

Customary Tenure Systems and REDD+

*Ensuring Benefits for
Indigenous Peoples*



Customary Tenure Systems and REDD+: Ensuring Benefits for Indigenous Peoples



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Acronyms

| | |
|---------|---|
| ACMA | Adaptive Collaborative Management Approach |
| ALTA | Agricultural Landlord and Tenant Act |
| ANSAB | Asia Network for Sustainable and Agriculture and Bioresources |
| CBD | Convention on Biological Diversity |
| CBS | Central Bureau of Statistics |
| CERDA | Centre of Research and Development in Upland Areas |
| CFUG | Community Forest Users Group |
| CSOs | Civil Society Organizations |
| CSR | Colonial Sugar Refinery |
| CTS | Customary Tenure System |
| DFO | District Forest Officer |
| DoF | Department of Forest |
| DPC | District People's Committee |
| ER-P | Emission Reductions Program |
| ER-PD | Emission Reductions Program Document |
| EU | European Union |
| FAO | Food and Agriculture Organization |
| FCPF | Forest Carbon Partnership Facility |
| FECOFUN | Community Forestry Users Groups of Nepal |
| FGD | Focus Group Discussion |
| FPIC | Free, Prior, and Informed Consent |
| FSS | Forestry Sector Strategy |
| GoN | Government of Nepal |
| ICCA | Indigenous and Community Conserved Areas |
| ICCPR | International Covenant on Civil and Political Rights |
| ICERD | International Convention on the Elimination of all Forms of Racial Discrimination |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICIMOD | International Center for Integrated Mountain Development |
| ILO | International Labor Organization |
| INGOs | International Non-Governmental Organizations |

| | |
|---------|---|
| JICA | Japan International Cooperation Agency |
| KII | Key Informant Interview |
| LOU | Land Owning Unit |
| LURCs | Land Use Right Certificates |
| LUU | Land Use Unit |
| MARD | Ministry of Agriculture and Rural Development |
| MoFSC | Ministry of Forest and Soil Conservation |
| MONRE | Ministry of Natural Resources and Environment |
| MPFS | Master Plan for the Forestry Sector |
| NCC | Northern Central Coast Region |
| NEFIN | Nepal Federation of Indigenous Nationalities |
| NFDIN | National Foundation for Development of Indigenous Nationalities |
| NFN | NGO Federation Nepal |
| NGOs | Non-Governmental Organizations |
| Norad | Norwegian Agency for Development Cooperation |
| NR | Non-REDD+ |
| NRAP | National REDD+ Action Program |
| NTFP | Non-timber forest products |
| PPC | Provincial People's Committee |
| REDD | Reducing Emissions from Deforestation and Forest Degradation |
| REDD+ | Reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries |
| RIC | REDD Implementation Centre |
| RPP | Readiness Preparation Proposal |
| RTL | Register of iTaukei Land Register of iTaukei Land |
| SESA | Strategic Environmental and Social Assessment |
| SFE | State Forest Enterprises |
| SUF | Special use forests |
| SNV | Netherlands Development Organization |
| TLC | iTaukei Land Commission |
| TLTB | iTaukei Land Trust Board |
| UDHR | Universal Declaration of Human Rights |
| UNDRIP | United Nations Declaration on the Rights of Indigenous Peoples |
| UNFCCC | United Nations Framework Convention on Climate Change |
| UN-REDD | United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries |
| WB | World Bank |
| VBK | Vola ni Kawa Bula |



Glossary

| | |
|------------------|---|
| Adivasi Janajati | Indigenous peoples of Nepal |
| Ailani | Public land |
| Badghar | Headman in a community. An informal customary institution, the Badghar system is prevalent in the Tharu community of Nepal |
| Birta | Land granted by the state to individuals for making a living. Such land was usually inherited and exempted from tax. This system was abolished in 1959. |
| daku ni kuila | Literally means behind the (British) flag; it refers to the time before land was codified into a western system by colonial administration |
| Guthi | Land assigned for religious or philanthropic purpose. Guthi lands still exist. |
| iTaukei | Indigenous Fijians who are the land owners |
| Jagir | Land granted by the state to civil and military employees in place of salary. This system was abolished in 1951 |
| Jamindar | Landlord |
| Kipat | Land permitted to be owned by certain indigenous groups, particularly Limbu of eastern Nepal. A Kipat land could not be transferred to individuals outside the community. The Kipat system was abolished in 1964. |
| Khoriya kheti | Traditional shifting cultivation common among certain indigenous peoples such as Chepang of Nepal |
| koro | iTaukei village |
| lewe ni tabenaga | Piece of land given to a woman upon her marriage which her husband and descendants have the right of use and can never be taken back by the givers. |
| mana | The power to effect |
| matanivanua | Traditional role that can be defined as the chief's herald; he is the link between the chief and the people of the vanua. |
| mataqali | Land-owning unit |
| Raikar | Land whose owner has to pay tax to the government. This land is included in official records, unlike other forms of land tenure such as Birta, Guthi, and Kipat. |

| | |
|---------------------|--|
| Rakam | Land granted as remuneration for performance of specific functions. This system was abolished in 1955. |
| sevusevu | Traditional ceremonial offering of yaqona roots or yaqona drink to request permission from the host or chief to perform an activity in a place where a person is a guest |
| soqosoqo vakamarama | iTaukei women's association |
| tabua | Whales tooth/teeth, the most esteemed item of iTaukei men's wealth |
| tabua salusalu | Sacred garland made of small carved tabua |
| talanoa | Casual conversations/discussions |
| Talukdar | Revenue collector at village level in the hills |
| tanoa | Wooden bowl in which yaqona drink is mixed |
| tokatoka | Smallest clan unit |
| turaga ni koro | Village headman who is a member of the village and paid by the government to look after village matters |
| turaga iTaukei | Chief |
| turaga ni mataqali | Chief of the mataqali |
| turaga ni yavusa | Chief of the yavusa |
| vakalutu ni qele | Land gifting such as when a woman marries; land is gifted to her and her descendants as part of her dowry but more so to affirm that she and her descendants will continue to be part of the vanua of her birth |
| vakavanua | Informal arrangements made by landowner and tenant; no documents give security to the arrangement but there is a sharing of resources and goodwill payment to the landowner |
| Vanua | An ancestral concept that relates to iTaukei's identity; it also means land or space |
| Vasu | The maternal link |
| veisorosorovi | Act of traditional reconciliation |
| veiwekani | Relationships |
| Vola ni Kawa Bula | iTaukei Register that records the name of each mataqali member and is maintained by iTaukei Land Commission |
| Vu | Literally means origin or source; it also means ancestral god from whom a tribe begins |
| yaqona | A crop in many parts of the Pacific, with the scientific name <i>piper methysticum</i> ; in some parts of the Pacific it is known as kava or 'awa. In Fiji it has an important traditional function which includes being offered as an item of reconciliation. |
| yavusa | Largest clan unit |



Synthesis

By Wilfredo V. Alangui

I. Introduction

Tenure rights, in general, refer to social relations and institutions regulating how lands and resources, including forests, are accessed and used (Larson, 2012). It is not just concerned with ownership but with who uses, manages and makes decisions about these resources. It is also about determining in what way and for how long these resources can be used. Questions investigated include what conditions apply and why, and what possibilities are there for transferring or inheriting particular rights.

Tenure rights are viewed, defined, and operationalized in various conditions and contexts. Among indigenous peoples, tenure rights are defined under customary practices and are generally categorized as collective-, kin-, or clan-based, and individual. Tenure rights on lands and forest resources vary, with clear obligations and responsibilities that form part of the practice, and will need to be studied in a diversity of contexts and conditions where these operate.

Customary forest tenure in particular has received interest from researchers and scholars since the inception of REDD+ talks. Their studies on forest tenure primarily used the “bundle of rights” framework* producing parameters for

assessing tenure rights within legal frameworks. A growing number of researchers and policy makers forward the view that recognizing (and to some extent formalizing) customary land rights is a way of addressing insecurity over forest resources.

Rights to lands and forests come with sets of individual and collective prerogatives and regulations at different levels. They are embedded in social relations and socio-political processes at the village level. Socio-cultural norms are drawn from different sources and are largely shaped by issues and concerns of communities. Thus, customary land and forest tenure systems are complex and evolving; they involve multiple rights and level of rights (individual or collective), which are determined by indigenous peoples on a case-to-case basis.

Taking into account the evolving nature of customary practices and diversity of problems, and concerns and situations involving REDD+ implementation, the experiences of other countries show the dynamic links between customary tenure practices at the community level and REDD+ legal mechanisms at the national and global levels.

Case studies conducted in REDD+ pilot areas in Cambodia (Bradley, 2012; Evans, Arpels &

*Rights and Resources Initiative (RRI) has recently developed an “expanded bundle of rights framework” that looks into the following aspects: Access rights, Withdrawal rights, Management rights, Exclusion rights, Alienation rights, and Duration of Extinguishability.

Clements, 2012) and Lao PDR (Moore, Hansel & Johnson, 2012) show evidence of how customary tenure shapes REDD+ implementation where communal titling was explored as an effective means to ensure that villagers have control over the carbon rights to their local forests. Cases from Latin America particularly Ecuador on the other hand show that communal tenure could be a means through which REDD+ incentive projects can be effectively arranged, and delineating land ownership by indigenous peoples is important in strengthening local land and forest governance institutions (Lastarria-Corhiel, Feijoo, Naughton-Treves & Suarez, 2012). This experience shows that customary governance can help in the effective implementation of REDD+ projects in indigenous communities.

II. Research Objectives

The cases mentioned above point to the need to understand better how the practice of customary tenure systems support the successful implementation of REDD+, and in turn how REDD+ can be used by Indigenous peoples in their assertion of their customary tenure rights. Identifying this interplay can help inform policy with regard to indigenous peoples' customary tenure rights and how benefits derived from REDD+ can be ensured.

The general objective of this research was thus to understand the interplay between customary tenure systems and REDD+ in order to ensure benefits of indigenous peoples from REDD+.

The specific objectives were to:

1

Document state laws and policies on land and forest tenure systems in three REDD+ countries and how these enhance or weaken indigenous customary tenure systems.

2

Describe the range of indigenous peoples' customary tenure systems that are practiced by indigenous peoples in their territories.

The specific questions we sought to ask were:

- *What values regulate or govern customary tenure systems?*
- *What are the threats to the practice of customary tenure systems?*
- *What innovations are undergone by indigenous peoples' customary tenure systems?*
- *What types of grievance mechanisms are in place?*

3

Determine the extent of recognition and practice of indigenous women's rights in customary tenure systems.

The specific questions we sought to ask were:

- *What types of rights (e.g., access, use, ownership, decision making) do indigenous women have in relation to customary tenure rights and how are these exercised?*

4

Determine how customary tenure systems facilitate the implementation of REDD+ in the three countries and help secure benefits from REDD+ (carbon and non-carbon).

5

Document how indigenous peoples are using REDD+ to assert, seek recognition, and strengthen their customary land and forest tenure systems.



III. Research Framework

The right to tenure is enshrined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), an international instrument that has been adopted by the three countries involved in this research. As the most comprehensive international instrument recognizing the rights of indigenous peoples, UNDRIP is the overall framework that guided the research.

In the context of indigenous communities, we define customary land and forest tenure as a bundle of rights rooted in indigenous customs and practices and passed on from one generation to another. For customary land tenure, this bundle of rights is “recognized as legitimate by the community where the rules governing the acquisition and transfer of these rights are usually explicitly and generally known, though they mostly are not normally recorded in writing” (Paaga, 2013, p. 264). We argue this holds true as well in the case of customary forest tenure.

For Bruce (1989), forest tenure refers to the set of rights that a person or some private entity holds in land or trees. We expand this definition to include rights of the entire community to the forest, rights that like land tenure are rooted in

indigenous customs and practices and handed down from one generation to the next.

The Food and Agriculture Organization’s categories of land tenure rights (2015) was adopted and modified in this study to include forest tenure rights as shown in the following table. Many of these rights derive from the individual’s membership to a social group such as a clan or family (Paaga, 2013).

For the purposes of this research, formal rights are those customary rights to tenure that are recognized by the State through State laws; informal rights are customary rights not recognized but are practiced by the indigenous communities and ethnic minorities.

Formal and informal rights do not make sense in the context of customary tenure systems—customary rights are inalienable rights of indigenous peoples and ethnic minorities, while the categorization formal and informal rights bestows power to governments to determine which customary rights to recognize formally and which rights to be allowed informally. We include this categorization here because of the reality that indigenous peoples and ethnic minorities have now been subsumed within dominant Western-style forms of government.

| Customary Tenure Rights | Land Tenure | Forest Tenure |
|-------------------------|---|---|
| | Explanation | Explanation |
| Use rights | Rights to use the land, for instance, for grazing, growing subsistence crops, farming, etc. | Rights to use the forest or parts of it, for instance, for gathering of forest products or selling them, place for worship, traditional rotational farming, etc. |
| Control rights | Rights to make decisions how the land should be used including deciding what crops should be planted and to benefit financially from the sale of crops, etc. | Rights to make decisions how the forest should be used including which parts are sacred, or designated for traditional rotational farming, who may access, restrict entrance or extraction of forest products (Bruce, 1989), etc. |
| Transfer rights | Right to sell or mortgage the land, to convey the land to others through intra-community reallocations, to transmit the land to heirs through inheritance, and to reallocate use and control rights, etc. | Right to reallocate use and control rights, right to sell or mortgage the forest or parts of it, if applicable, etc. |
| Formal rights | May be regarded as those that are explicitly acknowledged by the State and which may be protected using legal means. | |
| Informal rights | Those that lack official recognition and protection. | |



IV. Research Design and Methodology

The research involved three (3) case studies in Nepal, Vietnam and Fiji, countries that have been engaged with the REDD+ program since 2008 (Nepal) and 2009 (Fiji and Vietnam). Indigenous and ethnic communities involved in this study included those that either have or have no experience with the REDD+ program.

Country researchers were hired by Tebtebba to undertake the research in their respective countries. A lead researcher, acting as research coordinator, helped manage the implementation of the research. The research team consisting of the lead researcher and the country researchers developed and finalized the research design/framework following a Skype conference and several email exchanges. Ms. Helen Valdez, the project management team leader from Tebtebba, provided assistance and advice to the research team during the entire conduct of the research.

The research utilized the following data-gathering methods: review of literature, key informant interview (KII), and focus group discussion (FGD) including collection of other forms of information (e.g., photos, maps, stories and drawings).

The following were the partner indigenous communities and ethnic minorities for the research:

Country visits to Nepal and Vietnam by the lead researcher were also made during the last week of October and first week of November 2017, coinciding with the initial sharing of results with some of the study areas. This allowed him to interact with some of the stakeholders and meet with the research team members in both countries. A 3-day workshop was held in Vietnam in March 2018 to validate initial data and fill in some data gaps. Assisted by professional translators and staff of the Centre for Research and Development in Upland Areas (CERDA), two village leaders, Ha Trung Thong of the Tay ethnic group and Phung Van Kien of the Nung ethnic group from Thai Nguyen province, served as key respondents.

V. Research Findings

This section presents the consolidated findings from the three case studies, organized according to each of the specific objectives. Details of the findings are in the full component reports, which are found in the succeeding chapters of this publication. Important details from the country reports were purposely not included in the consolidated report for brevity; some may not have been captured. For these reasons, the consolidated report is best appreciated and understood if read along with the country reports.

| Country | Villages/Communes | Indigenous/Ethnic Minority Groups |
|---------|--|---|
| Fiji | Emalu, Draubuta and Navitilevu | iTaukei |
| Nepal | Shaktikhor and Padhampur (Kalika Municipality, Ward No 10, Chitwan District); Patharboji and Dalla (Madhuban Municipality Ward No. 1, Bardiya District) | Tamang, Chepang and Tharu |
| Vietnam | Binh Long, Phuong Giao, Trang Xa, Dan Tien, and Phu Thuong Communes (Vo NHai District, Thai Nguyen); Cat Van and Thanh Lam communes (Nhu Xuan District, Thanh Hoa) | H'Mong, Dao, Tay, Kinh, Nung, Cao Lan, Tho, Muong, Thai |

1. State Laws and Policies and Customary Laws on Land and Forest Tenure

Historical dynamics have had lasting impact on the practice of customary tenure systems in the three case study areas, due largely to the introduction of the Western tenure system. Tarabe (2018) describes this system as one that is based on the concept of individual ownership and European styled, capitalist oriented concepts. In the case of Fiji, the Western tenure system was one of the enduring impacts of colonization that fundamentally transformed customary tenure systems in the country (Tarabe, 2018).

How is the Western tenure system manifested in State laws and policies? For years, nation-states have all but appropriated most of the lands by declaring these as public. In the three study areas, and just like the rest of the world, the laws and policies that have been passed on property rights over lands have promoted various forms of private ownership, without regard for other forms of ownership like customary tenure systems practiced by indigenous peoples and ethnic minorities since time immemorial. Only recently have governments begun to incorporate provisions in laws and policies that recognize indigenous peoples' and ethnic minorities' rights over their lands and territories, including forests and other resources.

The Constitutions of Fiji, Nepal and Vietnam guarantee ownership and control by the State and its authority to allocate and dispose of lands and forests. The laws and policies that have been passed are consistent with what is provided for in the highest law of the land.

Across all countries, the government's decisions to use, allocate and dispose of lands and forests are built around the country's overall economic development program. For this reason, the "best urban, commercial and agricultural lands" (Tarabe, 2018, p. 29) are normally put within the control of the State, and parts of these lands are sold to rich individuals or corporations, or leased to them for a number of years.

Even as laws and policies have divested ownership of most of the lands to the State, the indigenous peoples in the study areas in Fiji and

Nepal, and the ethnic minorities in the study areas in Vietnam have some form of recognition of their rights to their lands and territories. However, historical and current State laws and policies have not entirely made it easier for indigenous peoples and ethnic minorities to own and control their lands and territories, including the forests. In most cases, these laws and policies have only served to make it more difficult.

There exist particularities in the case study areas in relation to use, control and transfer rights to lands and forests, and hence, State laws and policies differ in implementation. In some cases where the State allows some degree of control and management of their ancestral lands and forests, the indigenous peoples are restricted to what is stipulated in their legal certificates (Dolma Sherpa et al., 2018).

However, there are common issues that emerged from this study in relation to the interplay between State laws and policies and customary tenure systems. In general terms, these include:

1. Most States have adopted the Western tenure system that requires titles or a legal registration certificate as proof of individual ownership; in Vietnam, what is given are land use rights certificates that allow some use and transfer rights but not control and ownership. State laws and policies have therefore facilitated the divestment of indigenous lands and forests away from ownership and control of the communities;
2. State laws and policies have allowed the State to dictate how resource-rich lands and forests should be developed in accordance with its defined economic program especially in territories of indigenous peoples and ethnic minorities; many of the lands and forests in our case study areas are sites of major development projects or have active applications for use by corporations and industries.
3. The provisions of the laws and policies, especially in relation to securing titles, land registration certificates, or land user rights certificates have not been properly communicated to the indigenous

peoples and ethnic minorities; this has caused some confusion, misconceptions, and failure of many to apply for certificates, resulting in further dispossession of their lands and forests. In Nepal, for example, the government may confiscate the lands of indigenous peoples and evict them anytime if they do not have legal documents (Dolma Sherpa et al., 2018);

4. The application process is costly and requires resources, forcing individuals or households to avoid titling and securing legal certificates entirely, or devise creative solutions as in the case of Vietnam where households “merge all their claims under one title” (Alim et al., 2018) under a cooperative or an association they establish;
5. State laws and policies are not harmonized and contradictory in many aspects, some are ambiguous especially in terms of ownership, and some have been confusing and complicated for indigenous and ethnic minorities to understand. At other times, authority over lands and forests falls on competing agencies created by different laws, making negotiations difficult for communities; and
6. There continues to be limited recognition and protection of customary tenure systems in State laws and policies, despite inclusion of more positive provisions in favor of indigenous communities and ethnic minorities especially in relation to access and use of lands and forest resources. It seems governments are more likely to be open to providing use rights but are in general less willing to give greater transfer or control rights and ownership of lands and/or forests to indigenous communities and ethnic minorities.

How have the governments of Fiji, Nepal and Vietnam dealt with international instruments that recognize the rights of indigenous peoples? We make an observation focusing mainly on the UNDRIP as arguably the most important international instrument recognizing the right of indigenous peoples to self-determination that

encompasses rights of use, control and transfer of lands and forests.

In the Fiji report, Tarabe (2018) acknowledges the impact international agreements have in the protection of the rights of indigenous peoples to security of land. Unfortunately, of the three countries only Fiji has not ratified the UNDRIP. The government sees no need to sign the Declaration, arguing that the 2013 Constitution provides for the protection of the indigenous people in the country and their right to ownership of land is secure (Tarabe, 2018).

As parties to the UNDRIP, Nepal and Vietnam are expected to recognize the rights of indigenous peoples that are embodied in the Declaration. However, in Nepal many of the laws and policies put in place pertaining to lands and resources are “at odds with local needs and international laws related to rights of indigenous peoples (Sherpa and Dolma, 2018, p. 46).

Dolma Sherpa, Sherpa and Rai (2018, p. 61) make an important point about the effect of the lack of political will at the national level in realizing indigenous peoples’ aspirations that are reflected in international instruments like the UNDRIP:

Thus, while customary land and forest tenure systems have been in practice, they are not recognized legally. The Nepal government has so far been unable to harmonize relevant national laws to its international obligations under a number of international treaties, including ILO Convention No 169 and UNDRIP, which oblige state parties to respect indigenous peoples’ customary rights over natural resources. Further, government administrators lack an understanding about these rights. These have resulted in a gradual loss by indigenous peoples of their rights and control over their lands, forcing them to be ‘landless/homeless people’ within their own territories, communities and country.

In Vietnam, recognition of the ethnic minorities’ customary rights over their lands and forests continues to be limited, although some

significant move has been made towards recognizing these in recent years (Alim et al., 2018).

In relation to international treatments, therefore, State laws are in some cases in conflict with the provisions of international treaties especially in relation to recognizing the rights of indigenous peoples and ethnic minorities to their lands and territories, including their forests. This lack of harmonization results to continuing lack of implementation of the provisions of international treaties at the national level, especially those to which States are a party (Fiji may not have signed the UNDRIP but it is a party to ILO Convention 169, another important instrument). Hence, the recognition of customary tenure systems and customary rights remains an important if not an urgent concern in our case study areas.

2. Features of customary tenure systems across case study areas

We first present the results generated in response to the four (4) questions enumerated above. Then we discuss the nature of customary tenure systems, including formal and informal rights.

What values and concepts regulate or govern customary tenure systems?

As in any living cultural practice and heritage, customary tenure systems are dynamic and change according to historical circumstances and new realities. Quoting France (1969), Tarabe (2018, p. 28) puts it more succinctly:

What is now regarded as customary land tenure or 'traditional' has been modified, shaped and reshaped so many times that what was originally customary is unrecognizable.

While this may be true in general, indigenous peoples and ethnic minority groups have enduring values and concepts that guide them in their continuing practice of their evolving customary tenure systems. Many of these interrelated values, concepts and principles are common across indigenous peoples, and in the

three case study areas it is possible to identify some of them.

The first concept is *since time immemorial*, a phrase that connotes beyond the living memory of a people. For the iTaukei of Fiji, the Tamang and Chepang in Nepal, and the ethnic minority groups in Vietnam, just like for many indigenous peoples around the world, the lands and forests they now live and subsist on were established by their ancestors. This is the reason why indigenous communities have a special relationship with their lands and territories. The customary tenure systems that they have developed link them to their ancestors, and the loss of this knowledge and practice peels out a layer of such link to their past, including their identity. For the iTaukei people, this idea is captured by the value of belonging “that gives iTaukei their identity, meaning from their past and security in their future” (Tarabe, 2018, p. 32).

The second concept that is closely related to the first is that ownership is *clan-based*. This is precisely because they believe most of the lands and forests where they are now were opened and established by ancestors from their respective clans. For the iTaukei of Fiji, their mataqali (clan) owns the land; among the Tamang and Chepang, the land is inherited from their relatives and ancestors; and among the ethnic minorities in Vietnam, their ancestors opened the lands and forests on a “first come, first serve” basis (Alim, et al., p. 85).

Intergenerational is another concept common to the three case study areas. Customary lands and forests are passed on from one generation to the next, either by inheritance or gifting (in the case of iTaukei lands). Knowledge in management of resources and governance and customary tenure systems are also intergenerational. These are knowledge and practices that have been passed on and handed down, albeit continually evolving and adapting to changing times.

Customary tenure systems and the knowledge that developed around these are, therefore, *place-based*. For hundreds of years and across generations, indigenous communities and ethnic minorities developed, evolved, and

experimented on how they managed their lands and forests, which they themselves established, protected and nurtured. These lands and forests have been their grazing grounds, sources of wood, fodder and food. They have knowledge “of what is on the land and under the land” (Tarabe, 2018, p. 32). In the process, they have developed complex tenure systems that allowed them to live together relatively harmoniously for many years.

Customary tenure systems of lands and forests, including boundaries or extent of ownership, and the associated knowledge on resource management are known to and affirmed by the community. *Collective affirmation* is therefore another concept common to the three case study areas, or what the Vietnam ethnic minority groups refer to as sense of community. The experience in Vietnam that highlights mutual agreement and respect with regard to ownership of forests is a good example (Alim, 2018, p. 85):

When it comes to forests, these ethnic groups typically adhere to the traditionally observed communal ancestral claims. As ethnic peoples, they commonly regard forests with reverence, as they believe these hold spiritual value, being the place where their gods and the spirits of their ancestors reside as well as the channel for providing their daily needs. The range of access and use varies among different ethnic groups. But they usually allow mixed use with minimal cultivation since they generally reserve the whole forest as a place for worship, although each member has a plot of his/her own in designated areas.

Ethnic groups in adjacent communities recognize and respect the community’s claim on the forest, categorized under territorial claims. In cases where two or more ethnic groups surround the forest, they usually have a mutual agreement on who owns what, which parts they allow free access, and what types of use they can permit.

Sacredness or sanctity is another value or concept that guides the practice of customary tenure systems. This has been expressed in various ways in the three case study areas, emanating from a spiritual belief about their lands and forests. According to Tarabe (2018, p. 33):

Participants are guided by the spirituality of the land. The land is sacred; land is a living being. In this way, land is not merely a physical area of earth, hills and forests but something that is spiritual; a being like themselves, the heart of their lives. This is why alienation of the land is in fact spiritual isolation and prolonging this isolation is lethargic, a certain way of weakening indigenous communities.

Finally, another important value or concept guiding the practice of customary tenure systems is *sustainability* or sustainable use of resources, alluded to in the Vietnam report as the balance of spiritual and material (Alim et al., 2018). Among indigenous peoples and ethnic minorities, sustainable use of resources is guided by the desire to bequeath to future generations the same abundance that their elders have enjoyed from their lands and territories.

The above values and concepts, though not exhaustive, are interrelated and stand out from the experiences of the three case study areas.

What are the threats to the practice of customary tenure systems?

Based on the data culled from the three case study areas, it seems one of the biggest threats to the practice is the existence of at times conflicting State laws and policies that do not fully recognize customary tenure systems. In particular, the requirement for land titles and land registration certificates that privileges individual ownership is expected to have a long term impact on the concept of tenure and communal ownership. At the same time, the inability of indigenous communities and ethnic minorities to acquire land titles and certificates leads to insecurity of tenure, making them vulnerable to eviction. In Nepal, government officials consider those without land certificates as “homeless or landless

people, illegal occupants, and forest destroyers” (Dolma Sherpa et al., 2018, p. 58). Tarabe (2018) argues that the dual tenure system (referring to the Western tenure system and the customary tenure system) that exists in Fiji is not tenable, often to the disadvantage of indigenous peoples.

What seems clear is that governments do not have an understanding of or do not recognize what ownership of lands and forest means to indigenous communities and ethnic minorities, which could lead to further erosion of customary practices. Dolma Sherpa and co-authors (2018) report the lack of recognition of indigenous knowledge systems in State laws and policies in Nepal. In Fiji, male respondents from a non-REDD (NR) area lament this lack of recognition during a focus group discussion (Tarabe, 2018, p. 36; highlight mine):

*All this time, we kept the piece of necklace made of many small tabua and regarded it sacred...evidence of the gifting of land made between our ancestors and those of another tribe because our great grandfathers assisted them during a tribal war. That other tribe now wants the land back because of the forest and the monetary return it would give. We complained to the government, to the i Taukei Land Trust Board and we were told that the piece of necklace was from the dakunikuila or the time before the land laws were made and **it has no significance now**...we are really sad because what we had been keeping and holding as sacred for generations is now referred to as a useless thing. (FGD men, NR)*

However, there is increasing pressure for communities to apply for land certificates for practical reasons. Aside from securing ownership of their land (and in certain cases, forests), governments only provide support to communities or households that have legal documents over their lands and territories. This is validated by the following experiences of the indigenous peoples in Nepal (Dolma Sherpa, et al., 2018, p. 59):

During a focus group discussion in Bardiya, it was found that the government provided relief only to those who possess land ownership certificates. It does not also consider any compensation claims of land users without these documents in the event of natural disasters and wildlife raids.

A problem they continue to face...is the increase of wildlife population in the dense, lush forests. Without proper security arrangement in place, local people are injured and killed during attacks by wild animals.

Tharus and other poor marginalized communities have been frequent victims of such attacks. A few years back, a schoolboy and an old man in one of the study villages were killed by a wild elephant. In addition to human casualties, the wildlife attacks also destroyed crops and livestock. Despite these losses, these indigenous peoples who have no land certificates have been continuously deprived of any compensation by the government. According to government rules, communities having no land certificate are not eligible for government relief and compensation.

Also in Vietnam, the people see the increasing number of community members, mostly men, who migrate to other places in search of livelihood as a threat to the continuing practice of their customary tenure systems. This is exacerbated by migration and integration of non-ethnic migrants into the localities who are not familiar with these customary practices or who consciously disregard or violate them. Problems also arise involving private enterprises, like plantations and mining concessionaires, that “do not care about the cultural and spiritual significance” of the forests and impact of these on communities (Alim et al., 2018, p. 90).

Finally, another concrete example of how State laws and policies pose a threat to customary tenure systems has been expressed in the Nepal report, and this has to do with laws pertaining

to conservation and protection. These laws are “restrictive in nature” resulting in eviction and displacement of indigenous peoples from their ancestral domains, especially because national parks and conservation areas cover around 65 percent of their ancestral lands (Dolma Sherpa et al. 2018, p. 55).

What innovations are undergone by indigenous peoples’ customary tenure systems?

With changing conditions in the case study areas, indigenous peoples and ethnic minorities have no choice but to adapt and be creative in order to continually enjoy security of tenure over their lands and forests. However, in the case of Fiji, whatever innovations there are that impact the practice of customary tenure systems have been introduced by the government, like the establishment of the Land Use Unit and changes in rent entitlements—innovations that only served to further disadvantage the indigenous Fijians (Tarabe, 2018).

The Vietnam case study gives some examples on the innovations that ethnic minorities have introduced in response to current realities (Alim et al., 2018, p. 91):

- With respect to the entry of outsiders to their communities, the people have introduced a warning system where “violators are given a number of warnings before necessary disciplinary actions are pursued” in accordance with their traditional justice system;
- Refusal of assistance in times of death (in the form of physical and financial support) beginning from the wake to day of burial (this has been proven to be effective as violations become less frequent after its implementation);
- Ethnic minorities in Thai Nguyen pushed for the inclusion of customary regulations into District People’s Committee rules with respect to forest management (to which the DPC agreed); and
- The Nung people and neighboring ethnic groups in Vo Nhai District, Thai Nguyen have been pushed to live alongside each other due to socio-economic and political circumstances. With increasing interaction, intermingling and

intermarriage, these communities are learning to negotiate their respective customary tenure practices in the use and management of lands and forests.

What types of grievance mechanisms are in place?

The existence of grievance mechanisms is proof that customary tenure systems and practices are robust and alive in the three case study areas.

In Fiji, even as the iTaukei Lands Commission that was established in 1905 still functions as a grievance mechanism and becomes the last resort for the iTaukei to solve land and fishing rights, indigenous Fijians continue to resolve their disputes using their customary ways, like the vanua, to deal with land conflicts through a reconciliation system called veisorosorovi vaka-vanua (Tarabe, 2018).

The Badghar system, a traditional customary governance institution in the Tharu community in Nepal, is still in practice. The headman Badghar makes decisions related to village development, conflict management, paternal property distribution, and use of natural resources. Unfortunately, the Badghar system is neither recognized nor protected by the State (Dolma Sherpa et al., 2018).

A more elaborate grievance mechanism is narrated in the Vietnam report, where a village head, usually a man, makes decisions on land-related matters and other community issues, and metes out sanctions depending on the gravity of the violation; penalties may range from rice payment to the aggravated party to social exclusion where the guilty party is barred from participating in community activities, even the privilege to be buried in the community’s burial forests (Alim, et al., 2018).

There is also a system to make peace with gods and spirits guarding the land and forests. Officiated by land guardians or shamans, rituals are held to determine the gravity of forest-related violations like unauthorized intrusions or unjustified exploitation of forest resources. Compensation is mostly in the form of an offering during a ritual. The shamans also determine whether the gods have already meted out punishment, which could be in the form of



unexplained illness, extreme body pains, body deformity and/or mental derangement. The shaman may officiate a ritual for the healing of the guilty person if he is deemed to be worthy of forgiveness. Just like in Fiji, the ethnic groups in Vietnam resort to the formal institutions either at the district or commune level in difficult cases of violations; such cases normally involve conflicts with outsiders (Alim et al., 2018).

Finally, what seems to ground customary ways of resolving land conflicts is a genuine desire to maintain harmony especially if parties involved are from within the same village. A respondent from Emalu explains (Tarabe, 2018, p. 33):

There is mana in this engagement... It is an ancient custom that involves humility and respect...it maintains our closeness as relatives. (man, Emalu)

In Fiji, mana is an important concept that regulates customary practices. It refers to the presence of a spiritual “power to effect” (Tarabe, 2018).

Rights under Customary Tenure Systems

For decades, customary tenure systems have guided indigenous and ethnic groups in the exercise of their rights to use, control and transfer their lands and forests.

Who has access to lands and forests; how to use these; who makes decisions on access and use; who benefits from tilling the land or from forest products; who can sell, mortgage, reallocate or transmit the land and forests; which parts are designated as sacred, burial grounds, rotational farms, fire breaks, pasturelands, etc.; what restrictions and rules to follow; and what rituals to perform are important concerns that have long been settled and agreed on by community members using their own guidelines and rules, and in accordance with their customs and tradition.

These tenure systems are part of an elaborate and complex knowledge system about the environment that have evolved and developed

for hundreds of years. As reported by Dolma Sherpa, et al., (2018, p. 58), indigenous communities and ethnic minorities “have been observing customary practices to conserve and sustainably manage the land, forest, water and other natural resources” for many generations.

Clan or communal ownerships of lands and forests are affirmed by community members, based on knowledge that has been handed down by their elders following oral tradition and through various indigenous learning systems like rituals. The three case study reports validate this. In Fiji, for example, an evidence of transfer of land ownership may be the possession of a sacred necklace through the ritual of gifting from one family to another (Tarabe, 2018). In Nepal and Vietnam, people talk about ancestors who opened their lands and forests many decades ago, the same lands and forests they continue to own and manage now. Dolma Sherpa and her co-authors (2018, p. 58) speak of a long history in terms of “ownership and use of their ancestral lands and forests and control over the natural resources in their existing territories.”

Customary tenure systems require some forms of governance for efficient and effective management, including grievance mechanisms already discussed above. In all case study areas, tribal chiefs and village headmen take on important responsibilities in ensuring that customary rules and rituals are observed and that harmony within the community is maintained.

On Formal and Informal Rights

Regarding formal rights that are recognized by the respective governments in the three case study areas, while the type of tenure rights the State allows for the people to enjoy may differ, one commonality stands out.

In Nepal, use rights are allowed, and some forms of control rights especially over forests are recognized but not transfer rights. However, these rights are valid only in the context of land registration certificates. Without legal documents to show, indigenous peoples in Nepal do not have rights to use or control their lands and forests.

The same situation exists in Vietnam—recognition of ethnic minorities’ rights to use, access, and transfer lands and forests is limited precisely because the scope of these rights is defined by existing State laws and policies, a chief requirement of which is land use certificates. The ethnic groups’ rights to manage their lands and forests, which they have owned since time immemorial, are subject to restrictions, and the type of tenure rights they are allowed to enjoy is defined by the scope specified in their land use titles and certificates.

The Fiji case study focuses on land tenure and presents the respondents’ views on how the country’s legal system has stripped them of their right to live in their own land, and with it the customary rights they have had over their lands (which are now subject to law and government regulation). Here are some views of respondents from a non-REDD+ area (Tarabe, 2018, p. 35):

Our land is painted red on the map...it means that no one owns this piece of land.... but we are living here...according to the law we do not have the right to live here but this land belongs to us (FGD men, NR).

This red land was gifted to our ancestors through a practice called vakalutu ni qele... but the land is marked red and it means that all the members of the clan who own it are dead...but we know this is our land...we live here. (woman, NR)

Despite restrictions imposed by State laws and policies on the ability of indigenous communities and ethnic minorities to enjoy their use, access and transfer rights over their lands and forests, they continue to perform some of these. These are then considered “informal” rights because the people continue to perform them outside of what is allowed by law or by their land user certificates, or in spite of not being given due recognition by the government.

In Fiji, for example, some beliefs and practices under their customary tenure system have endured, like presenting a tabua (whale’s tooth/

teeth, the most esteemed item of iTaukei men’s wealth) to the chief to ask permission for the use of a piece of land. One respondent expressed the belief that “people die when they abuse the land—when there is false claim to the land,” while another said “mana is associated with the land, its boundaries and the resources on it... the land has eyes” (Tarabe, 2018, p. 34).

Just like in Fiji, beliefs about lands and forests persist among the ethnic minorities in Vietnam, and these have implication on the way they access these resources. Even State committees (like the Provincial and District Peoples’ Committees) are careful to exercise their administrative power over the ancestral forests in Thai Nguyen and Thanh Hoa for fear of violating spiritual codes and conduct that the ethnic minorities observe in using and managing these forests informally. With or without these social and spiritual factors, however, and despite the non-recognition of their rights to ownership and tenure, ethnic minorities emphasize that their community will continue to use their ancestral lands and forests because they believe it is their customary right (Alim, et al., 2018).

As mentioned earlier, indigenous peoples in Nepal have no transfer rights, preventing them from exercising certain rights like selling or mortgaging their lands with banks, or bequeathing these to their children. However, Dolma Sherpa et al. (2018, p. 59) note that:

[These indigenous peoples], especially Chepangs, practice transfer rights informally within their community... [T]hey inherit land from one generation to another or even divide the land among members within a household, though without any legal effect.

Indeed, even though certain rights are not recognized legally in Nepal, the indigenous peoples in the case study areas continue to practice their customary land and forest tenure systems in their communities (Dolma Sherpa et al., 2018).



3. Indigenous and Ethnic Minority Women and Customary Tenure Systems

Though discernible differences are reported, indigenous and ethnic minority women across the three study areas have a lot in common on rights they have (and do not have) under customary tenure systems.

In general, indigenous and ethnic minority women do not enjoy the same rights as the men under customary tenure systems. In Fiji, this is attributed to women being “at the lower end of indigenous Fijian’s social strata” (Tarabe, 2018, p. 37) and in Vietnam, to “traditional systems of governance that are patriarchal” (Alim et al., 2018, p. 92).

Contrasting emphasis in the responses of iTaukei women and men in Fiji with regard to ownership and tenure rights is insightful. Almost all the men focused on ownership and use rights—they said women have the same rights as men to own and use the land and have equal rights to access the forest and its products. Compare this with the views of the iTaukei women, who talked mostly about who has control over the land, which is either the husband or the clan. A woman respondent has this to say: “I do not have the control of land, my husband decides everything on land matters, I need permission from my husband” (Tarabe, 2018, p. 37). Only one male respondent acknowledged that even though women could own a piece of land, control is with the husband. Tarabe (2018, p. 37) points out “many participants felt that women were still regarded as inferior when it comes to the rights of women in customary tenure systems.”

In Nepal, Dolma Sherpa et al. (2018, p. 61) report that “Tharu and Chepang women are heavily reliant on forest resources and are also involved in the customary management of forests” and that the traditional customary forest management system ensures indigenous women and other disadvantaged women groups benefit equally from the community forests for non-timber forest products. However, indigenous women only have informal rights (because they do not have land certificates) to use and control

their lands and forests, and just like in Fiji, they lose these rights after marriage or when they get divorced.

The ethnic women of Thai Nguyen and Thanh Hoa communities can own lands usually through inheritance. However, respondents explained that ethnic groups prefer to have sons inheriting the land because “daughters usually move to their husbands’ house after marriage,” and for this same reason, some household heads prefer to hand the land over to nephews than their daughters (Alim, et al. 2018, p. 92). The Vietnam case study also reports that ethnic women are highly dependent on the forest just like the indigenous women of Fiji and Nepal, and that they enjoy equal use of and access to forest products under their customary tenure system. In northern communities like Thai Nguyen, ethnic men migrate to other cities and even to China to look for work. Because of this, their wives become the heads of their households and become responsible for the lands their families own. This gives the women the power to make decisions on how to manage the land. In general, this power does not rest on the women in the three case study areas.

Indeed, men dominate decision-making processes especially those pertaining to land and forests. Across all three case study areas, indigenous and ethnic minority women are not expected to make or influence decisions made under their respective customary tenure systems.

In Fiji, again conflicting views exist on women’s participation in meetings regarding land: according to female respondents, women may be present during land meetings but may not be allowed to speak, although most of the male respondents say otherwise (Tarabe, 2018). Differing forms of regulation also operate for women born into the clan and for women who married into the clan: the former may own land and speak in meetings but not the latter (an example on this among the Emalu is narrated by Tarabe [2018] in the report).

And in Nepal, even though the participation of indigenous women in meetings about land and forest management has been increasing,

the women's voices "are not effectively heard" (Dolma Sherpa et al. 2018, p. 62). The men may sometimes ask the women's opinion, for example, when selling or transferring registered land, but in general they go ahead with transactions without consulting the female members of the household.

There is not much difference in Vietnam. Alim and co-authors (2018) report that ethnic women may become involved in making land-related decisions but only to a certain extent since the men or the husbands have the final say on such matters. As an example, ethnic woman may transfer inherited land to her children, but in general it is the husband who decides on how to divide the land and when the transfer needs to be done.

In the context of the Western tenure system, the indigenous and ethnic minority women in Fiji cannot hold land titles, are deprived of their right to obtain land certificates in Nepal, or cannot have their names registered in land certificates in Vietnam (Tarabe, 2018; Dolma Sherpa, et al, 2018; Alim et al. 2018).

In Vietnam, ethnic women prefer not to get involved in the legal process of obtaining land certificates or having their names registered. There are two reasons for this: one is the customary practice of leaving the men to take care of matters about the land; the other is the women's lack of knowledge about their rights. An ethnic woman who fails to register her name in a land certificate may end up landless and propertyless in case of divorce from her husband. The only remedy is for her to secure custody of a son (if any) and the court will guarantee her share of a piece of land (Alim et al., 2018).

An important development in Nepal and Vietnam is the growing recognition of women's rights. The 2015 Constitution of Nepal guarantees equal inheritance rights for women and men, while the 2013 Constitution of Vietnam (and numerous State laws and policies) recognize women's land rights, use rights on agricultural lands, ownership of forestlands through forest certificates. As Alim et al. (2018, p. 93) report, "Vietnam's Constitution explicitly states that men and women are equal in legal stature, and

according to the (2013) Land Law and other gender-inclusive laws, this equal recognition should translate in terms of forestland ownership rights."

The reality however is that the indigenous and ethnic women of Nepal and Vietnam continue to be deprived of their rights, because the gender-inclusive provisions in their respective Constitutions and State laws and policies (like right to access, control, manage, and transfer through gifting or selling) do not get translated at the community level.

4. Customary Tenure Systems and Implementation of REDD+

Customary tenure systems are enduring practices in the case study areas despite the widespread implementation of the Western tenure system and years of non-recognition or weak support from their respective governments. With the implementation of REDD+, however, the governments are making some efforts to change existing laws to recognize these customary rights and practices.

There is reason for this change. Protecting land and forest rights of indigenous peoples and ethnic minorities is now generally acknowledged to be key to promoting forest conservation and stopping deforestation. Thus, the successful implementation of the REDD+ program in these communities requires recognition of the rights of indigenous peoples and ethnic minorities, including their customary rights to ownership and tenure.

The experiences thus far with regard to the implementation of REDD+ in these communities are varied.

In Fiji, carbon benefits are derived from the leasing of iTaukei land by the government for 99 years, and the mataqali (the land owning unit) ensures that benefits are shared equally to its members. Some problems arise from the inability of members to open bank accounts to which their share will be deposited. Other non-carbon benefits include building of community halls and livelihood projects like bee keeping.



In the district of Bardiya in Nepal, the indigenous peoples in the communities and key informants such as Badghars, the local political leaders, and members of the Community Forest User Groups were not aware of the REDD+ program. However, in Chitwan district some key informants like the District Forest Officer, members of the District Coordination Council, members of the Nepal Federation of Indigenous Nationalities (NEFIN), and representatives of Community Forestry Users Groups of Nepal (FECOFUN) are familiar with the concept of REDD+ and the REDD+ program in Nepal. But local indigenous communities such as Chepangs and other marginalized groups lack proper knowledge and understanding of the program.

Some poor and middle-income families in Chitwan have already benefited from the implementation of REDD+, receiving financial support to implement livelihood programs like animal husbandry (with documented success stories), vegetable farming, broom-grass cultivation, apiculture, planting of various kinds of trees, and installation of improvised cooking stoves. The program also created opportunities to attend vocational training (tailoring), enterprise development (shops, grocery management) and training in the production of biogas to reduce firewood consumption.

Vietnam is still in the readiness phase of the REDD+ program in which capacity building is a major component. The ethnic minorities in the two research areas have already undergone capacity building training. The Ministry of Agriculture and Rural Development (MARD) is taking steps to help the people prepare for the implementation of the program and ensure they benefit from it. For example, MARD has secured funding from the Forest Carbon Partnership Facility through the World Bank for the project “Support for REDD Readiness in Vietnam” in Hanoi and all provinces under the Emission Reduction Programme in the Northern Central Coast Region, which includes Thanh Hoa province. Several NGOs have also sponsored trainings to help the communities build their capacity in dealing with REDD+. In Thai Nguyen, the Centre of Research and Development in Upland Areas has organized training on the legal and

technical aspects of lands and forests, while Tebtebba implemented the project “Capacity building model for ethnic minority communities to be ready to take part in REDD+ program,” in the Binh Long commune of Vo Nhai District. This project was funded by the Norwegian Agency for Development Cooperation.

These capacity building activities have resulted in some positive results: ethnic communities in Thai Nguyen established cooperatives of their own, at least six (6) in the Vo Nhai District alone. The New Forest Law, expected to take effect in 2019, recognizes cooperatives as legal entities. The people believe having cooperatives will help them manage their forests collectively—for example, in processing various legal requirements like securing a harvest license, protecting the forests at low cost, and negotiating for better prices for their timber and non-timber products. More importantly, cooperatives help strengthen their voice and power to negotiate in securing ownership of their forests (Alim et al., 2018, p. 97):

With the help of CERDA, the local communities in Thai Nguyen and Thanh Hoa accomplished the application process and were allocated forests and given forest titles that deem them the legal owners. In line with their approach to be a collective entity through their cooperatives, they have merged their lands to have a forest area large enough to qualify for REDD+. By doing so, they were allowed to submit a proposal for funding and are now entitled to receive financial incentives under the program, provided they meet the criteria. This also provides them the opportunity to participate in the carbon market in the future.

This experience shows REDD+ is inspiring the people in the research areas to innovate in order to participate effectively in the program. REDD+ is also encouraging them to be more proactive. The ethnic communities in the Cat Van commune in Thanh Hoa province, for example, applied to the Vietnamese Government Program 661, which provides incentives for forest protection. They were able to secure

around 660 hectares of protection forests and financial support in the last three years. This year, eight (8) communities in the Thanh Lam commune also secured 320 hectares for forest protection under the program and expect to benefit financially starting next year (Alim et al., 2018). One of the major expectations from REDD+ of the ethnic minorities in the two provinces in Vietnam is to have alternative sources of income for their communities.

Other effects of the REDD+ program in the communities is affirming the value of “keeping a clean and healthy environment” (Tarabe, 2018, p. 39), the need to continue preserving the forests (Dolma Sherpa et al., 2018), and the importance of securing their rights over their lands and forests (Tarabe, 2018; Dolma Sherpa et al., 2018; Alim et al., 2018).

While the REDD+ program is generating interest and high expectations, especially because the indigenous peoples and ethnic minorities in the research areas have already started to benefit from it, some issues have also emerged.

In the Bardiya district, the Tharus cited one of the program’s negative impacts: forest protection has resulted to increasing population of wild animals; they are now suffering from attacks of wild animals that destroy their crops and houses, and in certain cases, even kill people. These attacks have impacted the women and children in the communities: now, “the women...do not feel safe in entering the forest to collect forest products for their livelihood, and children are afraid of going to school on their own” (Dolma Sherpa et al., 2018, p. 63).

People also still need to understand and appreciate fully how the REDD+ program works. In Fiji, one of the young respondents from a non-REDD+ area raised a “pragmatic concern” (Tarabe, 2018, p. 39):

REDD+ is good and also bad...how can we plant our gardens without cutting down trees? We need to burn the forest before we can make our gardens to get rid of the hornets and wasps and poisonous plants that can poison our skin. (FGD youth, NR)

In Nepal, there is “some misunderstanding on carbon benefits among indigenous peoples and local communities. They lack knowledge on the mechanism and process of result-based payment in REDD+” (Dolma Sherpa et al., 2018, p. 64). In particular some dissatisfaction was felt by the Chepang and other indigenous communities in Chitwan over the benefit sharing mechanism adopted in the pilot project implemented in the district. A concern raised is the possibility that some recipients might not be the ones truly in need of the limited financial support, creating confusion and misunderstanding among the recipients. Another cause of displeasure is the “lengthy bureaucratic process to access the fund” (Dolma Sherpa et al., 2018, p. 63) as well as funds passing through intermediary entities instead of going directly to the locals.

In Fiji, “there is a murmur of dissatisfaction when promises of what should be given in return for their participation and giving of their land are not met” as expressed by male respondents (Tarabe, 2018, p. 40):

REDD+ has not given us any money—it is 7 years now since they promised—we will wait even if it is 10 years. (FGD men, Emalu)

One major issue pointed out in the reports of Nepal and Vietnam is the weakness of the REDD+ program in fully recognizing and compensating indigenous peoples and ethnic minorities as custodians of forests, something which they have been doing for many generations. In Nepal, the people feel that the pilot program did not value their historical contributions to forest protection and ecosystem conservation.

A related concern is the non-inclusion of indigenous customary institutions like the Badghar system (as well as indigenous leaders) in decision-making bodies of REDD+ programs; this non-inclusion hinders the sharing of community issues that need to be addressed by REDD+. This is similar to the concern raised in Vietnam—the non-recognition of customary practices of ethnic minorities in relation to land and forest tenure and ownership. They cite the REDD+ requirement to have legal certificates as an indication of this non-recognition. Because of

this, the Vietnam report argues that the REDD+ program is missing an opportunity to transform the perspectives of the Vietnamese government regarding the customary rights of ethnic minorities (Alim et al., 2018). Finally, Dolma Sherpa et al. (2018) assert that REDD+ programs should prioritize both carbon and non-carbon benefits, address safeguards, and ensure that the rights of indigenous peoples (and ethnic minorities, in the case of Vietnam) are respected and recognized.

The Fiji report provides a cautionary warning on REDD+, while pointing out its potential to positively impact the lives of indigenous peoples (Tarabe, 2018, p. 40) and ethnic minorities:

The colonial and subsequent administrations have not been fair in dealing with iTaukei land. REDD+ must not perpetuate this injustice by becoming another type of colonial tool. It should be a vehicle for justice in dealing with the iTaukei customary tenure system and in this way uphold the values that guide these systems.

In general, research results suggest that indigenous peoples and ethnic minorities seem to participate more actively in REDD+ if they see that programs and policies actually help strengthen their tenure and ownership of their lands and forests, whether formally or informally.

5. Assertion of Rights of Indigenous Peoples and Ethnic Minorities through REDD+

The three case study areas indicate that REDD+ is helping indigenous peoples and ethnic minorities maintain social cohesiveness, push for recognition and assertion of their rights, and strengthen customary values and practices, especially in relation to tenure and ownership of ancestral lands and forests.

In Fiji, participants to the research believe REDD+ has brought back a sense of togetherness, unity and collaboration in the community, which disintegrated due to individualism and economic competition. And this positive experience might explain why the people see the

potential of REDD+ as an instrument alongside mataqali that can help them assert the recognition of their customary tenure systems especially in the areas where land involves customary gifting (Tarabe, 2018). Two statements exemplify how REDD+ is effecting positive change in Fiji:

We have learnt to manage and conserve resources and land areas...there is monetary benefit to the community...a sense of giving is witnessed from our collaboration with REDD+. (man, Emalu)

REDD+ has helped in strengthening our cultural ways of living and strengthen our customary tenure system. (woman, NR)

The experience of Nepal shows the important role played by civil society in helping empower indigenous peoples through REDD+. NEFIN, in particular, has been actively involved in REDD+ related activities since the program started, such that the organization has become a member of REDD Working Groups under the Ministry of Forest and Soil Conservation at all levels. Such membership, secure even in the coming new federal system, “has provided a platform for the indigenous peoples to put forth their concerns and assert their voices and stances with regard to Nepal's REDD+ policy and program” (Dolma Sherpa et al., 2018, p. 64).

Similar encouraging developments are seen in the participation of indigenous peoples in the REDD+ program. In Chitwan, Tharu representatives are in the working group along with NEFIN. Indigenous peoples' organizations such as Tharu Kalyankari Sabha and Chepang Association as well as indigenous leaders have been regularly invited to meetings. And while indigenous peoples are still not fully involved in the decision making process, they have made inroads in program meetings, unlike in the past when they were totally absent. NEFIN has also organized training courses and other capacity building activities on REDD+ for district forest offices, which have facilitated dialogues between indigenous leaders and other stakeholders especially government officers. In Bardiya and

Chitwan districts, the Tharus and Chepangs demanded for legal recognition of their customary land and forest tenure systems in REDD+ programs as well as in upcoming land- and forest-related laws and policies in line with the new Constitution. Dolma Sherpa and co-authors (2018, p. 65) report:

To a certain extent, these initiatives have helped to educate government officers and other stakeholders on indigenous issues and change their outlook towards indigenous peoples and their concerns in REDD+.

According to Dolma Sherpa et al. (2018, p. 64), “the final draft of Nepal’s REDD strategy covered many issues surrounding the customary tenure system based on indigenous knowledge, skills and experience.”

The capacity building component of the REDD+ program also helps ethnic minorities in Vietnam push for the use of their customary practices on land and forest ownership and tenure while combining these with innovative approaches. Again, through the efforts of CERDA, ethnic minorities as well as officials of the District People’s Commune provided trainings on the legal and technical aspects of REDD+, which also provided the necessary knowledge and information needed to accomplish requirements for registration. Some positive results coming from these capacity building activities are the following:

- A number of ethnic groups in five communes of Vo Nhai District developed a forest management plan that features an intercommunity linkage using a landscape approach that combines customary and State laws;
- The Hoa Binh community cooperative put up by Nung, Tay, San Diu, and Cao Lan ethnic groups did a forest biodiversity inventory of their forests (as part of their application for REDD+). This moved the communities to take action

after the inventory showed the extent of degradation of the forests, especially fauna. One action taken was rehabilitating the degraded forests (which were allocated to them in 2014 and 2016) for a period of five years, motivated by the possibility of getting more timber and non-timber forest products, more water for agricultural production, and the prospect of carbon benefits under REDD+; and

- Establishment of local cooperatives and alliances of cooperatives that helped them secure ownership of the forests.

The respondents in Vietnam also view the Cancun Safeguards, especially on free, prior and informed consent, as opportunities to promote their land- and forest-related rights as well as other rights of ethnic minorities.

The ethnic minority women in Vietnam similarly note that some REDD+ related documents (like the Cancun Safeguards) give emphasis to their land- and forest-related rights and participation rights, and they expect this to help them advance their status and equal opportunities in their communities and in larger society. The indigenous women in Nepal expressed the same expectation, especially in relation to their full and effective participation at all levels of decision-making processes and equitable benefit-sharing mechanisms under the REDD+ program.

In general, respondents in the three case study areas agree that REDD+ is making their respective governments more sensitive to their rights over their lands and forests and other rights as indigenous peoples and ethnic minorities. At the same time, the participation of some indigenous peoples and ethnic minorities in global platforms like the United Nations Framework Convention on Climate Change is helping bring the discussion of customary rights into the international arena, forcing governments to respect and comply with their obligations under such instruments.

VI. Conclusion

This research has illuminated the current status of customary tenure systems of indigenous peoples and ethnic minorities in countries where REDD+ has been implemented. The following are some of the findings that stand out.

- State laws and policies are slowly recognizing customary tenure systems, and REDD+ has contributed in making governments in Fiji, Nepal and Vietnam become more sensitive to the rights of indigenous peoples and ethnic minorities. However, there is need to harmonize some laws which are at times conflicting and confusing especially those with provisions on land and forest tenure and ownership. International instruments like UNDRIP, ILO Convention 169, and Cancun Safeguards, and advocacy and lobby work at the local, national and international arenas (e.g., at the UNFCCC) have proven effective in encouraging governments to respect and recognize the rights of indigenous and ethnic minority groups.
- Customary tenure systems continue to be practiced in the communities despite the implementation of the Western tenure system that encourages individual and private ownership. Chief requirement of this Western tenure system is to have land titles, and land or land user registration certificates that provide the scope of what tenure rights are allowed. This is anathema to the values that guide customary tenure and ownership.
- Indigenous and ethnic minority women, in general, do not have the same rights as the men have under customary tenure systems. They do not get to participate in decision-making processes especially on issues about land. Interestingly, State laws and policies are becoming more sensitive to rights and issues of indigenous and ethnic minority women, with the inclusion of some provisions that are deemed pro-women.
- REDD+ is starting to make a difference in communities where it is being implemented, even if some of the countries are still in the readiness phase. Just like any pioneering program that has not been tested in the past, it is encountering some issues and problems in its implementation. Expectations are also building up, and for the indigenous peoples and ethnic minorities in the case study areas, foremost is the protection of their rights to tenure and ownership over their lands and forests as well as recognition of their customary practices and knowledge systems.
- Initial experiences in the case study areas suggest that REDD+ is helping indigenous peoples and ethnic minorities assert their rights, encouraging governments to incorporate these in new laws and policies, and making local and national authorities aware and become more sensitive to their customary rights and practices.

The research shows that a key motivation for indigenous peoples and ethnic minorities to participate in REDD+ programs is the recognition of their customary tenure and knowledge systems especially on their lands and forests. REDD+ is better served if it continues to consider indigenous and ethnic minority peoples as critical and integral partners.

One of the values identified in the Fiji report that govern customary tenure systems is *liberation*, to mean “freedom, wholeness and justice” (Tarabe, 2018, p. 34). It seems that REDD+ is instrumental in bringing about this sense of liberation, based on the accounts of the respondents in Fiji. The expectations are great—liberation from the constraints of land inaccessibility, land unproductivity and injustice that people have been subjected to by the requirements of a Western-style legal framework that has long governed their customary tenure systems.

This idea of liberation is a common theme even in Nepal and Vietnam, expressed as an expectation that REDD+ can bring to indigenous and ethnic communities who have long endured

the non-recognition of their customary practices and knowledge systems and of their rights to their lands and forests. The process of recognition and the path to liberation are gradual and at times problematic, but what this research has shown is that the indigenous peoples and ethnic minorities in Fiji, Nepal and Vietnam are not taking things sitting down.

The REDD+ program seems to have injected a new fire into the communities: they are actively attending meetings; working with NGOs and agencies supportive of their issues and concerns; joining trainings and other capability building activities; forming cooperatives

and alliances; setting up livelihood programs; negotiating with authorities and institutions at the local, national and international arenas; and asserting their customary tenure systems by continually practicing these despite not being formally recognized by their governments.

These are encouraging and important grassroots initiatives in indigenous and ethnic minority communities under REDD+. In the end, their desired liberation will be realized because they have exercised their agency as indigenous peoples and ethnic minorities, even beyond the REDD+ program.

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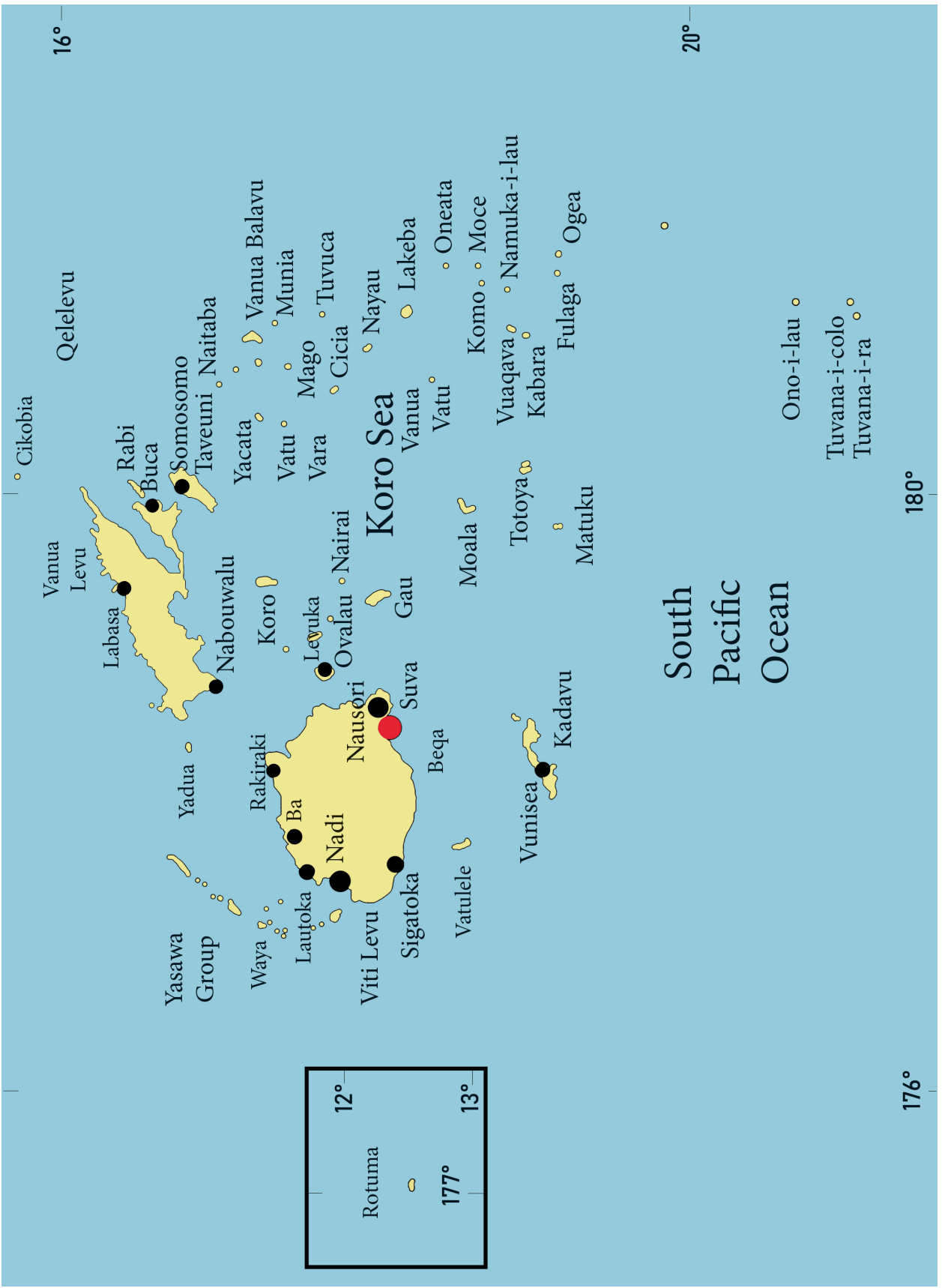
Navigating a Dual Tenure System and REDD+

by Akanisi Sobusobu Tarabe



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Figure 1. Map of the Fiji Islands (Source: Redrawn from Google Image).

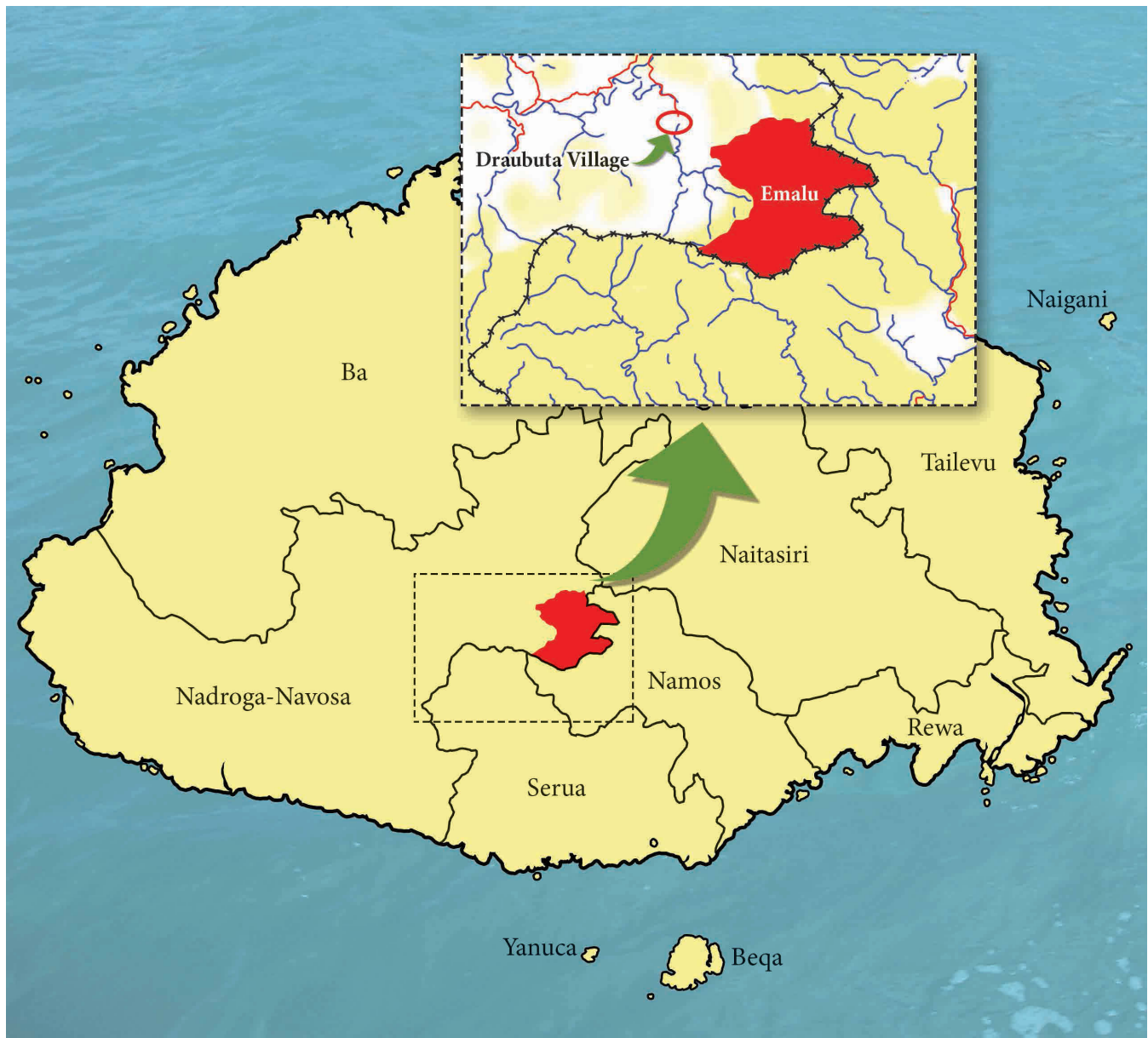


Abstract

The study focused on customary tenure system and how it ensures benefits from REDD+ for the iTaukei or indigenous peoples of Fiji. The context was Emalu, the REDD+ pilot area of the Fiji government. Participants in the study were indigenous Fijians from the tribe of Emalu and members of other tribes in

the village of Draubuta and the neighboring village of Navitilevu. Among the findings were the customary tenure system faces several threats, among these innovations it has undergone, and women have low participation in decision making relating to land. While the REDD+ program facilitates the customary tenure system, the study suggests institutional arrangements to engage it to further ensure benefits for the indigenous peoples of Fiji.

Figure 2. Map of Viti Levu indicating Draubuta Village and Emalu-REDD+ Pilot Site (Source: Redrawn from Ministry of Fisheries and Forests).



Introduction

This study is part of the Forest Carbon Partnership Facility Capacity (FCPF) Building Program on REDD+ which has two components, one for indigenous peoples and another for Southern civil society organizations (CSOs) and local communities.¹ The capacity building aims to provide these stakeholder groups with information, knowledge, and awareness on the REDD+ program (Reducing Emissions from Deforestation and Forest Degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries) to enhance their understanding to enable them to engage more meaningfully in the implementation of REDD+ readiness activities. The aim is to support activities that empower these stakeholder groups to enhance and influence REDD+ development outcomes and also to strengthen mechanisms for inclusion, accountability, and participation.

For indigenous peoples in the East Asia-Pacific and South Asia region, Tebtebba Foundation (Indigenous Peoples' International Centre for Policy Research and Education) was chosen to be the recipient. Fiji is one of three countries where Tebtebba has undertaken a study on the customary tenure systems of indigenous peoples and how these are affected by the implementation of the REDD+ program. Determining the interplay between them would help inform policy on customary tenure rights of indigenous communities and how they can be better ensured of benefits derived from REDD+. Emalu on Fiji's largest island has the only REDD+ pilot project run by the government. The land belongs to the iTaukei, the indigenous peoples of Fiji.

Recent studies show that tenure issues are related to internal institutional arrangements made in relation to REDD+. Findings from six REDD+ pilot sites in Tanzania show that while tenure is high on the agenda for all the project proponents, these efforts mainly focus on formalization and securing of tenure rights from the state to communities.² This research finding calls for follow up case studies on the governance of REDD+ in indigenous communities. This is because indigenous communities

have customary institutions and a traditional governance system that should be used to address compliance and management of resources. Studying village customary institutions are thus important in efforts to strengthen indigenous communities.

Study Design

The general objective of the study was to understand the interplay between customary tenure systems and REDD+ in order to ensure benefits of indigenous peoples from REDD+. Specifically it aimed to:

In relation to these, the study sought to answer the following questions:

1

Document state laws and policies on land and forest tenure systems in Fiji and how these enhance or weaken indigenous customary tenure systems;

2

Describe the range of indigenous peoples' customary tenure systems that are practiced by indigenous peoples in their territories;

3

Determine the extent of recognition and practice of indigenous women's rights in customary tenure systems;



4

Determine how customary tenure systems facilitate the implementation of REDD+ in Fiji and help secure benefits from REDD+ (carbon and non-carbon); and

5

Document state laws and policies on land and forest tenure systems in Fiji and how these enhance or weaken indigenous customary tenure systems;

- What *values* regulate or govern customary tenure systems?
- What are the *threats* to the practice of customary tenure systems?
- What *innovations* are undergone by indigenous peoples' customary tenure systems?
- What types of *grievance mechanisms* are in place?
- What *types of rights* (e.g., access, use, ownership, decision making) do indigenous women have in relation to customary tenure rights and how are these exercised?

Methodological Approach

The research focused on Emalu, the only REDD+ pilot program in Fiji run by the government. Emalu land belongs to the tribe of Emalu. The two villages of Draubuta and Navitilevu were the study sites because of their proximity, blood ties and cultural relationships to Emalu.

The members of the Emalu tribe live in the village of Draubuta on the island of Viti Levu, Fiji's largest island. Other tribes live in Draubuta, and they have witnessed the involvement of Emalu with REDD+. Draubuta has also benefited from the REDD+ program through a bee-keeping project and construction of a village hall.

The people of Navitilevu live close to Emalu land, which they have been using for generations to plant food gardens. The people of Emalu and Navitilevu are related to each other. It takes about four hours of bush trekking from the road at Nakoro after Draubuta to reach Navitilevu.

The villages of Draubuta and Navitilevu have many features peculiar only to them. For example, these villages do not have schools which their children could attend daily. Instead children from as young as six years go to boarding schools about 30-50 km away, leaving home on Sunday afternoons and returning on Fridays after school. During the research, school-age children were not seen anywhere as they were away for schooling for the whole week. This affected the way people responded to time such as the need to rush to have meals at certain times and so forth.

The participants in the research were indigenous Fijians from the tribe of Emalu and members of the other tribes in Draubuta and neighboring village of Navitilevu. They included equal numbers of men and women and mixed groups of youth to ensure different views for comparable analysis.

The study utilized literature review, focus group discussion (FGD) and key informant interview (KII) to collect data. In all, nine FGDs were conducted, with each FGD in each study area consisting of one men's group, one women's group and a youth group of males and females. Key people in the community were chosen for the six key informant interviews in each site, totalling 18 KIIs.

The key informants in Emalu were the chief, the chief's *matanivanua* (herald), the spokesman for Emalu, the two bee keepers and the women's group leader. In Draubuta, interviewed were the village nurse, *Soqosoqo vakamarama* leader (women's association leader), lay preacher, church pastor, tribe leader, and village headman. In Navitilevu, the informants were the village nurse, women's group leader, cultural guide, village headman, church leader, and assistant youth leader.

Relevant literature was accessed from the e-database and books on customary tenure sys-



▲ **Chief of Emalu-Lemeki Toutou.** Interviewing Lemeki Toutou, the chief of Emalu with Penina taking notes.



▲ **The community.** After the cultural protocol is done, the community listens while I explain the research. This gathering was in a house reserved for the people who visit Emalu clan. Closest to the camera is Ana Lauwai, the chief's daughter and one of the 2 beekeepers in Emalu.

▲ **Women's group leader.** RA interview with the leader of women's group in Emalu.



▲ **Ana Lauwai – Emalu's bee keeper** is being interviewed by Penina and Mereseini while her youngest brother keeps a curious watch.

▲ **Jese—the church pastor** testifies to the importance of veisorosorovi or traditional reconciliation when there is land dispute.



▲ **Draubuta women.** Chopping up meat for a communal feast that marked 'juvaulu', a post-burial ritual that ends a mourning period.



▲ **Youth focus group.** Youths that formed a focus group in Navitilevu were interviewed by Mereseini and Penina.

▲ **Ratu Vinaya Tiqe—the village head man** during his interview at Navitilevu. Ratu Vinaya is sitting on a straw mat made from dried pandanus leaves.



tems, forest and related laws at the University of the South Pacific (USP) Library. It included other documents collected from the iTaukei Land Trust Board (TLTB), the Ministry of Forestry and the Fiji REDD+ unit.

Part of the protocols involved calling on relevant government agencies particularly the Ministry of Forestry and its REDD+ Unit to get information on the study area and the work that REDD+ entails in Fiji. Permission from the iTaukei Affairs Board was also sought to conduct the research in Emalu. A key person from Emalu, Ilaitia Leitabu, who was present throughout the field work and became part of the survey team, initiated the process of contact with the communities.

The cultural protocol was conducted by the cultural protocol person. We presented our *sevusevu*³ to the chief as soon as we arrived at the research site. The engagement entailed the presentation of yaqona roots, which were later pounded and mixed into a drink. People sat in a semi-circle and in this formation the *talanoa* took place where the men, women, youth and children present were informed of the purpose of our visit and what we hoped to do. This engagement was done at all the research sites in

order that the communities would be properly informed before their consent was sought.

The study used a research tool prepared by Tebtebba and tailored to suit the local situation. It was translated into the iTaukei language and given to the iTaukei Affairs Board and the REDD+ Unit to ensure that the correct iTaukei terminologies were used for the research.

Two final-year university students, who served as research assistants, were first oriented on the objectives of the research, the research tool and their role in the research. They collected the literature on customary tenure systems and land and forest related laws, assisted in the interviews, interviewed informants as the researcher saw fit, and documented the interviews with digital recorders, mobile phones and in writing, and transcribed the field data. The responses were identified by site under four major categories in the research tool as well as by the different themes that emerged. The relevant responses were translated into the English language.

Data gathering and gender balance in focus group discussions were limited by cultural events that took place during the field research and other factors beyond the researcher's control. The FGD for men in Draubuta was not held because of a post-burial cultural activity that involved the men. The planned youth FGD also did not occur. In Draubuta many of the youth were out working in their food gardens, and in Emalu all the young men were then camping in planting sites for two weeks. Only two young women in Emalu, the bee keepers, were included in KIIs for youth.

Further, the women FGD in Emalu garnered little response from the participants. Although the women came to the FGD, they hardly made conversation.⁴ All the women currently living in Emalu are from other villages; the women born into the Emalu clan have married and moved away to other parts of Fiji. No data were thus collected from the Emalu women FGD.



Yaqona - the drink is prepared in a wooden bowl called *tanoa*, seen in this picture. It looks like muddy water and the taste is slightly bitter on the tongue. Yaqona holds an esteemed position in iTaukei society as a cultural item. Over this drink, a guest is welcomed, a piece of land is given and even a dispute can be settled. This yaqona was prepared by the youths of Navitilevu to welcome Penina and Mereseini.

The Context: Fiji

The Fiji Islands have a total land mass of 18,333 km² of which about a third is inhabited. Viti Levu and Vanua Levu are the two main islands, which make up 87 percent of the total area (Watters, 1969). Suva, the capital city, is on the southeastern side of Viti Levu. The most important event in Fiji's history that influenced the way iTaukei society is structured was its colonization.

Fiji was a British colony from 1874 to 1970. Prior to the coming of Europeans, indigenous Fijian social structure was fluid, and therefore leadership was not hereditary. People often moved around for different reasons and there were different land tenures to different parts of Fiji (Crosetto 2005; Ward 1964). The British Administration through governor Sir Arthur Gordon designed a land tenure system that could be used for the whole country, redefining the Fijian social structure and thus its land systems where he “cut corners, bulldozed opinion and had to rely to a large extent on his own propensities and prejudices to interpret and to codify custom” (Chapelle 1978: 71). France (1969) has since noted the “unqualified failure” of attempts by the British Administration in its first 30 years to satisfactorily define traditional iTaukei social structure.

Thus, the Fijian social structure was divided into *yavusa* (the largest unit), which traced descent from a common ancestor known as *vu*, then a smaller unit called *mataqali* (the land owning unit) and *tokatoka* (the smallest unit), which could even be represented by an adult male and his children (see Nayacakalou 1955; 1965). A *koro* (village) was usually composed of one or two *yavusa*, several *mataqali* and many *tokatoka* depending on the size of the village. In other cases, several villages would make up a *yavusa*; each village being a *mataqali* would be made up of several *tokatoka*.

Whatever the case, these differences arose because weak clan units or tribes were amalgamated into one unit while those that grew too big were bifurcated (Chapelle 1978; Nayacakalou 1955). What is now regarded as customary

land tenure or “traditional” has been modified, shaped and reshaped so many times that what was originally customary is unrecognizable (France 1969). France further notes that through the codification of the land tenure systems, women's right to hold land titles was removed. In spite of the amalgamation or bifurcation of clan units, some clans still maintain their identity of belonging to their original clan even though by law the particular clan does not exist. This gives rise to one of the causes of land disputes in Fiji (Nayacakalou 1955; Ravuvu 1983).

Another important event that is linked to the way land acts have been shaped is the coming of indentured laborers from India between 1879 and 1916 to work on the sugar cane plantations owned by the Colonial Sugar Refinery (CSR). At the end of their terms as indentured laborers, they were given the freedom to return to India at their own expense or work another five years and be given a free passage or remain in Fiji a free citizen (Lal 2004). For those that remained, their descendants have become part of Fiji's multicultural society, making up 30 percent of Fiji's population and a major contributor to Fiji's economy (Naidu 2004). For a long time, sugar was Fiji's main export, and many Indians are still sugar cane farmers who farm on leased land.

State Laws and Policies on Land and Forest Tenure Systems

The iTaukei Land Trust Act dictates two types of land systems in Fiji: a western tenure system and a traditional or customary tenure system. Under these systems are three main types of land holding: freehold lands, state lands, and iTaukei lands.

Western Tenure System

This type of land tenure system has an emphasis on individual ownership and is based on European styled, capitalist-oriented concepts. Included in this system are freehold lands, state

lands and a portion of iTaukei Lands that are leased out as iTaukei Leases (see Rakai, Ezigbalik and Williamson 1995).

Freehold lands are lands that are held individually or corporately in fee simple and are guaranteed by the government.

State lands are all public lands in Fiji and include: all lands below high water mark, including mangrove swamps and all foreshores; those held by the State for public purposes, such as roads, reservoir dams, drains; and those held by the State for leasing for either residential, commercial, industrial or agricultural purposes. It currently includes those lands that had not been claimed by indigenous Fijians when Fiji became a British colony in 1874 (State schedule “B” Land) and iTaukei lands for which the mataqali have since become extinct (State Schedule “A” Land).

Freehold and state lands account for only 16 percent of Fiji’s total land area. Some writers such as Crocombe (1984) argue that this figure is misleading because value wise this 16 percent includes the best urban, commercial and agricultural lands.

iTaukei leases are those iTaukei lands that have been leased out largely to allow the lands that were not being used by the iTaukei land owners to be utilized by other people of Fiji including non-landowning units. This land makes up 31 percent of all iTaukei lands and is found in the sugar cane farming areas and near the main urban centers. In other words, this land is the most accessible and arable of iTaukei lands.

The leasing and any legal dealings related to iTaukei lands are dealt with by the iTaukei Land Trust Board.⁵ The TLTB is a statutory body set up in 1940 under the iTaukei Land Trust Act to administer all iTaukei lands for the benefit of the iTaukei. The establishment of TLTB has effectively removed the iTaukei control of their own land, and this has been one of the causes of land disputes.

Under the western tenure system, the administration of lands lies with the Department of Lands and the Registrar of Titles for Freehold and state lands.

Traditional/Customary Tenure System

This system applies to all un-alienated iTaukei lands based on iTaukei customs and traditions. This type of land is alienated when it becomes iTaukei Lease. iTaukei land means lands that belong to the iTaukei, the indigenous Fijians and are based on their customs and traditions. iTaukei lands make up 84 percent of Fiji’s total land area, 31 percent of which is accessible and arable while the rest, about 33 percent, which is left to indigenous Fijians is in difficult terrain, inaccessible and of poor quality and marketability (see Fonmanu et al. n.d; Rakai et al. 1995).

Included under iTaukei lands are those that are used by indigenous Fijians for their subsistence and commercial use as well as iTaukei Reserves. iTaukei Reserves are those lands that have been set aside to be used exclusively by indigenous Fijians subject to the Forest Decree, the Mining Act, the State Acquisition of Lands Act, and the Petroleum (Exploration and Exploitation) Act (S 9 iTaukei Land Trust Act). Some of these lands have been leased out to non-indigenous Fijians under the *vakavanua* arrangements. Rakai et al. describe *vakavanua* leasing arrangement this way:

Vakavanua arrangement is one where an individual requests permission from the taukei to use the land. The request is normally made by a ceremonial presentation of sevusevu, where yaqona, supplemented with tabua or cash is offered to the taukei. The onus is then on the individual to pay or ‘share,’ voluntarily or as agreed upon with the taukei landowner, a part of the proceeds of his use of the land. (1995: 260)

Register of iTaukei Lands

Land under the customary system is communally owned, which means ownership is vested in the mataqali (land owning unit) as registered in the Register of iTaukei Lands (RTL) rather than individually. However, each member of the

mataqali is registered in the Vola ni Kawa Bula (VKB, indigenous Fijian Register). The RTL records the names of the mataqali, the iTaukei Land Commission (TLC) maps reference, the size, and the lot number of the land that a particular mataqali owns. The RTL is maintained by the Register of Titles.

iTaukei Land Commission

All customary land has been surveyed and charted on TLC maps. The TLC was established by the British Colonial Administration in 1905 under the iTaukei Land Ordinance to investigate the land tenure system in Fiji. These topographical surveys resulted in the production of TLC maps which are still being used today. The TLC has two main functions: to maintain the Vola ni Kawa Bula and to solve disputes in land and fishing rights (Rakai et al. 1995).

iTaukei lands cannot be sold but they can be officially leased out with the consent of mataqali members. For any mataqali, dealings with iTaukei lands such as lease require the approval of the majority of mataqali members who are at least 21 years of age. The final approval of these dealings is made by the iTaukei Land Trust Board. The land falls under the western tenure system once it is leased out.

Land Acts

iTaukei Land Trust Act

The iTaukei Land Trust Act (TLTA) Cap 134 transfers all rights from the mataqali to the iTaukei Land Trust Board (TLTB). Section 4 says, “The control of all native land shall be vested in the Board and all such land shall be administered by the board for the benefit of the Fijian land owners” (s 4(1) iTaukei Trust Act).

It has often been argued that because of the role it plays, the TLTB is the real owner of iTaukei lands rather than the indigenous Fijians (for example, see Shah 2004). The TLTB is the key to all leasing in Fiji, and as such indigenous Fijians are left with a steward type of role rather

than owner. In other words, the legal ownership of the land in Fiji remains with the land owning unit or mataqali while the control of iTaukei land is with the TLTB (Crosetto 2005; Dodd 2012). In this sense, Shah has since described an image of iTaukei land owners against TLTB as “toothless tigers as they are unable to control or manage their own lands and lose a quarter of the proceeds for the management and control which they do not even appreciate or agree to” (Shah 2004).

However, other clauses in the iTaukei Land Trust Act demonstrate that the absolute power of control is not always with TLTB such as in the leasing of the iTaukei Land Reserves. Reserves were designed in 1940 to ensure that Land Owning Units (LOU) had sufficient land to support their members. The leasing of a Reserve can only be approved at the consent of LOU and only to other iTaukei, which means that land can only be de-reserved if 60 percent of the LOU consents and have good reason to do so (iTaukei Land Trust Act (Cap134), s16 (2)).

Agricultural Landlord and Tenant Act

The purpose of the Agricultural Landlord and Tenant Act (ALTA) was to regularize the occupation of iTaukei land by iTaukei and non-iTaukei and to provide a basic set of guidelines



Land and identity. The surrounding land in Draubuta that is more than just hills, forest and mountains to the local people. It is part of an ancestral concept called vanua- the embodiment of their identity.

implied in leases of agricultural land. This arose out of the fact that because iTaukei lands cannot be sold but only leased, it was viewed as not being advantageous for Fiji's economy and in particular the Indian farmers. As a result, the ALTA was passed in 1977 in order to rectify this problem, enabling agricultural leases to extend to 30 years. This was a more secure tenure of lease.

Land Use Decree

The most recent of all land acts and policies is the Land Use Decree which was signed into law in 2010 following the interim government's sixth pillar of its "Twelve Pillars of Reform" in 2008 which focused on making more land available (Bainimarama & Mataca 2008). The Land Use Unit (LUU) then was established to facilitate the leasing of customary land, making LUU "a direct competitor of the TLTB" (Dodd 2012: 12). However, in a report by the local newspaper *Fiji Sun*, the TLTB general manager Tevita Kuruvakadua was quoted as saying the "Land Bank is not a threat to TLTB...some may say it is a challenge to TLTB even though they are not our competitor" (*Fiji Sun* online, April 24, 2015). But from a closer look at the way the two bodies run, we can make a sound conclusion that they are competitors for the same piece of cake.

In one of its clauses, the Land Use Decree (2010, No. 36) states that the utilization of the iTaukei land is to the "best interest of (the iTaukei) land owners" and further declares that this can be achieved by leasing the land on a longer tenure so that it can provide for the "livelihood for all parties concerned" (s 3(2)).

The Land Use Unit uses a process beginning with the designation of iTaukei land before lessees can apply for it. After receiving approval from LOU members, it is given to the Prime Minister for approval which is then entered into a register known as the Land Use Bank. The Land Use Decree -s9 (1) dictates that "The Decree has effect notwithstanding any provision of iTaukei Land Trust Act," making LUU responsible for "issuance and renewal of lease" of designated land (Land Use Decree s8 (b)). The tenure of lease is 99 years.

In summary, the Land Use Decree declares that once iTaukei land is designated, the Land Owning Units have no say in how the land shall be used and have granted the Director of Lands the power to lease the land. This means that he/she does not require the consent of the members of the LOU and neither can the LOU use any legal rights to occupy or use the land while it is designated. Neither can they challenge the government in court regarding their land.

International Laws and Implications on Rights of Indigenous Peoples

The protection of the rights of indigenous peoples through international laws and organizations has strong implications on security of land for indigenous peoples. The Fiji government however has not ratified the UN Declaration on the Rights of Indigenous Peoples. It so far sees no immediate need to do so, as it feels that the indigenous peoples and their ownership of land are protected under the 2013 Constitution and under no threat. Furthermore, the government reasons that Fiji's colonial experience is different from other countries such as Australia and the USA.

iTaukei Customary Tenure System

Values governing customary tenure

The customary tenure system of indigenous Fijians relates to the concept of *vanua* which is guided by various *vanua* values. *Vanua* is a sacred concept that means land as well as the relationships between people and their relationship to the land, forest, river, sea, sky, ancestors and their future generations. The following concepts can be summarized as values that govern customary tenure system in Fiji: belonging, sacredness and liberation.

Belonging

Belonging is a value that gives iTaukei their identity, meaning from their past and security in their future. It is expressed in *veiwekani*, a network of relationships that link them to their *vu* (common ancestors) and future generations. Ancestors define people from whom one comes while the space in the land, such as in the rivers, the sea and forest, defines where one comes from. In this context, the land is important to the iTaukei because it is the embodiment of their identity, making *veiwekani* a very important concept linked to iTaukei identity. This is how participants viewed the value of belonging in *veiwekani* (relationships) and customary tenure system:

Because we are related we let people use our land...we make things easy for them but we know the land is ours and the trees that grow on the land are ours. (man, Emalu)

*There are generational rights through *vasu* (maternal links)...it is very important because it is about land gifting through *lewe ni tabenaga* when a woman marries...the control and user rights are given during the gifting process, these cannot be taken back by the *mataqali*...it is forever. Our elders considered relationships important so the transfer of the land to them established our relationships forever. (FGD men, non-REDD+ or NR)*

Customary Tenure Rights

Ownership rights

The land of Emalu is owned by the mataqali. We know what is on the land and under the land...land and its resources are owned by the people. (man, Emalu)

Our mataqali owns this land. We own everything on it, the forest and everything in the forest, river...we also use the land next to Emalu so we also plant on Emalu land as was done by our ancestors and we continue to do the same now. There is nothing wrong with that because we are related. (youth, NR)

Sometimes we own land through gifting during tribal war times long ago. (Emalu, man)

Control rights

The control of land is with the chief of the mataqali. (youth, Emalu)

The control of the land is with the chief, Ratu Qoro. He allowed us to use the land and let our cattle and horses wander all over the land without fences. We know our animals by the brand we put on them. Now it is different, fences are built. (man, NR)

The control is with the village headman. (woman, NR)

User rights

*A man born into the clan has ownership rights to the land. If anyone from outside the clan wants to use the land they must ask the chief through the customary way by presenting a *tabua* or *yaqona*. For example if they want to use *makadre* tree for the glazing of their clay pot, they must first ask for permission from the chief of the clan. (man, Emalu)*

Other clans can cross over and use our forest to hunt for pigs, gather leaves for medicine or gather wild fruits and vegetables but must ask permission in the customary way from those who own that piece of land and forest. (man, NR)

There is mana in this engagement... It is an ancient custom that involves humility and respect...it maintains our closeness as relatives. (man, Emalu)

There are deep relational and emotional wounds when veiwekani is severed or threatened through misuse of land.

The land boundary has been extended by our vasu relatives making it legal and documented...it was made through deception.... Very sad to us...it hurts...gifting was an honorable act...it hurts when they call it theirs, very exclusive...we are not included as their relatives. (men FGD, non-REDD+)

The element of belonging is enhanced for the future generation by the people's contributions to it. The participants regarded the present work done by REDD+ as an opportunity to do this.

REDD+ brings prosperity to the community and to the generations to come...we now plant sandalwood trees around the villages which will benefit our children in 15-20 years' time. (man, Emalu)

REDD+ promotes the conservation of trees, land and other resources. It has broadened our knowledge about forests and the importance of the environment...conserving our forests for the future generations. (man, Emalu)

But destroying our forest will not help our future generations...they will have nothing to own and call theirs...REDD+ has brought benefits even to us in this present generation...our animals used to roam everywhere, now we have fences. (FGD youth, NR)

However, serious questions need to be asked by the government as well as Land Owning Units in terms of leasing land for 99 years and how landowners can continue to “belong” to a place they or their children and grandchildren may never set foot in their lifetimes. This raises questions on whether longer land leases are in the best interest of the landowners and whether providing for the livelihood of all parties is really in the best interest of the iTaukei (see Dodd 2012).

Sacredness

Participants are guided by the spirituality of the land. The land is sacred, it is considered a living being. In this way, land is not merely a physical area of earth, hills and forests but something that is spiritual, a being like themselves, the heart of their lives. This is why alienation of the land is in fact spiritual isolation, and prolonging the isolation is lethargic, a certain way of weakening indigenous communities.

Participants felt that land ownership is sacred because it can be traced to the ancestors and their origin, which can mean the ancestral god.

We communally own the land. It was given to our ancestors by our vu; therefore, no one can take it away from us. (man, Emalu)

Trees are not to be cut...nanaga was a religious practice long ago before Christianity came. That piece of land where nanaga was practiced still has stone altar we regard as sacred, so no one can cut the trees there or plant food gardens there. (FGD women, NR)

This spirituality is seen in the way land was transferred as gifts. The sacredness of the land and the forest relate to the spirituality of the vanua. Participants saw the land and forest as persons that can never be used abusively. Their

lives are guided by the way they treat the land, with repercussions occurring when not properly adhered to.

All these land gifting was orally made by our ancestors. This is the way or the law of the vanua (land) and it is honored because it is sacred. When it was given, it was transferred with the mana that people had. But state law can change this. (man, Emalu)

Mana is associated with land, its boundaries and the resources on it...the land has eyes. (man Navitilevu)

The land has eyes and ears. (man, Navitilevu)

People die when they abuse the land—when there is a false claim to the land. (man, Emalu)

A piece of land was gifted to the church by the mataqali Naboselawa so that the church pastor's house would be built on it. The pastor at that time was a vasu to this clan and he thought of transferring the land gifted through lewe ni tabenaga to build the pastor's house. Not only did he transfer the land to the church but he extended the boundary to other people's land. We know it is wrong because he had angered the ancestors and he transgressed the law of the land. A few months later he died. Now no one can live there. As the present pastor of the church, I refuse to go there until the conflict is resolved through the customary way by the relatives of the former pastor, otherwise something bad would befall me and my family. (man, NR)

Transfer rights

We cannot sell or lease this land. The right to use the land was transferred from us through the gift of lewe ni tabenaga to our vasu so that the land belongs to our vasu. When the transfer of rights was done, mana was transferred with it. The forest and things that grow on the gifted land belongs to our vasu—carbon and non-carbon. (FGD men, Emalu)

This land gifting between our ancestors and those they aided during the tribal wars a long time ago is honored forever. There is a token to mark this called the tabua salusalu, a sacred garland of carved whale's teeth and it remains with the chief of our clan. This symbol was shown and its meaning explained to us when we were children and our children will show it to their children so that they remember the land and the relationships we share with the other clan. (men FGD, NR)

Liberation

Liberation refers to freedom, wholeness and justice. Participants alluded to a sense of being liberated from the constraints of land inaccessibility, land unproductivity and injustice through the legal framework that has governed their customary tenure for many years. And part of this is attributed to REDD+.

REDD+ has helped in strengthening our cultural ways of living and our customary tenure systems. (woman, NR)

REDD+ brings knowledge of agriculture—honey making, vegetable farming, fisheries. (FGD men, Emalu)

We now know that air can be bought. We can still earn money from trees without cutting them down...support our customary tenure system. Trees are sacred. We learn about carbon and the right of owning it. (FGD men, Emalu)

Our forests are preserved and respected. Other things in the forest are preserved and maintained as ours, we learn about mixed cropping...the fish have returned to our river. (FGD men, NR)

However, as part of the non-carbon benefits from REDD+, people should look towards their liberation through the following:

- Accessible education for their children who at present are boarding from as early as 6 years old;
- More accessible banking services and investments from financial institutions;
- Provision of better, safer roads and cheaper and safer transport;
- More accessible markets for their produce.

Threats to Customary Tenure System

Dual tenure system

The biggest threat to the practice of the customary tenure system is the way the legal system has worked against it. These dual tenure systems do not always work well with each other.

Our land is painted red on the map...it means that no one owns this piece of land.... but we are living here. According to the law we do not have the right to live here, but this land belongs to us. (FGD men, NR)

This red land was gifted to our ancestors through a practice called vakalutu ni qele... but the land is marked red and it means that all the members of the clan who own it are dead. But we know this is our land...we live here. (woman, NR)

Formal rights

We will legalize our land and have it leased so that people will stop abusing it. (youth, Emalu)

Under the vola ni kawa bula, land ownership is legalized so that members of the clan have the right to lease the land. (woman, NR)

Informal rights

This gifting is still valid even if many generations have passed. When we were young we were told by our parents which land was gifted to us from another clan and which land our ancestors offered as gift to other clans. Everything on that land belongs to us. In turn we tell our children and they will tell their children and children's children. (men FGD, Navitilevu)

If you want to use a piece of land, the customary thing to do is take a tabua and present this to the chief to ask for the land use. (woman, Draubuta)

Emalu people have allowed us to use their land for generations because we are related. (FGD men, NR)

The unfortunate statements above are the result of the colonial administration's work to amalgamate or bifurcate clan units where some clans still maintain their identity of belonging to their original clan; by law the particular clan does not exist (see Nayacakalou 1955; Ravuvu 1983).

The western tenure system does not always recognize the importance of relationships that link one to the land. Even more so, the legal framework that guides the iTaukei Land Trust Board does not acknowledge certain customary practices that relate to the land.

All this time, we kept the piece of necklace made of many small tabua and regarded it sacred, evidence of the gifting of land made between our ancestors and those of another tribe because our great grandfathers assisted them during a tribal war. That other tribe now wants the land back because of the forest and the monetary return it would give. We complained to the government, to the iTaukei Land Trust Board and we were told that the piece of necklace was from the dakunikuila or the time before the land laws were made and it has no value now... We are really sad because what we had been keeping and holding as sacred for generations is now referred to as a useless thing. (FGD men, NR)

The forest can be a source of contention now that people are aware of its monetary return in the carbon trade. This calls for a review of land laws and formalization of traditional gifting practices as part of the customary tenure system.

Competing roles of TLTB and LUU

Another threat relates to the roles played by the iTaukei Land Trust Board and the Land Use Unit. Both entities declare that they function “for the best interest of land owners.” On one hand TLTB has shown that it is the real owner of iTaukei lands because it controls any dealings involving iTaukei lands. On the other, LUU has bypassed TLTB by designating land reserves and now has the power to lease land that is available through the Land Bank without having to consult the landowners or TLTB. Careful, meaningful discussions on land leases must therefore take place between the Land Owning Unit and LUU/TLTB. Meaningful discussions are not rushed but take time and do not put pressure on land owners to lease out their lands or designate their land reserves to LUU.

Innovations undergone by customary tenure system

TLTB board composition

The board of TLTB before 2010 was made up of 12 members consisting of the President of Fiji, the Minister for iTaukei Affairs, five iTaukei members appointed by the Great Council of Chiefs (GCC), three appointed by the Fijian Affairs Board (FAB) and two members from any race appointed by the President. Since the abolition of the GCC, the composition of the board has changed to include the Minister for iTaukei Affairs and 10 other members that the minister appoints. These 10 members are from five Land Owning Units, three from nominees of provincial councils and two others. The LOUs now have some direct representation on the TLTB board.

Vakavanua lease arrangements

The vakavanua lease arrangement is one way in which Land Owning Units have gained rights of control to their land bypassing the TLTB. Although not recognized by law, the informal arrangement has worked for LOUs and their tenants.

Land Use Unit

The literature shows that the introduction of the Land Use Unit is the newest addition that affects the customary tenure system. The LUU has stripped the iTaukei of their rights to use and control their land with tenure of lease going up to 99 years. What this means is summed up by Dodd,

A 99 year lease as allowed by regulation is a serious alienation: a child may be born and die an old man, having never set foot on the land of his mataqali. Long leases grant rights of exclusive possession that preclude fulfilment of the customary objective of maintaining a close connection to the land and drawing cultural connection from it. (Dodd 2012: 27)

Rent entitlement changes

The land reform introduced by Prime Minister Bainimarama in 2010 changed lease entitlements. Previously lease entitlement was distributed in accordance with the Native Land Trust Act [Cap 134]. The TLBT deducts not more than 25 percent for administration cost (Cap 134, Section 14) and the balance is shared as follows: 5% went to the *turaga i Taukei* (chief), 10% to the *turaga ni yavusa* (chief of the largest unit), 15% to the *turaga ni mataqali* (chief of the LOU) and the remaining 70% to members of the Land Owning Unit (Cap 134, Section 33). Sometimes chiefs held multiple titles, getting much more than individual members.

From 2011, rents were distributed equally to every member of the mataqali or land owning unit, but each mataqali member was required to have a bank account in the name of a trustee to which their share would be paid. Many did not have an account, and for those that did, the trustee was usually the chief. Furthermore, while the lease money is a big amount, when equally distributed some members receive almost nothing because there are many members and not enough to distribute equally around.

Grievance Mechanism

Grievance mechanisms are available. The iTaukei Lands Commission that was established in 1905 still functions as a grievance mechanism to solve land and fishing rights disputes. Apparently set up to address grievances that were typical of a certain period, it must be reviewed so that current issues that affect indigenous Fijians brought about by climate change and environmental concerns are adequately addressed.

At the community level there are customary ways in which disputes can be resolved.

We deal with grievances at village level through the village council and traditional ways are used to reconcile the two parties involved. (man, NR)

We have our customary ways or the vanua ways to deal with land conflicts; it is called veisorosorovi vakavanua (vanua/customary reconciliation) where the offender and his family or clan offers yaqona to the offended clan in a formal customary ceremony to say that he/the family or clan is wrong and asks for forgiveness. The people share the drink in the customary way so there is acceptance. (man, Emalu)

In many cases the last resort is the iTaukei Land Commission when people cannot resolve their disputes.

Rights of Indigenous Women

Women are usually placed at the lower end of the indigenous Fijian's social strata (Ravuvu 1983; Tarabe 2015). This has been exacerbated by the codification of the land system by the British Colonial Administration where women cannot hold land titles even though they are registered in the Vola ni Kawa Bula as members of the Land Owning Unit (see France 1969; Rakai et al., 1995). This archaic law needs to be reviewed and changed in order for women to have equal opportunities with men to hold land titles. Women's inclusion would ensure that equality in benefit sharing is really equal.

As seen in the discussions below many participants felt that women were still regarded as inferior when it comes to their rights in the customary tenure system. The decision making process is often dominated by men. Women may be present in meetings regarding land but may not be allowed to speak. Women may use land but the control of production is with men.

Women could own a piece of land when she marries but the control is with her husband. (man, Emalu)

I do not have the control of land. My husband decides everything on land matters; I need permission from my husband. (woman, NR)

Participants varied in their answers on the rights of women under the customary tenure system. Women have the right to use land was the common answer as women in this part of Fiji plant food gardens or work alongside their husbands planting and weeding.

Women do not usually plant or own food gardens where I come from, but I have learned to do so since I am now married to a man of this village. (woman, NR)

Women born into the clan have more rights than those who married into the clan.

Women born into the clan are rightful owners of the land. They have the same rights as men to the use of land. (man, Emalu)

Women are not usually given the opportunity to speak in meetings unless the woman belongs to the mataqali. (woman, Draubuta)

Differing Voices on Rights of Women

- Women have no ownership rights to land and forest. (woman, NR)*
- Control of land is with the clan not women. (woman, NR)*
- Lewe ni tabenaga is an important land gifting custom—it was given to my mother when she married and her children and her generations to come. (woman, non-REDD+)*
- Women's ownership rights are recognized through the lewe ni tabenaga land gifting when she married, but the control of use is with the husband. (man, NR)*
- Women married into the community are given rights to use land. (man, NR)*
- There is active women participation...women born into the clan are rightful owners of the land...they have the same rights to usage as men...equal distribution of land resources. (man, Emalu)*
- Sometimes women are allowed to speak during meetings that involve land issues. (women, FGD Draubuta)*
- Women are included in the decision making process regarding the use of land. (man, Emalu)*
- Women are not included in discussions. (youth, NR)*
- Women in Navitilevu do not participate in discussions of land, its resources and distribution. (man, NR)*
- Meetings about land is for men only. (woman, NR)*
- Both men and women have equal rights to access the forest and its products. (man, Emalu)*
- Women cannot speak on land issues during meetings. (woman, Emalu)*
- Women of Navitilevu do not participate in discussions of land resources and its distribution. (man, NR)*
- Women have rights like any other member of the mataqali...women are allowed to speak in meetings regarding land issues. (youth, NR)*
- During meetings, we cannot say things on big issues like land but only on small things. (woman, NR)*
- Through the vasu relationships, my sister's children allowed the road to come through their land to the village. (man, NR)*



The experience with the women's focus group discussion in Emalu showed a good example of the difference between rights of women born into the mataqali and those married into the mataqali. The latter's non-participation in discussions in meetings points to the likely reason for trying unsuccessfully to getting the chief to speak on their behalf during the FGD; because they were from another clan they had no right to speak on clan matters that pertain to Emalu land. However, other responses from men in Emalu contrasted with the above, so that it could only be concluded that the answers are part of what is expected by REDD+ from the people of Emalu.

Women also have their say in meetings. Everyone has equal rights to land, even the disabled. (man, Emalu)

There is active participation of women in land matters. (man, Emalu)

Experience with REDD+

Land is communally owned by the mataqali, and this in itself ensures that benefit sharing of carbon and non-carbon material is done. The TLTB has already a policy on equal distribution of monetary benefits to the mataqali members. But the shortfall in equal benefit sharing lies in the inability of each member to have a bank account to which their share would be deposited as required by TLTB; as earlier cited, the chiefs are usually relied on to be their trustees. The securing of carbon benefits in Emalu is done through the leasing of land by the government for 99 years. This calls for measures to be put in place that will ensure that the benefits are not lost or forgotten with each change of government within the period of 99 years.

Other benefits or the “plus” of REDD is received by the community in different ways. In both study villages, the non-carbon benefits, such as building of village community halls in Emalu and a bee keeping project, bring much needed revenue for the people. Other benefits include knowledge that is gained in keeping a clean and healthy environment.

REDD+ has taught us many things, about the importance of clean air, the environment, animals, birds...we are linked in life. (FGD women, NR)

We now know that air can be bought... we can still earn money from trees without cutting them down...support our customary tenure systems... Trees are sacred... We learn about carbon and the right of owning it. (FGD men, Emalu)

However, worth noting was an adverse reaction from a youth to the operation of REDD+ as he speaks of a pragmatic concern:

REDD+ is good and also bad. How can we plant our gardens without cutting down trees? We need to burn the forest before we can make our gardens to get rid of the hornets and wasps and poisonous plants that can poison our skin. (FGD youth, NR)

On REDD+

I have learned that REDD+ is concerned about the forests and our environment...not to cut trees for timber...not to burn forests. (youth, Draubuta)

Our forests are preserved and respected...other things in the forest are preserved and maintained as ours...we learn about mixed cropping...the fish have returned to our river. (FGD men, NR)

Knowledge that REDD+ brings is about the ozone layer, the atmosphere, animals etc...our forest is preserved/protected because we do not cut trees anymore, nor do we burn the forest like we used to. (youth, NR)

Using REDD+ to Assert Customary Tenure System

REDD+ can be used by the community to assert recognition of their customary tenure system especially in the areas where land involves customary gifting. This means that REDD+ can be the instrument for the Land Owning Units to use as the voice in the iTaukei Land Trust Board.

The participants felt there was unity and collaboration in their community that often may not have been seen because of individualism and economic competition. The coming in of REDD+ has brought back a sense of togetherness. Small communities such as in the research site can easily disintegrate with the drive towards economic development, but REDD+ has helped in maintaining social cohesiveness.

Customary land tenure system is affirmed... relationships are strengthened and we continue to plant side by side. (man, NR)

We have learned to manage and conserve resources and land areas...there is monetary benefit to the community. A sense of giving is witnessed from our collaboration with REDD+. (man, Emalu)

REDD+ has helped in strengthening our cultural ways of living and strengthening our customary tenure system. (woman, NR)

We now work together as a clan rather than individually. (FGD youth, NR)

However, under the gloss of REDD+ benefits is a murmur of dissatisfaction when promises of what should be given in return for their participation and giving of their land are not met.

REDD+ has not given us any money; it is 7 years now since they promised. We will wait even if it is 10 years. (FGD men, Emalu)

The colonial and subsequent administrations have not been fair in dealing with iTaukei land. REDD+ must not perpetuate this injustice by becoming another type of colonial tool. It should be a vehicle for justice in dealing with the iTaukei customary tenure system and in this way uphold the values that guide these systems.

Using REDD+ to assert customary tenure system

I represent the people of Emalu so I am part of the REDD+ Steering Committee. In this way our voice as a people is heard and discussed at the steering committee level. Similarly, we are very involved in land use mapping. The whole tribe of Emalu was involved, men, children, youth, women and girls as well as those with disabilities. We discussed where we would have our gardens, where the animals would graze and the forest area reserved for REDD+ purposes. This involved a lot of discussions to make sure that this is what we want as a clan. (Ilaitia, Emalu)

Our ancestors protected people who came for refuge—we are protecting REDD+ just like our ancestors did, protecting those who have come to teach us. (FGD men, Emalu)

REDD+ brings prosperity to the community and to the generations to come... We now plant sandalwood trees around the villages which will benefit our children in 15-20 years' time. (man, Emalu)

(It) strengthens our communal relationships...we keep on communicating...supports sacredness of forests. (FGD men, Emalu)



Conclusions and Recommendations

The customary tenure system in Fiji is regulated by indigenous values of belonging, sacredness and liberation, and this includes cultural mechanisms for dealing with land disputes. Considering these, legal frameworks around land should be reviewed so these indigenous values are duly acknowledged. Secondly, women are not recognized on issues pertaining to land in their communities because they do not have the right to land titles and they occupy a low position in society. Thirdly, some innovations that have taken place in customary tenure systems may not always be in the best interest of the indigenous peoples in Fiji.

Finally, REDD+ facilitates the iTaukei customary tenure system and brings benefits that are appreciated by the community. The carbon and non-carbon benefits must be well secured and appropriate measures need to be put in place to ensure the equal sharing of these benefits. REDD+ can be a vehicle to facilitate these changes.

In light of the findings, the following recommendations are forwarded to help strengthen land tenure laws and systems to effectively address customary ownership and rights.

iTaukei Land Trust Board:

- To formalize ancestral land gifting as an important aspect of customary tenure system, considering that it holds meaning and relevance to indigenous Fijian peoples but has no significance under the present western tenure system.
- To review the law regarding lands painted red on the map, which denotes that

members are still living but are regarded dead because of the colonial system of land amalgamation and bifurcation.

Land Use Unit:

- To carry out respectful, meaningful consultations with Land Owning Units regarding their land before they agree to have it leased for 99 years.
- To put appropriate legal measures in place to ensure the rights of Land Owning Units are protected in the 99 years they agree to lease their land. The protection of LOU rights should include their right to challenge government in court.

Ministry of Women:

- To review the law regarding indigenous women's right to hold land titles. The present system under which women do not have this right is demeaning and undermines their rights as members of a mataqali who should experience justice through equal access to ownership of resources. The voices of women should be heard at decision making levels concerning land, otherwise they will always have a silent presence in village councils.

Fiji Government:

- To sign the UN Declaration on the Rights of Indigenous Peoples to strengthen the laws that govern customary tenure systems, thereby protecting the rights of the indigenous peoples in Fiji.



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Endnotes

- ¹ This case study on Fiji was made for Tebtebba Foundation (Indigenous Peoples' International Centre for Policy Research and Education), the recipient chosen to manage the funds for the indigenous peoples in the East Asia-Pacific and South Asia regions.
- ² Therese Dokken, Susan Caplow, Arild Angelsen and William D. Sunderlin. "Tenure Issues in REDD+ Pilot Project Sites in Tanzania." *Forests*, 2014, 5, 234-255.
- ³ Sevusevu is the customary protocol of presenting yaqona to seek permission to enter and reside or work in a place.
- ⁴ This prompted the Emalu chief's wife at one point to call the chief to come and answer the questions for them, which the research associate did not allow.
- ⁵ This statutory body was for a long time (since its inception) known as the Native Land Trust Board (NLTB) until 2010.



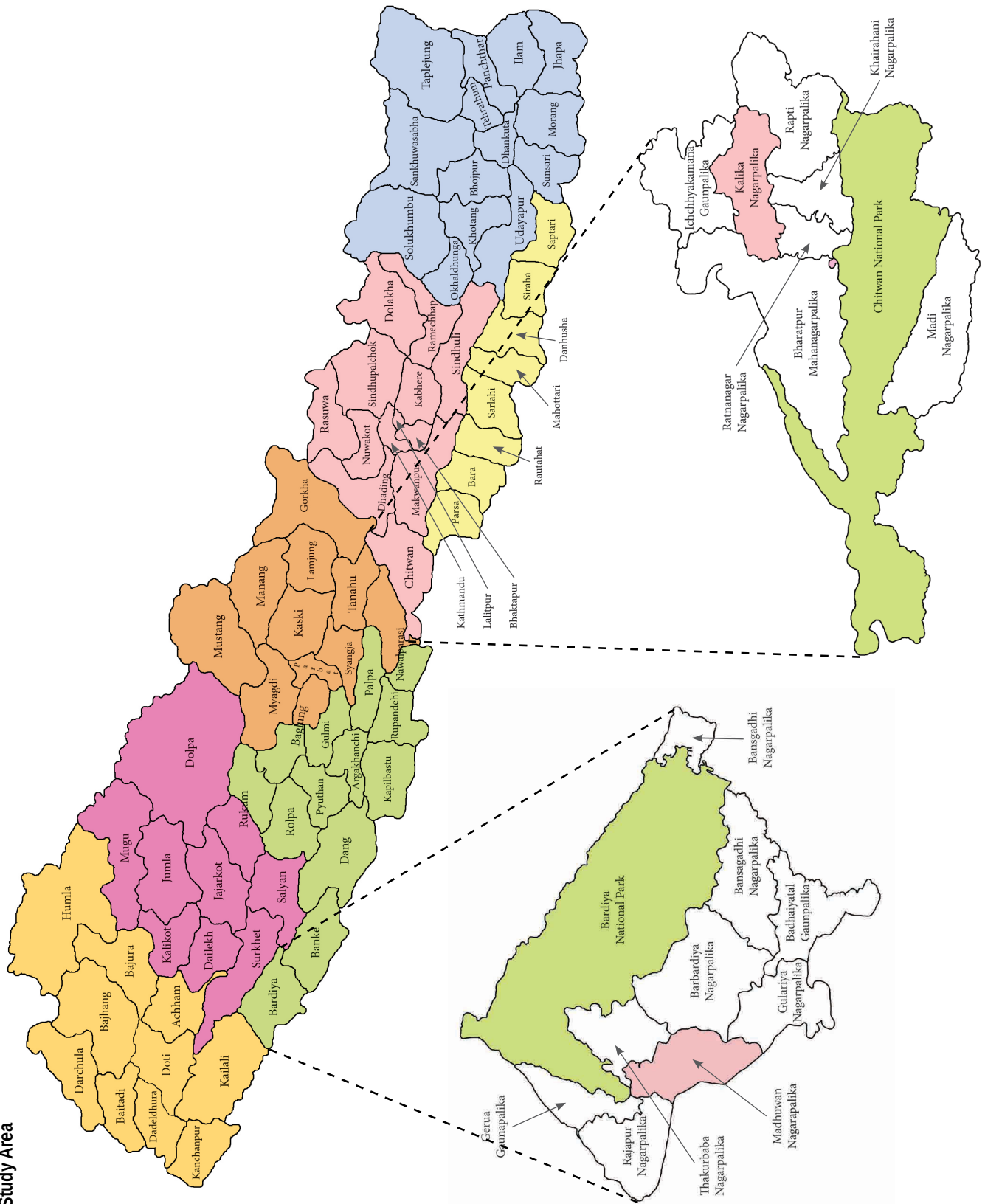


NEPAL

Customary Resource Management a Foundation for REDD+

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Study Area



Abstract

The indigenous peoples in Nepal have practiced for generations customary land and forest tenure systems that are deeply linked to their social, cultural and economic life. But these are currently not recognized by any law, and this has far-reaching implications for forestry-related programs, including REDD+.

Nepal has engaged in the REDD+ program since 2008. It has conducted pilot projects in Gorkha, Chitwan and Dolakha districts as part of the readiness preparation phase and is about to implement an Emission Reductions Program (ER-P) in 12 Terai districts. Non-recognition of customary tenure practices, however, has undermined the prospect of the indigenous peoples fully benefitting from REDD+. Forestry laws and other relevant legal provisions are basically restrictive, focusing more on conservation than on social and cultural aspects. The indigenous peoples' contribution to forest conservation and by extension carbon emission reduction, through their traditional customary practices, largely remains outside the REDD+ discourse due to limiting forest laws, especially Forest Act 1993.

The study analyzed Nepal's pertinent laws in relation to the customary tenure systems practiced in Bardiya and Chitwan districts and their ramifications on indigenous peoples and marginalized communities in the REDD+ program. These districts are among the 12 Terai districts identified for the Emission Reductions Program.

The study recommends the mapping and documentation of indigenous peoples' land, territories, forests and customary tenure practices, good governance in REDD+, and capacity building for indigenous peoples to put them in a position to reap benefits from REDD+. The indigenous communities should also be proactive in conserving and promoting their own institutions and

take a common stance to lobby for recognition of their customary rights and for favorable laws and policies at national and international levels.

Introduction

Historically, indigenous peoples including those in Nepal have a very special relationship with natural resources, including land and forest. These resources, which they have collectively and customarily owned, used and managed since time immemorial, are not only the basis of their livelihoods but are interlinked with their worldview and life systems.

The Government of Nepal (GoN) has officially listed 59 groups as Adivasi Janajati (indigenous peoples or indigenous nationalities) distributed throughout the mountains, hills and lowland regions. Constituting 37 percent of the national population (CBS, 2001), they rely largely on natural resources for livelihood and the continued practice of their age-old culture, traditions and religious observances. They use and manage these resources through customary resource management systems operated in different forms in different parts of the country. Through these traditional practices, they have been actively contributing to the conservation of natural resources.



Study area in Chitwan.

Nepal's laws however have so far failed to recognize indigenous peoples' customary practices in resource management. Nepal is going through a political transition from a centralized, unitary governance system to a new federal political setup after a decade-long Maoist insurgency that cost thousands of lives. The country overthrew the centuries-old monarchy, following the signing of a peace accord between the government and the rebels in 2007. It has a new Constitution, drafted by a Constituent Assembly in 2015, that is progressive in terms of social justice, inclusion, participation of all marginalized communities including indigenous peoples and their rights to natural resources including land and forest.

Nepal has ratified the International Labor Organization (ILO) Convention No 169 and adopted the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP), thus creating statutory obligations for the State to ensure the rights of indigenous peoples. However, existing natural resource-related laws especially in forestry are at odds with local needs and international laws on rights of indigenous peoples. The present laws do not recognize the contribution of indigenous peoples in sustainable management of natural resources. This has created problems for them, in many cases resulting in forcible eviction from their territories, crisis of livelihood, and violation of their cultural rights.

Nepal engaged with the Forest Carbon Partnership Facility (FCPF) of the World Bank in 2008 and with the UN-REDD (United Nations Reducing Emissions from Deforestation and Forest Degradation) programme as an observer country in 2009. The FCPF approved its REDD+ Readiness Preparation Proposal (RPP) in 2012. Over this period, Nepal worked towards REDD+ readiness preparation and started implementing the RPP with development partners.

More recently, Nepal secured Target Specific Program support from UN-REDD programme to continue its readiness preparation. It implemented a REDD+ project in three districts, namely Gorkha, Chitwan and Dolakha between 2009 and 2013 and is preparing to launch an emission reductions program (ER-P) in 12 Terai

districts on a subnational scale. It has already prepared the emission reduction program document (ER-PD) to be submitted to FCPF. At institutional and policy levels, Nepal has proposed a three-tier institutional structure and operational mechanism for REDD+. It has also prepared the final draft of the National REDD+ Strategy to guide the implementation of REDD+ programs in the country.

This study analyzed the land and forest-related laws of Nepal in relation to the customary tenure system and their ramifications for indigenous peoples and other marginalized communities in REDD+ programs. It presents evidences from the research carried out in Bardiya and Chitwan districts where a sizable population of indigenous peoples resides. These districts are two of 12 Terai districts where the government is set to implement the Emission Reductions Program.

The Study

The study generally aimed to understand the interplay between customary tenure systems and REDD+ in order to ensure benefits for indigenous peoples from REDD+. The specific objectives were to:

- Document state laws and policies on land and forest tenure system in Nepal and how these enhance or weaken indigenous peoples' customary tenure systems;
- Describe the range of customary tenure systems practiced by indigenous peoples in their territories;
- Determine the extent of recognition and practice of indigenous women's rights in customary tenure systems;
- Determine how customary tenure systems facilitate the implementation of REDD+ and help secure benefits from REDD+ (carbon and non-carbon); and
- Document how indigenous peoples are using REDD+ to assert, seek recognition, and strengthen their customary land and forest tenure systems.



Group discussion among Tharu communities in Bardiya

The study covered Chitwan and Bardiya districts selected purposively using the following criteria: population density of indigenous peoples, ancestral homeland of indigenous peoples, communities that are forest dependent, have an inalienable relationship with forest and land resources, with previous REDD+ experiences and with non-REDD+ experience.

In Chitwan district, the villages of Shaktikhor and Padhampur in Kalika Municipality, Ward No 10 were chosen for the study. Chitwan is one of the community-based REDD+ pilot program districts of the Federation of Community Forestry Users Groups of Nepal (FECOFUN), International Center for Integrated Mountain Development (ICIMOD) and Asia Network for Sustainable and Agriculture and Bioresources (ANSAB) funded by Norad (Norwegian Agency for Development Cooperation). These two villages have a high concentration of Chepang

indigenous peoples who have been living in their territories for generations, yet 60 percent of families have no land registration certificates.

In Bardiya, the selected villages were Patharboji and Dalla in Madhuban Municipality, Ward No 1. The majority population are Tharu communities, almost 80 percent of whom similarly are without land registration certificates. Unlike those in Chitwan, these communities have no experience of the REDD+ program and suffer attacks by wild animals mainly elephants and *chital*.

Methodology

The study was mainly based on qualitative and quantitative data collected from both primary and secondary sources. The field survey gathered primary information using research



Group discussion among Chepang communities in Chitwan.

methods that included focus group discussion (FGD), key informant interview (KII), observation and case study. An intensive desk review was made of available relevant literature including published and unpublished research reports, journals, articles, and government acts, regulations and policies on customary land and forest tenure systems, national REDD+ strategy, forest policy and strategy, and legal and constitutional provisions on indigenous peoples' rights over natural resources.

The field survey yielded qualitative information obtained from the indigenous peoples (particularly Tharus, Chepangs and Tamangs), social and political leaders, *Badghars* or the customary institution of Tharus, schoolteachers, senior members of the community, District Forest Officers (DFO), district REDD+ focal points, district chair of FECOFUN, chair of Nepal Federation of Indigenous Nationalities (NEFIN), District Coordination Council (DCC)

and members, members of Tharu Kalyankari Sabha, district REDD+ working group members and other concerned stakeholders. The study used FGD and KII guide questions provided by Tebtebba, translated into Nepali and suited to the local context.

The study conducted a total of 18 key informant interviews, with the informants selected through the snowball-sampling method and with the use of interview guidelines. Eight focus group discussions, consisting of both mix group and separate FGDs, were conducted in the communities with prior approval from the participants. The participants were encouraged to share their experiences and perceptions in a congenial environment and all had equal opportunities to share their views about the subjects.

The study further applied the observation method to understand the real situation in the study area and to collect information regarding the settlement areas, settlement patterns, nature

of houses, daily livelihood activities, situation of land and forest resources, daily uses of forest products, availability of those resources, distance of forest, farming system including shifting cultivation, situation of leasehold and community forests, and impact and sustainability of REDD+ pilot programs. The local indigenous research associates were actively engaged and participative while gathering information.

The results of the study were presented in a one-day community sharing and validation workshop¹ with 47 participants in Shaktikhor. Among the major issues raised by the Chepang were for recognition of their customary land and forest tenure, continuation of their shifting cultivation practices, and equitable benefit sharing so they could continue their traditional livelihoods and cultural practices. The Nepal Chepang Association Secretary underscored the need to provide land registration certificates to the Chepangs, 75 percent of whom do not have these, despite having lived in their ancestral land and forest for generations and which have deprived them of government relief assistance. The final report incorporated these and all other comments, feedbacks and recommendations made by the workshop participants.

The study had several limitations. The research area covered only Shaktikhor and Padhampur villages in Kalika Municipality in Chitwan district and Patharboji and Dalla villages in Madhuban Municipality in Bardiya district. The study dealt only with the Chepang, Tharu and Tamang communities in these areas and did not cover the customary tenure practices of non-indigenous peoples.

Indigenous Peoples and Concept of Customary Tenure

There is no one single universal definition of indigenous peoples in the world. They are referred to as the first nation, ethnic groups, tribal people, ethnic minorities and *adivasis*, among others. However, they share common attributes: (i) self-ascription or self-identification; (ii) a definable territory; (iii) historical resistance to colonization; and (iv) continuing cultures and traditions that have historically been differentiated from the dominant majority (Kingsbury, 2008).

The ILO Convention 169 Article 1 (1) (b) identifies “indigenous peoples” as “peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present states boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.” In Nepal, which ratified this Convention in 2008, the indigenous



Tharu woman catching fish in Bardiya.



Remnants of a Tharu house destroyed by wild elephants in Bardiya.

peoples are collectively referred to and identified both by the Government and the indigenous peoples themselves as *Adivasi Janajati*, distinct from the rest of the population.

The National Foundation for Development of Indigenous Nationalities Act of Nepal describes these indigenous peoples or indigenous nationalities as those ethnic groups that “have their own mother tongue and traditional customs, distinct cultural identity, distinct social structure and written or oral history of their own” (NFDIN, 2002).

Tenure means the holding or possessing of anything especially property. Tenure rights are often described as a “bundle of rights” that constitute rights to access, use, manage, exclude others from, and alienate land and resources (Schlager and Ostrom, 1992). These rights determine who is allowed to use which resources,

how, for how long and under what conditions, as well as who is entitled to transfer rights to others and in what way (Larson, 2012).

Tenure rights often exist in *de jure* and *de facto* forms. *De jure* rights are a set of statutory rules established and protected by the State, such as registered land titles and forestry laws. On the other hand, *de facto* rights are patterns of interactions established outside the formal realm of law and include customary rights, a set of community rules and regulations inherited from ancestors and accepted, reinterpreted and enforced by the community and which may or may not be recognized by the State (Larson, 2012)

As in other countries, several customary institutions for different purposes are still prevalent in Nepal, though in an informal or *de facto* form, in different indigenous communities. For

example, the *Kipat* system continues to be practiced mostly among Limbus in eastern Nepal while the *Badghar* system is prevalent among Tharus in the western plains. Through their customary institutions and customary practices, Nepal's indigenous peoples have been occupying, managing, using and controlling natural resources including lands and forests in their territories, contributing to the preservation of natural environments and ecosystems over many generations.

With the country now embracing federalism and in accordance with its 2015 Constitution, the formulation of many new laws and policies, including those related to land and forest tenure systems, are under way. Constituting more than one-third of the national population, the indigenous peoples are a major stakeholder in national affairs including in the forestry sector. Existing forestry-related laws, however, do not recognize their customary practices, which they have long observed and performed and are closely linked to their social, economic and cultural life.

The government is also gearing up for the implementation of the REDD+ program, at the core of which lies the customary land and forest tenure system as it forms the basis for benefit sharing within the REDD+ mechanism. However, the non-recognition of these customary practices in relevant laws, especially the Forest Act of 1993, has undermined prospects of indigenous peoples' access to benefits from the REDD+ programs.

International Legal Framework

Various international legal instruments provide for rights of indigenous peoples including to natural resources. Among these are ILO Convention 169, United Nations Declaration on the Rights of Indigenous Peoples, Convention on Biological Diversity (CBD), Cancun Safeguards under the United Nations Framework Convention on Climate Change (UNFCCC).

The UN Permanent Forum on Indigenous Peoples has recognized land as the basis of the

lives and cultures of indigenous peoples all over the world, while ILO Convention 169 declares land as a fundamental criterion for self-determination of indigenous peoples in their respective countries (Article 1). Likewise, Articles 14 and 15 of this ILO Convention give special importance to the cultural and spiritual value attached to their lands or territories and to safeguard traditional rights of ownership and land use.

Article 26 of UNDRIP further states that indigenous peoples have "the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." It creates an obligation for party states to give such legal recognition and protection.

The Cancun Safeguards (Para 2 c and d) respects the knowledge and rights of indigenous peoples and calls for full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities. In a similar vein, CBD's Article 8j and 10c call on states to respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities and to protect and encourage the customary use of biological resources for the conservation and sustainable use of biological diversity.

According to NEFIN, Nepal has at least 40 common and special national laws, some of which focus on natural resources that are discriminatory towards the indigenous communities (Lawoti, 2001 cited in Maharjan 2016). Under the Nepal Treaties Act of 1990, in case of divergence between the provisions of Nepalese law and those of an international treaty to which the country is a party, the latter shall apply (Raja Devasish Roy and John B. Henriksen, 2011).

As such, Nepal is legally obliged to implement its international commitments including under ILO Convention 169, UNDRIP, CBD, Universal Declaration of Human Rights, International Covenant on Economic Social and Cultural Rights, International Covenant on Civil and Political Rights, International Convention on the Elimination of all Forms of Racial Discrimination, and UNFCCC Cancun Safeguards. The government is duty bound to incorporate these international laws in its

national laws and implement them effectively. It is the obligation of signatory states to submit reports to the United Nations Human Rights Committee regarding measures taken to ensure the enjoyment of these rights by their citizens.

National Legal Policy Framework

The 1769 territorial unification in Nepal disenfranchised indigenous peoples and subsequently resulted in the loss of their self-rule and autonomy. During the Rana autocratic rule until its fall in 1951, they had the following major land tenure practices: *Raikar*, *Birta*, *Jagir*, *Rakam*, *Guthi*, and *Kipat*. The Ranas adopted a policy of “privatization of forest” for their own family members in the form of *Birta* and *Jagir* and to obtain the support of the elite, they gave forests to religious institutions in a separate grant called *Guthi* regime (Baral, 2012).

With *Birta* abolished in 1959, *Jagir* in 1951, *Rakam* in 1955 and *Kipat* in 1964, only *Raikar* and *Guthi* tenure systems exist today (Acharya, 2008). The Land Reforms Act 1964 imposed a ceiling on land ownership, and excess lands were distributed to landless or marginal land holders. In addition to this Act, the Land Acquisition Act of 1977, Land Revenue Act of 1978 and more recent Local Governance Act are key legislation that regulate the land sector in Nepal. Before 1964 when land records were not based on cadastral maps, lands were recorded by local heads like *Jimindars*, *Talukdars*, *Mukhyas* and *Patawaris* (Acharya, 2008).

Under the Land Acquisition Act of 1978, land ownership rights can be established only if the land is registered with the relevant government office. This has resulted in a large section of indigenous peoples losing ownership rights to lands they traditionally used, owned and managed. This happened due to the government’s failure to give the needed information to the indigenous peoples as well as the indigenous peoples’ own perception that they would have to pay taxes on lands and forest lands they had been freely using for generations. Tharus

in *Bardiya* have become landless as they lack tenancy receipts from landlords, and this situation has been aggravated by the establishment of a national park and floods in *Karnali River*. The above cited Acts authorize the government to form a commission to address issues related to land ownership, such as settlement of the landless and land redistribution through land reform, among others (GoN/FAO, 2016).

With issuance of the Private Forest Nationalization Act 1957, all forests came under government control. People, including indigenous peoples, lost their ownership over forests they had used till then as these became open public property. People deforested their forests to protect the forest lands from state control. Illegal logging also started taking place.

As the State failed to control forests, it reverted to a decentralized forest management regime in early 1970s. As a result, the Master Plan for the Forestry Sector (MPFS) 1989 was introduced with a primary focus on community forestry program. Ending in 2011, the MPFS guided Nepal’s forestry development for almost 25 years. It categorized forests into six groups, each with different tenure arrangements—community forest, leasehold forest, collaborative forest, protected forest, religious forest, and buffer zone community forest. However, the Master Plan had limited stakeholder engagement and weak forestry governance due to lack of social inclusion. It had no special program for indigenous peoples and their contribution in the forestry sector, as customary tenure rights continued to be excluded.

The Forest Act of 1993 and Forest Regulation of 1995 are other key laws for managing the country’s forests. The former Act recognizes Community Forest Users Groups (CFUG) as an autonomous body (Section 433). It divides forests into two ownership types—private and national forests—and recognizes the six forest categories. The tenure period of community forest is not limited, but the forest management plan called Operational Plan needs to be updated every five to 10 years. The Act vests discretionary powers in district forest officers (DFO). For example, upon receiving an application requesting the formation of a CFUG, the district forest officer

has the power to decide, which can be misused for personal interests. The DFO can also take back the community forest for such reasons as non-compliance of the periodic operational plan.

The Forest Act 1993, however, is silent on customary practices of forest and pasture management. It restricts and legally dislodges indigenous peoples from their ancestral forest lands, putting their livelihood and cultural life at risk. Indigenous peoples in different parts of the country use customary resource management practices, including their own dispute resolution mechanisms, but unfortunately these are not adopted by community forestry.

The Forest Regulation of 1995, which details the forms and modalities of regulatory management of forest categories, provides more leeway for indigenous peoples. Its Rule 27 as well as the

2015 Community Forest Development Program Guideline respect customary rights of indigenous peoples and local communities over forest resources (Sherpa 2013). This Guideline also provides for equal representation of men and women in the CFUG executive committee, with 50 percent of membership based on inclusive mechanisms. Some 35 percent of CFUG income is further allocated for livelihood and income generation for the poor, women, indigenous peoples and other marginalized groups. No separate treatment is given to indigenous women. Though encouraging, these provisions are not binding, as they are simply operating guidelines, thus devoid of any legally binding effect.

The Forestry Policy of 2015 states inclusive representation of women and indigenous peoples, socially marginalized groups and the poor in community-based forest management groups including in community forestry. It also specifies



Tharu community's paddy field eroded by the swollen river during the monsoon in Bardiya.

a special objective and strategies for women's full and effective participation in the forestry sector. However, it does not have a strong coordination mechanism among different stakeholders at local level, especially indigenous peoples and their representative organizations. This mechanism is important to ensure that these communities are given due space in the decision making process and that their voices are heard.

The Forestry Sector Strategy (FSS) 2016 is currently in operation with the expiration of the Master Plan for the Forestry Sector in 2011. The FSS provides direction and guidance over the next decade (until 2025). It is supposed to have been prepared after assessment of the MPFS achievements, consultations, and visualizing the future in light of federalism and decentralization. However, customary tenure rights and customary forest management practices remain in the shadow.

As with previous laws, the FSS does not recognize the symbiotic relationship between indigenous peoples and natural resources. It dwells only on protected areas and remains silent on the concept of indigenous peoples' conservation area. Customary forests held by indigenous peoples have been converted to community forests in many instances. Unless customary tenure is legally recognized, indigenous peoples are not in a position to gain from the customary forests commensurate to their contributions in preserving and managing them.

Aside from these core forestry legislations, the Wildlife Protection Act of 1972, National Parks and Wildlife Conservation Act of 1973, Biodiversity Strategy of 2002, Environment Protection Act of 1997, Environmental Protection Regulation of 1997 and Local Self Governance Act of 1999 have major bearing on customary forest and land tenure systems. These conservation and protection laws are restrictive and have resulted in the eviction and displacement of indigenous peoples from ancestral territories. This has also meant economic burden as they have to pay fees to access forest resources in conserved and protected areas. It is estimated that national parks and conservation areas cover

65 percent of indigenous peoples' ancestral lands. This situation has forced them to migrate (Maharjan, 2016).

These Acts have failed to adopt the emerging concept of Indigenous and Community Conserved Areas (ICCAs) as a designation of forest management. Despite Nepal having many ICCAs, the country lacks clear policies and programs that recognize and incorporate indigenous and community regulatory practices. A case in point is the Khumbu Community Conserved Area in Nepal, which encompasses all of the Sagarmatha National Park and its buffer zone—a 1,500 square kilometer region which the Sherpa peoples manage and protect as a *beyul* (a sacred, hidden valley) and as their homeland (Sapkota, M. et al., 2016).

The Environmental Protection Act of 1997 (also Soil and Watershed Conservation Act of 1982) has no clause that provides respect for forest tenure rights and is ambiguous on ownership of land—whether it belongs to the government or to the local community (REDD IC, 2015).

The Constitutions of Nepal in various time periods have given strategic guidance to laws, policies and strategies. And land reforms have been a top agenda throughout political movements/declarations, gaining prominence during the Maoist insurgency. The 2015 Constitution incorporates many progressive provisions on land/forest and indigenous peoples' issues and occupancies. It states that the government may give priority and preferential rights to local communities in sharing benefits from natural resource management [Article 51 and 59 (4) (5)]. It also internalizes the principles of intergenerational equity and free, prior, and informed consent (FPIC) under state policies on natural resource management (GoN/FAO, 2016).

However, the new Constitution does not explicitly recognize the collective tenure rights of indigenous peoples and local communities over forests and forest lands. The state policy gives priority to local communities during mobilization of natural resources, but such policy has no legal binding effect.



Table 1. National legal policies and impacts on Indigenous Peoples.

| Legal policy framework | Lapses/impacts on Indigenous peoples |
|---|---|
| Forest Nationalization Act 1957 | <ul style="list-style-type: none"> All forests, including of indigenous peoples, came under government control. Indigenous peoples lost their customary forests to the government. |
| Land Act 1962/Land Reform Act 1964/ Land Acquisition Act 1977 | <ul style="list-style-type: none"> It is mandatory for all lands to be registered with relevant government office. A large number of indigenous peoples did not/could not register their lands which rendered them landless legally. |
| Wildlife Protection Act 1972/ National Parks and Wildlife Conservation Act 1973 | <ul style="list-style-type: none"> Their restrictive nature resulted in eviction of indigenous peoples from ancestral territory; Too much focus on conservation undermines cultural, traditional beliefs and practices and livelihoods of indigenous peoples. |
| Master Plan for the Forestry Sector (MPFS) 1989 | <ul style="list-style-type: none"> No special program for indigenous peoples and their recognition and contribution in the forestry sector; Limited stakeholder engagement, weak social inclusion in forestry governance. |
| Forest Act 1993/ Forest Regulation 1995 | <ul style="list-style-type: none"> No mention of customary forests and customary forest/pasture management practices; Indigenous peoples' traditional livelihood practices, cultural life at risk; Even within community forestry, tenure security is uncertain; DFO has unlimited discretionary powers; No specific space for indigenous women. |
| Biodiversity Strategy 2002/ Environment Protection Act 1997 | <ul style="list-style-type: none"> Full and effective participation of indigenous peoples missing; Strong coordination between central and local and within local governance structure, coordination with indigenous peoples, indigenous peoples' bodies and organizations are lacking; No recognition of indigenous and community conserved areas as protected areas (PA) even though Nepal is rich in ICCAs. |
| Forestry Sector Strategy 2015 | <ul style="list-style-type: none"> Customary tenure rights and customary forest management practices continue to be unrecognized; Role and representation of indigenous peoples tied to CFUGs; Within CFUGs, indigenous peoples' roles, representation, coordination with them are weak; Only talks about protected areas but not indigenous peoples' conservation area concept; Mapping and documentation of indigenous peoples' forests, customary resource management practices are missing. |
| REDD+ Strategy 2015 (draft) | <ul style="list-style-type: none"> No recognition of customary collective land/forest rights of indigenous peoples prior to nationalization of forests; No provision for ensuring benefits for indigenous peoples from carbon stored in indigenous peoples' protected customary forests (still in practice though informally); Indigenous peoples perspective on certain drivers of deforestation and forest degradation is absent; Whether carbon is owned by government or community (it is not in case of CF; the case in customary managed forests is even worse); Effective participation of indigenous peoples in REDD+ processes, including in new federal structure is not promising; No due space for indigenous knowledge, technology and traditional conservation practices. |
| 2015 Constitution | <ul style="list-style-type: none"> Does not explicitly recognize collective tenure rights of indigenous peoples and local communities over forests and forest land; Does not envision customary rights within given jurisdiction of federal, provincial and local levels of land governance; Relevant state policies and other provisions remain to be enacted into laws. |

Compiled by authors

Customary Tenure System and REDD+

After Nepal's REDD+ Readiness Preparation Proposal was approved in 2012 by the Forest Carbon Partnership Facility, the government continued REDD+ readiness preparation and started implementing the R-PP with support from FCPF and other development partners. Nepal piloted a REDD+ project in Gorkha, Chitwan and Dolakha districts between 2009 and 2013. As part of REDD+ preparation, it conducted a study on drivers of deforestation, reference (emission) level (RL/REL), measurement and monitoring, reporting and verification (M and MRV), Social and Environmental Safeguards Assessment (SESA), CGE modeling, total economic valuation of forest, and development of national forest information system including an ongoing capacity enhancement process at multiple levels.

The government is currently preparing to launch an emission reductions program in 12 Terai districts on a subnational scale, with the Emission Reduction Program document ready to be submitted to FCPF. To implement the REDD+ program, the government has finalized the draft National REDD+ Strategy 2015, whose endorsement has been delayed a little further due to the country's elections. The strategy paper provides overall policy framework for carbon forest ecosystem services, customary practices and customary use rights.

Nepal's R-PP states, "A key principle is that carbon rights should be linked to land and forest tenure rights to minimize complexities and there will be a less direct link between forest management responsibility and the potential benefits from carbon trading..."

Existing legal frameworks of the forestry sector do not recognize forest carbon and neither do they clarify carbon ownership rights. Moreover, indigenous peoples' customary rights over lands and forests that existed before the government nationalized forests in 1957 remain unrecognized in forestry-related legislation. Many also did not register their lands as required by law. As such, indigenous peoples are not in a

position to gain from carbon trade from forest lands they have been customarily holding, managing and using. Any money earned through those lands will go to the government. As forestry laws make no mention of carbon rights, it may also be difficult to accommodate the new REDD+ concept on carbon ownership within the wider forestry sector. In the REDD+ realm, this is a double blow to indigenous peoples in terms of ownership, control and benefit sharing of carbon and benefits from customary forests.

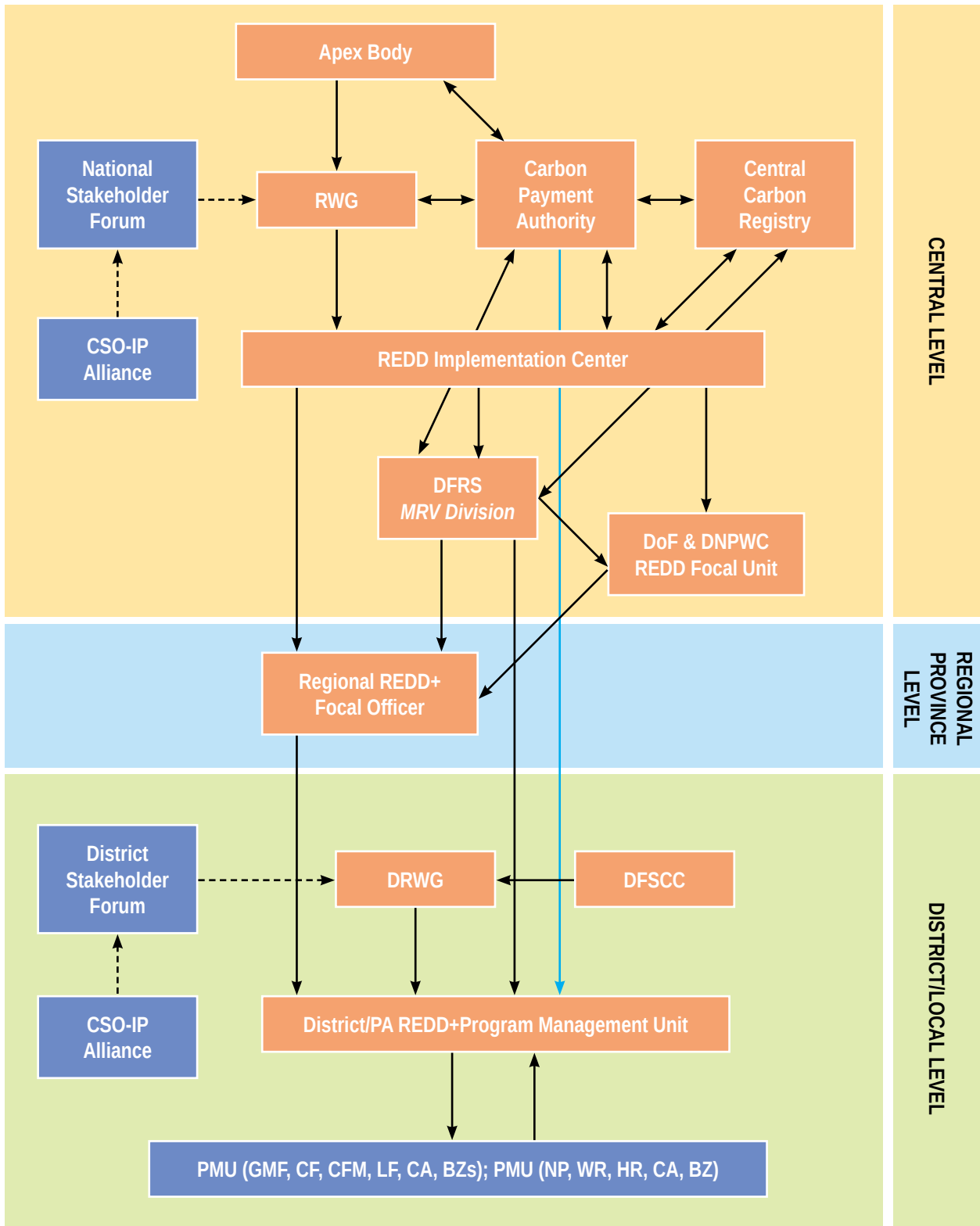
The draft National REDD+ Strategy 2015 also proposes a three-tier REDD+ institutional governance structure, i. e., at central, provincial and local levels. However, it does not ensure effective participation of indigenous peoples as they and government officials still lack capacity to understand the issues and each other's perspectives.

REDD+ Institutional Structure from Central to Local Level (REDD IC, 2015)

The draft REDD+ Strategy has identified nine proximate and 10 underlying drivers of deforestation and forest degradation and proposes 13 strategies to tackle the gaps. However, not only have the indigenous peoples been increasingly concerned about possible violation of their rights, eviction from ancestral territories, loss of grazing land, and disruption of cattle rearing and livelihoods due to the imposition of laws while implementing these strategies, but the strategies also do not include indigenous peoples' perspective on deforestation and forest degradation.

Stakeholder consultation forms one of primary bases while preparing the drafts of the REDD+ Strategy and of the Emission Reductions Program Document (ER-PD). It is yet unclear whether enough consultations were held or were in accordance with FPIC procedures. Nepal's REDD+ programs are mostly

Institutional Structure of REDD+



focused on the concept of protected areas and ignorant of indigenous peoples' conserved areas. How indigenous peoples' contribution to forest preservation and sustainable management through their centuries-old customary resource management practices would be recognized remains a big question. In terms of gender in both community and leasehold forestry, women are mandated to hold at least one-third of forest committee positions.

Customary Tenure Systems in Chitwan and Bardiya

As in other parts in Nepal, indigenous peoples in the study areas where the majority population are Tharu and Chepang have their own traditional tenure systems. Also known as the "sons of the soil," the Tharu and Chepang reside in the Terai region with a traditional socio-cultural relationship with the land and forest. They have a long history of ownership and use of their ancestral lands and forests and control over the natural resources in their existing territories. Over generations they have observed customary practices to conserve and manage these sustainably.

Among the Tharu, the Badghar system, a traditional customary governance institution with a traditional head and assistants, is still in practice (see case 1, p. 61). Though a de facto body, it has the most significant role² in resource management, judicial functions and development activities in the community. The Badghar, who is the headman, makes decisions related to village development, conflict management, paternal property distribution, and use of natural resources. However, this traditional practice and its role in the conservation and sustainable management of natural resources and biodiversity is neither recognized nor protected by the State due to the absence of supporting national legislation.

Like Tharus, the Chepangs also have their own customary resource use and management system. For instance, they have practiced shift-

ing cultivation (*Khoriya kheti*) for hundreds of years. Within this system, they have set their own rules. A household, for example, cannot enter another household's *Khoriya* without the latter's consent. A native tree (*Chiuri*) also has a special cultural connection with this community. They customarily give away a Chiuri tree to their daughters after marrying them off. However, their traditional system such as shifting cultivation has declined for several reasons, including lack of legal recognition and conversion of their forest lands into community forests.

The Chepang conserve natural resources such as forests and pasturelands. Being nature worshippers, the forest and land hold deep spiritual and socio-cultural significance for them, more than any commercial interest. They manage these resources for the common good of the community through collective approaches in use, ownership and consumption.

These indigenous peoples have their own conflict resolution and grievance mechanisms. In the Tharu community, for example, the Badghar institution adjudicates any disputes, including those related to land and forest, and disputants comply with the decisions it makes.

Land Ownership

Although these communities have lived on these lands for many generations, only 25 percent of the Chepang and 45 percent of Tharu possess a land registration certificate (*Raikar*). The remaining families in the study areas have lands that are not registered with the district land offices of their respective districts.

These communities depend on *Ailani* (public) lands for their livelihood. According to the District Forest Officers of Bardiya and Chitwan districts, however, all those residing and cultivating crops on unregistered lands are 'homeless or landless people, illegal occupants, and forest destroyers.'

The government and the Tharu and Chepang communities differ in their definition of unregistered lands and homelessness/landlessness. The Tharus and Chepangs claim they are the owner of lands they occupy, having

Table 2. Salient features of forest management systems.

| Forest Management System | Key features |
|---------------------------|---|
| Private forest | <ul style="list-style-type: none"> • Any forest planted, nurtured or conserved in any private land owned by an individual based on the law; • Tenure is dependent on owner's wish; • Owner has to pay land revenue; • Need to obtain permission for sale of forest products in the markets; • Cultivation of certain species restricted. |
| Government managed forest | <ul style="list-style-type: none"> • It is a national forest managed by the government; • Ownership and control are with government; • Tenure is unlimited; • Individuals have no rights of any type in this system except through lease or any other prescribed means; • Grazing, cultivation, construction of house, paths, etc. prohibited. |
| Community forest | <ul style="list-style-type: none"> • It is national forest handed over to a user group; • Its development, conservation and utilization for the collective interest according to the law; • Tenure period is not defined by law but regulated by a management plan updated every 5 to 10 years; • CFUGs have use, control rights; • DFO can take back community forest for non-compliance with management plan, among other reasons. |
| Leasehold forest | <ul style="list-style-type: none"> • It is a national forest leased to any corporate body, industry, community or individual; • Tenure is 40 years and extendable; • Income from sale of timber and non-timber products goes to the holder; • Holder required to utilize the forest according to the lease; • DFO can retake forest on violation of lease. |
| Religious forest | <ul style="list-style-type: none"> • It is a national forest handed over to any religious body, group or community wishing to manage it for its religious value; • Tenure is unlimited; • Forest products cannot be sold or used for commercial purpose; • DFO can retake the forest if not operated as stipulated. |
| Protected forest | <ul style="list-style-type: none"> • It is a national forest protected for special environmental, scientific or cultural significance; • Tenure is unlimited; • No activities generally allowed in protected forest. |
| Collaborative forest | <ul style="list-style-type: none"> • It is a national forest managed in collaboration with local people and government; • Tenure is limited and managed through a management plan that needs to be updated every 5 years; • Benefit sharing between government and community on 75:25 ratio. |

lived on and used them for many decades to the present. The Land Acquisition Act of 1978 on the other hand vests tenure rights of any land in the occupants only after they have registered it with relevant government offices. The Act has thus curtailed the rights of indigenous peoples over ancestral territories and forests they have used and managed since time immemorial.

Without the land ownership certificate, the indigenous population also do not have land entitlement rights. They are deprived of government relief (*rahat*) and incentives on the ground

that their lands³ have not been registered in their names. In Bardiya, it was found that the government provided relief only to those who have land ownership certificates. In addition, land users without this land document cannot claim compensation in cases of natural disasters and wildlife raids.

Under current land and forest laws, the indigenous peoples have use and control rights but not ownership and transfer rights. Thus, they cannot mortgage their lands with banks. However, they, especially the Chepang, practice

transfer rights informally within their community. They inherit land from one generation to another or even divide the land among members within a household, though without any legal effect.

Forest Ownership

Like public land or *Ailami* users, community and leasehold forestry user groups are legally insecure over their forests and other lands. The Tharu and Chepang use community forests they themselves established and preserved to graze their cattle and to collect firewood and fodder; some Chepang also depend on leasehold forests.

Nepal's land laws however have far reaching repercussions on rights, access, and control over forest resources. With no ownership rights over their ancestral lands, these indigenous communities have also lost ownership over the forests that have grown on their lands. While they have been given access and control rights of leasehold lands/forests on a de facto ownership basis, they cannot transfer ownership of such areas under the leasehold arrangement.

According to the district forest officers, community forest users can protect/consERVE, promote and use but cannot transfer (sell, buy or mortgage) the land/forest. The CFUGs are required to develop management plans which should be updated every 5 to 10 years. The government provides leasehold forests to the Chepangs for 40 years with a period extension depending on the progress they make.

Even within the community forestry regime, these indigenous communities face multiple challenges, aside from insecurity of tenure. Under the Forest Act of 1993, DFOs have discretionary powers, which could be misused for personal interest. The government can seize forests on multiple grounds including violation of

the management plan. According to community forestry members, a forest inventory had to be done prior to renewal by hiring experts, who could be a government officer or an external consultant who gets paid NRs.30,000 to NRs.50,000, a fee they deemed too expensive for community members. This has seriously undermined tenure security over such forest lands. Most of the indigenous communities and disadvantaged groups are also not aware of existing laws by which the State can confiscate their ancestral homelands anytime on the basis of not having a land registration certificate.

Another problem they face, as raised by local community elders and leaders, is the increase of wildlife population in community forests that have turned lush and dense. Without proper security arrangement in place, local people are injured and killed during attacks by wild animals. Tharus and other poor marginalized communities have been frequent victims of such attacks. A few years back, a school boy and an old man in one of the study villages were killed by a wild elephant. In addition to human casualties, wildlife also attacks and destroys crops and livestock. Despite these losses, however, the indigenous peoples without land registration certificates are not eligible for government relief and compensation.



Tharu elders weaving fishing net in Bardiya.

Like the other indigenous groups in the country, the Tharu in Bardiya district and Chepang in Chitwan district remain vulnerable to state laws that put their livelihoods in jeopardy. The Forest Regulation of 1995 and the more recent Community Forest Development Program Guideline (revised 2015) respect customary rights of indigenous peoples and local communities over forest resources in terms of social inclusion, participation, representation and benefit sharing, but they do not confer any legal recognition.

Thus, while customary land and forest tenure systems have been in practice, they are not recognized legally. The Nepal government has so far been unable to harmonize relevant national laws to its international obligations under a number of international treaties, including ILO Convention No 169 and UNDRIP, which oblige state parties to respect indigenous peoples' customary rights over natural resources. Further, government administrators lack an understanding about these rights. These have resulted in a gradual loss by indigenous peoples of their rights and control over their lands, forcing them to be 'landless/homeless people' within their own territories, communities and country.

Indigenous Women and Customary Tenure System

The Tharu and Chepang women are heavily reliant on forest resources. They collect grass, firewood and medicinal herbs from the forest. In the Tharu community, the women can also hold the position of Badghar. However, women Badghar were not found in the study area.

These indigenous women are involved in the customary management of forests. Along with other disadvantaged women's groups, they equally benefit as the men from forests under their traditional forest management system and community forestry. The findings showed that more women than men participated in community forest management, as most male household members had moved to urban areas and India

Case 1

In Bardiya district, the Tharu community has been practicing their customary *Badghar* system for generations. Badghar is the head of the Tharu community similar to *Mukhiya* also known as Mahatanwa. For every function and important decision to be made in the community, his presence is a must. The Badghar, who serves a tenure of one year, plays a vital role in decision making in development activities, conflict management (among family members or others), land/forest related matters, parental property distribution, and management, use and conservation of natural resources, among others. This system maintains good governance and self-governance.

According to the Badghars of the Tharu villages of Bahadurpur, Somalpur, Chodakidaduwa, Durganagar, Dalla and Pattharbuji, the Badghar system should be recognized and legalized by the State. They emphasized they have their own set of rules and regulations that have created harmony and peace in their society. The customary tenure system long observed by generations is respected and followed by everyone in Tharu communities.

Under government laws and policies, they are living on unregistered land illegally, but the Tharu maintain that as indigenous peoples they are the 'sons of soil' who have been using that land and forest for a very long time. They declared, "We have rights on these territories." Because of this conflict between state policy and customary land tenure system, the Tharu cannot claim any compensation or relief from the government in the event of any loss and harm by wildlife or natural disaster. It is their collective demand that the government should equally treat those who do not have land ownership certificates as those who have them in the days to come.

The six Badghars expect that the upcoming REDD+ programs will have provisions for identification and recognition of customary practices. They also expect job opportunities, health services, education and reliable security from wildlife raids, which continue to threaten their lives and crops.

Note: The newly-elected rural municipality chairman said that the Badghar's presence is compulsory in any decision making related to conflict management, village development and use of natural resources. He cannot take any decision without the Badghar under the law of the traditional system, even though the customary institution is not legally recognized by the State.



Group discussion with Badhgards (Tharu customary leaders) in Bardiya.

for wage labor. Outmigration is a situation faced by the indigenous peoples, most of whom do not have land.

Indigenous women's participation in forest management meetings has also risen in recent years. Despite this, however, their voices are not effectively heard. Their role in decision-making is virtually ineffectual in the presence of women in general.

According to women in the study area, they are deprived of the right to obtain land certificates. Although Tharu and Chepang women have been using public land and leasehold forest for their livelihood, they do not have this land document. The 2015 Constitution guarantees equal inheritance rights for women, but it is not observed at the community level. In practice, indigenous women have only informal rights of

use and control over their lands, but they lose these rights after marriage or divorce. While in general the men consult their female counterparts when selling or transferring registered land, the findings showed the men transferred their lands even without consulting the women in their households.

Indigenous Peoples and REDD+ Implementation

The communities in the research sites generally had a low awareness of the REDD+ program. In Chitwan district, some key informants like the DFO, District Coordination Council members of the Nepal Federation of

Indigenous Nationalities or NEFIN, and representatives of Community Forest Users Group of Nepal or FECOFUN were familiar with the REDD+ concept and the REDD+ program in Nepal. But the indigenous communities such as the Chepang and other marginalized groups lacked proper knowledge and understanding of the program. Similarly in Bardiya district, the indigenous peoples and key informants such as Badghars, local political leaders, and members of the community forest user groups had no knowledge of it.

In Chitwan district where a REDD+ pilot project was implemented, some Chepangs and other indigenous communities expressed dissatisfaction with the REDD+ benefit sharing mechanism. Under the project, a limited fund amount was provided to a limited number of households, and the process created confusion and misunderstanding among the recipients. The fund was essentially meant for vulnerable groups and those with low economic status in the community. Forest coverage and population distribution were the major criteria for fund distribution. The recipients were proportionally selected from certain clusters, and chances were that a selected beneficiary household of one cluster could be better off than non-beneficiary household/s in another cluster.

Other reasons for displeasure with the benefit sharing were a lengthy bureaucratic process to access the fund, local communities' high expectations from the project, and their demand that the fund be directly distributed to the people rather than an intermediary entity. Indigenous peoples from these areas expect these issues to be addressed in the next REDD+ project to be implemented in their communities.

In Chitwan, according to FGD and KII participants, the pilot project benefited certain households in the indigenous and local communities. Poor families received some financial support for income generation (see case 2, p. 64), such as animal husbandry (goat and buffalo), vegetable farming, broom-grass cultivation, apiculture, planting of various kinds of trees such as *harro*, *barro*, cinnamon, *amriso*, asparagus, *sajiban*, vocational training (tailoring), and enterprise

development (shops, grocery management). Further, the project supported poor and middle income households with improvised cooking stoves and training in biogas production to reduce firewood consumption. These activities helped to improve women's health and the general quality of life in the study area.

The indigenous communities in the study areas, however, felt that the pilot project did not value their historical contribution to forest and ecosystem conservation and to existing community forests and leasehold forests. They consider themselves forest custodians who have preserved the natural resources for many generations through their indigenous knowledge and customary practices. To them, their contribution to the present carbon stock should have been considered in determining the sharing of REDD+ benefits and respected through a special benefit package for them.

Overall the REDD+ program was cited by the FGD participants for contributing in preserving forests and for its awareness raising training that helped change people's attitude toward the program. But they also cited its negative impacts on the indigenous peoples. The Tharus in Bardiya district for example are suffering from wild animal attacks that destroy crops and houses and even kill people. The women especially do not feel safe in entering the forest to collect forest products for their livelihood, and children are afraid of going to school on their own.

They also expressed concern about the lack of full and effective participation of indigenous women at all levels of REDD+ decision-making processes and equitable benefit sharing. Since indigenous customary institutions like Badghar play a crucial role in the community, including community development and natural resource management, these institutions and indigenous leaders similarly need to be part of the decision making bodies for their issues and concerns to be addressed. Therefore, the REDD+ program should not only prioritize carbon stock but also respect the rights and address the safeguards and non-carbon benefits of indigenous peoples.

Case 2

Bir Bahadur Chepang in Siddhi, Saktikhor, Chitawan district received Rs.15,000 for goat farming under the REDD+ pilot program. With the money, he bought four goats and returned the amount to the community forest committee within a year. After 6 years, he was able to increase the number of goats to 32. He earned Rs.70,000 – 80,000 annually from the goat farming. He said that this financial support, which he was happy to receive from the REDD+ project, has helped enhance his livelihood. But he added that the reimbursement mechanism should be applied strictly by the community forest committee because most of the beneficiaries, who received such support on condition they would return the seed money, have failed to do so.

The REDD+ program in general has created high expectation among these indigenous peoples and local communities as well as some misunderstanding on carbon benefits. The people also lack knowledge on its mechanism and process of result-based payment. In both districts, the Tharu and Chepang demanded legal recognition by the REDD+ program of their customary land and forest tenure systems and for forest- and land-related laws and policies to be formulated in line with the new Constitution.

Assertion of Customary Tenure Rights through REDD+

Non-recognition by the State of customary tenure and natural resource management practices in land and forestry sectors is a long-standing issue in Nepal. Although a relatively new concept, REDD+ considers to some extent certain concerns regarding indigenous peoples and customary tenure systems. The final draft of Nepal's REDD+ Strategy covers many issues surrounding the customary tenure system based on indigenous knowledge, skills and experience. This has been made possible through various efforts of indigenous peoples and their repre-

sentative organizations at local, national and international levels.

At national level, NEFIN, the umbrella organization of all indigenous bodies of Nepal, has long been involved in capacity building and training of indigenous leaders on REDD+. It has been raising awareness among indigenous communities of their rights and enhancing their capacity to hold meaningful policy dialogue with the government. The trained indigenous leaders, in turn, are deployed at regional, district and local levels to spread awareness in the community as well as to develop more indigenous community leaders who can lobby for their rights and hold dialogue with district and local stakeholders including concerned government officers.

NEFIN has a wide network that includes its District Coordination Councils, Village Development Councils, various indigenous people's organizations (IPOs) and indigenous professional/interest groupings of indigenous journalists, youth and women, among others. It has undertaken awareness raising and sensitizing on the rights of indigenous peoples and recognition of their customary tenure management systems through mass media, research and publications.

After persistent lobbying, NEFIN has become a member of the REDD+ Working Group under the Ministry of Forest and Soil Conservation at central, district and local levels both in the erstwhile state structure and the new federal structure. This has provided a platform for the indigenous peoples to put forth their concerns and assert their voices and stances with regard to Nepal's REDD+ policy and program. In Chitwan, a separate membership has been designated for Tharu ethnicity apart from NEFIN.

According to NEFIN District Coordination Councils and IPOs, such as Tharu Kalyankari Sabha and Chepang Association, indigenous leaders have been regularly invited for REDD+ program meetings. Their concerns are not well addressed, however, as indigenous peoples are still not fully involved in the decision making process. However, unlike in the past when they

were totally absent in such forums, they have now been able to make inroads in such meetings.

The district forest offices have also used REDD+ trainers who earlier took NEFIN's REDD+ Training of Trainer courses. All these efforts have resulted in increased dialogue and discussion between indigenous leaders and other stakeholders especially government officers. To a certain extent, these initiatives have helped to educate government officers and other stakeholders on indigenous issues and change their outlook towards indigenous peoples and their concerns in REDD+.

Indigenous peoples' delegates from Nepal have also consistently used global platforms such as the UNFCCC Conference of Parties to make their voices heard in the international community in tandem with other indigenous peoples from around the world. This has further pressed the Nepal government to comply with its international obligations on indigenous peoples' rights and customary law and practices.

Summary of Key Findings and Conclusion

- The indigenous peoples of Nepal had intact customary tenure systems before 1950. However, a series of legislations in subsequent decades including Land Act of 1964 and Forest Act of 1993 resulted in deprivation of their customary rights. While a number of customary tenure and resource management practices continue to exist today across different indigenous groups, no existing law recognizes such systems and practices. Whatever few provisions exist on customary tenure rights are limited to policies, guidelines, directives and general statement in the Constitution. A law needs to be enacted to recognize indigenous peoples' customary tenure rights and resource management practices to ensure their rights, access and use to their land and forest.
- Tenure rights is a key aspect of REDD+ as it is directly linked to carbon rights. In Nepal the REDD+ program is relatively flexible to issues and concerns of indigenous peoples compared to forestry sector laws which do not recognize customary rights and tenure system. For the indigenous peoples to reap maximum benefits from REDD+, existing laws should be revised or new laws enacted that recognize indigenous peoples' customary rights.
- In the study areas, the Tharus still effectively practice the Badghar or headman system while the Chepangs have their own customary practices such as Khoriya Kheti, though in a de jure form. However, large sections of these indigenous communities do not have land ownership certificates, and thus, based on Nepal's existing land laws, have become landless in their own ancestral territories. Portions of forest lands and forests that they have been traditionally using for their livelihood are now categorized as community forestry. Their experience with an earlier implemented REDD+ pilot project has been positive to some extent but they are not satisfied with its benefit sharing as they feel that their historical contribution to the enhancement of the current carbon stock has not been duly reciprocated.
- Indigenous women are very close to and heavily reliant on forest resources for livelihood. Their involvement in the customary tenure practice, as well as community forest management, is higher than their male counterparts as most men tend to move to cities and India as wage earners. However, their role in the decision making processes is insignificant. In the study areas, as many Tharus and Chepangs do not have land ownership documents, they only have user and control rights. Within these communities, women lack the right to inheritance of parental properties.
- As a forest dweller and forest dependent community, indigenous peoples have

adopted customary forest resource management practices for generations for their collective use in a sustainable way. There is currently no legal recognition of customary tenure system; however, their time-tested customary practices would facilitate implementation of REDD+ by helping sustain and further improve forest conditions and enhance carbon stock. This would also help in local REDD+ governance with increased local ownership and bring desired, equitable REDD+ benefits through a mix of modern scientific approach and local indigenous know-how.

- The indigenous peoples of Nepal so far have considerably succeeded in devising REDD+ to assert and seek recognition of customary rights and tenure practices through capacity building of indigenous leaders to spread awareness in the community and dialogue with stakeholders including the government. They have sensitized the public on the issue through mass media, publications and policy dialogue at local and national levels. They have also built networks and alliances with partner entities with similar interests, regularly raised their voices at international forums, and exerted pressure on the government to be responsive to their rights.
- This has resulted in representatives of the indigenous communities being included in the REDD+ Working Group and in consultations as well as changing government officers' perception on indigenous issues. The final draft of the national REDD+ Strategy has also tried



Group discussion among women in Bardiya.

to address these concerns, something not much seen in previous forestry policy/strategy documents.

Recommendations

For the Government

Revision/formulation of legal provisions

As a modern state, especially after it has transitioned to a federal democratic republic, Nepal has to ensure that voices and rights of all communities, including indigenous peoples, are recognized and respected. Existing laws in question should be revised or new legislation adopted to create an enabling policy environment for REDD+ with due recognition of customary tenure rights and practices and indigenous knowledge and technologies of indigenous peoples of Nepal. Clarity should be made on the division of roles and responsibilities between district and sectoral REDD+ Working Groups.

Mapping and documentation

Considering the dearth of studies on customary natural resource management practices of the indigenous peoples, mapping and documentation of customarily held lands and forests, indigenous knowledge, and resource management practices should be carried out and integrated/translated into the national forest monitoring system, national laws and policies and inventories. Contributions of indigenous peoples to sustainable management of forests, including non-carbon benefits, through customary practices should be accounted for, best practices emulated and accordingly rewarded in REDD+ programs. A strong database and accounting/recording system for all types of forest management regimes, including customary land and forest, should be developed and maintained.

Good governance and benefit sharing

Legislation and policies alone are not enough. Full and effective participation, representation of indigenous peoples in all mechanisms and at all levels of REDD+ processes should be ensured. Maintain transparency and accountability. Grievance redress mechanism and equitable benefit sharing mechanism should be adopted. In sharing benefits, consider both carbon and non-carbon benefits. The Free, Prior, and Informed Consent procedure should be conducted whenever any project or consultation is held in indigenous peoples' areas and on projects that have impacts on indigenous peoples and other communities. Since despite contributing least to climate change they remain at the forefront of its negative impacts, indigenous peoples should be given preferential treatment in REDD+ programs.

Awareness raising and capacity building

Government officials and other stakeholders should be sensitized about the rights of indigenous peoples. Both indigenous peoples and government agencies should be educated about the concept of climate change and REDD+ in relation to the issues and concerns of indigenous peoples. There should be a uniform understanding maintained across sectoral ministries such as Ministry of Forest and Environment (MoFE), federal affairs and local development ministries on issues related to climate change, REDD+, customary practices and indigenous peoples. Also capacity of indigenous peoples should be built for policy dialogues with government and other local, national and international stakeholders.

For the Indigenous Peoples

Indigenous community leaders have to take initiatives to align voices of indigenous peoples across the country through effective communication and coordination. They should hold and facilitate wider discussions among indigenous community members to reach consensus on supporting or rejecting any REDD+ projects pitched by the government or any development partners that have bearing on their social, cultural and economic life. The indigenous communities should be proactive about conserving and promoting their own institutions and should take a common stance to lobby for their customary rights and favorable laws and policies at national and international levels.



Annexes

Annex I. Description of the Study Area

Bardiya and Chitawan districts were selected as the prime location for this research. During the study, FGD and KII were conducted in Madhuban Municipality-1, Bardiya and Saktikhor 1, Chitawan district among the Tharus and Chepangs community.

Bardiya District

Bardiya district lies in Bheri zone of the mid-western region of Nepal. Bardiya is in the fertile Terai plains, covered with agricultural land and forest. Bardiya National Park is a protected area in Nepal that was established in 1988 as Royal Bardia National Park. Covering an area of 968 km² (374 sq m), it is the largest and most undisturbed national park in the Terai of Nepal, adjoining the eastern bank of the Karnali River and bisected by the Babai River. The headquarter Gulariya lies in the bank of Babai River. The Karnali, one of Nepal's largest rivers, divided into multiple branches when it reaches the Terai. There were 31 VDCs and one municipality before a second municipality was formed by merging some of the VDCs. Total Forest coverage Areas in Bardiya District- 202,500 hectares (60% land).

Population

In Bardiya district, Tharus (an indigenous group) account for 52.6% of the total population of 426,576 (CBS, 2011), followed by Chhetris (10.6%), Brahmin (9.5%) and Muslims (3%). The Tharus of Bardiya District belong to indigenous communities known as the Deshauri and Dangaura Tharus, who claim Dang District, east of Bardiya, to be their original home and have their own language.

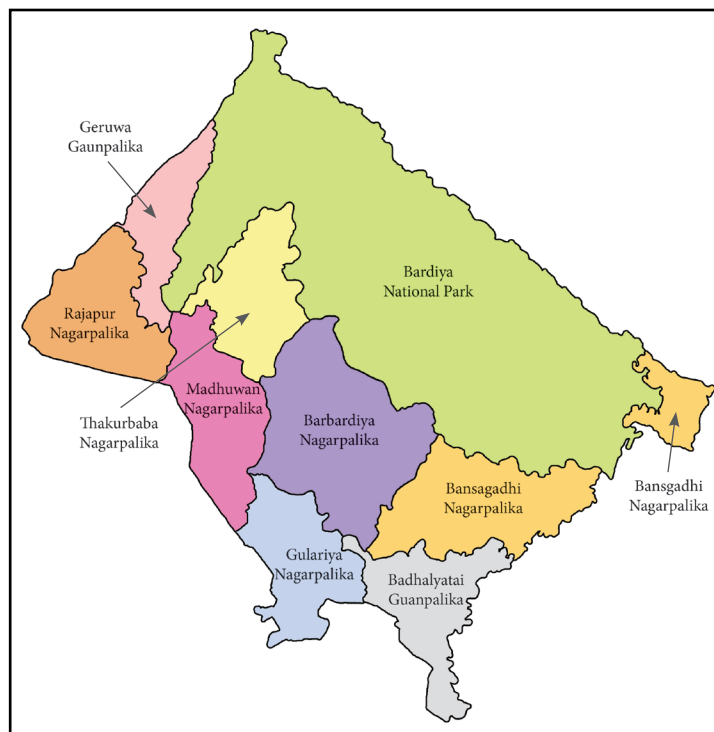
Madhuvan Municipality

The research was conducted at Madhuvan municipality in Bardiya district which is situated about 12kms away from Gulariya, 47 kms away from Nepalgunj and 20 kms from nearest Mahendra highway, Bhurigaun. Babai river is in the east part of this valley and also the gateway to the longest bridge of Nepal, Kothiyaghat bridge at Karnali (Geruwa) that connects with Rajapur. The famous Bardiya National Park, Thakurdwara temple and Karnali bridge at Chisapani are the nearest tourist destination.

Pattharbhuji Village and Dalla Village

Pattharbhuji and Dalla villages are located in Madhuvan municipality of Bardiya district. There are 109 households in Pattharbhuji village in total including Tharu (64), BK (1), Badhi (15) Pariyar (4), Rawat (8), Bhandari (8), Madhesi (2), Misra (3) and Bohora (4) caste. Among them, the population of Tharu is highest in number.

According to the local participants and key informants, there are 111 households in Dalla village with 614 population. Tharu, Dalits, Kumal, Khatri, Khadka and Rawal are the caste/ethnic composition in the village. Among them, majority of the population are Tharu (80 hhs). Farming and wage labour are the main



occupation of the local peoples. Beside this, some are engaged in government service.

There is a community forest (Ganeshpur Sisiniya Community Forest) that covers 170 hectares. In addition, only 40-50 houses have land certificates and most of the local community people are found landless in the research areas. They have been farming in government land since long.

Chitwan District

Saktikhor and Siddhi VDCs were selected as study area in Chitawan district. FGD and KII were conducted in Janapragati Community Forest office at Saktikhor and Nibuwater Community Forest office at Siddhi Village. Janapragati Community Forest is situated about 19 kms far from the Tandhi chowk, Chitawan.

Likewise, Siddhi village is quite far (5-6 kms) from the Saktikhor. Brahmin, Chettri, Tamang, Gurung, Newar, Chepang (Praja), Nepali, BK, Kami and Yogi are the caste/ethnic groups in both Siddhi and Saktikhor.

Jana Pragati Community Forest-Saktikhor-1, 5 Chitwan

Total 284 household including 1704 populations (Male 836 and Female 868)

| Caste/Ethnicity | Household | Population | Female | Male | Remarks |
|-----------------|------------|--------------|------------|------------|---------|
| IPs | 122 | 732 | 373 | 359 | |
| Dalits | 39 | 234 | 119 | 115 | |
| Brahmin/Chettri | 123 | 738 | 376 | 362 | |
| Total | 284 | 1,704 | 868 | 836 | |

Source: Janapragati Community Forest Committee report 2073.

Annex II. Participants of Community level sharing and validation program in Shaktikhor, Chitawan

| S. No. | Name | Gender | | Position |
|--------|---------------------|--------|---|---|
| | | M | F | |
| 1 | Kamal Raj Khanal | √ | | Secretary, NGO federation |
| 2 | Tilak Kunwar | √ | | Member, leasehold forest federation |
| 3 | Tika Shrestha | √ | | Forest Guard, District forest office |
| 4 | Mira Adhikari | | √ | Facilitator, Ilaka forest office |
| 5 | Lal Bahadur Gurung | √ | | Member, shaktikhor community forest |
| 6 | Riz Bahadur Praja | √ | | Member, Chitram kaminchuli community forest |
| 7 | Kabi Raj Praja | √ | | Chairperson, Deujar CF |
| 8 | Ramji Babu Shrestha | √ | | Forester, Shaktikhor Ilaka forest office |
| 9 | Shova Khatri | | √ | Treasurer, Pragati CF |
| 10 | Hum Kumari Thapa | | √ | Office secretary, Janapragati CF |
| 11 | Deepa Basnet | | √ | Member, Shaktikhor Ilaka |
| 12 | Bir Bahadur Praja | √ | | Forest guard, Nibuwater CF |
| 13 | Madhab Tamang | √ | | Office Secretary, Nibuwater CF |
| 14 | Krishna Kumari Giri | | √ | Member, Janapragati CF |
| 15 | Sharmila Rana Magar | | √ | Member, Samfrayang |
| 16 | Moti Waiba | | √ | REDD facilitator, Haripur Ilaka |

| | | | | |
|----|-----------------------|-----------|-----------|---|
| 17 | Sapana Kandel | | √ | REDD facilitator, |
| 18 | Lekh Prashad Kharel | √ | | Secretary, Federation of Private forest |
| 19 | Narjung Praja | √ | | Chairperson, Batauli CF |
| 20 | Krishna Bahadur Praja | √ | | Chairperson, Kalika municipality 11 siddhi |
| 21 | Bhim Bahadur Chepang | √ | | Secretary, Nepal Chepang Association |
| 22 | Bikash Shrestha | √ | | Office secretary, Pragati CF |
| 23 | Ram Narayan shrestha | √ | | Jana pragati CF |
| 24 | Dhan Kumari Chepang | | √ | Nibuwatar CF |
| 25 | Manju Upreti | | √ | REDD facilitator, Ra. Na.Pa 3 |
| 26 | Shrijana Gautam | | √ | REDD facilitator,Ra.Na Pa 13 |
| 27 | Sharmila Gurung | | √ | REDD facilitator, Bharatpur Na Pa 11 |
| 28 | Dhan Bahadur Basnet | √ | | Advisor, Latauli CF |
| 29 | Gyan Bdr Tamang | √ | | Former ward Chair, Nibuwatar CF |
| 30 | Bhagawati Thapa | √ | | Former, ward vice chair |
| 31 | Madhab Pd Pokharel | √ | | Shaktikhor |
| 32 | Durga Bdr Gurung | | √ | Chairperson, Nibuwatar CF |
| 33 | Kuber Praja | √ | | Chairperson, Jharna CF |
| 34 | Laxmi Karki | | √ | Treasurer, CFUG Federation |
| 35 | Bisnu Pd Neupane | √ | | Assistand Forest Officer, Shaktikhor Ilaka forst office |
| 36 | Ramchandra Shrestha | √ | | Chairperson, CF |
| 37 | Hem Bahadur Chhetri | √ | | Chairperson, Municipality |
| 38 | Aan Bdr Sharu | √ | | Chairperson, Samfayang CF |
| 39 | Kamal Chepang | √ | | Member, Chi.Ka CF Siddhi |
| 40 | Dinesh Praja | √ | | Member |
| 41 | Tulka Giri | √ | | Forest guard, Janapragati CF |
| 42 | Uttam Praja | √ | | Forest Guard, Siddhi Forest office |
| 43 | Ran Bdr Praja | √ | | Treasurer, Jharna CF |
| 44 | Bharat Pd Dhungana | √ | | Secretary, CFUG federation Chitawan |
| 45 | Man Maya Shrestha | | √ | Mahila Sahakari |
| 46 | Khem Raj Praja | √ | | User, Batauli CF |
| 47 | Dil Kumari Shrestha | | √ | Member, Janapragati CF |
| | Total | 31 | 16 | |



Annex III. Key Informant Interview (KII) in Bardiya District

| S. No. | Name | Organization | Designation |
|--------|--------------------------|----------------------------------|---------------|
| 1 | Mr. Ram Kumar Tharu | NEFIN DCC | Chairperson |
| 2 | Mr. Govinda Prd Tharu | Tharu Kalyankari Samaj | Chairperson |
| 3 | Mr. Tanka Bdr. Gurung | District Forest Office (DFO) | Assistant DFO |
| 4 | Mr. Ashok Ram Tharu | | Badghar |
| 5 | Mr. Parsuram Chaudhari | Rural Municipality- Madhubhan | Chairperson |
| 6 | Mr. Tulasi Ram Chaudhari | Ganeshpur Community forest | Chairperson |

Key Informant Interview (KII) in Chitwan District

| S. No. | Name | Organization | Designation |
|--------|------------------------|------------------------|-------------------------------------|
| 1 | Mr. Surbir Thapa Magar | NEFIN DC | Chairperson |
| 2 | Mr. Mahendra Dura | NEFIN DC | Secretary |
| 3 | Mr. Ram Bdr. Bhujel | NEFIN DC | Member |
| 4 | Mr Padam Bdr. Gurung | NEFIN DC | Ex-Member/School principal |
| 5 | Mr. Kedar Nath Paudeld | District Forest Office | DFO |
| 6 | Mr. Ganesh Thapa | District Forest Office | Asst. DFO and REDD+ focal person |
| 7 | Mrs. Laxmi Karki | FECOFUN | Chairperson |
| 8 | Mr. Hem Bdr. Chhetri | Janapragati CF | Chairperson |
| 9 | Mrs. Hum Kumari | Janapragati CF | Secretary |
| 10 | Mr. Uttam Praja | District Forest Office | Forest Guard |
| 11 | Mr. Tek Bdr Gurung | District Forest Office | Forest Guard |

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Endnotes

¹ The participants included 16 women, indigenous peoples and local communities, social and political leaders, activists in the communities, recently elected rural municipality members, Assistant DFO, District and Ilaka REDD Working Group (RWG) members, forest guards, REDD facilitators, Local Resource Persons (REDD facilitators, LRPs) of REDD+, FECOFUN members, community forest users group members, representatives from leasehold forest federation, private forest federation, Nepal Chepang Association, and municipality members.

² The interview with Badghars revealed that typical cases and disputes are resolved by the Badghar. These include disputes on the use of natural resources such as irrigation channels, forest, etc., disputes among family members or others and domestic violence. The system maintains good governance, self-governance and plays a vital role in the development of the village and in maintaining peace in the Tharu community.

³ According to the land law, those using lands not registered in their names are not the legal owners of those lands, and as such the government is not bound to provide relief to the occupants.



V I E T N A M

Customary Tenure Rights and REDD+ Potential to Promote Legal Recognition

*by James Israel Alim, Vu Thi Hien,
Ho Thanh Thuy, Hoang My Lien*



Abstract

The ethnic peoples in Vietnam have developed over time well-defined customary land and forest tenure systems. While the country has reformed land and forest laws and policies, customary tenure systems and customary rights continue to have very limited state recognition. The ethnic peoples enjoy legal rights over their lands and forests only if they have legal certificates on these resources (i.e., Land Use Right Certificates, forest titles, and forest management contracts). Very few ethnic people, however, possess such documents due to limited resources and access to legal knowledge and services.

Despite this, customary tenure continues to operate beyond legal frameworks and persist through innovation and adaptation to prevailing conditions. It is however threatened today by factors other than lack of legal recognition. Among these are outmigration by ethnic men for labor and in migration and integration of non-ethnic migrants in ethnic communities. Due to the men's absence in households, ethnic women are becoming more involved in political processes, although they still lack land tenure security even under the customary system.

Customary tenure systems facilitate the smooth implementation of the REDD+ program in Vietnam due to the ethnic peoples' deep relationship with their lands and forests. In the same vein, ethnic communities are able to assert, seek recognition of, and strengthen these systems through REDD+. They have gained technical knowledge and skills and partnered with NGOs to further strengthen these systems. Some have succeeded in securing forest tenure. Singled out as a shortcoming, however, is REDD+'s non-recognition of customary tenure systems, deemed a lost opportunity to influence a more favorable government perspective on customary land rights.

The study was conducted in Vo Nhai District, Thai Nguyen province and Nhu Xuan District, Thanh Hoa province.

Introduction

Indigenous peoples in Vietnam are known as ethnic minorities,¹ ethnic groups or communities, or ethnic peoples.² The ethnic minorities account for 13.8 percent of the country's total population. The government officially recognizes 54 distinct ethnic groups, such as the Kinh,³ Nung, Thai, Hmong and others, who are typically located in remote and mountainous upland areas in extremely difficult regions where poverty remains high. In spite of their distance from political and urban centers, however, they have managed to subsist mainly from their deep-seated relationship with their lands and forests.

The ethnic peoples remain reliant on the lands they live on including the water, forest products, animals, and crops. The forests determine their life as individuals and as communities as they depend on them for practical and economic needs. In order to maintain their livelihoods, they adopted rules on managing, harvesting, and protecting forest and water resources. These customary rules of conduct enable harmony among the community members (people) and the environment (nature). These principles, values, and behaviors have been guiding the daily activities of ethnic minorities.

Among the traditional systems in place is customary tenure, which involves ownership, access, use, control, and transfer rights according to longstanding principles that have operated way before the formal legal system reached their realms. Customary tenure is associated with traditional institutions and customary laws that define the use, allocation, and preservation of lands in the local communities. With such customary governance practices, the ethnic peoples have succeeded in managing, utilizing, and harvesting land (mainly forested lands) for a long period of time. These practices demonstrate their ability to administer, manage, and sustain their environment and the resources therein. Although their customary tenure system (CTS) operates outside the formal legal system, it has been subjugated by prevailing political institu-



tions and legal systems, which have changed over time.

The national legal framework on lands and natural resources is enshrined in the 2013 Constitution of the Socialist Republic of Vietnam. The Constitution explicitly stipulates that “land, water, mineral resources, marine resources, airspace and other resources and assets invested in or managed by the State are public assets owned by the entire people with owner representative and unified management by the State.”⁴ All land- and forest-related policies currently implemented by the government such as the Land Law and Forestry Law reflect this standpoint.

In light of how customary tenure systems have historically been treated under Vietnamese legal frameworks, current laws and policies are greatly improved. But their full recognition remains far from grasp. Considering this, ethnic communities turn to whoever can provide them the resources to cope with policy developments and legal requirements that concern their ancestral domain. They collaborate with non-governmental organizations (NGOs) and participate in various development programs such as REDD+.⁵

Vietnam is one of the first countries to implement REDD+ in 2009. Financed by the Norwegian government and the World Bank’s Forest Carbon Partnership Facility (FCPF), the Vietnamese government has carried out REDD+ readiness-related initiatives, including the Vietnam UN-REDD Programme⁶ piloted in six provinces and the Vietnam REDD+ Readiness Preparation implemented in provinces in the North Central Coast region.⁷

The government has also approved the National REDD+ Action Program (NRAP) in 2017 on reduction of greenhouse gas emissions through efforts to reduce deforestation and forest degradation and to conserve and manage forest resources sustainably to enhance forest carbon stocks for the period up to 2030. Part of the measures for the program implementation stipulates that the State shall “...institutionalize the mechanisms for ethnic minorities, forest-dependent communities and women to

exercise their right to participation throughout the REDD+ process, from preparation to implementation.”⁸

It is in light of these circumstances that this study was undertaken. It presents evidences from the research carried out in selected communes of Vo Nhai District in Thai Nguyen province and Nhu Xuan District in Thanh Hoa province, both of which have a sizable population of ethnic peoples and forest dependent communities.

Research Methodology

The study generally aimed to understand the interplay between statutory and customary tenure systems and REDD+ in order to maximize benefits for ethnic peoples from the REDD+ program in Vietnam, specifically in selected communes of Vo Nhai District in Thai Nguyen province and Nhu Xuan District in Thanh Hoa province. The specific objectives were to:

1

Document state laws and policies on forest/land tenure systems in Vietnam and how these enhance or weaken indigenous customary tenure systems;

2

Describe the range of customary tenure systems practiced by the ethnic peoples in their territories;

3

Determine the extent of recognition and practice of ethnic women's rights in customary tenure systems;

4

Determine how customary tenure systems facilitate the implementation of REDD+ and help secure benefits from REDD+ (carbon and non-carbon); and

5

Document how ethnic peoples are using REDD+ to assert, seek recognition, and strengthen their customary land and forest tenure systems.

This study used a qualitative research design. Given limited time to gather in-depth data, the research became exploratory in nature. Through the use of quantitative and qualitative methods to gather, validate, organize, and analyze data, the experiences and realities lived by the ethnic peoples were further investigated and dealt in detail.

Thai Nguyen and Thanh Hoa provinces were purposively selected as research sites based on the following conditions: presence of ethnic communities that still practice customary tenure systems, community's lack of experience on REDD+ (former province) and community's prior experience with REDD+ (latter province), and existence of well-established linkage with the communities for ease of access and smooth facilitation of the study. The research involved 81 ethnic participants and government officers of Nhu Xuan district. As part of the cultural protocols, the research team secured free, prior and informed consent (FPIC) from the heads of the communities first and then from the participants themselves during the fieldwork.

The research synthesized and analyzed various literature and qualitative data gathered from primary and secondary sources. Primary data were collected through focus group discussions (FGD), informant interviews, and observation conducted during field visits and fieldwork. Information was further obtained from second-

ary sources through an intensive desk review of pertinent literature: laws and policies, published and unpublished studies, books, working papers, and government and organization reports, among others, that provided baseline data.

The team validated the primary and secondary data through follow-up FGDs, interviews, and a team writeshop. The writeshop was done with the key informants to clarify and validate significant information and initial analysis and to seek more breadth and depth in selected information.

National Legal Framework on Land and Forest Administration

Four distinct periods are significant to Vietnam's land tenure systems: pre-colonial period, French colonial period, conflict period, and modern period.⁹ Of these, the two most recent ones have significantly changed the face of the country's land administration in relation to customary tenure systems.¹⁰

During the pre-colonial or pre-19th century period, most of Vietnam followed the feudal system of land administration introduced by Chinese feudalistic forces. During the colonial period (1858-1945), the French introduced their own system, superseding the feudal administration. These land administration systems, however, did not significantly affect the ethnic communities that are located in remote upland areas; in spite of the developments taking place nationwide, they were able to maintain their customary authority over their ancestral lands and territories.¹¹

It was during the conflict period (1945-1975) that the foundation of today's national land- and forest-related legal frameworks were laid down. The establishment of agricultural cooperatives in 1958 in Northern Vietnam became a turning point for the country's land administration.¹² People contributed their land for the cooperatives to own and manage; consequently, the cooperatives dictated what crops and livestock



Interview with the informants.

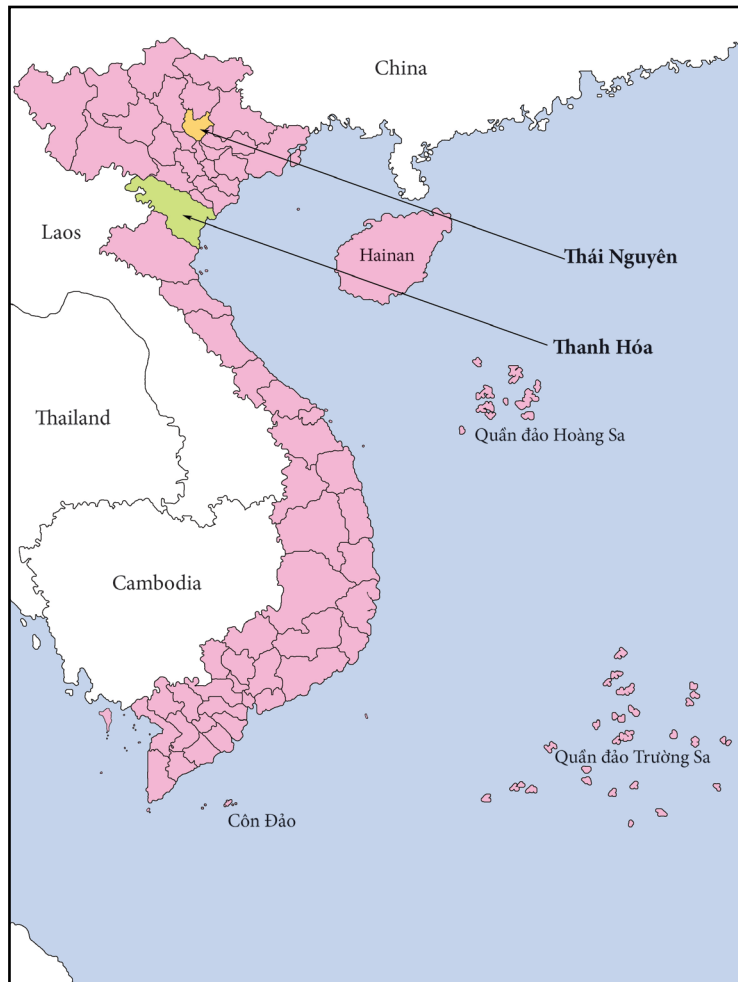


Figure 1. Geographical location of Thái Nguyên and Thanh Hoa provinces in Vietnam.



farmers were expected to plant and tend. By 1970s, most of the lands were already under the management of these cooperatives.

From 1956-1960 in Northern Vietnam, the state established State Forest Enterprises (SFEs) and authorized them to control a large part of forest land in remote areas. For the 53 ethnic minority groups, the formation of SFEs meant the end of customary forest tenure arrangements, leading to exclusion from their traditional lands used for agriculture, hunting, and gathering of non-timber forest products (NTFPs).¹³ Many of the forests especially in the North were reallocated to state-owned forest farms. This resulted in the destruction of many sacred forests.

Shortly after, the ownership and management of these forests shifted from state-owned

forest farms to single liability limited forest companies. Eventually, state-owned farms that did not perform successfully became "dezoned" and the area went back to the management of local government, which could reallocate them. During this period, ethnic communities still managed a significant portion of their ancestral lands and forests, but the authority of the state was starting to overpower their customary administration systems over their territories.

By 1980, the government implemented a new Constitution, which stipulated that land was a possession of all its citizens. This manifested in the 1988 Land Law, which provided rights to own, use, and control to the legal land owner. A succeeding Prime Minister directive and resolution recognizing the role of households

Figure 2. Geographical location of research sites in Vo Nhai District, Thai Nguyen province.

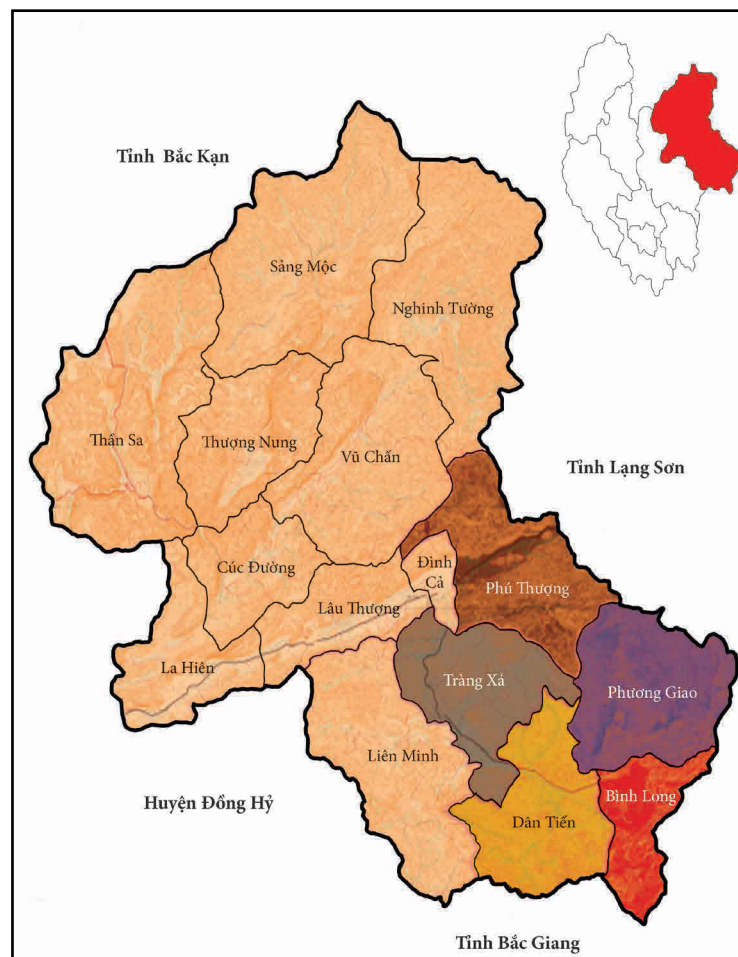
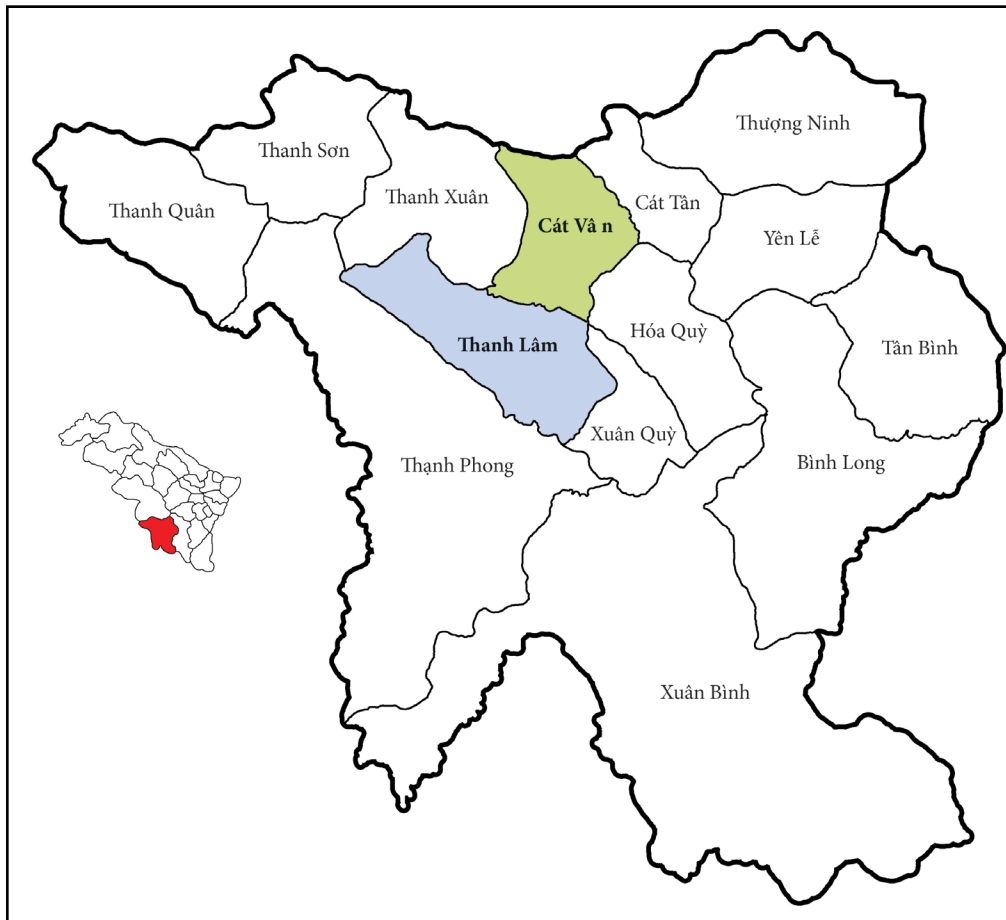


Figure 3. Geographical location of research sites in Nhu Xuan District, Thanh Hoa province.



in agricultural production and consumption led to households receiving recognition as a legal entity that could own land and ultimately secure land allocation for longterm use.¹⁴ In 1990-1992, cooperative-owned lands were fully dissolved and they were given temporary autonomy. As part of the national reunification, the national government slowly gained authority even in remote ethnic communities as it began to reach out to these areas.

In the forestry sector, Vietnam underwent a revamp entailing adjustments in the management of forest resources. The collective use of forests was abolished (as it did with agricultural land), while most of the forest areas stayed under the management of State Forest Enterprises (SFEs). At the end of 1980s, some SFEs were proven incapable of managing all forest resources in the country in contrast to the success

attained under the reforms in agriculture land rights. This led to a gradual change in forest use rights, which redirected the focus towards providing the people access to use and even own forests over the following years.

Upon the implementation of a new Constitution in 1992 and a new Land Law in 1993, all lands in Vietnam became state-owned. The state began to issue land use right certificates (LURCs) that provide only "land users' rights to use, lease, mortgage, exchange, and transfer lands and resources attached therein." In the case of forests, the Forest Protection and Development Law was passed by 1991, even prior to the 1992 Constitution and 1993 Land Law. This law provides the legal framework for new arrangements that allow not only state entities but also private entities to participate in forest management. In 1993, the state began to hand over forest use rights to the people. This

opened up discussions of providing forest ownership in succeeding years.

The principles of the 1993 Land Law remained apparent in the 2003 iteration of the Land Law. What made the 2003 Land Law different is that land users for each plot of land they use must secure a Land Use Right Certificate (LURC). It was from this point in time that land registration became fully systematic and everyone, including the ethnic peoples, was expected to comply to secure state-provided legal rights mentioned earlier. These principles still hold in contemporary legal frameworks of the country.

In contrast, forest policy has taken the other route. From its operation based on state-managed mechanisms since 1950s, the thrust has turned to people's advantage as legal developments provided them the opportunity to secure use rights over their forests, which would later evolve into limited ownership and management rights. Upon implementation of the 2004 Forest Protection and Development Law, communities were recognized as forest users and in later iteration of the law, forest owners. This law, together with the 2003 Land Law, allowed allocation of parts of SFE lands to households and communities.

This development, however, operated under the context of economic development, which resulted to exploitation of production forests due to dominance of commercial entities. Since ethnic and local communities usually do not have the resources to secure certifications, state-owned farms and private enterprises hold most of the forests. Among the cases where households and communities were able to secure legal rights, some complained about the poor quality of the forests allocated to them; these were without plant cover and unfit for economic endeavors.

These recent policy developments played a significant part in the formulation of the 2013 Constitution and 2013 Land Law, which maintained their predecessors' stance on ownership and use rights on lands. The New Forestry Law seems to be promising more than ever.

Laws and Policies Impacting Customary Tenure Systems

This section mainly reviews and analyzes the 2013 Land Law and New Forestry Law¹⁵ among land- and forest-related legislation that have far-reaching impacts on ethnic communities, principally on their customary tenure systems.

Residential and Agricultural Lands

There is a stark contrast between customary tenure systems and statutory legal frameworks. Ethnic peoples' customary tenure systems govern all types of lands in the ancestral domain—residential, agricultural, and forest lands. Under legal frameworks, separate but complementing laws and policies govern these same types of lands.

The 2013 Land Law is the landmark policy for residential and agricultural lands. It stays true to the 2013 Constitution which stipulates that the State, as the representative of the people, ultimately holds ownership and control of all lands and can only hand over land use rights to land users through state-issued certificates (i.e., LURCs).¹⁶ The State also reserves the right to reclaim lands on certain grounds such as “national defense or security purposes” (Article 61) and “socio-economic development in the national or public interest” (Article 62), among others.¹⁷

Through the implementation of the Land Law from 1987, land registration became compulsory and ethnic communities scrambled to keep up with it along with succeeding legal developments, given their scarce resources to do so. Under this policy, applicants need to meet the stipulated requirements, which demand physical, technical, and financial resources that ethnic peoples do not typically have access to. Up to this time, the number of LURCs registered under ethnic peoples' names is low compared to their Vietnamese counterparts.

In its most recent version, the Land Law specifically provides that its implementation should consider the ethnic peoples' social, cultural, and practical conditions through adoption





of related and relevant policies (Article 27). The reality, however, is that some of its provisions, including this one, do not really materialize on the ground. More importantly, the compulsory land registration process bypassed land-specific aspects of the customary tenure system, initially not recognizing it. In the recent iteration of the Land Law, very limited recognition is given to this system.

Part of the reason why ethnic peoples were doubtful of the land registration process is the land use levy they were required to pay. It was not until the implementation of the 2003 Land Law that they became exempt from paying land use taxes.¹⁸ Today they express remorse for not pursuing land registration back then, even though in retrospect they probably did not have the means to secure LURCs.

With only land use rights granted to them by the State, that is if they are able to secure LURCs, they receive full access, use, and transfer rights and limited control and management rights.¹⁹ These rights, however, are still subject to the authority of the State, the acting representative of the landowner (i.e. the Vietnamese people), that can reclaim lands for specific purposes.

Forest Lands

Under legal frameworks, forest lands are categorized into three main types: protection forests, special use forests (SUFs), and production forests. Under the New Forestry Law, customary tenure systems receive better recognition, although still limited in nature. This law complements the 2004 Forest Protection and Development Law, a significant forest policy that cemented the State's provision of forest ownership to Vietnamese citizens, ethnic peoples included. Provided that they secure forest titles or management contracts, ethnic communities can have ownership and/or use rights over their forests.

Under the 2004 Forest Protection and Development Law and the Forestry Law, ethnic peoples can claim ownership under the following categories: domestic household, individual, economic organization forest owner. Due to the resources required to accomplish the application process, however, they usually merge all their claims under one title represented by a cooperative or association they establish, which falls under the economic organization forest owner type. Cooperatives and union of cooperatives

are also identified and defined as forest owner type in the New Forestry Law.²⁰

The State allows individuals, households, communities, and economic organizations to have ownership rights on production and scattered protection forests through forest titles, which are valid for 50-70 years depending on conditions and renewable upon expiration. For SUFs, however, the law only provides 20-year renewable management contracts, which do not provide ownership rights.²¹ Renewal of these legal documents is subject to government approval and requires holders to undergo the renewal process.

Similar to the provisions of the Land Law, ethnic communities need to undergo the registration process and fulfill the stipulated requirements to secure forest titles and management contracts under the Forestry Law. But to accomplish the registration, ethnic communities in most cases similarly lack legal knowledge and physical, technical, and financial resources. These state-introduced legal processes provide limited or no recognition at all to their customary forest tenure systems.

With limited recognition to ownership rights, it is little wonder that there is only limited recognition to other forest-related rights of ethnic peoples. Although they receive full rights to access and transfer, they are restricted in the rights to use, control, and manage their forests. These restraints include lack of legally recognized right on portions of forests they informally use, since forest titles and management contracts have stipulated size limits that cannot account for the immense lands they customarily own. Another restriction is the lack of autonomy to change forest use since they need to apply for land conversion, which is subject to government approval. They are also wary of the potential exploitation that can be made out of the stipulated grounds for forest reclamation, which is open to wide interpretation.²²

Although customary tenure systems are still far from full recognition, policy development in forest lands has managed to evolve faster and further compared to residential and agricultural lands. In retrospect, forest policies have become

more sensitive to and inclusive of ethnic peoples' traditional knowledge and systems. The recognition of sacred or ghost forests is one of the manifestations of this development.²³ This is also apparent in recent policies, which provide more and more attention to local participation in development, management, and protection of forests. It is also important to note that forest land allocation now takes long-term forestry purposes into serious consideration, which is advantageous to ethnic communities as their customary tenure systems are a testament to how they can sustainably administer their forests.

Other Related Policies

In response to the lack of legal knowledge of ethnic communities, the State implemented several laws that should have already addressed this concern. The 2012 Law on Legal Dissemination and Education stipulates that the citizens have the right to access legal information and that they themselves are obliged to learn and explore it. The 2016 Law on Access to Information further states that direct consultations must be conducted especially in extremely difficult regions. These consultations are also venues for policy education and discussion. The same policy specifies that appropriate measures must be applied to these direct consultations that cover all matters that affect the community.

Aside from these laws, specific provisions in the 2013 Land Law and the New Forestry Law reflect the developments introduced by these two information and consultation-related laws. Under the Land Law, the State should initiate efforts to make available, build up, and disseminate land information to ethnic communities (Article 28). The New Forestry Law demands support for the involvement of communities in sustainable forest management (Article 102).

This adequacy in policies on access to legal information and local participation in political processes, however, does not trickle down and materialize on the ground as hoped for by the government.



REDD+ Program

As part of the REDD+ readiness preparation phase, the government has piloted the Vietnam UN-REDD Programme in six provinces (Lao Cai, Bac Kan, Ha Tinh, Binh Thuan, Lam Dong and Ca Mau) and implemented the Vietnam REDD+ Readiness Preparation in provinces in the North Central Coast region, including the research site, Thanh Hoa (others are Nghe An, Ha Tinh, Quang Binh, Quang Tri, and Thua Thien Hue). It approved the National REDD+ Action Program last year to bring down greenhouse gas emissions through efforts to reduce deforestation and forest degradation and at the same time to sustainably manage and conserve forest resources to enhance forest carbon stocks over the next 13 years (up to 2030).

The government recently finished the Emission Reductions Program Document (ER-PD)²⁴ and is currently developing an Emission Reductions Program (ER-P) proposal to be submitted to FCPF's Carbon Fund managed by World Bank. To address the drivers and underlying causes of forest loss and barriers to sustainable forest management and forest enhancement, the program's overall approach and design is to build on and support implementation of the current ambitious national

and sub-national policies and initiatives in the Northern Central Coast region. At the site level, the program designed an Adaptive Collaborative Management Approach (ACMA) that can accommodate local realities.

The ER-P will support a combination of enabling conditions for emissions reduction and sectoral activities focused on the forest and agriculture sectors. The ER-PD shows that ER-P's Benefit Sharing Mechanism is through ACMA, a major program component and the main framework in improving forest management that ensures all activities are inclusive and pro-poor. The ACMA entities will play a central role in benefit sharing. It is proposed that 94 percent of the available carbon monetary benefits will be allocated by the provinces to participating ACMA entities on the condition they can demonstrate a very clear commitment to include all forest users, contribute to sustainable forest management, and reduce pressure on Special Use Forests and protected areas.

The government hopes that linking benefit sharing with collaborative management will go beyond simply incentivizing and compensating individuals and communities to sustainably manage and protect their forests. It wants to narrow the divide between the managers and



Workshop in Nhi Xuan district, Thanh Hoa province.

users of forests and recognize the veracity of both “indigenous” and “technical” knowledge. It recognizes that forests cannot be managed in isolation from land not utilized for forestry purposes and that local forest dependent persons have livelihoods that include both forest and non-forest based resources and land use. Through ACMA, the government also wants to facilitate empowerment of local communities in their relationships with managers of forests and biodiversity conservation through greater participation of ethnic women and poor and vulnerable villagers who have been largely excluded from meaningful forms of participation.

As part of the readiness preparation phase, the government issued key decisions similar to Decision no. 419/QĐ –TTg dated 5 April 2017.²⁵ These include Decision no. 5399/QĐ-BNN-TCLN dated 25 December 2015, which stipulates the regulation mechanisms on piloting REDD+ benefit sharing under the framework of UN-REDD Programme Phase II. It aims to provide a basis for developing REDD+ benefit sharing mechanisms and policies and contributing to reduce greenhouse gas emissions or REDD+ while improving livelihoods of forest dependent people.²⁶ Under this Decision, households, individuals, and communities who are forest owners, have rented, have natural forest allocation, or contracted for protection, regeneration, or production purposes and/or are implementing forest protection or forest regeneration activities can benefit from REDD+ activities.²⁷

Another is Decision no. 5337/QĐ-BNN-TCLN dated 23 December 2015 that approved the establishment of the Vietnam REDD+ Fund. According to this decision, communities and households who implement activities in the National/Provincial REDD+ Action Plan can access the Fund through the result-based payment scheme.²⁸ Forest owners and forest users whose activities contribute the biggest impact on emission reductions and removals are given priority access.²⁹ According to National REDD+ Action Plan, the line ministries and branches have responsibilities to “establish, issue regulations on the organization and operation of the Vietnam REDD+ Fund in compliance with Vietnam laws and international rules and practices.”³⁰

Although these legal frameworks are available, ethnic and local communities can only maximize the benefits if they have forest use rights or have forest protection contracts.³¹ The question on how many households benefit from REDD+ and can be eligible and capable to participate in REDD+ remains a big concern. In reality, only a few ethnic and forest dependent communities have forest use rights. This reality stems from their very limited access to information on policies and necessary capacity building to enable them to understand and maximize forestry policies in general and REDD+-related policies in particular. These are big barriers to their access to REDD+.

Customary Tenure Systems of Ethnic Groups in Thai Nguyen and Thanh Hoa

Customary law is understood as a form of indigenous knowledge established historically through a peoples’ experiences in dealing with the environment and society and is passed on from one generation to another by memory and through practices. Of different forms, it provides guidance for social relations and human relations with nature that is accepted and practiced by all community members and creates consensus and balance in the community.

Customary law covers a wide range of principles that encompasses all aspects of social life such as organization and management of community, society, security and order, and benefits for the community; adoption of customary laws and practices; civil and family relations; education and lifestyle; religious belief. Aside from these, customary law covers allocation, use, and management of land and protection of natural resources.

In this regard, a customary tenure system has become a system of rules of conduct, which guides human relationship to the natural environment and human relations within the community. It expresses the will of the whole



community and is done voluntarily through practice but compulsorily for those who do not. The customary law stipulates rules set up by the community members themselves, not by a single class of people serving their own interest, to coordinate relations among them and followed voluntarily.³²

With abundant resources in their ancestral lands and forests, ethnic peoples in Vietnam have relied for their livelihood on nature or the environment around which revolve all their activities. This situation exists until now in many regions. As such, they have developed knowledge and practices to use the natural environment sustainably and protect it from overexploitation most often done by non-ethnic entities. They are fully aware that any damage to the natural environment will directly affect their lives.

With various ethnic minority groups in the research areas, customary tenure systems can take on different forms. The underlying principles, however, seem to be similar in that they collectively value, use, protect, and revere the lands and forests they have. This section explores the commonalities among different customary tenure systems practiced in the research areas and the range these cover in terms of customary rights related to land and the resources attached to it. This section also documents the innovations the customary tenure system has undergone, the recognition it received from the State, and the threats it still faces.

Ownership and Transfer Rights

Like other ethnic peoples in Vietnam, the ethnic groups in Thai Nguyen and Thanh Hoa provinces make claims on land as established by their ancestors. They know that ancestral claims were on a “first come, first serve” basis as their lands were then wider for their respective communities. In the present time, this rule still stands in claims on uncultivated lands. Although there already is a state-defined system of legal ownership of land, claims in the community level remain hinged on customary law.

Customary ownership claims, which can be either individual or household, are usufructuary

in nature, which means people are free to do what they want with their lands. The community recognizes and respects these claims; in fact, it is the only way to guarantee ownership at the village level, since community members should collectively affirm a member’s ownership of the land and resources therein. The informants shared that the same principle applies at the inter-village level in which neighboring communities recognize and respect each other’s ancestral territorial claims. This system of mutual agreement has been reliable even with the absence of written agreements, as individuals and communities take pride on and abide by what they say. This system continues to be reliable among contiguous communities with significant ethnic population.

When it comes to forests, these ethnic groups typically adhere to the traditionally observed communal ancestral claims. As ethnic peoples, they commonly regard forests with reverence, as they believe these hold spiritual value, being the place where their gods and the spirits of their ancestors reside as well as the channel for providing their daily needs. The range of access and use varies among different ethnic groups. But they usually allow mixed use with minimal cultivation since they generally reserve the whole forest as a place for worship, although each member has a plot of his/her own in designated areas.

Ethnic groups in adjacent communities recognize and respect the community’s claim on the forest, categorized under territorial claims. In cases where two or more ethnic groups surround the forest, they usually have a mutual agreement on who owns what, which parts they allow free access, and what types of use they can permit.

Under customary tenure systems, transfer rights can only be applicable to individual or household claims on private lands. Typical practices of transfer include inheritance and temporary gifting. Traditionally, the community does not allow transfer of land to non-ethnic people although the informants emphasized that they believe it would have been on a case-to-case basis if ever instances in the past permitted it. Ethnic groups do not usually allow selling of lands under the regime of their ancestral domain.



This conscious exclusion of outsiders played a vital role in the integrity of their lands and territories. In view of entry of migrants and local industrial development in the present, however, these customary rules of conduct face challenges in terms of enforcement.

Access, Use, and Control Rights

The findings reveal that ethnic minority groups provide community members equal access to forests and resources, allowing them to take control and manage their lands. The members are given the liberty to determine how to use their lands and benefit from them. It should be noted that they typically follow the way of access, use, and control they learned from generations before them, which is grounded by culture and spiritual belief. In the case of non-ethnic outsiders, they customarily secure access, use, and control rights from the community as represented by the village head who provides these to them on a case-to-case basis.

Specific restrictions are in place in certain areas of the forests designated as sacred/ghost forests and burial forests. The community agrees on, abides with, and enforces these rules of conduct voluntarily. They also follow strict prohibition rules for hunting, gathering, farming, and logging. Penalties are meted out for violations based on customary law, which the village head executes.

All members of the community enjoy timber and non-timber forest products such as herbal medicine, honey, resin, and raw materials for clothing and other domestic use. Food is also among the benefits ethnic people secure from forests; they gather edible plants, hunt animal meat, and in some cases, cultivate portions of the forests for seasonal crops. More often than not, they farm on individual private lands where they are free to plant whatever crop they want but mostly for domestic consumption or for barter with neighbors. But changes have come as they get more involved in the formal economy. They observed that preference for cash crops increases and more encroachment happens whether by community members or outsiders.

They also do hunting now mostly for commercial purposes. Animal meat used to be a precious forest resource mainly because of the way the community members obtained it (by group) and the way the bounty was shared with the community. In spite of the changes, however, they shared that one thing did not alter—community members still enjoy access, use, and control of land and forest resources.

The control and administration of ancestral domain, however, ultimately belongs to the village heads so they can intervene in cases of unjustified exploitation of resources and when disputes arise among community members. In such instances, customary law and conflict management mechanisms operate and the community relies on the decision and pronouncement their village heads make.

Among the most critical factors in relation to ethnic groups' access, use, and control of their lands and forests is their indigenous spiritual belief. Beyond the material realm, they believe that gods and spirits reside and govern their lands and forests. This serves as the basis of how to utilize these resources. With the belief that something higher than their power is at play, they access and use forests with special regard. In terms of control, they ask their gods for protection and integrity of their lands and territories among other concerns. In some cases, they relegate land-related conflicts to the will of their gods and the ancestral spirits, especially when justice seems out of reach.

They show this dependency through rituals they still practice. They have rituals for clearing the fields, sowing seeds, harvesting the produce, and other agricultural- and forest-related activities. They believe these acts of worship will please the gods and bless them with a good season and a bountiful harvest. In some communities such as the Nung's, these rituals became influenced by common folk's celebrations, making them a mix of indigenous and religious ways. In the case of the Kinh groups, some of these spiritual activities are dying due to cultural influences of non-ethnic populations and exposure to urban cultures.³³





Grievance Mechanisms

As provided by customary law and traditional political structures, the village head represents the community, controls the ancestral domain, and makes decisions on community concerns including land-related matters. Community members affirm the village head's power and pays respect to this authority. Since all ethnic groups in the research areas are patriarchal in nature, men occupy this position.

In cases of aggravation in the community, the village head takes the helm in the attainment of justice. Community members go to the village head when they have land-related disputes and grievances. The village head then assesses the situation and provides judgment based on the given circumstance, corresponding evidences and customary law and practices. The village head metes out sanctions depending on the gravity of the violation.

Customary law provides punishments from reprimands as banal as rice payment to the aggrieved party to such grave restitution as social exclusion where the guilty party loses the right to participate in community activities and even

to be buried in their burial forests. In cases of violations by outsiders, the community can provide penalties if the concerned person agrees to them, but what often happens is that the community, as represented by the village head, seeks justice from formal justice institutions they have access to, in most cases on the district or commune level.

Aside from the village head, ethnic groups also have what they call land guardians who take care of the spiritual aspect of land and forest management. The land guardians' concern is how to make peace with the gods and the spirits of ancestors who might be offended due to forest-related violations such as unauthorized intrusion or unjustified exploitation of forest resources. They determine whether a compensation, mostly in the form of an offering, must take place and conduct the ritual. They can also discern whether the gods have already afflicted divine punishment on the violators.

According to shamans, divine punishment commonly takes the form of sudden manifestation of unexplainable conditions such as extreme body pains, visible body deformity, and/or mental derangement. Should the gods

deem the violator worthy of forgiveness, healing would come to him through the help of the local shaman who often is a land guardian as well.³⁴

Values Governing Practice of Customary Tenure Systems

Three core values govern the practice of customary tenure systems at least among the ethnic minority groups in the research areas: sense of community, reverence for sanctity of land, and balance between spiritual and material.

Sense of community manifests in the way the community members give recognition and respect to individual claims and how they distinguish and affirm which parts of the community is communal. This is also shown in the collective establishment of individual boundaries and their voluntary involvement in the creation, revision (in some cases), and enforcement of traditional rules of conduct.

Another core value that governs customary tenure systems is reverence for sanctity of land. As discussed earlier, ethnic groups depend on their forests for sustenance and development through the benefits they secure from them. They also largely treat their forest lands as sacred (i.e. ghost forests and burial forests). One solid example of veneration they practice is worshipping big trees, which they believe are home to their forest god. They lay down offerings at the foot of these trees. They say this spiritual practice is not influenced by religion but rather is an indigenous concept. They continue to practice this act of worship to the present.

A third value is the balance between the spiritual and material. For the ethnic groups, what they get from the forests should be nothing more than what they need. In their perspective, forest resources should still be intact by the time their children have children of their own. Although they do not know the word sustainable development, they actually practice it on the ground. This stems from their complete reliance on their lands and forests. In spite of their need to fulfill their material needs, they will not compromise the spiritual aspect of their lands and forests.

Formal Rights

The 2013 Land Law provides limited recognition to ethnic peoples' rights to use, access, and transfer land, since these rights depend on the scope covered by the Land Use Right Certificate they must secure. Land user types applicable to ethnic peoples include individual, household, community, cooperative, and alliance of cooperatives.³⁵ The State also offers limited recognition to their rights to manage and control the lands allocated to them, since they need to undergo the government process to convert land use, the State being the ultimate owner and manager of the land. Finally and most importantly, the State does not recognize ethnic peoples' customary right to ownership of their ancestral domain including the lands they customarily and still informally use that are not part of their LURC. This limited recognition generally undermines their self-determination as individuals and as a community.

The New Forestry Law, to be implemented in January 2019, provides wider recognition to ethnic peoples' right to ownership of their forests although it remains limited in nature. The law gives limited ownership rights to production and scattered protection forests to individuals, households, communities, cooperatives, and alliance of cooperatives. Forest titles are only valid for a specific period, usually 50 years or as long as 70 years in special cases. These titles are subject to renewal upon expiration but titleholders must undergo the renewal process by then.

The case is different for Special Use Forests as the State only provides 20-year, 5-year, or 1-year renewable management/protection contracts and not ownership certificates. This, however, is the first time that a policy recognizes the cultural and spiritual significance of ghost forests (Article 4). Under this policy, ghost forests are classified as SUFs (Article 5), which the State can allocate to communities to manage (Article 14).

The limited recognition extends to other forest-related rights. Although the ethnic peoples receive rights to use, control, manage, and transfer land under the forestry law, they are restricted by the scope the titles allow. Ethnic communities customarily own immense for-



ests, which stipulated limits cannot fully cover. Without formal recognition of the whole extent of what they traditionally own, they do not possess formal rights over areas their titles do not cover. The bureaucratic process in use conversion, including seeking State approval, is also a restriction since ethnic communities customarily have the liberty to use parts of the forests for purposes they collectively desire.

The ethnic peoples singled out specific provisions in these policies, which affect the integrity of their lands and territories and which they deem susceptible to abuse. These are provisions in the 2013 Land Law (Articles 61 & 62) and the New Forestry Law (Article 22) that allow the State to reclaim land, for such purposes as

national development and national security and defense.³⁶

Aside from these rights, customary village reconciliation mechanisms are not also fully acknowledged. The 2013 Law on Mediation at Communal Level recognizes the role of the village head and the village reconciliation board, which are roughly the equivalent of the traditional justice officials of ethnic communities.

Although still limited in nature, forest policies in general are starting to recognize ethnic peoples' traditional forest-related knowledge and systems and their role in forest management and protection. A comparison of land-related rights as provided by customary law and State laws and policies are presented in the following table.

Comparison of land-related rights under customary and statutory laws

| | Customary Law | State Laws and Policies |
|-----------------------|--|---|
| Ownership | Communal and private (usufruct) ownership on land and forests | Land belongs to the people, State acts as representative and manager Forests can be privately or collectively owned (except SUFs, which only permits management) |
| Use | Community members determine how to use their land and how to benefit from it | Only use rights are given in residential and agricultural lands (LURCs) Forest titles or management contracts provide use rights |
| Access | Equal access to community members; outsiders are given access on case-to-case basis | Only forest owners/managers have exclusive right to access forests and resources, except in particular cases |
| Control | Belongs to village head while community members share responsibility of enforcement Community members have full right to abstain from using all rights to land (as manifested in sacred forests and burial forests) | Ultimately belongs to State. Forest ownership (state and non-state) is also decentralized as part of control right by law |
| Management | Community members determine management of their land but supervised by community at large as represented by village head | Restricted right as conversion of land or change of use ultimately depends on government approval |
| Transfer | Applicable among community members only; transfer to outsiders is not usually allowed | Depends on forest categories and ownership types; can be leased, inherited, and transferred |
| Land tenure guarantee | Community should respect right of community member to the resource | LURCs and Forest Titles with 50 years validity, up to 70 years in special cases. For special use forests, 20-year, 5-year, or 1-year forest management/protection contracts. All these are renewable upon expiry. |



| | | |
|---------------------|--|--|
| Benefit sharing | Depends on practical demands of community members | Based on legal framework on forest benefit sharing mechanism in place at provincial and national levels |
| Accountability | Village head, power vested by customary law | Ministry of Agriculture and Rural Development and Ministry of Natural Resources and Environment are accountable to the nation; People's Committees at provincial, district, and commune levels are accountable to their respective territories |
| Monitoring | Village head, power vested by customary law | Forest ranger system monitors law enforcement |
| Grievance mechanism | By customary policies and traditional conflict resolution mechanisms | By state laws and judicial processes |

Source: Bui, Forester, Nguyen, Thu, Nhung, Ulrich, & Vhuong (2004) and Nguyen, Nguyen, and Vu (2008).

Informal Rights

With no formal recognition of customary right to land ownership, ethnic peoples now settle for informal recognition from local government units and even from public and private enterprises.

Peoples' Committees (i.e., Provincial People's Committee (PPC), District People's Committee (DPC)) and State-owned farms informally recognize the ethnic groups' ancestral forests in Thai Nguyen and Thanh Hoa even before they secure rights certificates. They recognize how ethnic peoples regard these forests as sacred. In spite of their administrative power over these forests, the PPC and DPC do not access these forests for fear they might violate spiritual codes of conduct of ethnic communities and suffer divine punishment including negative effects on their livelihood and agricultural production.

State-owned farms experience the same. Ethnic peoples cite refusal of farm managers to use and cultivate lands legally allocated to State farms simply because these are ancestral ghost forests and they do not want to cause conflict in the community. In the case of the Dzao ethnic group in Thai Nguyen, their sacred sites are near the main road which not one entity has attempted to encroach due to oral stories of how those who tried to do so were afflicted with mental derangement or critical illnesses.

These social and spiritual factors play a crucial role in preventing outsiders' access and use of ancestral forests. Tensions arise, however, when private enterprises enter the picture as

they do not care about these forests' cultural and spiritual significance and the implications of their access and use of such lands. With or without these social and spiritual factors, however, ethnic peoples emphasize that their community will still use their ancestral lands because they believe it is their customary right.

Threats to Practice

The ethnic groups face numerous threats to the integrity of the practice of their customary tenure systems. Foremost is limited State recognition, which threatens their continuity and further development (or lack thereof) and can significantly affect how they innovate and adapt to prevailing social and political conditions.

The bureaucratic processes under certain laws and policies that require certifications and titles bypass customary rights, thus posing another risk. Ethnic groups lack the knowledge and resources to secure such legal documents, which exposes their lands to other interests who can undergo the legal process and acquire the necessary papers. In addition, such certificates and titles cannot fully encompass the entire extent of their ancestral lands due to specified limits in the law.³⁷ Land use is also limited by what the title or certification allows. Should they desire to change the land use, they need to apply for conversion subject to government approval.

This lack of legal knowledge constrains their ability to assert their rights, which they might not even know they have. This and their

low access to legal services due to distance from political centers marginalize them on this matter. Although required by law, their public involvement in these concerns is also restricted by inadequate resources of local government agencies and even of social and political organizations such as Farmers' Union, Women's Union, and Youth Union. Aside from poor implementation of local consultations, their free, prior, and informed consent is not usually sought.

Other threats include migration: both outmigration of ethnic men and women for employment and immigration of non-ethnic peoples for resource exploitation facilitated by infrastructure developments, establishment of forest timber plantations, and mining concessions even in remote areas. These phenomena have corresponding economic, social, and political implications that affect the practice of customary tenure systems.

With the integration of non-ethnic population, ethnic communities also now have to decide whether to pursue traditional justice or the State judicial system. Unfortunately, this decision primarily hinges on factors not entirely in their hands: the non-ethnic party's willingness or submission to be judged under customary law and/or the resources they have to be able to file a legal complaint. These two factors are usually not in the favor of ethnic peoples and they usually become the aggravated party in land-related conflicts.

Other significant threats are logging and widespread poverty.³⁸ These economic-driven factors promote resource exploitation and encroachment, which directly affects the integrity of customary tenure systems.

Innovations on Customary Tenure Systems

The two faces of migration, as discussed above, change the community makeup and dynamics, in the process affecting the practice of customary tenure systems. With more men leaving ethnic communities, the women become more involved in political processes. Consequently, ethnic communities affected by outmigration now slowly "redefine" their patri-

archal stand on women's involvement in politics.

With better means by outsiders to access their lands, ethnic communities have seen the number of non-ethnic members rise in their areas. Given this, they are again talking about being faithful to the fundamental traditional justice systems that govern their lands including customary law and practices. As a result, a warning system has been put in place in which violators of customary law are given a number of warnings before disciplinary actions are pursued. Another innovation in relation to penalties is the refusal of burial assistance in the form of physical and financial support from the period of the wake to the burial; this has proven effective as violations became less frequent after its implementation.³⁹ In forest management, ethnic communities in Thai Nguyen also pursued the inclusion of customary regulations in the District People's Committee's rules, which DPC itself approved.⁴⁰

Another change in the practice of customary tenure systems is the creation of associations and cooperatives as a response to laws and policies on land stewardship. In light of legal frameworks implemented by the government, ethnic minority groups have no other choice than to abide with these, given the limited recognition of customary rights. As provided for by law, they can secure Land Use Right Certificates as individuals, household, village-based community, cooperative, or alliance of cooperatives.

Since most do not have the resources to secure LURCs and forest titles/certificates/contracts as individuals, they need to establish an economic entity such as a cooperative to formally pool resources and be able to receive support from support groups. Through the help of NGOs like the Center for Research and Development in Upland Areas (CERDA), local communities form either a traditional group of households also known as self-governing groups (SGGs) that can secure forest use rights legally or a cooperative, which can also be granted ownership, use, or protection rights certificates, titles, or contracts.

The biggest innovation in the communities in the research sites is the intercommunity approach documented in the case of the Nung and

neighboring ethnic groups in Vo Nhai District in Thai Nguyen province. Due to economic, social, and political circumstances, they were repeatedly pushed away from their original ancestral lands and now reside near their ancestral forests, which are surrounded by at least seven other ethnic groups who were similarly forced to leave their lands.⁴¹ Due to intermingling and limited lands and resources, they depend on inter-village aspects of their customary tenure systems and need to adapt with the changing conditions of their social and cultural environment. With intermarriages, they also cited challenges on how to sustain their indigenous culture along with the traditional knowledge, systems, and practices that come with it.⁴²

Ethnic Women and Customary Tenure System

Most of Vietnam's ethnic groups maintain traditional systems of governance that are patriarchal in nature. This political environment remains a critical factor to ethnic women's limited rights under customary tenure systems.

Ownership and Transfer Rights

Ethnic women can own lands. This occurs when they receive lands from their parents as inheritance. However, most ethnic groups prefer to have sons inherit the land, since daughters usually move to their husbands' house after marriage. Almost all women FGD participants attested to this.

There are cases where the head of household hands the land over to nephews rather than his own daughters. In the case of the Nung in Thai Nguyen, they set conditions for a nephew to be worthy of the land. They require him to move into the household and be responsible for all family activities. They justify the practice in that the nephew will take on the duty to lead the household in all aspects of its development, most especially in the care of the elders and ancestor worship.

In terms of transfer rights, ethnic women can also transfer the land they own to their children, but not entirely on their own decision and not at all times, as informant interviews revealed.⁴³ In conservative households, the wife typically is consulted but the husband decides on how to allocate the land to their children and when to give it away, which puts women at a disadvantage. It is only in case of the husband's death that the wife can transfer land on her own.

Use and Control Rights

All the FGD women participants agreed that ethnic women enjoy equal access to and use of forest resources. Compared to their male counterparts, they maintain greater interest in forest resources and access the forests more for non-timber forest products (NTFPs) for domestic and commercial use.⁴⁴ They use these NTFPs for food and as raw materials for housing, clothing, medicine, and weaving and handicrafts for their livelihood. This signifies the level of dependence ethnic women have on forests including agriculture.

According to recent statistics, Vietnamese women, ethnic women included, are now more self-employed in agriculture than the men,⁴⁵ validated by the data gathered on the ground. Traditionally, men engaged only in soil preparation, harvesting, and other more labor intensive tasks, while women took care of the remaining ones. Due to economic circumstances, ethnic men now also work as laborers for families who have larger lands and more equipment. In the case of communities found in the north like Thai Nguyen, the men also migrate to other cities and even to China to work in farms that offer higher income. Although not that common, ethnic women also leave their own farms for better economic opportunities. But most of the women step up and become the heads of their households in lieu of their husbands. In the process, they become responsible for the lands the family owns.

When it comes to making land-related decisions, ethnic women are involved only to a certain extent. Customarily, they can only hold

a consultative role, giving their perspective, but the decision ultimately lies with the husbands. As the women shared in the FGDs, they complain but usually maintain “a high level of compliance” with the household head. They can only expect to have a say on the management of agricultural land, i.e., what to plant and whether the household should secure a loan for the farm or not.

Except for matriarchal ethnic groups such as Ede, ethnic men usually take leadership in both household and village level.⁴⁶ It is only in the case of a husband’s departure, which can be due either to death or migration for livelihood that the wife can lead the household. Customary law dictates that, should the husband die and the wife remarries, the new husband does not have the right to the land unless the wife will explicitly give him rights on her property.

Formal Rights

The case of Vietnam presents an interesting case in the recognition of women’s land rights, which are enshrined in the 2013 Constitution and reflected in numerous laws and policies. As provided for by State laws and policies, ethnic minorities can only have use rights on agricultural lands vested in them through state-issued Land Use Right Certificates. In terms of forestlands, however, they can actually be owners provided that they secure forest certificates. Vietnam’s Constitution explicitly states that men and women are equal in legal stature, and according to the Land Law and other gender-inclusive laws, this equal recognition should translate in terms of forest land ownership rights.⁴⁷

In reality, however, women still experience deprivation of their right to have their names registered in land certificates.⁴⁸ Analysis reveals this reality is due to prevailing traditional power dynamics where men are the ultimate decision makers in critical household decisions. Due to ethnic women’s lack of knowledge on their rights paired with the mindset that men should take care of such matters, most women prefer not to be involved in the legal process. This leads to extreme cases such as landlessness

among women, which happens when the couple decides to divorce and the wife failed to secure her name in the certificates during marriage. In this case, the wife will receive no share of her husband’s property after divorce unless she secures custody of her son, which is the only time she can be certain that the court will give her a share of land. In the case of the husband’s death, statutory laws state that should the wife remarry, she can decide whether to include the new husband’s name in the title, the land being her private property before (re)marriage,⁴⁹ which coincidentally affirms customary law.

The 2004 Forest Protection and Development Law recognizes the rights of forest owners, who can be men or women, to own and use forest lands. Under this law, ethnic women fall under the individual and domestic household types of forest owner. Other rights provided for by statutory laws are women’s rights to access, control, manage, transfer (including gifting), and even sell the use rights covered by certificates they possess. However, these rights do not fully materialize on the ground due to a number of reasons, primarily the traditional notion of women’s role in the household and in the community that persists among ethnic groups.

Informal Rights⁵⁰

Although statutory laws cover women’s rights on land in general, there are specific land-related realities that the State does not recognize but is lenient to or even informally allows to a certain extent. In relation to agricultural lands, the District People’s Committee informally recognizes those the local peoples encroach on provided these are part of the lands farmed by their ancestors and/or part of their ethnic group’s communal ancestral domain, which means these have been used for food and livelihood ever since. Although this informal recognition is impermanent, it still generally benefits the women, being more involved now in agriculture than the men. It is also important to note that ethnic women usually make use of plots far from the lands they registered under LURCs and/or near the forested areas.



The State observes leniency with ethnic groups when it comes to access to forests, including those not included in certificates they hold. This benefits ethnic women since they get non-timber forest products almost daily. With this leniency, ethnic women's intricate relationship with the forests persists and concurrently sustains their traditional knowledge on forests.

Ethnic women however remain overlooked in forestry policies. This indicates the non-recognition of their traditional knowledge and role in forest management. Policies do not typically define women's roles in forest management. The only exception is the National REDD+ Action Plan that provides specific roles for women in general.

Other Limitations

Although Vietnam's legal frameworks require women's participation in land- and forest-related decision making processes, the reality is they still struggle mainly due to lack of aid to fully participate in these processes. Inadequate legal information and financial assistance contribute to this reality. Vietnamese women in general do not have the chance to learn about their legal rights because they need to work to earn money for their families. As they spend their whole day at work, their interest in legal matters decreases. This cycle goes on and will continue to persist until an opportunity comes for them to participate in the process, with provision of aid they truly need.

The recent migration surge for work among the male population entails positive and negative impacts on ethnic communities and households. It provides economic development at the expense of the absence of male members, which brings a number of social effects to the dynamics of their families and communities. For instance, women become more involved in political and legal systems due to a smaller number of men who can participate. The community now sees more women attending meetings. But in terms of quality of involvement, ethnic women commonly hold the mindset to listen and pass the information to male members of the household.

They do not usually become part of the conversation: they do not argue, recommend, or provide their perspective on matters and thus remain passive players in the process.

Customary Tenure Systems and REDD+ Implementation

Ethnic Minorities Way of Life and REDD+

Customary tenure systems can either facilitate or block the REDD+ program's success in communities.

Like indigenous peoples all over the world, the lives of ethnic groups in Vietnam revolve around the land and forest. They subsist mainly on the food they hunt and gather from the forests. The forest also provides for their other needs: housing, medicine, and livelihood (e.g., materials for weaving, handicrafts and other NTFPs). Beyond fulfillment of their material needs, they expressed the spiritual value of forests. They believe their gods and the spirits of their ancestors reside in the forests, which explains why this is where they conduct rituals and other forms of spiritual worship.

Their whole life is intrinsically linked to their lands and forests so they protect and sustain them in the hope that their children and their children's children will still have lands and forests to inherit—a notion held by their ancestors and passed on to them.⁵¹ This dependence makes ethnic groups develop love and care for their lands and forests to make sure there are enough resources for this and future generations. This inner drive is critical to the implementation of REDD+ as it acts as their same drive to work on it.

The ethnic groups protect their forests not because they expect something in return but because of the deep and intricate connection they share with their forests. They observe vigilance all over their territories to ensure their integrity (mostly from outsiders). In the traditional set up, they do not receive direct compensation for





doing so. But with forest protection recently becoming harder than ever, the community people in the research sites expressed they would appreciate it if they could be compensated for the patrolling they do.

This customary perspective on forest management facilitates REDD+ implementation as ethnic communities already have a solid grounding on why they should support a program that will directly benefit them and potentially others as well. Already practicing forest care and protection as a way of life, they are more driven to manage and sustain their forests in light of the direct financial benefits they can reap by doing so.

The link between ethnic groups and REDD+ implementation also manifests in their

traditional knowledge, practices, and systems, which play a vital role in the whole process. For instance, ethnic groups have traditional knowledge on how to manage and protect their forests at a low cost. In terms of consumption, they know which parts of the plants to harvest, to use for certain purposes, and to leave out. In terms of sustenance, they know which plants and animals to hunt and gather in a given season. They follow a community calendar that considers reproduction cycles and replenishment periods of the resources they take from the forests, adjusting these accordingly on their abundance or lack.

This knowledge of their forests, passed down by their ancestors and reflected in their customary forest management systems, is in line with REDD+'s overall goals. They developed rules that have become customary law enforced by the community that govern access and use of forests and impose penalties for acts that harm the forests and resources therein.⁵² For example, individuals report to the village

head cases of outsiders' entering their forests. In view of rising migration to rural areas and its implication on resource exploitation for financial gain, this vigilance on forests and lands becomes more imperative than ever.⁵³ Landless migrants might encroach on forested areas and gather resources even without the community's consent due to ignorance of informal rules of conduct observed in ethnic communities and disregard for statutory law because of financial straits.

The ethnic communities' combined traditional knowledge and systems on forest management lay the foundation for REDD+ implementation on the ground. But the continuity of these knowledge and practices runs counter to the identified major barrier to REDD+: the

lack of clear forest tenure and governance.⁵⁴ As the above discussion shows, customary tenure systems facilitate REDD+'s smooth implementation on the local level. These systems emphasize the importance of forests in community life. This is apparent in the ethnic communities in both research sites as their approach now has transcended mostly to inter-village level due to their new circumstances. The observed inter-community and intertribal coordination can be helpful in management of forests surrounded by various communities of different ethnic groups.

Experiences and Expectations in REDD+

The ethnic communities have high expectations for REDD+ especially on capacity-building, security of forest ownership, and financial incentives they can derive from it.⁵⁵ They shared that some of these expectations are already being fulfilled, while others are still far from their grasp. As Vietnam is still in the REDD+ readiness phase, the study communities were more familiar with the program's capacity building component and have already benefitted from it.

The Ministry of Agriculture and Rural Development (MARD), with support from the Norwegian government, has been implementing the Vietnam UN-REDD programme aimed at capacitating Vietnamese communities to enable them to benefit from REDD+'s result-based payment in the future and to carry out fundamental and positive impacts for the forestry sector. It is carried out, however, only in selected provinces such as Ha Tinh, Lam Dong, Binh Thuan, Ca Mau, and Thai Nguyen's neighboring provinces in the north, Lao Cai and Bac Kan.

The MARD has also secured funding from the Forest Carbon Partnership Facility to implement the project "Support for REDD Readiness in Vietnam" in Hanoi and all provinces under the Emission Reductions Program in the Northern Central Coast region, which includes Thanh Hoa.

In Thai Nguyen, the communities had the opportunity to learn the legal and technical aspects of lands and forests through CERDA. One of the research sites, Binh Long commune

in Vo Nhai District, was part of the project, "Capacity building model for ethnic minority communities to be ready to take part in REDD+ program," funded by the Norwegian Agency for Development Cooperation in coordination with Tebtebba. The project aimed to assist communities to secure use rights on natural production forests, manage community forests, develop a pilot model for community-based ownership of REDD+ initiative through a legal community entity, and secure benefits such as result-based payment. Institutional capacity building and techniques development were undertaken to enable communities to implement REDD+ initiatives in the commune.

Implemented in 2011-2015, the project later expanded to other communes. The later project, "Strengthening access to forest land use right of upland ethnic minority communities in Vietnam contributing to reducing illegal logging and natural forest transition process," funded by EU REDD+ Facility and European Forestry Institute, was implemented in Binh Long commune and neighboring communes: Dan Tien, Phuong Giao, Trang Xa, and Phu Thuong, which were also research sites.

As part of the capacity building component, ethnic communities in Thai Nguyen have established their own cooperatives. At least six cooperatives were set up in Vo Nhai District. Considered a legal entity, the communities used their cooperatives to amplify their collective voice and negotiation power to secure ownership of their forests and better prices for their timber and non-timber products and agricultural produce.⁵⁶

Beyond capacity building, part of their experience in REDD+ is the security of ownership of their forests. With the help of CERDA, the local communities in Thai Nguyen and Thanh Hoa accomplished the application process and were allocated forests and given forest titles that deem them the owners. In line with their approach to be a collective legal entity through their cooperatives, they have merged their lands to have a forest area large enough to qualify for REDD+. By doing so, they are eligible to submit proposals to appropriate government agencies to participate in the State's forest programs.



This also provides them the opportunity to participate in the future carbon market.

This experience of Thai Nguyen became the basis for succeeding efforts. A commune in Thanh Hoa used this model, which the provincial Department of Agriculture and Rural Development wants to scale up to the entire province. By early 2018, a total of 4,000 hectares of natural protection and production forests had already been secured in both provinces. With forest ownership at hand, the communities now aspire to gain full capacity to implement REDD+ themselves as they still heavily rely on external assistance (i.e., CERDA).

In terms of financial incentive, neither province has yet received any amount from the REDD+ program, as Vietnam is still in the readiness phase. The communities repeatedly expressed high hopes for this component, as it can be a significant alternative income source to help them cope with economic difficulties. But they were grateful that the program has already benefitted them in many ways and will continue to do so in the future.

In Thanh Hoa province, the ethnic communities, maximizing their forest ownership, applied for the Vietnamese Government Program 661, which provides financial incentives for forest protection.⁵⁷ The ethnic community in Cat Van commune, which was able to secure around 660 hectares of natural protection forests, has already been receiving benefits for three years. Eight communities in Thanh Lam commune also joined the program this year for protection of 320 hectares of forest and expect to receive financial benefits starting next year.

The communities also consider the Cancun Safeguards adopted by REDD+ as an important protection they can benefit from. Under these safeguards, community leaders believe that their land- and forest-related rights and traditional knowledge must be fully respected and their full and effective participation in forest management and protection must be realized. The ethnic women also noted that the safeguards emphasize these same rights for women, which they see will advance their rights not only in the community but in larger society.

The communities, however, identified one critical shortcoming in REDD+ in relation to Vietnam's ethnic peoples and customary tenure systems. REDD+ policies recognize only some traditional knowledge and practices but not the vital aspect of customary tenure systems: the ethnic peoples' rights over their ancestral lands and forests as enshrined and guaranteed by customary law. This is evident in the fact that REDD+ requires legal certificates and does not provide recognition to customary ownership of land. Without REDD+'s full formal acknowledgment of customary tenure systems, the program loses an opportunity to make a lasting impact on the Vietnamese government perspective on this matter.

Assertion of Customary Tenure Systems through REDD+

The ethnic groups are able to assert, seek recognition, and strengthen their customary land and forest tenure systems through REDD+. The study communities used REDD+'s capacity building component to acquire relevant knowledge and skills such as legal and technical information and training, which they believed they could not get anywhere else. The District People's Committee itself participated in the capacity building sessions and learned as much as they did, prompting its high-ranking officials to acknowledge CERDA's efforts to assist communities and strengthen the members' morale.

As a result of the capacity building, the community members were able to accomplish the requirements for application for forest ownership. For instance, the ethnic groups who reside in five communes of Vo Nhai District developed a forest management plan that features an inter-community linkage using a landscape approach that combines customary rights and state law. Considered innovations to their customary tenure systems, penalties similar to traditional punishments such as rice payment to the aggrieved party and denial of burial assistance from the period of wake to the burial have been included in the management plan.



Another exceptional output, the Hoa Binh community cooperative of Nung, Tay, San Diu, and Cao Lan ethnic groups produced a forest biodiversity inventory (as part of their application for REDD+ program), which documented the status and characteristics of their forests' biological diversity. The inventory indicates a rich plant biodiversity but scarce fauna. Although they see the deterioration of their forests, it was not until they saw the inventory that they became motivated as a community to take gigantic actions to counter the decline. Since the forests had been allocated to them in 2014 and 2016, they are working to rehabilitate them for at least five years. The motivations include replenishment of timber, NTFPs, and water to use for agricultural production, and in light of REDD+ they now also look forward to the carbon benefits from their forests.

The program further enabled the communities to establish a legal entity of their own through local cooperatives and alliances of cooperatives, which have helped them secure ownership over their forests among other benefits. Given the insufficient resources available and accessible to ethnic communities, having legal organizations is considered a precious opportunity. The establishment of cooperatives led to one way of asserting their customary tenure systems through REDD+: their determination and accomplishment of forest ownership application for at least 4,000 hectares of natural protection and production forests.

Aside from these, they also cited the Cancun safeguards, along with FPIC, as an opportunity to promote not only their land- and forest-related rights but also a vast array of human rights. In relation to this, they believe that REDD+ made the government more sensitive to their rights as forest owner ethnic peoples and their other land-related rights.

Through REDD+ related programs, the ethnic communities were able to network and partner with external organizations to work towards their communities' comprehensive development. These bridges and linkages introduced them to allies who sincerely look after their welfare and can champion their cause in both local and international arenas.

In general, the ethnic communities believe that forest-centered programs such as REDD+ emphasize the essence of their customary tenure systems—the community working as one to protect and sustain the integrity of their lands and forests for the sake of the next generation.

Summary of Key Findings

On State Laws and Policies

In spite of the great strides made in land- and forest-related laws and policies, the State provides very limited or no formal recognition to ethnic peoples' customary tenure systems and customary land- and forest-related rights. The national land registration process bypasses their traditional land administration system, rendering their rights conditional. Under the legal system, customary rights can only be legally recognized if they accomplish the registration process and secure certification to their lands and forests. While certain provisions in some State laws and policies aim to make lands and forests certifications more accessible to the ethnic minorities, these are not properly implemented on the ground mainly due to local government units' lack of resources to do so. Poor implementation of laws and policies coupled with ethnic peoples' limited access to legal knowledge and services restrict their involvement in the whole process.

On Customary Tenure Systems

Ethnic peoples' customary tenure systems persist in spite of the economic, social, and political developments in Vietnam. These systems manage to operate beyond the legal framework but have undergone significant innovations to be able to do so. These currently face a wide range of threats such as in- and out-migration, integration of non-ethnic population in ethnic communities, and limited State recognition. The State does not recognize customary ownership right to residential and agricultural lands

and barely recognizes ownership of their forests (i.e., forest titles are given only for production and scattered protection forests). Their rights to use, access, and transfer land are also restricted to what their land use rights certificates, forest titles, or forest management certificates stipulate, which usually do not cover the entirety of their ancestral lands and forests. Their rights to manage and control their lands and forests are similarly constrained by bureaucratic legal processes required in cases of land use change.

Given this limited recognition, the ethnic peoples settle for informal recognition of their customary claims given by Peoples' Committees, State-owned farms, and even local people who respect their sacred forests. However, they do not get this kind of recognition from private enterprises, which gives rise to tensions. They are also concerned about the susceptibility to abuse of State reclamation rights on lands and forests on certain grounds. With or without formal and informal recognition, the ethnic communities expressed they would continue to administer and use their ancestral lands and forests, as they believe it is their customary right to do so.

On Ethnic Women and Customary Tenure Systems

Vietnamese women, ethnic women included, remain marginalized in terms of land tenure security, with State law being more inclusive of women than customary law. Cultural factors play a critical role in the advancement of women's rights. Since customary law dictates the social and political dynamics in ethnic communities, steps must be taken to reconcile these two systems in favor of women. Ethnic women's rights remain immaterial on the ground due to social, economic, and socio-political circumstances, such as lack of resources among government institutions to implement gender-related policies. Gender laws and policies can facilitate change in some customary beliefs and practices that disadvantage women.

In general, gender equality remains an aspiration. But the increasing rate of involvement seen among ethnic women in land-related legal

and political processes should be maintained, if not improved, to encourage them to continue being part of the process. To do so, they should be aided to participate fully in land-related concerns.

On Customary Tenure Systems and REDD+ Implementation

The ethnic peoples' way of life provides them the innate motivation to be fully invested and involved in the implementation of programs relevant to their ancestral lands and forests such as REDD+. Their forest-centered traditional knowledge and systems as well as their warm welcome for the program (due to its regard for their cultural beliefs, knowledge, and practices) can help facilitate REDD+ on the local level. At this point, the ethnic communities in the study sites have high hopes for the program. Based on their experience so far, their expectations are already slowly being met especially on capacity building and security of forest ownership. They were able to gain benefits that equipped them with knowledge, skills, and mechanisms that eventually helped them to own their forests legally. The experience of one community became the basis for other communities.

Since REDD+ in Vietnam is still in the readiness phase, their expectations on financial incentives are yet to be fulfilled; Thanh Hoa communities meanwhile have applied with another program that had yield them financial gains as early as 2015. Identified as a critical shortcoming, however, is REDD+'s non-recognition of customary tenure systems. The communities believe that this is a lost opportunity to make a lasting impact on the Vietnamese government perspective on the matter.

On Assertion of Customary Tenure System through REDD+

The ethnic communities have used REDD+ to assert, seek recognition, and strengthen their customary tenure systems mainly through its capacity building component that served as



their gateway to numerous benefits, such as acquisition of legal and technical knowledge and training and establishment of local cooperatives, both of which helped them ultimately secure ownership of their forests. They also identified other program benefits they gained that can help assert their customary tenure systems. These are the Cancun Safeguards' promotion of their rights as ethnic peoples, REDD+'s role in making the government more sensitive to their rights, and linkages they developed with various organizations.

Recommendations

For the Government

The government should provide resources to its local units to ensure that ethnic groups and local communities are served well and to implement laws and policies to the local peoples' advantage.

On forest governance, the government should promote and encourage ethnic communities to uphold their traditional forest administration mechanisms. The lesson learned from the project implemented in one of the research areas shows that where forest land use rights are communal, forest protection is effective and efficient vis-à-vis individual and/or household allocation.

The government should provide mechanisms to resolve disputes over lands and forests. It should identify solutions and have mechanisms in place to solve conflicts between the State, private enterprises, and local people. Resolutions of conflicts on lands and forests should respect individuals or households who used the area for a long period of time without use certificates and allocate the area to them.

For the REDD+ Program

REDD+ can explore ways to make cooperatives more accessible and workable for the ethnic peoples, which is supposed to be considered under the Adaptive Collaborative Management Approach. The program should also be sensitive to communities' level of knowledge and attitude on cooperatives. It must be noted that some communities may have no idea of how these operate, which can make them fearful of the idea. These considerations can be critical to the success of REDD+.

The program should also take the initiative to recognize ethnic communities' customary tenure systems and customary rights under them. This way, it can influence the Vietnamese government to change its current stance on the matter. In relation to this, REDD+ should conduct in-depth consultations with its partner ethnic communities to learn more about their realities, aspirations, and demands in relation to their lands and forests. Through this, REDD+ can create mechanisms to meet the expectations of ethnic peoples on the program.

For the Ethnic Peoples

Ethnic communities, especially ethnic women, must maintain their involvement in political and legal processes they have access to. They can exploit these channels to voice out their perspectives and positions on important matters that concern their communities.

They can also build on the partnerships and linkages they have forged with local and international NGOs who can be allies in future endeavors.

Most importantly, the ethnic peoples must sustain and protect their customary law and traditional knowledge, systems, and practices including customary tenure systems.



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Endnotes

- ¹ Vietnam's legal frameworks use the term "ethnic minorities" to refer to the indigenous peoples. The term is clearly defined in Decree 05/2011 or Forest Protection and Development Law.
- ² For the purpose of this paper, they will be regarded as such. This paper does not use the term ethnic minorities that much to emphasize the distinction between the individual yet distinct members as implied in the term ethnic peoples and the collective as implied in the term ethnic groups or ethnic communities.
- ³ The Kinh ethnic group refers to the ethnic Vietnamese who comprise the majority, while the 53 other ethnic groups refer to the ethnic minorities who have distinct cultural identities.
- ⁴ Stipulated in Article 53 of 2013 Constitution.
- ⁵ Under REDD+ readiness preparation phase, the Vietnamese Government also encourages participation of INGOs (JICA, SNV, Winrock, etc.) national NGOs including CERDA, which became a partner, and additional networks of ethnic communities.
- ⁶ In this project, MARD was designated as executing agency, Vietnam Administration of Forestry as project owner, and FAO, UNDP, UNEP as project implementing partners.
- ⁷ This project is further substantiated in the section, CTS and REDD+ Implementation, as it covers one of the research areas: Thanh Hoa province.
- ⁸ Stipulated in 5.1.e of NRAP
- ⁹ Major literature that points this out include Vietnam Land Access for Women (LAW) Program's Training Toolkit for Land Law and Gender (Alvarado, Hong, Mukasa, Douglas, Schutzman, Nguyen, Nguyen, and Vu, 2015) and Mekong Land Governance's 'The Recognition of Customary Tenure in Vietnam' (Ironside, 2017).
- ¹⁰ This claim is based on relevant literature (identified in previous footnote) and the research participants themselves.
- ¹¹ Ibid.
- ¹² The recognition of agricultural cooperatives as an official category of land owner was enshrined in the 1958 Vietnam Constitution.
- ¹³ Dang, Pham, and Ngo (2016) argued this in their paper.
- ¹⁴ Directive 100 (1981) encouraged households to be involved in agricultural production while Resolution 10 (1988) provided recognition to households as a "production entity" and that eventually received allocated lands (Alvarado, Hong, et al., 2015).

¹⁵ The new forestry law was approved by the Vietnamese government in November 2017 to be implemented in January 2019 (VNS, 2017).

¹⁶ This is stipulated in Article 53 of 2013 Constitution and Article 4 of 2013 Land Law.

¹⁷ Other grounds for reclamation are “violations of land law” (Article 64) and “termination of land use in accordance with law, voluntary return of land, or risks of threatening human life” (Article 65).

¹⁸ This remains in 2013 Land Law (Article 110).

¹⁹ Aside from the general rights stipulated in Article 166, land users also have “the right to exchange, transfer, lease, sublease, inherit, donate, mortgage land use rights and contribute land use rights as capital” (Article 167).

²⁰ This is stipulated in Articles 3, 4, and 8.

²¹ The provision of these 20-year renewable contracts is already considered a big leap from the contracts provided by the State in the past, which holders are required to renew every year. This is also reflected in Decree 168 (2016) on the Contract of Forest, Garden, and Surface Water Area in SUFs.

²² Similar to the provisions stipulated in Articles 61 and 62 of 2013 Land Law, the New Forestry Law reflects the authority of the State, as the representative of the Vietnamese people (the land owner), that can reclaim lands based on grounds such as “national defense and security” and “socio-economic development in the national or public interest” (Article 22).

²³ Specific provisions of the New Forestry Law stipulate recognition of ghost forests (Article 4), classify these forests as SUFs (Article 5), which the State can allocate to community for management (Article 14).

²⁴ Publication details of ER-PD indicate that it was submitted on January 5, 2018 (MARD, 2018).

²⁵ As mentioned earlier, this decision is the National [REDD+] Action Program (NRAP).

²⁶ As stipulated in Article 1 of Decision no. 5399

²⁷ *Ibid*, Article 8

²⁸ As stipulated in Article 1.1 of Decision no. 5337

²⁹ *Ibid*, Article 1.3

³⁰ *Ibid*

³¹ The term ‘maximize’ is used to indicate that those who do not have necessary legal documents can still benefit. It must be noted that the ACMA encourages people or households, even those who have no legal documents, to participate and still be able to benefit depending on specific arrangements. Aside from REDD+, Vietnam also has the Payments for Forest Environmental Services (PFES) program that provides incentives to communities for their forest protection efforts and cater to all people in the community willing to participate in the program.

³² It must be noted, however, that women were not usually involved in the creation of these rules most especially in patriarchal ethnic groups.

³³ The case of Kinh ethnic group presents an interesting case as they have lost some cultural and spiritual practices as they become more integrated in the formal economy.

³⁴ In the case of the Nung ethnic group, they further specified that the violator must seek healing from the shaman of the locality that governs the forests he/ she violated. The shaman of his own community cannot do the healing for him/ her as this is not within the shaman’s power.

³⁵ These are just some of the seven identified land user types under the Land Law (Article 5). Principally, ethnic communities can apply under the community land user type but the legal framework favors cooperatives more.

³⁶ These provisions are constitutional as the 2013 Constitution explicitly states that “The State may recover land currently used by organizations or individuals in case of extreme necessity prescribed by a law for national defense or security purposes; or socio-economic development in the national or public interest.” (Article 54)

³⁷ LURCs can only cover up to 400 square meters for residential land, while forest allocation with a base of 50 years and forest management contracts with a base of 20 years only cover 30 hectares.

³⁸ Vietnam’s ER-PD identified these as significant threats to REDD+ but the discussion of these issues in the document also implies its effect on CTS (MARD, 2018).

³⁹ One of the communities to implement this practice and see its implication is Binh Son Village, Cuc Duong Commune, Vo Nhai District, Thai Nguyen (Vu, Nguyen, Nguyen, and Pham, 2013).

⁴⁰ There had been debates with DPC on the inclusion of traditional regulations but with the communities’ eagerness and assistance of CERDA through REDD+, the DPC reversed its initial ruling to reject the proposition and agreed to consider customary regulations in the rules they implement.

⁴¹ The other ethnic groups referred to here include Kinh, Tay, San Diu, San Chi, Dao, Hmong, and Hoa.

⁴² The Nung mentioned that in light of this new living arrangement with various ethnic groups with distinct cultural identities, only the Hmong and Dao communities were able to sustain most of their tangible culture (e.g., traditional houses and clothes). They, however, noted that their intangible culture remains somehow intact (e.g., music, dance, etc.).

⁴³ Bui, Foerster, Nguyen, et al. (2004) and Ironside (2017) also discussed this harsh reality on the ground.

⁴⁴ This reflects the statistics published by UN Women (2015) on the situation of ethnic women and girls in Vietnam.

⁴⁵ *Ibid*

⁴⁶ Bui, et al. (2004) and Ironside (2017) also took note of this reality.

⁴⁷ Both 2013 Land Law and 2014 Law on Marriage and Family encourage having both husband and wife’s names in legal documents such as LURCs and forest titles.

⁴⁸ This is also a reality among non-ethnic population as reflected in statistics. The 2008 Living Standard Assessment revealed that only 18.2% of LURCS registered in rural areas and 29.8% registered in urban areas bore both names of the couple (Alvarado, Hong, et al., 2015).

⁴⁹ This is covered in both 2013 Land Law and 2014 Law on Marriage and Family.

⁵⁰ These informal rights organically arose during discussions of women’s rights to own, access, and use the forests. Although they

do not see this as an informal recognition of their customary rights, they do believe these conditions bring benefits to them.

⁵¹ This coincides with the idea of sustainable development.

⁵² Cases of these in literature are cited by Bui, et al. (2004) and Vu, Nguyen, Nguyen, Nguyen, and Pham (2013).

⁵³ Thanh Hoa anticipates thousands of migrants to enter the province every year (MARD, 2018, p. 34).

⁵⁴ This is discussed further in the ER-PD document (MARD, 2018, p. 32).

⁵⁵ This is also one of the reasons why the ACMA was proposed so that it can operate at a local level to understand the local issues and provide a mechanism to address those relating to land and forest management.

⁵⁶ According to the New Forest Law (to be implemented in 2019), as an economic organization and legal entity, cooperatives are allowed to manage lands and can be given forest management contracts. Aside from this reason, ethnic communities prefer to register under the cooperative type of ownership as it helps them to protect forests at low cost, to manage timber and prepare harvest design, and to apply for harvest license, which is needed to directly sell timber to enterprises and have a legal capacity to negotiate premium prices. This is compared to the measly amount they can secure if they were to indirectly sell timber individually to potential buyers, through middlemen for instance.

⁵⁷ Program 661 is stipulated in Decree 99 (2010) on the Policy of Payment for Forest Environmental Services and Decision 661 on the Forest Protection Program. The State through VNFF distributed the money to the SUF board or district authority who gave the contract of forest protection.



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