholders at ASEAN key strategic meetings;

2. Development of an FPIC tool kit, gender mainstreaming guideline, and toolkit for recognizing customary tenure at the regional level to support understanding and implementation at the national level;
3. An implementation mechanism to support the use of the Guidelines, feedback, knowledge management, and monitoring mechanisms;
4. Strengthening the practice of national commitments (VGGTs, RAI, FPIC, and SDGs). This can be done by focusing on identifying required actions at different levels of government and identifying steps to move forward. Capacity building on national commitments is still needed;
5. The implementation will be supported by the best available knowledge and tools relevant to knowledge systems, gender perspectives, and intergenerational equity, including traditional Indigenous and local knowledge, as well as the best practices and lessons learned from the implementation to date of complementary, supporting, and over-arching guidelines: VGGT, ASEAN-RAI, UNDRIP, UN-CBD, UNFCCC- Cancun Safeguards, and CEDAW;
6. Encourage more grounded and analytical work prepared to recognize customary tenure. The process should include programs on cultural work for promoting and generating cultural narratives based on the unifying motifs aimed at educating and embracing pluralism by both the public and institutions;
7. The Guidelines can be treated as a living document enhanced as national circumstances improve and new global developments occur, leaning towards recognizing customary tenure and the lessons collectively learned through their formalization, implementation, protection, monitoring, and evaluation.

## REFERENCES

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- <sup>iii</sup> The definition of “Indigenous Peoples” in this brief is aligned with the scope of the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention No. 169 (1989). It includes those peoples who self-identify as indigenous or tribal, primarily hold land and natural resource rights to ancestral territories at the community level, and who are either: (1) “regarded as indigenous on account of their descent from the populations which inhabited [a] country, or a geographical region to which [a] country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”; (2) “tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations”; or (3) traditional peoples who may not be referred to as “indigenous” or “tribal” by others, but who share the characteristics of other peoples recognized as indigenous and tribal, including a cultural heritage distinct from a country’s majority population, a natural resource-based livelihood grounded in traditional practices and a deep cultural connection to nature within specific ancestral territory, and a customary land tenure system in which resource rights are primarily held at the community-level. ILO Indigenous and Tribal Peoples Convention No. 169 (1989), Arts. 1 - 2. As cited in Boyd and Keene. 2021.
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- <sup>vi</sup> Rights and Resources Initiative. 2018. At a Crossroads: Consequential Trends in Recognition of Community-Based Forest Tenure from 2002-2017. Washington, DC: Rights and Resources Initiative. <https://doi.org/10.53892/UCYL3747>.
- <sup>vii</sup> Ibid.
- <sup>viii</sup> Ibid.
- <sup>ix</sup> Rights and Resources Initiative. 2020. Estimated area of land and territories of Indigenous Peoples, local communities, and Afro-descendants where their rights are not recognized. Washington, DC: Rights and Resources Initiative. <https://doi.org/10.53892/UZE76605>.
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- <sup>xi</sup> CIFOR & ASFCC. 2015. Social Forestry and Climate Change in Southeast Asia. Jakarta, Indonesia.
- <sup>xii</sup> Dynamism of Rotational Farming, Food Security, Biodiversity, and Climate Change Innovation in *Pgakenyau* Community in Northern Thailand. Presented in the Lower Mekong Network Meeting. July 22, 2021. By Prasert Trakansuphakon. Pgakenyau Association for Sustainable Development (PASD)
- <sup>xiii</sup> FAO. 2021.
- <sup>xiv</sup> Hirsch, P. and Scurrah, N. 2015. The Political Economy of Land Governance in the Mekong Region. Vientiane: MRLG. Available at [www.mekonglandforum.org/sites/default/files/Political\\_Economy\\_of\\_Land\\_Governance\\_in\\_Region.pdf](http://www.mekonglandforum.org/sites/default/files/Political_Economy_of_Land_Governance_in_Region.pdf)
- <sup>xv</sup> Asia Indigenous Peoples Pact. 2014. Training Manual for Indigenous Peoples on Free, Prior and Informed Consent (FPIC). Asia Indigenous Peoples Pact, Chiang Mai, Thailand
- <sup>xvi</sup> The Action Program includes Activity 1.1.3. Review customary and statutory tenure arrangements at the national level, including access and use rights of Indigenous Peoples, local communities, forest dwellers, and other forest-dependent communities to ensure that they are recognized, respected, and protected by effective legislation, including the principle of free, prior and informed consent (FPIC) as provided for in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007.
- Promoting community models of sustainable forest tenure and management, promoting participatory management and monitoring of NTFPs
  - National and Regional Workshops on Tenure/Resource Access and Participatory Forest Governance and follow up national activities
  - Develop regional review customary and statutory tenure arrangement
- The key results intended is an “Updated list of customary and statutory tenure arrangements at the national level, including access and use rights, compiled and shared with Indigenous Peoples’ local communities, forest dwellers and other forest-dependent communities.”
- <sup>xvii</sup> The total area of land defined as forest land in the Southeast Asia measures nearly 196 million hectares (45 percent of the total ASEAN land area). There are now approximately 13.9 million hectares of forest managed under the various forms of social forestry practiced in six ASEAN countries. (196 M forest land in Southeast Asia)
- <sup>xviii</sup> Social Forestry and Climate Change in the ASEAN Region: Situational Analysis (2020) available at <https://www.recoftc.org/publications/0000379?t%5B0%5D=88&p=browse>
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- <sup>xxii</sup> Ibid.
- <sup>xxiii</sup> Ironside 2017a.
- <sup>xxiv</sup> Cambodia: For the explanation of the area estimate of 0.59 mHa where Indigenous Peoples’ and local communities’ rights are already recognized in Cambodia, please refer to page 26 and endnotes 30 and 31 in: Rights and Resources Initiative 2015. Cambodia: A conservative estimate of 0.338 mHa for unrecognized rights in Cambodia is based on the official extent of community forests and community protected

areas that are in the process of being recognized but have not yet received formal government recognition. (Sokchea, Tol. 2020. Personal communication). This estimate is presented in the table. However, it is likely to be an underestimate and needs to be upwardly revised. Try and Hindley (2017) estimate that the areas used and claimed by Indigenous communities is up to 5 mHa but provide no data to support the estimate. In absence of clear data, this estimate has not been included. In 2010, the Government of Cambodia issued a National Forest Program stating that 2 mHa would be managed as Community Forests (Ministry of Forestry, Cambodia. 2010). Only 0.35 mHa of forests have been designated as community forestry to date, implying that 1.65 mHa of community forests remain unrecognized. However, it is not clear how the government reached this estimate of 2 mHa and is therefore not considered here. As no clear data on the extent of larger land and forest claims are available, the more conservative estimate of 0.338 mHa is being presented in this current estimate. Ministry of Forestry, Cambodia. 2010. National Forest Program 2010-2029. Available at: [www.cdc-crdb.gov.kh/cdc/documents/Sector\\_Strategy/6\\_Forestry\\_Reform/National\\_Forest\\_Programme\\_2010\\_2029\\_Eng.pdf](http://www.cdc-crdb.gov.kh/cdc/documents/Sector_Strategy/6_Forestry_Reform/National_Forest_Programme_2010_2029_Eng.pdf);

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xxxv On Basic Agrarian Law (UUPA) Number 5 Year 1960, article 3 states that "The implementation of the ulayat rights and other similar rights of adat law communities as long as such communities in reality still exist must be such that it is consistent with the national interest and the State's interest and shall not contradict the laws and regulations of higher levels"

xxxvi The most is Adat Forest is stated on Law on Job Creation No. 11/2020; Government Regulation No. 23/2021 on Forest Administration and Ministry of Environment and Forestry's Decree No. 9/2021 on Social Forestry Management.

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- <sup>xlvi</sup> MRLG and LIWG (2021). Assessment of the new Land Law and Forestry Law in Lao People’s Democratic Republic: Focusing on Customary Rights. MRLG and LIWG Report. Vientiane: LIWG, MRLG.
- <sup>xlvii</sup> *Ibid*; Ironside. 2017b.; Forest Trends, 2014. As cited in RECOFTC. 2021.
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- <sup>xlx</sup> Guidelines for considering and approving investments and mechanisms for managing land for agricultural investment, No. 0457/MPI, 2019 and Decree on Compensation and Resettlement Management in Development Projects No. 84/PM, 2016 are the main focus to promote community participation and FPIC process.
- <sup>i</sup> Lao PDR: Jeremy Ironside (2017b) estimated in 2017 that 5 million hectares of rural areas need to be titled for rural communities. This data has been accepted and recommended by Almeida (2019).
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- <sup>lvi</sup> *Ibid*.
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- <sup>lx</sup> National Land Code 1965: section 4 (2) and under the Civil Law Act 1965, section 3 (2)
- <sup>lxi</sup> *Ibid*.
- <sup>lxii</sup> RECOFTC. 2021.
- <sup>lxiii</sup> S. Mei Toh, and K. T. Grace. 2006. Case Study: Sabah Forest Ownership. in FAO. 2006. Understanding forest tenure in South and Southeast Asia. Rome. Accessed: <https://www.fao.org/3/i8167e/i8167e.pdf>.
- <sup>lxiiii</sup> Article 3 of the Constitution (2008).
- <sup>lxv</sup> RECOFTC. 2020.
- <sup>lxvi</sup> FAO and MRLG. 2019. Challenges and opportunities of recognizing and protecting customary tenure systems in Myanmar. Bangkok, 12 pp.
- <sup>lxvii</sup> Myanmar: Figure reflects the forest area recognized for communities as of 2017. For additional explanation, see page 46 and endnote 172 in: Rights and Resources Initiative. 2018.
- <sup>lxviii</sup> Myanmar: The estimate of 20.7 mHa is based on data from the Department of Agricultural Land Management and Statistics (2018) with interpretation of this data by Paul De Wit (2019, Personal communication). In Myanmar, vacant, fallow and virgin (VfV) land area statistics are available. Common knowledge indicates that a significant area of these lands may be claimed and De Wit assumes that all VfV lands are claimed, a likely overestimation. On the other hand, communities may claim land that falls under the permanent forest estate, which could - as per De Wit - compensate for the overestimation on VfV land. Much of these lands are in the ethnic upland states, including Kachin, Shan, Kayah, Kayin, Chin, Mon, Rakhine, and Tanintharyi region.
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- <sup>lxxii</sup> Erni, Christian (2021). Persistence and Change in Customary Tenure Systems in Myanmar. MRLG Thematic Study Series #11. Yangon: POINT, MRLG.
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- <sup>lxxiiii</sup> *Ibid*.
- <sup>lxxv</sup> Rights and Resources Initiative. 2018.
- <sup>lxxvi</sup> RECOFTC. 2020.
- <sup>lxxvii</sup> *Ibid*.
- <sup>lxxviii</sup> Spingate-Baginski. 2019.
- <sup>lxxviiii</sup> FAO and MRLG 2019. As cited in RECOFTC. 2020.
- <sup>lxxix</sup> *Ibid*.
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- <sup>lxxxi</sup> *Ibid*.
- <sup>lxxxii</sup> RECOFTC. 2020.
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- <sup>xciii</sup> Ibid.
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- <sup>c</sup> Rights and Resources Initiative. 2020. *Rights-Based Conservation: The path to preserving Earth's biological and cultural diversity?* Retrieved from Washington D.C: <https://rightsandresources.org/publication/rights-based-conservation/>
- <sup>ci</sup> Philippines: The estimate of 4.307 mHa is based on official government data from the National Commission on Indigenous People (NCIP) (NCIP, 2017). This data is likely an underestimate as it does not include claimed areas of Community-Based Forest Management Agreements (CBFMAs) and Protected Area Community Based Resource Management Agreements (PACBRMAs) (Almeida, 2019).
- <sup>cii</sup> WWF, UNEP-WCMC, SGP/ICCA-GSI, LM, TNC, CI, WCS, EP, ILC-S, CM, & IUCN. 2021. *The State of Indigenous Peoples' and Local Communities' Lands and Territories: A technical review of the state of Indigenous Peoples' and Local Communities' lands, their contributions to global biodiversity conservation and ecosystem services, the pressures they face, and recommendations for actions* Gland, Switzerland.
- <sup>ciii</sup> Asia Indigenous Peoples Pact, Badan Registrasi Wilayah Adat, Cambodian Indigenous Peoples Alliance, Cambodia Indigenous Peoples Organization, Centre for Orang Asli Concerns, Center for Indigenous Peoples' Research and Development, Federation of Community Forestry Users Nepal, Indigenous Media Network, Indigenous Peoples Foundation for Education and Environment, Indigenous Peoples Partnership, Indonesian Institute for Forest and Environment, Inter Mountain Peoples Education and Culture in Thailand Association, Jaringan Kerja Pemetaan Partisipatif, Land Conflict Watch, Nepal Federation of Indigenous Nationalities, Network of Indigenous Peoples in Thailand, Non-Timber Forest Products - Exchange Programme, Partners of Community Organizations in Sabah Trust, Promotion of Indigenous and Nature Together, Rights and Resources Initiative, and Working Group ICCAs Indonesia. 2022. *Reconciling Conservation and Global Biodiversity Goals with Community Land Rights in Asia*. Washington, DC: Rights and Resources Initiative.
- <sup>civ</sup> Ibid.
- <sup>cv</sup> Rights and Resources Initiative. 2018.
- <sup>cvi</sup> Faure, N., B. Ichou, and T. Venisnik (2019). *Communities at the Heart of Forest Management: How Can the Law Make a Difference? Sharing Lessons from Nepal, the Philippines and Tanzania*. London: ClientEarth. Accessed: <https://www.clientearth.org/media/mr2f3x3k/communities-at-the-heart-of-forest-management-ce-en.pdf>
- <sup>cvi</sup> Ibid.
- <sup>cvi</sup> Ibid
- <sup>cix</sup> RECOFTC. June 2021. *Thailand's Community Forest Act: Analysis of the legal framework and recommendations*. Bangkok, RECOFTC.
- <sup>cx</sup> Rights and Resources Initiative. 2018.
- <sup>cx</sup> Malmer, P., et al. 2019. *Dialogue across Indigenous, local and scientific knowledge systems reflecting on the IPBES Assessment on Pollinators, Pollination and Food Production*. Stockholm Resilience Center (SwedBio) Workshop Report, Chiang Mai and Chiang Rai, January 21 – 25. Available at: [https://swed.bio/wp-content/uploads/2019/04/7017-0033-SRC-Report-Pollinators-dialouge\\_WEB.pdf](https://swed.bio/wp-content/uploads/2019/04/7017-0033-SRC-Report-Pollinators-dialouge_WEB.pdf)
- <sup>cxii</sup> Mellegård, V. 2018. *Hta: How Karen Farming Saved a Forest in Thailand and its Poetry Changed International Policy*. *Langscape Magazine* 6 (2). Available at: <https://medium.com/langscape-magazine/hta-how-karen-farming-saved-a-forest-in-thailand-and-its-poetry-change-international-policy-3f214d973bc9>
- <sup>cxiii</sup> For example, those who are convicted of encroachment and other offenses could face up to 20 years in prison and two million Baht (approx. US\$ 66,666) in fines.
- <sup>cxiv</sup> The 2017 Constitution of Thailand, article 43, established the right of communities to "manage, maintain and utilize natural resources [...] in a balanced and sustainable manner, in accordance with the procedures as provided by law" but they are not granted ownership rights. Communities only have the right to collectively manage and use state-owned lands for their livelihoods under the laws. The Constitution allows local communities to participate in state management of natural resources and "obtain the benefit from such undertakings" (Article 57). Conservation laws completely disregard the social aspect of forests, ignoring the historical relationships communities' have with nature; food systems, medicine, shelter and spiritual relationships.
- <sup>cxv</sup> Shimray, G. A., et al. 2017. "Forests, communities and ecosystems: A case study of Huay Hin Lad Nai community, Thailand." In *Knowing our lands and resources: Indigenous and local knowledge and practices related to biodiversity and ecosystem services in Asia*, edited by M. Karki, R. Hill, D. Xue, W. Alangui, K. Ichikawa, and P. Bridgewater. UNESCO Publishing: Paris.
- <sup>cxvi</sup> Indigenous Media Network. 2020. *ร่าง พ.ร.บ. สภากษัตริย์พื้นเมืองแห่งประเทศไทย พ.ศ.* Available at: <https://imnvoices.com/ร่าง-พ-ร-บ-สภากษัตริย์พื้นเมือง/>
- <sup>cxvii</sup> Thailand: In the absence of any estimate for the areas claimed by Indigenous Peoples and local communities as customary lands, the only estimate available is that of forests proposed to be brought under community forestry. As per RECOFTC (2017), the government has set a target of bringing 1.6 mHa under community forestry. As of August 31, 2016, approximately 0.75 mHa was under the jurisdiction of community forestry, but no substantive rights have been recognized in these forest lands. Consequently, 1.6 mHa are minimum claims for rights recognition used in this estimate. This number is likely an underestimate since the upland tribes practice customary tenure in several areas.
- <sup>cxviii</sup> Rights and Resources Initiative. 2018.



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<sup>cxix</sup> Consultative Institute for Socio-Economic Development of Rural and Mountainous Areas (CISDOMA). 2022. Viet Nam Country Case Study Report: Recognition of customary tenure to improve food security of Ethnic minority people. Unpublished.

<sup>cox</sup> FAO and MRLG. 2019.

<sup>coxi</sup> Ingalls, M.L., Diepart, J.-C., Truong, N., Hayward, D., Neil, T., Phomphakdy, C., Bernhard, R., Fogarizzo, S., Epprecht, M., Nanthavong, V., Vo, D.H., Nguyen, D., Nguyen, P.A., Saphangthong, T., Inthavong, C., Hett, C. and Tagliarino, N. 2018. State of Land in the Mekong Region. Centre for Development and Environment, University of Bern and Mekong Region Land Governance. Bern, Switzerland and Vientiane, Lao PDR, with Bern Open Publishing.

<sup>coxii</sup> FAO and MRLG. 2019.

<sup>coxiii</sup> Salemink, O., 2003. *The ethnography of Vietnam's Central Highlanders: a historical contextualization, 1850–1990*. University of Hawaii Press.

<sup>coxiv</sup> Ironside, J. 2017c. The Recognition of Customary Tenure in Vietnam. MRLG Thematic Study Series #6. Vientiane: MRLG.

<sup>coxv</sup> The program was directed by the Communist Party's Resolution 30/NQ-TW issued on 12 March 2014 (Resolution 30), the National Assembly's Resolution 112/NQ-QH issued on 27 November 2015 (Resolution 112), and followed by the Government's Decree 118/2014/ND-CP issued on 17 December 2014 (Decree 118).

<sup>coxvi</sup> Ironside, 2017c.

<sup>coxvii</sup> FAO and MRLG. 2019. Challenges and opportunities of recognizing and protecting customary tenure systems in Viet Nam. Bangkok, 12 pp. Licence: CC BY-NC-SA 3.0 IGO

<sup>coxviii</sup> Ironside. 2017c.

<sup>coxix</sup> Adopted in Hanoi, Vietnam in 2018 during the 40<sup>th</sup> AMAF meeting

<sup>coxx</sup> Mekong Region Land Governance Project- Customary Tenure. <https://www.mrlg.org/>

<sup>coxxi</sup> FAO. 2002. Land Tenure and Rural Development. FAO Land Tenure Studies 3. <ftp://ftp.fao.org/docrep/fao/005/y4307E/y4307E00.pdf>

<sup>coxxii</sup> Representation from Asia Indigenous Peoples Pact (AIPP)

<sup>coxxiii</sup> The Semai of Malaysia calls this *tenhaq* while the new declaration of the Dusun of Sabah, Malaysia calls this *divine human-stewardship*.

<sup>coxxiv</sup> The term Indigenous Peoples with capitalized initials is used to denote its evolved meaning, which is well established in international law as well as in some national laws. The term Indigenous Peoples also reflects how they want to be referred to as it emphasizes diversity and their rights under international law. The 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes the right of Indigenous Peoples to self-determination, as all other peoples, under which they can freely determine their political status. The capitalization of Indigenous Peoples is increasingly used by UN bodies, other international and national organizations as well as governments across the world. The use of Indigenous Peoples is not a claim to be the only native people in the region, as there are with other peoples and communities, native to their lands settled before the colonial period. <https://aippnet.org/use-of-the-term-indigenous-peoples/>

<sup>coxxv</sup> Berger, T., & Cotula, L. 2015. *Improved but still weak protection of customary rights*. Retrieved from <http://www.istor.org/stable/resrep16586.6>

<sup>coxxvii</sup> Mekong Region Land Governance Project- Customary Tenure. <https://www.mrlg.org/>

<sup>coxxviii</sup> MRLG and Land Portal (2021). Mekong Regional Land Forum 2021: Land tenure in Mekong forest landscapes: Advancing the recognition of customary rights and responsible investment practices. Summary Report. Vientiane: Mekong Region Land Governance.

<sup>coxxviii</sup> FAO. 2012. Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. Retrieved from <https://www.fao.org/3/i2801e/i2801e.pdf>

<sup>coxxix</sup> The precept of living in harmony with nature where human beings are an inseparable part of nature, and they cannot damage it without severely damaging themselves. Values and concepts of the interrelatedness of human well-being and interrelatedness and care for nature are unifying motif of the values and principles of the framework and Guidelines

<sup>cd</sup> In coming up with this definition, the ASEAN Working Group on Social Forestry as the proponent of this policy proposal, must build on the concept of customary tenure and recognize its multi-dimensional nature, including its economic, cultural, and social aspects. For instance, when it comes to coverage, it must emphasize the inclusion of forest and forest lands in light of the economic, cultural, and social significance of these resources to communities, especially Indigenous Peoples.

<sup>cxli</sup> Peacebuilding can be interpreted in a manner -In resolving conflicts or disputes, any determination or decision thereon shall be reached through dialogue and consensus as far as practicable; it can be among communities or with states.

<sup>cxlii</sup> Formal grievance system has tremendous delays and steep costs in the recognition of titles due to overlaps in sectoral land laws and policies. There is a prevailing stalemate among agencies in terms of settling the administrative procedures in the recognition of true landowners and land users given the overlapping tenure instruments and claims.

<sup>cxliii</sup> FAO Forestry Paper 165. Reforming Forest Tenure. 2011

<sup>cxliv</sup> In 2017 in a meeting in Thailand, the AWGSF recommended to ASOF to ensure customary tenure rights and access rights to forest and farmland including shifting cultivation areas, are secured, including those who are within protected and conservation areas. Recognize and put in place policies that establish and support co-management, Indigenous Peoples and local communities conserved areas and territories, and other proven management and governance arrangements in forested landscapes.

<sup>cxlv</sup> Should a recommended step-by-step recognition process be identified and reflected in this Guidelines? Can a streamlined and easily accessible process through which communities can apply for customary tenure be agreed upon at the regional level? Based on recommendations- ASEAN can agree on the steps essential to customary tenure recognition and the timeframe (for example, a maximum number of days) for each step. For discussion.

<sup>cxlvi</sup> Asia Farmers Association & NTFP-EP. Draft Report Recognition and Implementation in the Context of Food Security and Sustainable Livelihoods in ASEAN, 2021.

<sup>cxlvii</sup> ASFN and NTFP-EP (2016). Supporting Community Forestry Enterprises (CFEs) with the ASEAN Strategic Action Plan (SAP) for Small and Medium Enterprises (SMEs). A policy paper by the ASEAN Social Forestry Network (ASFN) in collaboration with the Non-Timber Forest Products – Exchange Programme (NTFP-EP) Asia. Available: <https://ntfp.org/wp-content/uploads/2016/06/NTFP-EP-Policy-Paper-SMEs.pdf>

<sup>cxlviii</sup> ASEAN Ministers on Agriculture and Forestry (AMAF) Approach to gender mainstreaming in the food, agriculture, and forestry sectors was adopted during the 40<sup>th</sup> AMAF Meeting in 2018 in Ha Noi, Viet Nam.

<sup>cxlix</sup> Men and women are regarded as inheritors of collective resources, and both play crucial roles in meeting their communities' livelihood and food security needs. However, in cases where individuals apply for individual titles, the titles are usually put under the name of men instead of women. This scenario can leave women at an economic disadvantage because they typically have rights to such forest resources as fodder, fuel

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wood, medicinal plants, and some non-timber forest products (NTFP) of commercial value, whereas men often have rights to forest resources with more cash value, including timber and high-value NTFP. Dwindling forest resources and declining quality impacts more women, as many rural women spend much of their lives collecting fuelwood, food for family consumption, medicinal plants, resin, and other non-timber forest products. Studies have highlighted the entrepreneurial role that women play in value-added activities, especially in the informal sector, as well as their leadership role in the community and participatory forest management.

<sup>cl</sup> CEDAW/C/GC/34

<sup>cli</sup> Capacity building is not limited to training but providing actual opportunities for women to be empowered, if women are farmers, entrepreneurs, access to different financial services such as credit, savings, remittances, and insurance schemes is needed to scale up

<sup>clii</sup> AWGFSF Recommendations to ASOF in the 2017 meeting hosted by Thailand. An earlier recommendation on “Develop FPIC guidelines for forestry, including SF/CF, building on the lessons from REDD+” was made in the AWGFSF meeting in Yogyakarta, 2015

<sup>cliii</sup> Shifting or rotational agroforestry systems are prevalent across the uplands of the region although their impacts differ. Under the right conditions, these practices are sustainable and can maintain forests and biodiversity. Too often these systems are not appropriately considered in the statutory legal frameworks.

<sup>cliv</sup> Processes include community forest and farming practices and protocols, need to enhance and enforce existing laws, including zoning to strengthen community confidence and participation in local forest management/ agriculture development

<sup>clv</sup> United Nations Human Settlements Programme (UN-Habitat). 2021. Tenure-Responsive Land Use. Planning: A Practical Guide for Country-Level Intervention. Retrieved from: [nhabitat.org/sites/default/files/2021/10/210910\\_tenure\\_lup\\_guide\\_web.pdf](https://nhabitat.org/sites/default/files/2021/10/210910_tenure_lup_guide_web.pdf)

<sup>clvi</sup> Rapid development in Indigenous Peoples ‘and forest-dependent communities’ territories as large-scale development by state and private business interests leads to dispossession and extensive degradation of the natural resource base upon which communities depend for survival and livelihoods. The community plans and priorities are not taken into consideration during the development and implementation of such projects. In most of these projects, the right to provide or withhold FPIC is not respected or upheld

<sup>clvii</sup> In most cases, the policy requires a community plan or an undertaking signed by the private/ corporate entity to be given to Indigenous Peoples and local communities and the government, the actual practice may be different

<sup>clviii</sup> AFA & NTFP-EP Customary Tenure

<sup>clix</sup> Ibid. Documentation Mekong Land Forum 2021

<sup>clx</sup> Peacebuilding can be interpreted in a manner -In resolving conflicts or disputes, any determination or decision thereon shall be reached through dialogue and consensus as far as practicable; it can be among communities or with states.

<sup>clxi</sup> Formal grievance system has tremendous delays and steep costs in the recognition of titles due to overlaps in sectoral land laws and policies. There is a prevailing stalemate among agencies in terms of settling the administrative procedures in the recognition of true landowners and land users given the overlapping tenure instruments and claims.

<sup>clxii</sup> Includes the right to resolve land conflicts following local and customary laws of the area where the land is located

<sup>clxiii</sup> Monitor development investments to ensure they abide by all existing laws, especially consultation under EIA and FPIC, if available; Priority of Indigenous Peoples in employment in jobs generated by development in their customary lands areas.; Facilitate and regulate the development of equitable partnership between smallholders, SMEs, larger enterprises; Address the issue of overlapping claims with finality; Establish a speedy process to resolve such cases that all government agencies and the whole of society will respect and observe.

<sup>clxiv</sup> FAO Forestry Paper 165. Reforming Forest Tenure. 2011

<sup>clxv</sup> Encouraging civil society organizations and development partners, to scale up training and information for government officials at all levels and in other sectors concerning the interlink between customary tenure security, food security, and livelihoods to improve policy and practice.

<sup>clxvi</sup> Documenting customary tenure systems enables communities to discuss, address and unpack their current practices and decide how they want to manage their natural resources. Documenting is also an important tool to protect their land while engaging with external stakeholders, whether state or private sectors.

<sup>clxvii</sup> Documenting customary tenure to inform the process of zoning protected areas. Zoning plans need to be coherent with the actual practices of the communities.

<sup>clxviii</sup> Sarmiento Barletti, J.P. and Larson, A., 2021. Multi-stakeholder forums and the promise of more equitable and sustainable land and resource use: perspectives from Brazil, Ethiopia, Indonesia, and Peru. *International Forestry Review*.

<https://www.ingentaconnect.com/content/cfa/ifr/pre-prints/content-ifra>

<sup>clxix</sup> Hewlett C, Sarmiento Barletti JP, Larson AM, Heise Vigil N and Cisneros N. 2021. Intensity and embeddedness: Two dimensions of equity approaches in multi-stakeholder forums. Occasional Paper 221. Bogor, Indonesia: CIFOR.

<sup>clxx</sup> Ibid

<sup>clxxi</sup> Ibid

<sup>clxxii</sup> Ibid

<sup>clxxiii</sup> Ibid

<sup>clxxiv</sup> Ibid

<sup>clxxv</sup> Rights and Resources Initiative. 2020. The Land Rights Standard. Washington, DC: Rights and Resources Initiative. Available at:

<https://rightsandresources.org/land-rights-standard/>