



Customary Tenure in relation to Free, Prior and Informed Consent and Existing Safeguards for Indigenous Peoples and Local Communities



COUNTRY REPORT:
MYANMAR



non-timber
forest products -
exchange programme

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Promotion of Indigenous and Nature Together (POINT)

Non-Timber Forest Products Exchange Programme - Asia

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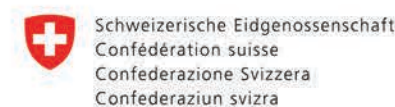
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Director Naw Ei Ei Min
Promotion of Indigenous and Nature Together (POINT)

Acronyms

CBD	Convention on Biological Diversity
CF	Community Forestry
COP	Conference of the parties
CT	Customary Tenure
EAO	Ethnic armed organizations
EIA	Environmental Impact Assessment
FPIC	Free, prior, and informed consent
GCF	Green Climate Fund
GRM	Grievance Redress Mechanism
IP	Indigenous Peoples
IPLC	Indigenous Peoples and Local Communities
NCU	National Coordination Unit
MCRB	Myanmar Center for Responsible Business
MOAI	Ministry of Agriculture and Irrigation
MOECAF	Ministry of Environmental Conservation and Forestry
MONREC	Ministry of Natural Resources and Environmental Conservation
NBSAP	National Biodiversity Strategy and Action Plans
NLUP	National Land Use Policy
REDD+	Reducing Emissions from Deforestation and Forest Degradation
SLRD	Settlement and Land Records Department
TDO	Township Department Office
UNDRIP	United Nations Declaration of the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
VFV Law	Vacant, Fallow, and Virgin Land Law

Executive Summary

Myanmar does not formally recognize the term “indigenous people” (IP). However, the country uses the terms “ethnicity”, “races” or “ethnic nationality”, which are broadly categorized under eight major ethnic nationalities, and recognizes 135 distinct ethnic groups. Customary land tenure in Myanmar is complex, diverse, and locally specific, as it is in many Southeast Asian countries. Traditionally, customary rights are established through the first clearance of the land which is called “Dama-Ugya”. Dama-Ugya lands are mortgageable, sellable, and inheritable by descendants. Once inherited, the land is classified as “Bo Bwa Paing” which generally means land owned by fathers and grandfathers in the Burmese language (Boutry & Thant, 2020).

Customary tenure and ownership are common and widely used by ethnic or Indigenous Peoples for their livelihoods. These include upland and lowland farmlands, grazing lands, forest lands, and shifting cultivation lands, which are commonly used, especially in the uplands of Myanmar. However, indigenous lands are vulnerable to expropriation by business investors, development projects, and militarization due to the lack of legal titles, especially since customary tenure ownership is yet to be recognized and protected by domestic legal frameworks. Land confiscation and militarization within indigenous territories have negatively affected the well-being and livelihoods of forest dependents and farmers, increasing poverty rates in these areas. According to the World Bank (2019) findings, the poverty headcount is significantly higher in rural areas of Myanmar (30.2 percent) compared to urban areas (11.3 percent). The number of poor people is also 6.7 times higher in rural areas where most IPs settle, in contrast to urban areas. Those residing in rural areas make up an overwhelming majority (87 percent) of the nation’s poor.

Myanmar has adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which is the most extensive international instrument addressing the recognition and protection of the rights of IPs. This includes any circumstance that can impact their way of life and livelihood. Under the guidance of free, prior, and informed consent (FPIC), no development project shall be granted access within indigenous territory without proper consultation and prior approval from IPs.

Myanmar is also a signatory to the Convention on Biological Diversity (CBD) and is mandated to conserve its natural heritage and biodiversity in accordance with the provisions of the Convention. The CBD recognizes the dependence of many IPs on biological resources and acknowledges the contribution of traditional knowledge to both conservation and sustainable use of biological diversity. By recognizing IPs and their traditional knowledge as key components in the pursuit of the CBD’s objectives, it is accurate to say that all the articles of the CBD are relevant to IPs. Nevertheless, the Convention specifically highlights IPs in the *Preamble, Article 8(j): Traditional Knowledge, Article 10(c): Customary Sustainable Use of Biodiversity, Article 17: Exchange of Information including its Repatriation, and Article 18(4): Technical and Scientific Cooperation including Indigenous and Traditional Technologies*. Furthermore, a fundamental principle of the program of work for Article 8(j) is the participation of Indigenous Peoples and local communities (IPLC) in the work of the CBD. On June 15, 2017, the CBD’s Executive Secretary invited parties, other governments, relevant organizations, and Indigenous Peoples and local communities to contribute to the development process of the Post-2020 Biodiversity Framework.

In 2014, Myanmar acceded to the Nagoya Protocol and became party to implement the protocol’s requirements in the country. According to Article 5 and in accordance with domestic laws, each party shall take measures to ensure that traditional knowledge associated with genetic resources held by indigenous and local communities is accessed with prior and informed consent, and that mutually agreed terms should be established among stakeholders. Based on the provisions of Articles 7 and 12, the Myanmar government must develop measures to safeguard the rights of IPs with regards to genetic resources and associated traditional knowledge through legislation and policy.

The United Nations Program on Reducing Emissions from Deforestation and Forest Degradation (REDD+) in Myanmar recognizes the critical role of IPs and other forest-dependent communities to long-term sustainability, especially in forest lands. Indigenous peoples and local communities (IPLCs) who depend on forests for subsistence dwell in the world’s remaining forests

and have historically played important cultural roles in sustainable forest management.

The FPIC concept can be found in newly legislated legal frameworks such as the Environmental Impact Assessment (EIA), Myanmar Investment Rule, and Ethnic Rights Protection Law. Unfortunately, there is no established formal guideline for FPIC in the legal framework yet. Discussions are still ongoing, and no specific ministry has been identified to implement the guidelines.

Two key laws were passed in 2012 to address tenure security: the Farmland Law and the Vacant, Fallow, and Virgin Land Law. However, both land laws failed to acknowledge customary land tenure, which recognizes the land tenure of IPs. During consultation workshops led by the democratic government, discussions were held with IPs regarding their land and livelihood. These workshops focused on amending laws and policies. As a result, IP and community leaders became aware of their rights as citizens and the international mechanisms in place to protect Indigenous Peoples’ rights.

With the engagement of non-governmental organizations (NGO), civil society organizations (CSO), and the Indigenous Peoples Network, the government enacted the National Land Use Policy (NLUP) in 2016. The NLUP has been highly anticipated and regarded as a path to success for the protection of customary tenure. Section 8 of the NLUP states the recognition of customary land tenure will be practiced in the National Land Law. In addition, the customary land area of IPs will be reviewed and updated under the land title of “customary land” from the current land classification according to the policy. However, the National Land Law has yet to be developed.

The Ethnic Rights Protection Law of 2015 ensures FPIC in all development projects, extraction of natural resources, and business affairs within ethnic group territories. In addition, the law provides provision for a grievance mechanism for ethnic groups at both regional and national levels. With the obligation to implement relevant international mechanisms, the Ministry of Natural Resources and Environmental Conservation (MONREC) has demonstrated a willingness to recognize the rights of ethnic groups and local communities through FPIC or community forestry. The FPIC process also includes a Grievance Redress Mechanism (GRM). However, these processes have been suspended due to the recent

military coup. As of this writing, there is no information disseminated on these mechanisms to local communities and the pace of implementation on the ground is likely to slow down in the current crisis.

The case studies of two communities, Myay Latt and Sar Pauk, clearly demonstrate the advantages of customary tenure in sustainable forest conservation and the enrichment of cultures and social norms. However, these communities remain vulnerable to exploitation and expropriation due to the absence of FPIC guidelines and a legal framework for customary land tenure.

1 Country Context

1.1. Customary tenure in Myanmar in relation to free, prior, and informed consent and existing safeguards

The political and economic situation of Indigenous Peoples (IPs) in Myanmar is challenging, but somewhat promising. Myanmar is one of Asia's most culturally diverse countries, with different ethnic communities embedded within its population. However, thousands of IPs have no citizenship, which effectively denies them their rights since they do not possess legal identification documents - a prerequisite of the 2008 Constitution (Guest, 2016). In addition, IPs are vulnerable to political issues regarding their land, especially conflict-affected territories and areas with abundant natural resources. The latter directly affects IPs' way of life when the government approves development projects within their territories. As a result, there seems to be no progress in the IPs' economic growth and livelihood, even though they are the primary stakeholders in development projects within their territories.

In most cases, IPs are not entitled to receive resources or revenue from private sector projects, despite living in resource-rich areas where timber, jade, gemstones, and minerals can be found (Guest, 2016). IPs are vital stakeholders who can provide valuable inputs and potential solutions to some of the pervasive issues in the field.



Capacity-building and awareness-raising among Indigenous Peoples and local communities (IPLCs) during discussions with the government or the private sector can improve their knowledge and capabilities, reducing the risk of outsiders or other stakeholders from taking advantage of IPLCs.

Myanmar's indigenous network seeks to support IP's rights in land tenure, promote participatory development, and preserve cultural identity. Their efforts have resulted in policies and laws enacted by the country's post-2010 government (Morton, 2017). The situation regarding the politics and economics of IPs is challenging, but to some extent, hopeful.

One of the main reasons for IP migration is their economic situation. Certain factors, such as land grabbing and the impact of climate change, have brought challenges to their livelihood, which consists primarily of farming. Since IPs have no land rights, their lands are vulnerable to illegal land acquisition or grabbing by the government, as well as by local and foreign private organizations or investors. Land grabbing by the government and the military displaces IPs. As mentioned, IPs are more aware of their rights and the proper channels to voice out their needs. IPs can now go through legal procedures to reclaim their territory or demand adequate compensation. However, barriers such as militarization and political instability cannot be entirely overcome yet.

Droughts and unusual rainfall patterns linked to the changing climate have led to reduced crop yield. Some IPs in Myanmar have identified possible solutions to these issues, including planting trees, taking necessary actions to prevent illegal logging within their territories, and applying appropriate logging techniques to prevent excess timber production. IPs continue to find ways to cope with the challenges in their way of life, although some are forced to migrate to other regions and neighboring countries.

Indigenous Peoples in Myanmar are also caught in a protracted local armed conflict between military and Ethnic Armed Organizations (EAO). This situation has caused poverty rates to soar in affected areas. According to a 2013 study, an estimated 73 percent of the population in Chin State, 44 percent in Rakhine State, and 33 percent in Shan State live below the poverty line, while the national poverty rate stands at 26 percent (Mizzima, 2022).

When conflicts break out in these areas, local community members have to abandon their livelihood. The military presence has also affected local communities through the conversion of large acres of farmlands for military purposes. IPs are prohibited from entering these areas and are deemed unsafe as work areas. IP Alliance Myanmar is involved in a peace process to resolve the conflict between the national government and numerous EAOs (Morton, 2017). However, peace talks ceased, and armed conflicts have broken out in many regions due to the military coup that started in February 2021.

IPs also suffer indirect discrimination due to language barriers. The government disseminates information, such as official announcements and proceedings, using only the Burmese language. Some indigenous communities need help understanding Burmese, which is not their mother tongue. Conflicts due to language barriers are common due to these circumstances. The friction between the government, IPs, and potential development project proponents can be avoided. However, no policy or guidelines can be followed in these scenarios. In addition, IPs are often excluded from decision-making processes due to the notion that they need to be more educated and qualified to contribute to state discussions. Collaborative work between IPs and civil society organizations (CSOs) aims to remove these barriers and ensure that IPs' voices are heard. In effect, IPs were able to start participating in workshops and meetings held by the reformed democratic government. Increased participation could be the first step towards eliminating discrimination.

Indigenous Peoples in Myanmar commonly practice customary use and communal land ownership. These include upland and lowland farmland, grazing lands, forest lands, village lands, and vacant, fallow, or virgin land. In addition, shifting cultivation, also known as swidden agriculture, is common in the uplands of Myanmar. Land in indigenous areas has been

particular vulnerable to expropriation. As mentioned above, indigenous lands are susceptible to land grabbing due to the lack of a formal title, particularly upland areas where original land users have not been identified (Guest, 2016). The government has already expropriated land in Myanmar's borderlands, where IPs have practiced shifting cultivation for decades. Opposing land grabbing is a big challenge since their collective rights and customary land practices are not recognized in the 2008 Constitution (Morton, 2017).

Some indigenous areas may be under the governance of two separate forms of government, the national government and the EAO. These circumstances occasionally lead to disputes and confusion in land jurisdiction. According to the Myanmar Center for Responsible Business (MCRB) consultations with indigenous communities in September 2015, there were some cases wherein neither the government nor EAOs take responsibility for land issues, including expropriations and disputes (Guest, 2016). However, in October 2014, the government-initiated consultations with CSOs and IPs on drafting a new National Land Use Policy (NLUP). The consultations continued until 2015, and the final version of the policy was issued on the 30th of January 2016. Article 7 (d) states that one of the policy's guiding principles is to recognize and protect the private and communal property rights of citizens as included in the Constitution, thereby acknowledging communal land use rights of Indigenous Peoples. Article 68 states that the customary land of ethnic groups shall be transparently reviewed, registered, and protected as customary land. In addition, Article 70 calls for the formal recognition and reclassification of customary land rights relating to shifting or rotating cultivation, commonly used by IPs (The Republic of the Union of Myanmar, 2015b).

With support from CSOs and other NGOs, empowerment and capacity building of IPs can lead to positive and realistic ways to uphold and defend their rights, especially within their territories. However, challenges remain due to the current political situation in the country, and ongoing activities and discussions related to the welfare and rights of IPs are put on hold.

1.2. Historical and current context of the recognition of customary tenure and rights of Indigenous Peoples

IP RIGHTS

Myanmar voted in favor of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) in 2007. However, for various reasons, neither the term “indigenous peoples” nor their rights to customary tenure (CT) is recognized. There has yet to be an official terminology to refer to IPs; instead, the country instead uses terms such as “ethnicity” or “race”. In Myanmar, there are 135 recognized distinct ethnic groups, although this number is usually cited without qualification, and is based on dubious lists compiled 100 years ago by amateur colonial linguists and physiognomists. These groups tend to be interpreted in Myanmar as racial than ethnic. Social scientists generally use the term “race” to refer to a set of physical attributes that are taken to be heritable, and “ethnicity” to refer to characteristics of shared culture and language. Moreover, the Burmese words for race or ethnicity do not translate easily onto their English counterparts and leading to more confusion. (International Crisis Group, 2020).

According to Myanmar's 1982 Citizenship Law, to be considered native or national, a group had to have lived there permanently before 1823, the year before the first Anglo-Burmese War. Although the idea of “indigenous races” played a significant role in defining who belonged to the nation at this point, there was no official rule for classifying groups as indigenous. State officials often referred to major groups that had their own states, while unnamed groups were referred to as “others” (International Crisis Group, 2020).

Currently, the concept of ethnicity under the Citizenship Law in Myanmar employs three forms of citizenship that offer different entitlements: citizen by birth or descent, associate citizen, and naturalized citizen. The latter retains the description of “indigenous races” but in a more limited form. Only individuals belonging to ethnic groups residing in Myanmar before 1823 are eligible for citizenship by birth, while others can obtain full citizenship by descent after three generations. However, people from communities such as the Rohingya and those of Chinese or Indian descent face prejudice, as they are restricted to lower categories of citizenship or denied citizenship altogether (International Crisis

Group, 2020). Unfortunately, there was no open or effective process in place for the post-independence state to determine which communities met the criteria for being indigenous and which did not. After the Citizenship Law was strengthened to prioritize indigeneity, government authorities began referring to “135 national races” (International Crisis Group, 2020).

Myanmar's 2008 Constitution came into effect in 2011, creating a new government system that includes ministers for ethnic affairs and self-governed areas. However, this system has intensified competition among minority groups, as larger minorities enjoy more rights than smaller ones. Consequently, this has fueled a fundamentalist thinking about ethnic identity, with ethnic minorities in Myanmar expressing dissatisfaction with the status quo for a long time. Since the Burman elite has controlled most of the country's levers of power since its independence in 1948, ethnic minorities have been engaged in what is considered the world's longest-running armed battles. Despite the country moving towards more political freedom since 2011, minority grievances have largely remained unaddressed, and there has been little progress in building a more inclusive sense of nationalism (International Crisis Group, 2020).

Myanmar has struggled to create a national character that reflects its different ethnic groups and meets the needs of the diverse populations who live within its borders. The idea of racial identity divides “national races” instead of bringing people together (International Crisis Group, 2020). Individuals who are not considered “indigenous enough” will not be able to fully participate in politics and state organizations, and they cannot fully protect their rights under the constitution's bill of rights (International Crisis Group, 2020).

Customary tenure in Myanmar

In Myanmar, customary tenure arrangements date back centuries and are linked to the characteristics of the landscape and its resources, as well as to the kinship systems, population density, and the history of the area and settlement. In general, the ethnic upland villagers' identity is closely linked to the land constituting a dense network of places, each with different cultural and material value and containing a mosaic of resources. There is an inherent connection between history, identity, and land (Andersen, 2015).

Customary tenure in Myanmar is complex, diverse, and locally specific, as in many Southeast Asian countries. Traditionally, customary rights are established through the first clearance of the land. However, rights can also be relinquished when the land is abandoned, similar to Cambodia. The right of such first clearance of land is called “Dama-Ugya”. Individual members in the village could clear land within the village territory if there are no current claims to the land; however, consent is necessary to use the land if there are existing claims. In cases where Dama-Ugya land is left vacant for more than 12 years, it becomes free for other individuals to clear and use the land. Dama-Ugya lands can be mortgaged, sold, and inherited by descendants (Thant, 2018). Once inherited, it is then classified as “Bo Bwa Paing”, which generally means land owned by fathers and grandfathers in Burmese. This type of customary tenure can be inherited by family members nominally for up to seven generations, effectively beyond the reach of social memory (Thant, 2018).

Customary law and customary tenure

Like elsewhere in the world, IPs in Myanmar have had their own customary laws and institutions for centuries to regulate access, use, and management of land, forest, and other natural resources. During the British colonial rule, traditional local governance systems in remote and hilly frontier areas remained largely intact because of the indirect-rule strategy applied in those areas. As a result, much of the uplands, where most IPs live, continued to be managed according to customary law until independence in 1948 and, to some extent, until today.

Following independence, Myanmar's Constitution declared the state the ultimate landowner. In 1953, the Land Nationalization Act was adopted, which abolished private land ownership, and at the same time, provided farmers with land use, or ‘tillage rights’ to those using the land. Land was exempted from appropriation if landowners had been cultivating the land themselves, had been in possession of the land since 1948, and if most of the family members were Burmese citizens. They were given rights over a limited area of their land as long as they complied with the applicable government regulations.

The socialist military government that took power after the 1962 coup d'état expanded nationalization to other sectors of the economy. In 1974, they drafted a new constitution following modeled after Eastern European one-party states.

The nationalization of land was completed with the Tenancy Act of 1963 and its amendment in 1965. Private tenancy was forbidden, and the government could grant leases to any land irrespective of existing property rights. However, “these laws did little more than push existing tenancy practices underground”, and “unofficial leases or transfers of land use rights were relatively common, with officials tolerating them” (Erni, Cung, & Maru, 2019, p. 9).

In response to a deepening economic and political crisis in the 1980s and early 1990s, the State Law and Order Restoration Council, later renamed as the State Peace and Development Council, initiated economic reforms toward liberalization and more foreign engagement and investment in land. In 1991, the initial law allowed ‘fallow’ or ‘waste’ lands to be accessible to state-owned enterprises and foreign investors in the form of 30-year leases. Following the 1998 amendment, concessions up to 50,000 hectares per lease have been granted (Erni, Cung, & Maru, 2019). The shift away from a socialist command economy toward a market economy is also enshrined in the new 2008 Constitution. The Constitution explicitly prohibits nationalization, but according to Article 37 (a), the state remains “the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union”. Article 37 (c) stipulates that the state “shall permit citizens right of private property, right of inheritance, right of private initiative and patent in accord with the law (The Republic of the Union of Myanmar, 2008, p. 10).” Although citizens were granted the right to private property, the majority of farmers in the country lack legal documents that secure their tenure rights over land and forest (Erni, Cung, & Maru, 2019).

Following the political reforms that led to the general elections in 2010, two laws were passed in 2012 to address tenure security. The Farmland Law was the first law, which provides provisions for individuals and organizations to register their land. The second law, the Vacant, Fallow, and Virgin Lands Management Law (VFV Law), was passed to continue the policy established under the 1991 'Wasteland Law'. The VFV Law was amended in 2018, allowing business concessions for “unused” land. Both laws reintroduced the concept of private ownership, allowing tenure rights to be sold, traded, or mortgaged. However, both laws have been criticized for being seriously flawed, especially concerning the latter for benefiting foreign investors more than local

farmers. Moreover, neither law protects IPs' customary land rights (Erni, Cung, & Maru, 2019).

At the community level, customary landholding is still accepted and practiced. Land tenure for all households is made possible through customary laws embedded in communal systems and sociocultural traditions. In this way, landlessness does not mean a lack of access to land. These customary laws have been practiced since ancestral times and precede some existing laws.

Customary tenure is often characterized as shifting cultivation practices. However, from the government's perspective, fallow lands appear idle and vacant, putting them at risk of being subject to economic land concessions. In present-day Myanmar, these customary systems will require recognition by state law, if they are to be protected and survive as the market economy grows and land concessions and land-grabbing incidents increase.

POLICIES AND PRACTICES

On a positive note, the 2016 NLUP includes an entire section dedicated to recognizing customary land tenure practices by ethnic nationalities (The Republic of the Union of Myanmar, 2016). This policy will become the overarching framework that will shape the governance of land and natural resources in Myanmar. The ultimate challenge lies in recognizing customary land tenure arrangements practiced by various ethnic minorities, each with their own unique practices (Thant, 2018).

This is highly encouraging for the movement towards more equitable access to land and natural resources. In its fifth national report to the CBD, Myanmar indicated that shifting cultivation in upland areas is seen as one of the key threats to biodiversity (Ministry of Natural Resources and Environmental Conservation [MONREC], 2014). However, in contrast to the official position of the Myanmar State, evidenced-based studies have shown that shifting cultivation can lead to increased biodiversity, which is ecologically appropriate and provides the best means of preserving biodiversity in the region (Fox, 2000; Bhattachan, et al., 2015). Additionally, the pressure to transition from shifting cultivation to other land uses often contributes to permanent deforestation and loss of biodiversity (Vliet, 2012).

Issues

The new Land Law does not recognize customary landholding, which is fully recognized and accepted in the communities concerned. Thus, implementing the new laws might create intra-community conflicts instead of benefitting the poor communities involved. Unless existing customary laws and communal systems are taken into proper account by laws officially recognized by the government, current laws may constrain prospective attempts at linking resources to livelihoods (Pau, 2016). In addition, if land is turned into capital without recognition of community rights, the basis for the day-to-day sustenance of farmers, who comprise most of the rural population, will be lost (Andersen, 2015).

Customary land tenure needs to be adequately recognized and protected by legislation in Myanmar. The key land laws are the Farmland Law and the VFV Law, which are highly centralized and investment-driven (Franco et al., 2015; Win, 2017; Woods, 2010). Farmland Law replaced previous legislation, such as the 1953 Land Nationalization Law, the 1963 Peasants' Rights Protection Law, and the 1986 Disposal of Tenancies Law, which have been the basis for managing land tenure system in the country for more than 60 years. Similar to previous legislation, the Farmland Law maintains the basic aspect of previous land laws, in line with the 2008 Constitution, which asserts that the state is the ultimate owner of all land. In addition, land use rights can be obtained for cultivation. However, the most notable reform of this land law is that farmers can now register their land and receive land use certificates. Unlike previous laws, the system has now removed restrictions on buying, selling, transferring, gifting, and mortgaging land, and allows slightly more freedom of choice concerning crops for cultivation. The key part that has come into conflict with customary land tenure system is that farmers are prohibited to let the land go fallow without good cause. The land tenure security provided by the law is very weak because land use rights can be withdrawn if the conditions of the limited land use are violated (Obendorf, 2012).

Acquiring permits can also be problematic for landowners. Different classifications of land include freehold land, grant land, farm or agricultural land, permit or licensed land, leased lane, vacant, virgin, and fallow land, and monastery or religious land. However, since the 2008 Constitution considers that the state owns all lands, and Article 12(g) of the Farmland Law states

that no other use of farmland without permission is allowed, a landowner would have to apply for several relevant land use licenses or other land use rights documents depending on how the land will be used.

To access land use right, the landowner needs to apply to the Township Department Office (TDO) through Village Tract Farmland Management Group in accordance with the 2012 Farmland Law with the specifications mentioned in Article 6. Afterwards, the TDO must check, in accordance with Articles 4 and 5, the application for land tenure and submit to the relevant Township Farmland Management group. The Township Farmland Management group will have to issue a land license under the supervision of District Farmland Management group and let the landowner pay the registration fee in accordance with the stipulations. The District Farmland Management group therefore has the authority to grant land use rights based on Farmland Law 2012 (The Republic of the Union of Myanmar, 2012).

Current gaps and challenges

Forest management is centralized. There is no sufficient capacity in terms of human and financial resources for forest department to manage all forested areas in Myanmar resulting in weak rule of law to effectively control illegal logging. The Forest Law does not recognize customary tenure and rights of IPs to protect and control their traditional land, territories, and natural resources. Customary land tenure is not officially recognized in Myanmar which can lead to conflict between stakeholders. For example, IPs are still practicing shifting cultivation and taking care of their customary land in forest areas, although it is prohibited by the forest department. There is no recognition of Indigenous and Community Conserved Areas (ICCAs) in legal texts, even though local communities hope to have their lands recognized as such.

DETERMINATION OF LAND TYPES AND CLASSIFICATIONS

There are three general land classifications according to NLUP: (a) agricultural land, (b) forest land, and (c) other land. Based on these, various land classifications may be determined:

1. Agricultural land is all land used primarily for agriculture production purposes, including growing annual or perennial crops, growing industrial crops, animal husbandry activities,

land-based aquaculture activities, any agriculture production focused support facilities, and any agriculture production focused support facilities that are either currently cultivated or fallow.

2. Forest land is intended to capture those areas of the country that will be determined to be part of the permanent forest estate.
3. Other land includes urban land, village land, religious land, public land, government administrated vacant, fallow, virgin land, and wasteland that is not classified as forestland and agricultural land.

To meet the current needs of the country, relevant government institutions will transparently review and amend the existing land types and classifications in accordance with the rule of law, NLUP, and National Land Law. A more detailed classification of land in the country is detailed as follows:

Farmland

Lands administered under the 2012 Farmland Law are subdivided into the following:

- Le-land are paddy lands
- Ya-land are lands not suitable for paddy
- Kaing-kyung is land near rivers seasonally flooded and suitable for growing oilseed crops, pulses, vegetables, and tobacco
- Garden land is land suitable for fruit orchards or for growing vegetables
- Dhani-land and taungya land are lands used as part of shifting cultivation

The Law further states that farmlands "[do] not include land situated within any town or village boundary used for dwelling, religious buildings and premises, and public owned land which is not used for agriculture purposes" (The Republic of the Union of Myanmar, 2012a, p. 1). In addition, the Law defines paddy land as "land mainly for growing irrigated or rain-fed rice paddy." Furthermore, the Law also defines alluvial land as land flooded yearly whose character and location varies depending on the water channel.

The classification system provided by the 2012 Farmland Law does not recognize many local

communities' customary land use and agricultural practices, commonly referred to as 'taungya' or upland cultivation. It should be noted that the term used for 'taungya land' in the Farmland Law refers explicitly to this land use when it is not in a rotational fallow system. However, even when smallholder farmers have legal land tenure documents, their land is often appropriated in the nation's or the public's interests as prescribed by the Farmland Law. Many farmers have records showing that they have been cultivating and paying taxes for these lands. Some farmers possess what is classified as 'permanent land use rights' to these lands, which appear primarily for irrigated paddy lands. Other areas with 'non-permanent' land-use rights in tax payment documents have insecure land tenure security.

Reserved or protected forest land

The land is administered in accordance with the provisions of the Forestry Act of 1992, with the primary purpose of producing forest products.

Protected public forest land

These are forest lands used primarily for nature protection purposes and is subject to both the Forest Act and the Protection of Wildlife and Conservation of Natural Areas Law (1994).

Public forest land

These are forest lands used primarily for nature protection purposes and is subject to both the Forest Act and the Protection of Wildlife and Conservation of Natural Areas Law (1994).

Virgin land

The VFV Law defines virgin lands as new lands or other woodlands where cultivation has never been done before. These lands may or may not be covered in forests, and include land legally canceled as reserved forest land, grazing land, and fisheries ponds. There are mechanisms by which Community Forestry (CF) arrangements can be secured for these areas of land. However, the MOECAF Forestry Department and the MOAI currently have overlapping authority over these land areas. Access and land use tenure claims to these areas are not very secure due to the lack of documentation to back up land use claims.

Vacant and fallow land

These are areas of land defined in Article 2 (e) of the VFV Law as "land, which was cultivated by the tenant before, and then that land was abandoned by the tenant for any reason, not only the State designated land but also for agriculture or livestock breeding purposes (The Republic of the Union of Myanmar, 2012, p. 1)." Many of these areas of land fall outside of the land surveys conducted by the Settlement and Land Records Department (SLRD). Due to the current definition of "vacant and fallow", many areas of land under active cultivation by farmers and community groups, which use these lands traditionally, could be classified as "vacant and fallow". The land tenure claims to these lands are weak due to the lack of proper and official documentation.

Grazing land

Classification and management of grazing lands in Myanmar is set out in the Upper Burma Land Revenue Regulations (1889). Grazing land is not referred to in the Farmland Law, although a brief mention is made in the definition of "virgin land" under the VFV Law.

Non-agricultural land

Non-agricultural lands are divided into 13 sub-categories, including mining areas, grazing ground areas, railway land areas, road areas, embankments, land and dam areas, river or stream and underwater areas, fisheries or ponds areas, factory areas, town land areas, village areas, airfield areas, religious buildings and cemetery areas, and cantonment areas (Oo, et al., 2020).

EXISTING AND EMERGING OPPORTUNITIES FOR COMMUNITIES

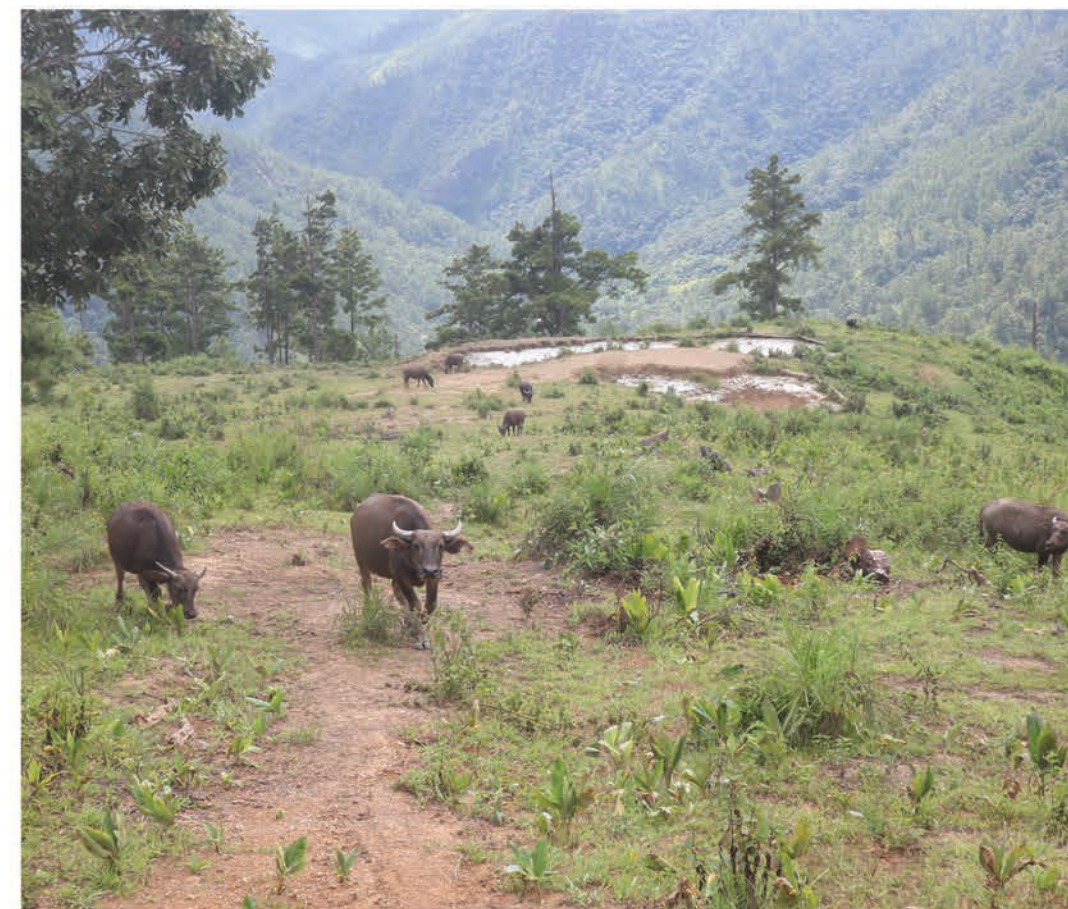
The Myanmar government does not officially recognize the presence of IPs in its country. However, it assumes that all Burmese citizens are indigenous or that there are none. However, the term "Indigenous Peoples" is occasionally used in English versions of government policy documents. For example, the term can be used when defining the rights of IPs in government laws, policies, and international legal instruments.

IPLCs are essential to the successful implementation of the United Nations' Reducing Emissions from Deforestation and Forest Degradation (REDD+) Programme. The REDD+ programme is a climate change mitigation approach developed by parties to the United Nations Framework Convention on Climate Change (UNFCCC) to incentivize developing countries to reduce carbon emissions from deforestation and forest degradation (UN-REDD Programme, 2016). Most IPs from developing countries are forest-dependent communities living within forest areas, positioning them to offer support and human resources for the REDD+

programme. The programme has developed guidelines for stakeholder engagement and consultation for REDD+ Readiness Roadmap focusing on principles for effective participation and consultation of IPs and other forest-dependent communities. This includes FPIC which outlines a normative policy and operational framework for the REDD+ programme partner countries.

Through the FPIC, states are obliged to consult and secure consent with IPs and local communities which is based on universally accepted human rights. Although FPIC is not explicitly mentioned in the Cancun Agreement and in the Appendix on REDD+ safeguards, FPIC is indirectly addressed because the General Assembly has adopted the UNDRIP (UNFCCC, n.d.).

For many generations, IPs and local communities living in the hilly and mountainous areas of Myanmar have practiced shifting cultivation which is well adapted to the local climatic conditions. Traditional methods are essential for successfully implementing the REDD+ programme in these areas. Government, NGOs, CSOs, and other stakeholders were invited to workshops to discuss



Pasture Land in Naga Indigenous Community
Photo: POINT Myanmar

the policies and measures of the draft National REDD+ Strategy addressing shifting cultivation (REDD+ Programme Myanmar, n.d.). Traditional or sustainable shifting cultivation, which neither expands the cultivation area nor reduces the fallow period, is considered carbon-neutral and does not contribute to deforestation or forest degradation. As such, the stakeholders established that the REDD+ policies and measures must support and implement traditional or sustainable shifting cultivation (Dudley, 2008).

As noted previously, Myanmar has adopted the UNDRIP, which recognizes the rights of IPs to FPIC, and IPs are accorded proper consultation and consent in circumstances that involves their way of life, territory, and livelihood. These include consultations before adopting and implementing legislative or administrative measures, accessing and approving development projects within their territories, and expropriating their cultural, intellectual, religious, and spiritual properties (E. R. Law 2015). However, the provisions of the UNDRIP have yet to be fully incorporated into the legal framework of Myanmar. In accordance with Ethnic Rights Protection Law, ethnic nationalities under Article 4(f) “have the right to preserve and reveal not to extinct their traditional medicine and to carry out development of it” (The Republic of the Union of Myanmar, 2015a, p. 5) . Furthermore, Article 5 adds that “the matters of projects shall completely be informed, coordinated and performed with the relevant local ethnic groups in the case of development works, major projects, businesses and extraction of natural resources will be implemented within the area of ethnic groups” (The Republic of the Union of Myanmar, 2015a, p. 7). These two articles indicate the rights of ethnic groups to access natural resources within their areas and the right to FPIC (Yee, 2017).

According to Article 7 of the Myanmar EIA procedures, projects involving involuntary resettlement or potentially adverse impacts on IPs shall comply with specific procedures separately issued by the responsible ministries. Before issuing specific procedures, all such projects shall adhere to international good practice (as accepted by international financial institutions, including the World Bank Group and Asian Development Bank) on Involuntary Resettlement and Indigenous Peoples. Most importantly, Article 61 of the Myanmar Investment Rules (2017) states that “where the Investment may be subject to the Law on the Rights of Protection of Ethnic Nationalities 2015, the Myanmar Investment Commission will consider any specific consultations that may be

required with the relevant State or Regional Government or other stakeholders as part of the assessment process or in connection with any conditions to be included in the Permit” (The Republic of the Union of Myanmar, 2017, p. 11). This provision paves the way to apply the FPIC principle by spelling out the FPIC processes and procedures in the bylaws of the Ethnic Rights Protection Law, which is currently being drafted. As a result, FPIC can be adopted before considering mega extractive projects that can negatively impact the environment and ethnic communities (Yee, 2017).

The United Nations Convention on Biological Diversity (CBD) is the international legal instrument for “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources” that has been ratified by 196 nations (United Nations, 1992, p.3). Since Myanmar is a signatory to the CBD, conservation of its natural heritage and biodiversity actions are implemented following the provisions of the Convention. For example, Article 10(c) of the CBD states that the country should protect and encourage the customary use of biological resources per traditional cultural practices compatible with conservation or sustainable use requirements (United Nations, 1992). Article 18(4) furthers that the contracting parties shall, following national legislation and policies, encourage and develop methods of cooperation for the development and use of technologies, including indigenous and traditional technologies, in pursuance of the objectives of this convention (United Nations, 1992). In addition, General Principle no. 4 of the program of work on Article 8(j), affirms the principle of FPIC that states “access to traditional knowledge, innovations and practices of Indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices (Convention on Biological Diversity, 2012).”

The MOECF Forest Department developed the National Biodiversity Strategy and Action Plan (NBSAP) through multi-stakeholder consultation workshops and thematic working group meetings with government agencies, academic institutions, and NGOs. The NBSAP was finalized and approved by the Union Government in 2011. It comprises six chapters, starting with a general description of Myanmar’s biodiversity and the context for biodiversity conservation followed by a discussion

of threats. The NBSAP outlines strategies for sustainable biodiversity conservation, and detailed action plans to be implemented by relevant organizations between 2011 to 2030. The seventh Conference of the Parties (COP) to the CBD decision on protected areas underlines the importance of conservation of biodiversity within and outside protected areas and recommends parties to recognize and promote a broad set of protected area governance types, including areas conserved by IPLCs.

Myanmar acceded to the Nagoya Protocol in 2014. Following Articles 7 and 12, the government of Myanmar must develop measures to safeguard the rights of IPs concerning genetic resources and associated traditional knowledge (UNCBD, 2011). In addition, Article 5(2) of the protocol states that following domestic laws, each party shall take measures, as appropriate, to ensure that traditional knowledge associated with genetic resources held by indigenous and local communities is accessed with prior and informed consent or approval from and involvement of indigenous and local communities, and that mutually agreed terms have been established (UNCBD, 2011).

The international community recognizes the importance of engaging IPs in climate change policies and actions which was highlighted during the Cancun Agreement. Other international instruments followed suit. For example, the preamble of the Paris Agreement acknowledges the obligation of State parties to respect, promote, and consider the rights of Indigenous Peoples when undertaking climate change actions (United Nations, 2015). In addition, it acknowledged the necessity of strengthening the practices and efforts of IPLCs in addressing climate change (United Nations, 2015). In 2018, the COP requested the Green Climate Fund to consider enhancing its consideration of local, indigenous, and traditional knowledge and practices, with the aim of integrating these practices into adaptation planning, implementation, and monitoring procedures (Green Climate Fund, 2018).

The GCF indigenous policy recognizes that IPs often have identities and aspirations that differ from other groups in national societies and are disadvantaged by traditional mitigation, adaptation, and development. IPs generally have limited capacity in terms of economic, social, and legal status to defend their rights to and interests in land, territories, and natural and cultural resources, as well as in their ability to participate in

and benefit from development initiatives and climate change action. In many cases, they have yet to receive equitable access to project benefits, or benefits are not devised or delivered in a culturally appropriate form. In addition, IPs are not often adequately consulted about the design or implementation of activities that have potentially profound impact on their lives and their communities.

The governing instrument for the GCF and other policies reflect the importance of fully and effectively engaging with IPs in the design, development, and implementation of strategies and activities to be financed by the GCF. The policy allows GCF to anticipate and avoid any adverse impacts its activities may have on IPs’ rights, interests, and well-being; and, when avoidance is not possible, to minimize, mitigate or compensate appropriately and equitably for such impacts in a consistent way and to improve outcomes over time. Overall, there are emerging opportunities for IPLCs, particularly when the country is engaged with international processes.

1.3. Specific context on consultation and consent and FPIC processes

According to the Ethnic Rights Protection Law (2015), all development projects, natural resource extraction, and business operations in ethnic group regions require the FPIC from local ethnic communities. The Law also mandates the establishment of a grievance redress mechanism (GRM) for ethnic groups at the regional and national levels. The MOECA (now MONREC) has demonstrated willingness to recognize the rights of ethnic minority groups and local communities through FPIC or community forestry. While there is a commitment to the application of FPIC in Myanmar, its implementation in practice remains unclear. Concerns have been raised over the conduct of FPIC too early in the process may leave communities ill-equipped to make informed decisions. Detailed guidelines exist, such as the Myanmar REDD+ Safeguards Roadmap, Extended Summary of NFMS, FPIC Guideline for Conducting FPIC (UN-REDD Programme, 2013; UN-REDD Programme, 2022). Gender equality and respect for IPs' rights must be included in REDD+ readiness activities and future implementation approaches.

There are different government departments that do not include armed ethnic administrations, related to land governance, which means that indigenous lands and territories are still vulnerable to state-sponsored cronyism. Customary protection of land tenure is not limited to agricultural lands, but also includes practices of shifting cultivation on forest lands, as well as recognition of communal land tenure systems. The National Land Use Policy (2016) highlights the need to encourage stronger participation of ethnic nationalities, recognizes customary land tenure rights and culture, and develops dispute settlement mechanism related to land use issues (Republic of the Union of Myanmar, 2016). Customary land use practices are mapped and registered. The customary land area of ethnic groups will be reviewed and updated under the land title of "customary land" from the current land classification according to the policy. However, as noted earlier, the National Land Law is yet to be developed.

Existing programmes, such as the National Reforestation and Rehabilitation Program and the establishment of protected areas have not yet fully applied the Initial Environmental Examination (IEE), Environmental Impact Assessment (EIA), and Strategic Environmental Assessment (SEA) or FPIC guidelines pertinent to such programmes (MONREC, 2019). The REDD+ implementing agencies will be responsible for guiding and implementing policies and measures, including consideration of customary practices and cultural heritage and ensuring that FPIC processes are conducted where these apply, with coordination through the National Coordination Unit (NCU). The NCU will be responsible for the coordination of any updates to the National REDD+ Strategy and REDD+ policies and measures (MONREC, 2019).

FPIC has been included in different laws and policies including the drafted REDD+ Strategy and REDD+ Safeguards. However, these are yet to be implemented on the ground. Discussions are still ongoing, and no specific focal ministry has been mandated to implement these strategies. For instance, FPIC is elaborated in the Ethnic Rights Protection Law Section 13, but there has been no action taken yet.

Myanmar is a sensitive country prone to conflicts, as there has been a long-lost trust among stakeholders. The concept of community dispute resolution is therefore essential in implementing laws and policies. Different NGOs are working on this using different approaches. For example, My Justice Myanmar implements a programme involving community-based dispute resolution forums to avoid conflicts in ethnic areas and promote peace. As for the REDD+ Strategy, there will be discussions related to this in the future as part of technical working group meetings.

2 Community case studies

2.1. Sar Pauk Village, Asho Chin Community

Sar Pauk is in Bone Baw Village Tract, Minbu District, Nga Pe Township, Magway Division, and was founded about 400 years ago. It has a total area of approximately 4,269.53 acres with a hilly landscape. Community members belong to one of the Chin sub-ethnic groups called "Asho Chin". According to the census, there are 52 households and 270 members of the population in the village.

The villagers in Sar Pauk inherited the land from their forefathers which was passed on from generation to generation. The local community depends on agricultural lands, forests, and settlement areas for their livelihood. There are rotational farming land and orchard land in agricultural areas, while there are reserved forests, communal forests, and cemeteries in the forest.

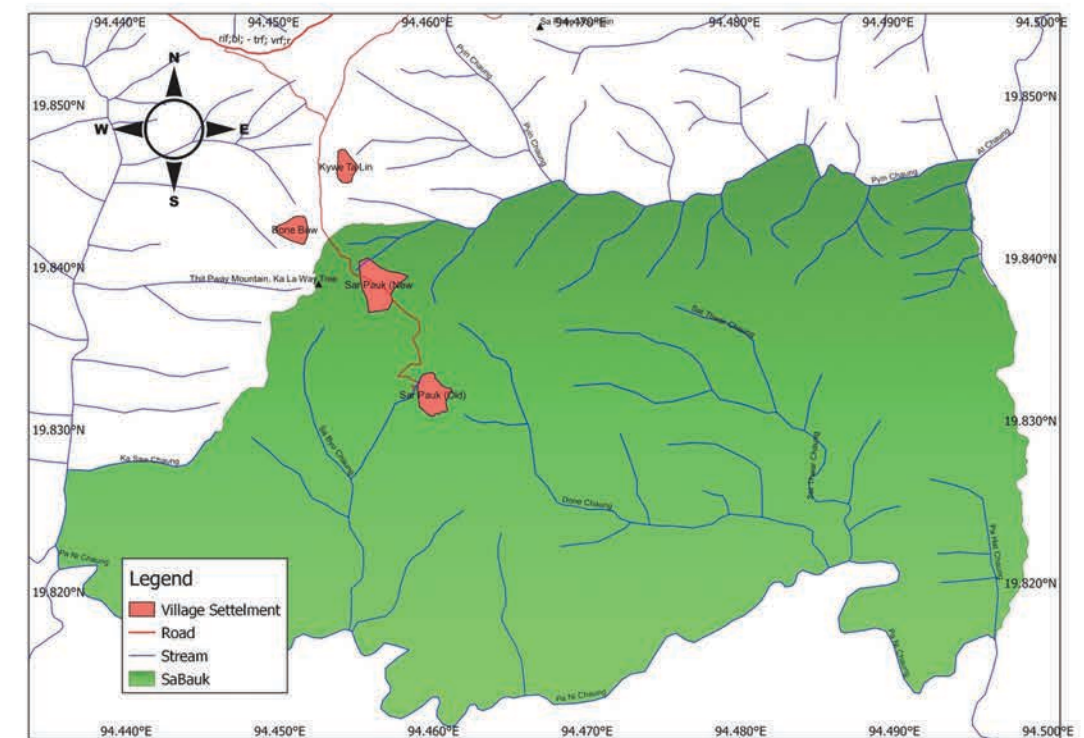


Figure 1. Boundary Map of Sar Pauk Village

ROTATIONAL FARMING

Due to the village's mountainous and hilly topography, residents mainly depend on collecting forest products, animal husbandry, hunting, and rotational farming for their daily livelihood. Rotational farming is a traditional livelihood system wherein villagers use most of the land occupying about 1,400 acres with at least seven years for rotation. Although rotational farming used to be only for subsistence, products from farming are now sold in local markets. Cash crops such as coffee, corn, pigeon peas, banana, and vegetables have become a major source of income for the community. Cash crops plantations have gradually increased in the last decade due to increased income generating capability compared to other options.

ORCHARDS

Planting orchards started in 1980 and has gradually increased in utilization in the village. After the construction of the Minbu-Ann Highway in 1993, orchard plantations became an alternative way to earn livelihood and make extra money. According to 2015 data, about 150 acres in the Sar Pauk Village are orchard lands. Currently, villagers use these areas for subsistence and income generation by growing cash crops. As a result, some rotational farming areas were converted to orchards. Immigrants can also buy land plots from local landowners to convert them to orchards. The villagers also collect different kinds of resources from the forest for their needs. Although locals collect dry wood from the forest, the living trees are not cut down in their forest.

PRESENCE OF GOVERNANCE AND MANAGEMENT REGIME

There are two types of communal land in Sar Pauk Village. All land types in the village, apart from agricultural lands, are considered communal land, including forests along the streams, mountain ridges, and between agricultural lands. All villagers have the right to access the communal forest. To protect the forest and the people from the stream, villagers do rotational farming by maintaining the forest along the mountain ridges and streams as buffer zones. Buffer zones are also considered as communal land. Permission is needed from the cultivator of a specific plot when dealing with buffer areas or if someone would like to cut a tree.



Primary School
of Sar Pauk Village
Photo: POINT Myanmar

The second type of communal land is land where both forest and cultivation areas are located. Communal land is shared among the villagers, decided through a village meeting, but long-term plants are not allowed to grow on this land. Although all villagers from Sar Pauk have the right to access the land for cultivation, planting orchards was not allowed on this communal land in the past.

Although about half of the village boundary is inside of Man Reserved Forest established by the forest department, villagers still utilize that land for their livelihoods, as they did before the establishment of the reserved forest (RF). The orchards are situated in the reserved areas, and the villagers are concerned about the intervention of the government. The villagers cannot continue practicing rotational farming on lands demarcated as reserve forest, half of which were originally designated as village territory in the past. If they do not use the land inside the RF, there would only be 4 or 5 five years fallow which is inadequate for the regeneration of vegetation or for the forest to be ready for another round of farming. Therefore,

they have to follow an 8-9-year farming cycle. However, the remaining land outside of the RF cannot accommodate the needs of community. Therefore, the villagers have to resort to using the lands inside the RF.

The Sar Pauk Village holds village meetings to elect a leader and members of the village administration committee. During conflicts such as land disputes and other social issues, villagers are expected to follow the decisions of the leaders and elders. In terms of resources, the villagers hold meetings to discuss and decide on receiving donations from outsiders, as people from other villages often come and request to cut trees for their own use or for their village's residents and schools. The donated funds are used for building roads, schools, and other village activities.

COMMUNITY RULES ON THE USE AND MANAGEMENT OF FOREST RESOURCES, LAND, WATER, NTFPs, AND ECOSYSTEM SERVICES

Sar Pauk Village has its own management system for customary land tenure, which demonstrates the unique connection between the communities and their land and forests. To share plots for rotational farming, the communities hold village meetings, and the size of the plot and household determine the plot allocation. For instance, a bigger family has the right to access a larger plot compared to a smaller family. Every household has the right to access rotational farming plots in the village areas. The villagers also practice exchange of labor, such as weeding, corn harvesting, and rotational farming.

According to customary rules imposed by the village leaders, the villagers must maintain the forest along the mountain ridges, leave the forest along stream banks, and preserve the forest in watershed areas to ensure sound ecological practices and good forest management.

Under customary rules, women do not have the right to own land, only the right to use it. In the event of a woman's death, the land is typically given back to her brothers, as there is no right to pass it down to her children. Women are typically only given family treasures, such as traditional dresses, silver, and gold. However, there are reports of some families giving orchard land to their daughters.

Immigrants who settled in the village have fewer land ownership rights than the villagers. These immigrants are Asho Chin people, many of whom are related to the villagers. While they have the right to access land for rotational farming free of charge, as well as the right to buy land for orchard farming, they are not permitted to clear virgin lands. Additionally, they must purchase land before planting orchards or long-term crops. Sale of land to outsiders or villagers who are not part of the Sar Pauk village requires consultation and agreement with the community.

According to customary law, if an organization or a neighbor community wishes to extract natural resources for business or research purposes, they must inform and obtain permission from Sar Pauk's community. Outsiders are expected to follow and respect traditional practices, knowledge, and the community's sacred places.

Researchers or organizations from outside who wish to study natural resources and forest products within Sar Pauk territory must follow the FPIC principle. This involves fully informing and consulting with the leader and communities. For example, researchers must provide the purpose of the study, procedures, potential risks and benefits, and other relevant information in a participatory manner. They must use language that is easily understood by the local communities and allow enough time for communities to discuss the project among themselves. The proposal will then be considered, and communities can adjust or negotiate through this consultation process. According to customary practice, decisions are made democratically in the village assembly, where all household representatives must be present.

2.2. Myay Latt, Asho Chin Community

Myay Latt Village is an old community founded four hundred years ago. It is located in the Bone Baw Village Tract, Min Bu District, Nga Phe Township of the Magway Region. The area around the village has a narrow, mountainous, and hilly topography. Although the boundary of the village territory was not clearly defined by their ancestors, all the villagers and neighboring villages know its traditional boundaries well. The total area of the village's territory is 1,428 acres with 22 households and a population of 110, most of whom are Asho Chin ethnic people. Similar to Sar Pauk villagers, the Myay Latt community mainly depended on rotational farming, however, when the Minbu-Ann Highway opened, many have shifted to planting orchards.

There are three main types of land use in the village, including:

- agriculture lands where most villagers cultivate orchards and implement rotational farming techniques;
- forest lands where most NTFPs are extracted, and act as a water shed area for other activities (e.g., cemetery areas and areas around the settlement); and
- community forestry lands.

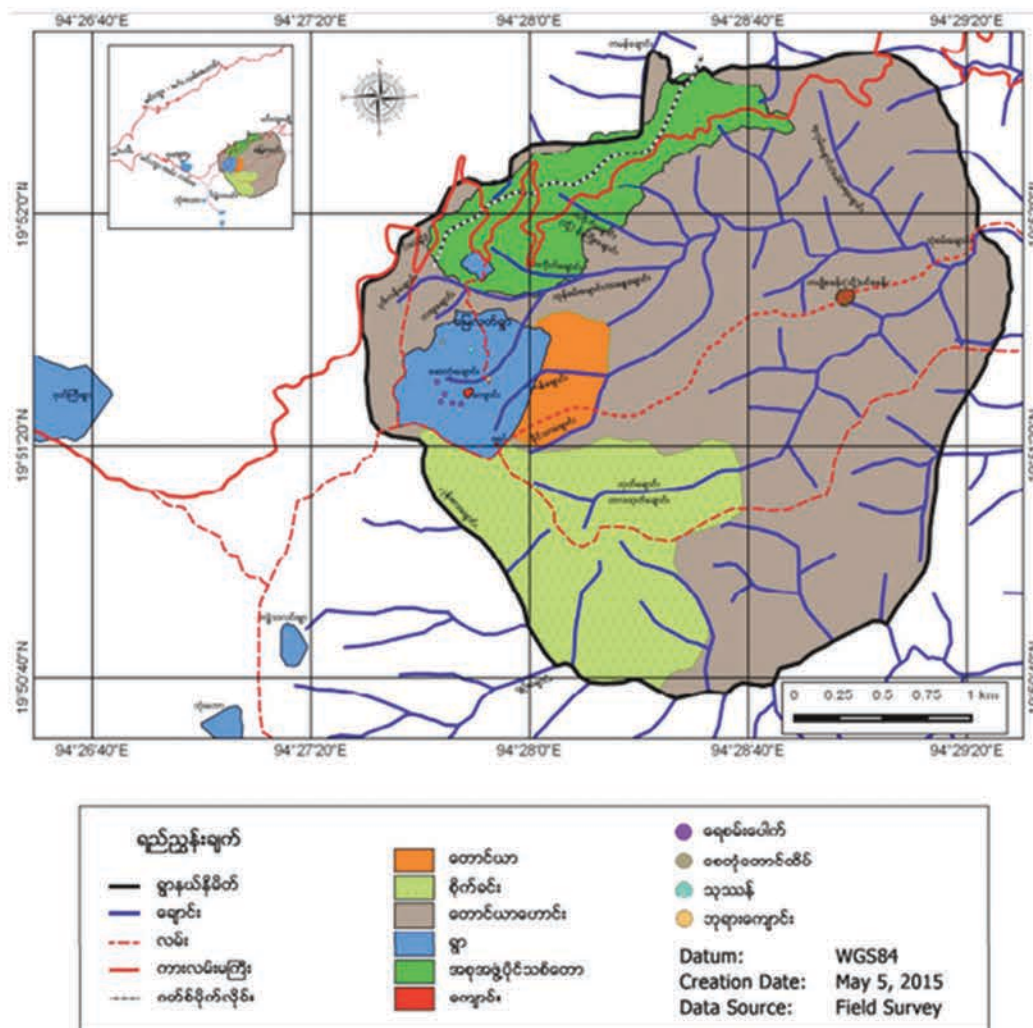


Figure 2. Land Use Map of Myay Latt Village

ROTATIONAL FARMING

Agricultural lands are used for rotational farming in the village. The fallow period in rotational farming is 8 years, and the villagers demarcated the land with streams, mountain ridges, roads, trees, veins, and deep valleys. The demarcation process is easy to memorize for the villagers because they regularly clear and cultivate the same plot. Rotational farming areas occupies 450 to 500 acres out of the total territory of the village. At present, most rotational farming lands have been converted into orchards to grow cash crops such as bananas, pineapples, limes, lemons, coffee, and other fruit trees.

ORCHARDS

In Myay Latt Village, orchards have become the dominant agricultural land use, particularly for cash crops. The use of rotational farming land has decreased by about 300 to 350 acres, and about 214.2 acres have been converted to orchards. Over the last two decades, more than half of the rotational farming areas have been transformed into orchard lands, and some have been designated as community forestry. However, there is no land registration for any type of land use in the village.

FOREST

The entire village boundary falls within the Man Reserved Forest, which covers an area of 16,257,846 acres. Although the forest has been designated as reserved, the villagers still utilize the land since customary land tenure grants them the right to access it. However, when utilizing the forest near orchards and rotational farming areas, the landowner must be informed. Villagers mainly use timber for building houses or as a source of extra income.



Orchard farming of Myay Latt Village
Photo: POINT Myanmar

COMMUNITY FORESTRY

The community forest (CF) of Myay Latt Village was established in 2004 with technical support from the Japan International Cooperation Agency (JICA). It included some families from Bone Baw and Kyay Tha Lin Villages. The CF originally occupied 100 acres and started with ten households. By 2006, the number of households had increased to 42.

The community forest is self-reliant, with 70 acres of the total 100 acres designated as protected area, and the remaining 30 acres used for agroforestry. Members plant teak, banana, cassava, lime, and other perennial trees. After applying for the Community Forestry Certificate in 2004, the government officially granted it in 2006. Illegal logging is prohibited in the CF area and has decreased significantly since the CF certificate was obtained.

OTHER LANDS

The villagers have a settlement area where they have established a community and a cemetery. The village cemetery, located near the village, is a protected area that is strictly reserved for one purpose. The settlement area is surrounded by a forest and a watershed, which provides water resources for the village. Cutting trees in the forest surrounding the settlement area is prohibited.

The villagers have the right to utilize the forest and land by consolidating customary rules that guide the systems of management, including matters related to ownership rights, inheritance rights, rules for selling land, and sound practices of environmental conservation. Rules and customary practices are managed by the leaders and members of the village administration committee.

The lands are originally owned by the village elders by implementing the Dama Ou Cha Principles¹ on privately claimed lands. These lands are primarily agriculture lands and other lands which are not considered as communal land. The individual who cleared the primary forest is considered the owner of the land and other villagers respect and acknowledge this, even without land ownership certificates. Some plots are owned by clans, and clan members have the right to access the land. The transformation of clan land into individual land must be carried out through an agreement within the clan. Only then can individual lands be transformed into orchards based on the individual owner's decision.

The elders have allowed forests to be cleared for rotational farming, but extending the cultivation areas has been prohibited among the villagers in the last 20 years. The elders clear the primary forest and shift between fallows together. Then, their descendants inherit the lands. There is little ownership difference among clans and families because each family clears a plot once a year for rotational farming. Some plots are not individually owned because descendants share plots of land. For example, some plots are owned by five or six families in a clan. The elders hand down the lands only to their sons because customary practice does not allow women to inherit land, resulting in the lack of land ownership rights for the women in the village.

Asho Chin immigrants who marry a woman from Myay Latt Village can settle in the village. Immigrants may request to acquire or utilize land and are allowed to farm the land surrounding the village, as long as they do not plant long-term crops. The agreement is discussed and decided upon at a village meeting, and the decision to sell the land to immigrants depends on the private owner. Before deciding, the owner needs to inform and discuss the matter with their relatives. If a family member or relative intervenes and decides to buy the land, the owner will have to sell it to that member. However, if there are no buyers within the family, the owner can then sell it to the immigrant.

The process of buying and selling land is strictly limited to members of the clan. Selling land and renting to outsiders are traditionally not allowed. The villagers understand that these lands are their main source of subsistence and should not be used for commercial purposes. Selling the lands among clan members is limited by the regulations set by each clan. According to these regulations, any member of the clan should maintain their own land and never sell the land to outsiders. A land registration certificate can be issued by the government for their ownership, along with an option to register their lands together as communal land including all the forest and cultivation areas.

The community has their own rules in relation to rotational farming and forest management. The rules are decided and coordinated among village members through village meetings. For example, the selection of the farming area and the land sharing process for each family are decided collectively. Those who did not win the private land in the selected area of the rotational farming has the right to offer to use the land to the landowner according to their preference. After clearing vegetation, they create a firebreak together to control the fire when they burn the cleared vegetation. The forest along the streams and mountain ridges are left cleared for farming. Access to forest areas with large trees are restricted. In addition, villagers are not allowed to cut and clear around the watershed area even if these areas have been marked as cultivation areas.

¹ According to this principle, the person who first wielded a machete to clear the land becomes the owner of that land. The owner's descendants are considered a group that holds both the land and forest under customary tenure.

All forest areas in the Myay Latt Village are owned by all the villagers, and they have the right to access timber for domestic use. Individuals from neighboring villages who want to access timber in these areas, per customary rules, must first obtain permission. This will be decided by the village administration committee during the village meeting. If donations were received from outsiders for granting access to timber, these funds are spent on village infrastructure such as, schools, bridges, and other village activities (Promotion of Indigenous and Nature Together [POINT], 2016).

Customary tenure has been found to be flexible and adaptable based on the current situation. While women were initially unable to inherit land titles in the past, some women now have been given rights to do so. The use of land has also changed from shifting cultivation to orchard plantations. However, shifting cultivation remained the main source of subsistence for the studied communities. Likewise, the practice of customary tenure allowed for better protection and conservation of their land and forest areas, as selling land to outsiders is not allowed. The extraction of natural resources requires permission from the village committee, and outsiders also must also respect the customary rule and obtain FPIC.

The lack of legal land titles and non-recognition of customary land tenure limit land security. Both communities are located within the boundaries of the Man Reserved Forest Area which was established without securing FPIC. Not only were the IPs not given any form of compensation, but their presence within the forest reserve can also lead to imprisonment for trespassing and possible confiscation of their lands.

Law enforcement has been weak, and with the current crisis, indigenous lands are increasingly under pressure from economic land concessions and foreign investments without FPIC. Many indigenous communities, such as Myay Latt and Sar Pauk, are at a high risk of losing their lands. They may even face illegal encroachment and imprisonment, since their community areas have been designated as part of the Man Reserve Forest Area, and are subject to practices such as rotational farming, which is a major driver of deforestation.

The community forest is self-reliant, with 70 acres of the total 100 acres designated as protected area, and the remaining 30 acres used for agroforestry. Members plant teak, banana, cassava, lime, and other perennial trees. After applying for the Community Forestry Certificate in 2004, the government officially granted it in 2006. Illegal logging is prohibited in the CF area and has decreased significantly since the CF certificate was obtained.

2.3. Principles practiced in consultation and consent processes

The Myanmar Government has no national legal requirement or framework for FPIC (Guest, 2016). The terms of the FPIC principles need clarification and are currently perceived as unnecessary by the government and business sector groups. Ethnic representatives have informed the MCRB that private sector projects are often initiated without consultation with or FPIC from local communities. Companies usually provide IPLCs with information on only the positive aspects of development projects, disregarding other crucial facts and data that may affect their lives.

The FPIC process requires the systematic identification of IPs within the legal framework and the recognition of their collective rights. However, only a few administrative documents provide reference to 'indigenous people'. Article 5 of the Ethnic Rights Protection Law (2015) states that IPs, translated in Burmese as 'ta-ni tain-yin-ta', should receive complete and precise information about extractive industry projects and other business activities within their areas before project implementation, prior to the negotiations between the IPs and the government or private companies (The Republic of the Union of Myanmar, 2015). However, these conditions were added late into the parliamentary process and has not yet been tested or implemented (Guest, 2016, p. 24).

There is a growing awareness of the concept of FPIC among CSOs and indigenous communities through various activities and programmes. However, there has been no opportunity to test it in practice, including the identification of which groups should have the right to give or withhold consent, and what processes are involved. Ethnic nationality CSOs are prepared to advocate on how Article 5 of the Law should be implemented within the country's context.

Administrative boundaries do not reflect populations of IPs in Myanmar, although the boundaries need to be changed according to the constitution. Many ethnic people from different states and regions form communities with other ethnicities, and some of them self-identify as IPs. The 2014 census data on ethnicity and religion, which identified a list of 135 national races raises have been questioned for its accuracy. The Government and private investing companies need to engage with all communities regardless of whether they self-identify as IPs or not, which may include all national races intermingled with IPs

within certain States. The comprehensive engagement of all communities may help ensure that no IP groups are left out.

A GRM for the FPIC process has yet to be established in the country. The principles governing GRM are as follows:

1. The GRM should be able to deal with grievances at the lowest possible level. Local communities usually have an effective traditional and culturally appropriate grievance mechanism. However, a system for recording the grievance and the result needs to be identified.
2. The GRM should be impartial and should be able to deal objectively with grievances involving parties with different power levels.
3. The GRM should work promptly and report in a timely manner. It should also be predictable and transparent by indicating the expected number of days for each stage of the GRM process.
4. The GRM needs to be affordable and available at all times.
5. There needs to be a mechanism to record a grievance and its results.
6. Information and communication materials should be provided in a language that is understood by the community.
7. Key performance indicators and targets should be identified with inputs from the community to ensure that grievances are received, acknowledged, and closed out in a timely manner, and reflects the expectations of the community and other stakeholders.

However, these processes have been suspended due to the military takeover in February 2021. To date, there is no information dissemination on these mechanisms and implementation on the ground is unlikely to happen due to the crisis.

Cooperation between the government and IPs is necessary to develop comprehensive FPIC guidelines. These guidelines should be incorporated into national legislation and aligned with the provisions of the UNDRIP. This requires the complete implementation of the FPIC process in policy and practice, particularly regarding the issue of consent.

The government should properly enforce the guidelines on FPIC for any project implemented within IP areas, including actions related to the international climate change agenda. Additionally, clear and transparent information on benefit sharing with project-affected indigenous communities must be provided. Undertaking a comprehensive assessment of conflicts and risks is necessary to mitigate the negative impacts of mega-development projects in indigenous areas.

2.4. Gaps in existing safeguard mechanisms

The FPIC principle is an international standard for IPs' rights and customary tenure. However, the country has yet to fully utilize and implement the principle in its policy frameworks and legal guidelines. There are no other safeguard mechanisms apart from what is stated in existing domestic laws. The gaps within these laws can potentially create avenues to expropriate or own indigenous land without prior consent from the local indigenous community. A country with rich resources and cultural diversity must have solid safeguards and mechanisms, such as the FPIC, to build a peaceful and just community for all its citizens.

3 Key findings and conclusions

There are existing tenure arrangements that recognize the rights of Indigenous Peoples and local communities. However, the extent and definitions of these rights need to be clarified.

Tenure Type	Description	Extent of rights related to ownership, access, and use	Right to be consulted (Yes or No)
Farmland	Certain land use types can be applied for certification Recognized by the government and given protection which can be transferred, inherited, and mortgaged	The government will determine the areas considered as farmland. To apply for certification, the land type must be an eligible land use for farmland. If certification is successful, farmers can sell, pawn, inherit, or mortgage under the condition that farmers must produce regular and seasonal crops.	Yes. Although there is no FPIC guideline or instruction, some existing legal frameworks have articulated the recognition and the need for obtaining consent from the local community.
Community Forestry	Type of forest which is given to the local community or forest user group under community forestry instruction. Community Forestry is noted in the Forest Master Plan 2030 which is cited in the country's Nationally Determined Contribution.	The local community or forest user group (composed of 5 or more people) can apply for a 30-year use right certification, which can be extended. If granted, the forest user group is given access and management rights to the area, wherein they can extract timber and NTFPs. The forest user group must follow the community forestry instruction and maintain a master plan.	Same as above.
Customary Land tenure	Customary land tenure is a type of land use widely used by indigenous communities in accordance with traditional norms and practices.	Customary tenure systems are complex and diverse as they contain various rights, and sometimes, overlapping rights to various resources that are	Yes. Although, it is not yet formally recognized and protected under a legal framework, according to the Ethnic Rights

		enjoyed by different individuals or groups. Customary land tenure is not yet recognized under the existing legal framework. It is noted in the NLUP which can only be formalized when the National Land Law has been legislated.	Protection Law (2015), consent is required prior to project implementation in ethnic areas, wherein impacts to livelihood are expected.
Local Community Conserved Area	A type of land use noted under the Forest Law and the Biodiversity Conservation and Protected Area Law for locally conserved forest area.	The sense of recognition and ownership is similar to Indigenous Community Conserved Areas (ICCA) but further instructions for recognition and protection are not described. The number of local communities given this type of land use right is unknown.	Yes. If the land use right has been given to the local community, obtaining FPIC will be required before implementing a project in that area.

Customary tenure systems of IPs are complex and often include different forms of individual and collective tenure. These systems contain different combinations of rights, which are at times overlapping, and cover various resources enjoyed by different individuals or groups in the community. Generally, the bundle of rights can be understood as being comprised of five rights: access rights, withdrawal rights, management rights, exclusion rights, and alienation rights. As per international obligations, Myanmar must rectify its existing legal framework and adopt new legislation which recognizes and protects the existence and well-being of IPs. In this regard, the country must use the provision of the NLUP to draft a national land law that considers FPIC and IP rights. However, other laws have been passed that have negative implication on IP customary land tenure rights.

Although indigenous communities in Myanmar continue to practice customary law and practices over their customary land, community forest instructions (CFI) provide only some form of collective communal tenure with limited usage rights. For example, the community cannot practice shifting cultivation in community forest areas, which has led to the adoption of orchard planting. In addition, there are also limits on the right to sell and mortgage land, and the management rights only last for 30 years. If the

community does not follow these stipulations, the CF certificate may be terminated.

Recent laws, such as the Farmland Law, VFV Law, and the NLUP, show improvements regarding IPs' rights, albeit still leaving gaps for the complete protection of these rights. These gaps need to be addressed immediately. For example, the VFV Law has been criticized for its perceived increased benefit toward foreign investors rather than local farmers. Neither the Farmland nor the VFV Law has provisions for IPs' customary land rights. Furthermore, the National Land Law, presumed to harmonize laws that deal with land, forest, environmental conservation, and related matters, is still in the drafting process. This delay has resulted in conflicts over land grabbing and land confiscation within IP lands.

The UN REDD+ programme in Myanmar recognizes the critical roles of IPs and other forest-dependent communities in long-term sustainability. The programme aims to engage with local stakeholders for support. Securing FPIC also meets the objectives of the Cancun Agreement. In addition, REDD+ activities recognize all types of forest management and conservation, including customary tenure practiced by IPs. Unfortunately, as previously mentioned, the country does not officially recognize the existence of IPs, and the guideline for FPIC still needs to be

made available. Due to the coup d'état in February 2021 and the associated political changes, the discussion on these issues is expected to come to a standstill in the foreseeable future. The political state in the country will slow down law reform processes and the development of FPIC guidelines.

The ICCA is considered as one form of protection and conservation of customary land by IPs and local community leaders in Myanmar. It is an international mechanism that requires capacities for processing which can be challenging for IPs and local communities. Likewise, the requirements are unknown, but once IPs successfully gain control over their territories, they may exclude others from accessing land and resources, impose the right to secure FPIC for extraction of their natural resources, or protect their land from confiscation. The capacity of local communities on the conservation of forests and its natural resources, along with their living standards, is expected to improve over time.



Farm Land in Naga Indigenous Community
Photo: POINT Myanmar

4 Recommendations

For policy makers

1. Enact the National Land Law that recognizes and protects customary land tenure and complies with the conditions under the UNDRIP.
2. Conduct a nationwide assessment of FPIC practices of different indigenous groups in Myanmar.
3. Develop national FPIC guidelines in consultation with Indigenous Peoples in Myanmar.
4. Establish grievance mechanisms to tackle disputes on customary land tenure and related land issues.
5. Create a specific and sole administrative mechanism mandated to manage and regulate customary land tenure registration.

For UN agencies and international NGOs

6. Conduct multi-stakeholders' dialogues to encourage communities to recognize, aspire, and practice customary tenure.
7. Support the activities and initiatives of indigenous communities in maintaining indigenous knowledge.
8. Support the documentation of and research on indigenous knowledge.

For CSOs and Indigenous Peoples' Organizations

9. Strengthen the knowledge and capacity of indigenous communities to be able to defend their land, territories, and natural resources.
10. Empower indigenous women on their roles and rights to customary land tenure.

For indigenous communities

11. Document relevant community protocols on customary land tenure and FPIC practices related to natural resource management.
12. Create a space for sharing indigenous knowledge among elders, youth, and other members of their communities.

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