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COMMUNITY LAND AND RESOURCE TENURE RECOGNITION: REVIEW OF COUNTRY EXPERIENCES

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Many villages in Bago region, one of Myanmar's prime rice production areas, have received land use certificates for their paddy land plots. (photo: Nayna Jhaveri)

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ACRONYMS AND ABBREVIATIONS

ADO	Ancestral Domains Office (Philippines)
AMAN	*Aliansi Masyarakat Adat Nusantara* (Indigenous People's Alliance of the Archipelago)
APA	Aboriginal Peoples Act (Malaysia)
ASEAN	Association of Southeast Asian Nations
BAL	Basic Agrarian Law of 1960 (Indonesia)
BFA	Basic Forest Act of 1967 (Indonesia)
BPN	*Badan Pertanahan Nasional* (National Land Agency, Indonesia)
CAB	NLMA's Cabinet Office (Lao PDR)
CADC	Certificate of Ancestral Domain Claim (Philippines)
CADT	Certificate of Ancestral Domain Title (Philippines)
CALC	Certificate of Ancestral Land Claim (Philippines)
CALT	Certificate of Ancestral Land Title (Philippines)
CLS	Customary Land Secretariats (Ghana)
CRL	Community Rights Law of 2009 (Liberia)
CSO	Civil Society Organization
DUAT	*Direito de Uso e Aproveitamento da Terra*
ELC	Economic Land Concessions (Cambodia)
FAA	Forestry Affairs Act of 1999 (Indonesia)
FAO	Food and Agriculture Organization of the United Nations
FARC	Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarios de Colombia*)
FPIC	Free, Prior, and Informed Consent
FUNAI	National Indigenous Foundation (*Fundação Nacional do Índio*) (Brazil)
GDA	Gender and Development Association
GIZ	*Deutsche Gesellschaft für Internationale Zusammenarbeit*
GOC	Government of Colombia
ICC	Indigenous Cultural Community (Philippines)
ILO	International Labor Organization
INCODER	Colombian Institute of Rural Development (Colombia)
IP	Indigenous Peoples
IPRA	Indigenous Peoples Rights Act (Philippines)
IWGIA	International Work Group for Indigenous Affairs
JKPP	National Community Mapping Network (Indonesia)
LAP	Land Administration Program (Ghana)
LMAP	Land Management and Administration Project (Cambodia)

MLMUPC	Land Management, Urban Planning, and Construction (Cambodia)
LRA	Land Rights Act (Liberia)
LRP	Land Rights Policy (Liberia)
MI564	Ministerial Instruction 564 of 2007 on Adjudication for the National Land Management Authority (Lao PDR)
MD88	Ministerial Decree 88 of 2008 on the Implementation of the 2003 Land Law (Lao PDR)
MD101	Ministerial Decree 101 of 2005 on the Implementation of the 2003 Land Law (Lao PDR)
MONRE	Ministry of Natural Resources and the Environment (Lao PDR)
MRD	Ministry of Rural Development (Cambodia)
NCIP	National Commission for Indigenous Peoples (Philippines)
NGO	Nongovernmental Organization
NLC	National Land Code (Malaysia)
NLMA	National Land Management Authority (Lao PDR)
OECD	Organization for Economic Cooperation and Development
PDR	People's Democratic Republic
PNDCL	Land Title Registration Law of 1986 (Ghana)
PROCEDE	Program for Certification of *Ejido* Land Rights and the Titling of Urban House Plots (Mexico)
RAN	*Registro Agraria Nacional* (National Agrarian Registry [Mexico])
SD83	Subdecree No. 83 on Procedures for Registration of Land of Indigenous Communities of 2009 (Cambodia)
SLC	Sarawak Land Code (Indonesia)
SLCs	Social Land Concessions (Cambodia)
SUHAKAM	*Suruhanjaya Hak Asasi Manusia Malaysia* (National Human Rights Commission of Malaysia)
TGCC	Tenure and Global Climate Change Program
TI	Indigenous Land (Terras Indigenas) (Brazil)
TLA	Tribal Land Act (Botswana)
VFV	Vacant, Fallow and Virgin Lands Management Law (Myanmar)

Local land governance in action in Lao PDR: Women develop a village map. (photo: SDC Mekong)

EXECUTIVE SUMMARY

In recent years, many governments globally have formally recognized community land and natural resource tenure, either based on existing customary practices or more recently established land governance arrangements.[1] These tenure arrangements have been called by a variety of names, such as community, customary, communal, collective, indigenous, ancestral, or native land rights recognition. In essence, they seek to establish the rights of a group to obtain joint tenure security over their community's land. This approach is not necessarily limited to use by those communities that largely manage their lands solely on a communal or collective basis, because it can encompass individualized arrangements within it. In fact, recognizing the boundary of all lands held by a community, and then allowing the community itself to define individual rights within that community land boundary, can be much more cost-effective (Deininger, 2003). Neither is it an approach solely used by indigenous, ancestral, or native communities, because any rural community with established occupation of their lands can potentially be eligible for such protections. We use the term "community land and resource tenure" because many community-based forms of tenure encompass a range of different land use types, including permanent agricultural land, shifting or swidden cultivation areas, forests, grazing areas, and water bodies.

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security, established in 2012, affirm the importance of recognizing and respecting all legitimate tenure rights holders and their rights, whether formally recorded or not (Food and Agriculture Organization of the United Nations [FAO], 2012). This includes indigenous peoples (IP) and other communities with customary tenure systems that exercise self-governance of land, fisheries, and forests.

In some countries, these community land and resource tenure rights have been developed to apply broadly to self-defined communities; in others,

1 "Tenure" refers to an institution with rules that define how property rights to land are to be allocated within a community or society. These rules define rights of access, use, management, exclusion, and alienation.

the tenure rights have been designed to address the needs of a particular group specifically, such as IP or identified customary or native communities. There is growing support for community tenure because it offers a cost-effective and rapid process for recognizing the rights of communities to their lands through local systems of land governance, particularly in the face of external threats. Given that devolved forms of land governance, customary or otherwise, remain significantly active globally, there is considerable interest in learning lessons from diverse experiences with community land and resource tenure recognition.

In a growing number of countries, legal (formal) recognition of community claims to land provides a basis for a range of rights codified in legislation. This recognition may be established anywhere along the continuum from formally registered title, certified ownership rights, or through acknowledgment of long-standing customary use and access rights. The process to recognize these groups' rights formally varies widely across countries with some countries requiring communities to register officially as legal entities (in the form of associations, for example), while others utilize existing institutions or recognize the de facto existence of certain types of communities through constitutional provisions. In doing so, some of these recognition processes are limited to affirmation of group rights (also referred to as collective or communal rights), while some systems can, in addition, recognize individual rights within communal holdings. In such cases, individual rights may follow customary practice or law, or the law may provide the basis for individuals to obtain title to lands within a collective holding.

In the case of customary land regimes, once recognized, the role of customary law in land management also varies considerably across jurisdictions—with some providing for extensive customary law application through statute, while others provide little or no opportunities for its application. If the continuation of customary land management practices is not required by law, then the development of sustainable land use plans may be called for. Where developers seek to establish projects on such community lands, the government can mandate the need to obtain free, prior, and informed consent (FPIC) from local communities regarding changes in land use or management of these lands.

The types of land recognized within community land and resource tenure systems vary considerably: in some jurisdictions, rights are limited to settlement and agricultural lands; while in other countries, lands recognized may include forests, shifting or swidden cultivation areas, grazing land, hunting areas, fallow fields, coastal lands, water bodies, and sacred forests. Finally, the set of rights conveyed by various

Community members of Faisako Village in Zambia's Maguya Chiefdom discuss field demarcations during community agricultural parcel mapping. (photo: Jeremy Green)

recognition processes vary considerably across countries, particularly with regard to the rights of alienation, such as rights to lease or sell land.

The global experience indicates that there is no one best practice that is applicable to all national contexts. Instead, it is clear that careful tailoring of a national approach to community land and resource tenure recognition requires a detailed understanding of the national government administration, policy, and legal context; the political economy of development; and the diversity of existing land tenure practices (customary or otherwise) that prevail across a country. This review of a wide variety of country experiences aims to support the design of local-level pilots for community land and resource tenure recognition in Myanmar, which will, in turn, inform the national land policy, legislation, and regulatory reform process that is underway with USAID support.

CASE STUDIES

This review primarily focuses on five member countries of the Association of Southeast Asian Nations (ASEAN), as their political, economic, and social conditions have many similarities to the conditions Myanmar is experiencing. For example, the countries face similar characteristics in terms of government capacity and approach, new investment pressures (particularly in the agricultural sector), ethnic diversity, the role of civil society organizations (CSOs), and the overall state of conflict over land rights. In addition, the review also covers experiences from a select number of countries in Africa and Latin America that provide insight into the diverse ways that countries in other regions have approached community land and resource tenure recognition.

The ASEAN country case studies include an examination of the "black letter law"[2] and its implementation; the Africa and Latin America cases focus on specific implementation issues. The report highlights a range of lessons gained from this diverse set of experiences. The analysis focuses on the following main elements of any community land and resource tenure recognition system:

- Community land rights holders,
- Recognition and registration processes,
- Land types on which community tenure is recognized,
- Customary law application, and
- Rights conferred.

The major strengths and weaknesses in each country approach can be found in Table 1. Following this table is a summary of each country's approach and achievements.

CAMBODIA

In Cambodia, recognition of customary rights is limited to IP groups under the Land Law of 2001.[3] Three ministries are involved in this complex process, which requires that IP communities first form a legally recognized entity, record their by-laws for land use management, and then prepare their communal title application, which includes preliminary demarcation of all lands and resolution of all land rights disputes. All of these steps require considerable technical assistance from nongovernmental organizations (NGOs), and in addition, a title application fee is required for the application to be processed. Individual parcels of residential and agricultural lands, shifting cultivation lands as well as small plots of sacred and burial forest can be included within this communal title. Although interim protections are available to protect IP communal lands while they go through the process, very few protections have been offered in practice. These communal lands are not alienable (i.e., cannot be transferred to new owners), although individuals may receive an individual private title, which is then removed from the communal holding. While the Cambodia model does provide IP with communal land titles, the process is complex and involves multiple ministries. As a result, very few communities have successfully completed the process to date.

INDONESIA

In Indonesia, the Constitution recognizes traditional communities and their customary (*adat*) rights to land within certain limitations. Many IP inhabit land classified as "state forest area." In a 2012 landmark case, the Constitutional Court recognized customary land rights over forestlands by determining that provisions of the Forestry Affairs Act of 1999 were unconstitutional and ruled that IP customary forests should not be classified as "state forest areas." While this landmark case presents opportunities for customary land rights recognition, the Forest Affairs Act currently allows communities to acquire a "customary forest" (*hutan adat*) license. This requires that the community must be legally recognized by documenting customary authorities and acts, exist in its traditional form, have leaders and institutions, occupy a defined area, have legal institutions to uphold customary

2 Black letter laws are well-established legal rules that are no longer under dispute.

3 Information on many laws cited here can be obtained from http://faolex.fao.org.

TABLE 1: MAJOR STRENGTHS AND WEAKNESSES OF THE LAND-RELATED SYSTEMS CONCERNING COMMUNITY LAND AND RESOURCE TENURE

COUNTRY	STRENGTHS	WEAKNESSES
CAMBODIA	• IP provided with communal land title. • A diversity of land types is included, including fallow land as part of shifting agriculture systems, and some forestlands. • Individual households can obtain title to their lands. • Individuals that leave the community are eligible for compensation of their individual customary holdings.	• Restricted to IP communities. • Does not include urban lands, all forestlands, and seasonal lakes. • Title contingent on continuation of traditional practices by community. • Complex and lengthy process involving multiple ministries with limited results. • Those who elect for individual title will not be able to join communal titles.
INDONESIA	• Constitution recognizes traditional communities and their customary (*adat*) rights to land. • Community customary rights cannot be extinguished or restricted without prior consent of *adat* communities, and just compensation. • Individuals may use customary rights as a basis for acquiring private title.	• No current means to register communal title. • Individuals may use customary rights as a basis for acquiring private title but must extinguish their customary rights and conform with private land law rights. • The process to acquire rights in forestlands (70% of *adat* lands), is complex; the community must be legally recognized by documenting customary authorities and acts, exist in its traditional form, have leaders and institutions, occupy a defined area, have legal institutions to uphold customary law, and traditionally use forests for the community's daily needs.
LAO PEOPLE'S DEMOCRATIC REPUBLIC (PDR)	• Collective or communal tenure applies to all lands, not only IP customary lands. • Wide range of organizations eligible to apply for collective or communal title. • A wide range of land use types is covered: agricultural, forests, grasslands, water bodies, and others.	• Lack of clear practical guidance as to where communal or collective titles apply. • Lack of clear process on how communal or collective land titles can be obtained. • Administrative reorganization at the ministerial level slowed down the process. • Land Policy needs to be finalized for clearer guidance to be provided on how titles can be obtained.
MALAYSIA	• The statutory recognition of customary land rights is available to majority Malay ethnic group, Orang Asli (original peoples), as well as native peoples. • Doctrine of common law supports indigenous land rights. • Native Courts Enactment of 1992 permits adjudication of *adat* law systems, particularly to address long-standing conflicts.	• High burden to establish ownership through documentary evidence. • Long processing times for obtaining native customary title. • Conflicts among communities over boundaries results in perimeter surveys being cancelled. • Aerial photos and topographical maps are restricted and only available for community dialogue sessions. • Community maps are not allowed under amendments to the Surveyor Ordinance. • Only rights to settlement and cultivation areas eligible for registration; rights to areas customarily used for hunting/gathering and sacred sites are not.
PHILIPPINES	• Customary land rights and autonomy recognized in statutes. • Constitutional entrenchment of land rights regime and autonomy. • Grant of formalized titles that transfer land from state to communities. • Law recognizes both individual and community rights. • Customary law determines allocation of rights within the community. • FPIC process legally enshrined. • Customary dispute resolution legally recognized. • Ancestral Domains Office (ADO) assists in resolving disputes. • Rights of displaced IP/Indigenous Cultural Communities (ICC) to ancestral domain recognized.	• Funding, logistical, and manpower shortages in the National Commission on Indigenous Peoples (NCIP). • Bureaucratic and procedural complexities in land-titling process causing evidential burden. • FPIC process inadequately followed. • Prevailing assumption that ICC are homogenous (leading to exclusion of coastal dwellers and inadequate recognition of rights to coastal settlements, shorelines, and sea). • Law requires communities to practice traditional forms of production, but ICC are increasingly integrated into modern economic systems. • Multiple types of tenure regimes not adequately recognized by Certificate of Ancestral Domain Title/ Certificate of Ancestral Land Title (CADT/CALT). • Stronger role of local governments enabled through decentralization undermines awarding of titles to IP/ ICC. • Suspension of titles to areas with overlapping claims.

COUNTRY	STRENGTHS	WEAKNESSES
BOTSWANA	• Land Boards that comprise customary leaders, government-appointed members, and community-elected representatives are responsible for land administration.	• Composition of Land Boards heavily represented by government resulting in marginalization of traditional authority.
GHANA	• Customary Land Secretariats introduced by donor projects to support the process to register customary lands under the 1986 Land Title Registration Law.	• The informal role of Customary Land Secretariats in the registration process has led at times to issues of legitimacy both within customary communities, and with government agencies with formalized registration mandates. • Reliance on donor funds for expansion and strengthening of Customary Land Secretariats.
LIBERIA	• Proposed legislation recognizes customary rights.	• Ambitious agenda for organizing communities and registering their rights may be unrealistic to implement. • Many customary lands are already under concession agreements.
MOZAMBIQUE	• Community ownership is recognized in the Constitution and covers most of the country's land base. • Government issues community land leases that include land for expansion. • Community land may be leased to investors with consent of community and subject to a community-investor agreement.	• Inadequate registration of community land leases compared to estimated area of customarily held land, particularly compared to leases issued to investors. • Inadequate safeguards in place to support customary interests over those of more sophisticated investors.
BRAZIL	• Demarcation of IP lands is required under the law.	• Demarcation process involves limited community participation. • Implementation of demarcation requirements has been limited and process protracted.
COLOMBIA	• Constitutional recognition of collective land rights of IP and Afro-Colombian communities. • Indigenous reserves are legal, social, and political entities with a collective title that are owned and managed with full private property and resource rights according to traditional indigenous laws.	• Displaced peoples' population presents challenges to implementation.
MEXICO	• Long-standing, institutionalized example of formally recognized communal rights in the form of *ejidos*. • Permits communal and individual title in an *ejido*. • Title includes full rights of alienation.	• More effort needed to ensure gender and intergenerational equity in conveying *ejido* property rights.

law, and traditionally use the forests for meeting the community's daily needs. This rigorous process presents significant obstacles to implementation. That said, the Constitutional Court's recognition of customary rights has spurred participatory mapping of IP lands; some 4.8 million hectares were submitted to the One Map Initiative by December 2014. It is expected that a clearer process for secure recognition of customary lands will be established once a draft IP law is finalized along with clarification of the extent of those land rights. Finally, it should be noted that individuals may acquire private title to customary land but must extinguish their customary rights and conform with private land law.

LAO PEOPLE'S DEMOCRATIC REPUBLIC (LAO PDR)

In Lao PDR, the government owns all land, but may certify and/or grant land titles to individuals, villages, and organizations. Under the law, the majority of land in Lao PDR is eligible for collective or communal ownership subject to government approval, and customary ownership may provide the basis for collective ownership. Land owned collectively is not alienable but land within a collective title may be managed in conformity with tradition (e.g., allocated to individuals) so long as it is consistent with the law. The process is administered at multiple levels, from the national to the district,

by the National Land Management Authority. To date, collective titles have only been issued in two small areas. There remains a need to clarify both the process for a community to obtain title to their lands, as well as the distinction between collective and communal title used in different but related pieces of statute.

MALAYSIA

Malaysia has three distinct systems that recognize customary rights. In Peninsular Malaysia, Malay Reserve Lands have been reserved for Malay people as the original inhabitants of this area. These lands may not be sold to non-Malays but pass through private title. Orang Asli, a minority ethnic group on the peninsula, however, have tenancy rights (but not title) on their customary lands at the individual, household, and community levels. These rights are not alienable. These rights may be obtained in Aboriginal Areas and Reserves declared by the state but do not include reserve lands including forests. In other areas of Malaysia, the communal customary tenure of ethnic groups identified in the Malay Constitution are recognized. In Sarawak, for example, ethnic minorities may hold customary communal rights (although no alienable title). While this does not include forest reserves, other forestlands may be included. Customary law is also given voice through native courts that adjudicate many issues related to native lands using customary law and its systems. To date, despite the presence of adequate statutorily established enabling frameworks for the recognition of customary lands, in practice, the process has been slow and drawn out due to complications in the recognition process.

PHILIPPINES

The Philippines recognizes the customary or ancestral land rights of what it terms "indigenous cultural communities" (ICC), as well as autonomous region populations. Based on the 1987 Constitution that protects the identity and rights of ICC, the 1997 Indigenous Peoples Rights Act (IPRA) is a landmark piece of legislation for protecting the ancestral domain of ICC. Beyond collective title to ICC ancestral domain lands, individual title is also available for acquisition both within customary title areas and outside so long as an ancestral claim can be proven. Transfers are not permitted under the law. It is one of the few laws for IP globally that includes a requirement for FPIC. This process is administered through a government agency, the National Commission on Indigenous Peoples, set up specifically to administer IP lands. To date, some 56 percent of the area eligible for communal rights recognition has been titled.

AFRICAN CASE STUDIES

In **Botswana**, Tribal Land Boards administer customary lands and comprise community-elected representatives and government appointees. This differs significantly from customary administrative systems dominated by chiefs. While these boards provide more transparent and democratic land administration institutions, the actual application of customary law and practice in land administration has been reduced, and the presence of government appointees on the boards has provided opportunities to promote government land agendas over the interest of customary practice.

In **Ghana**, Customary Land Secretariats (CLSs) have been created with the support of donors to educate and enable communities to complete the mandatory land registration process. While CLSs can play an important role in improving the efficiency of these registration processes, their reliance on donor funds and their informal role in the registration process has at times led to issues of legitimacy both within customary communities and with government agencies responsible for formalized registration mandates.

In **Liberia**, the proposed definition of customary land in the 2013 Land Rights Policy is expansive. It could conceivably cover much of the rural hinterland of the country. Draft legislation would require implementation of recognition processes that includes registration of communities and demarcation of their lands. There is limited capacity to implement this ambitious agenda, which could be further complicated by active concessions that cover up to 23 percent of the country's land base, including significant customary holdings.

In **Mozambique**, all land is owned by the state, but communities, individuals, and investors may acquire 50-year "rights of use and benefits" (*Direito de Uso e Aproveitamento da Terra* [DUAT] in Portuguese). For communities, DUAT cover customary lands and, while a registration process is outlined in the Land Law, community DUAT are recognized under the law, regardless of whether community DUAT are formally registered. In contrast, investors must undertake a formal process to register DUAT that includes a determination of whether there are any community DUAT associated with the proposed investment area. Permission must be sought from the community for the investor to move forward with the DUAT process. Despite the existence of a registration process for community DUAT, implementation of that process has been rather modest in comparison to the number of investor DUAT processes developed.

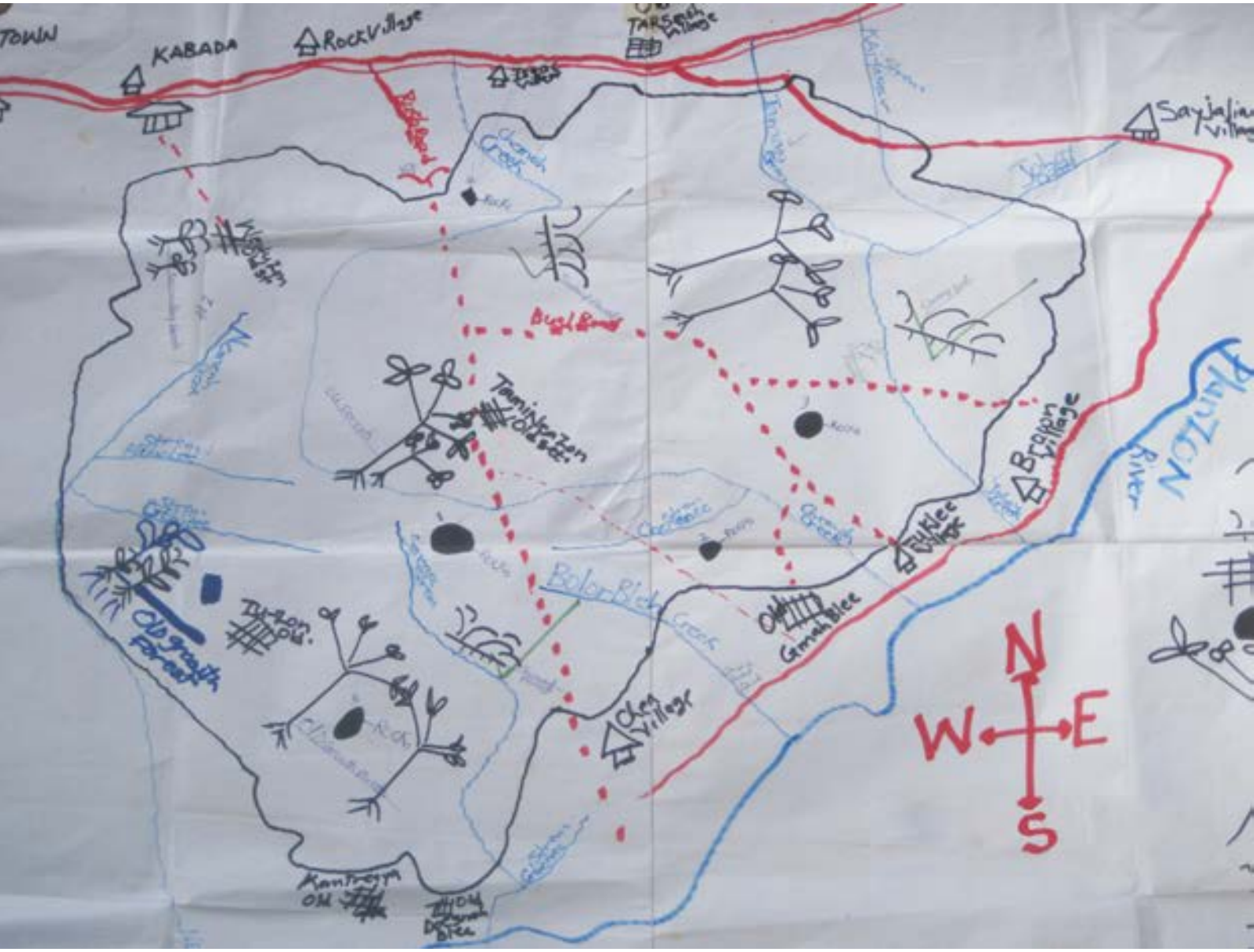
LATIN AMERICAN CASE STUDIES

The 1973 Statute of the Indian and Article 231 of the 1988 Brazilian Constitution guarantee rights to the land traditionally inhabited or occupied by indigenous communities, irrespective of whether a title officially exists. In **Brazil**, the process for recognition of customary rights for indigenous territories includes boundary identification and delimitation, demarcation, legal ratification, and agrarian regulation. While these steps are termed "participatory," the government plays a significant role at each stage in this lengthy and protracted process. As a result, the mandatory registration process has made limited progress in implementation. This example serves to illustrate the importance of ensuring that communities are actively involved in demarcation to ensure legitimacy for the recognition process.

In **Colombia**, the 1991 Constitution recognized the multiethnic character of its society and conferred collective land rights to both indigenous and Afro-Colombian groups. However, there is a significant difference between the rights of indigenous and Afro-Colombian communities and how their collective territories are governed. Indigenous reserves are legal, social, and political entities with a collective title that conveys full private property and resource rights, which are administered in accordance with traditional indigenous laws, excepting subterranean mineral rights. In contrast, Afro-Colombian territories may receive collective land title but are not considered sovereign communities or independent units of local governance. Finally, while Afro-Colombian communities may exercise extensive land and natural resource use rights on their lands, they must adhere to the government's policies and regulations.

Although communal land rights have been recognized in **Mexico** in the form of *ejidos* since 1917, prior to the neoliberal reforms of 1992,

Communities develop a land use map as part of the forest management planning process in Sinoe County, Liberia. (photo: Vaneska Litz)



Mexico's *ejido* lands were not alienable. Reforms introduced post-1992 created alienation rights as well as certification of individual parcels within *ejidos*. Despite concerns that this would undermine the communal land rights system, collective land ownership remains a significant and important land administration category. The strength of long-standing *ejido* land institutions is credited with this success, as it allowed the process of individualization to occur in a relatively transparent and non-confrontational way.

ANALYSIS AND PROGRAM DESIGN CONSIDERATIONS FOR MYANMAR PILOTS

Analysis of the case study country experiences provides guidance to policymakers in Myanmar and identifies key issues for consideration. Foremost among these considerations addressed below are questions regarding which groups can be eligible for community land and resource tenure recognition, the types of lands that can be included in such recognition, the process to achieve formal recognition (including certification and registration), and the types of ownership rights that will be conferred in the community tenure bundle.

COMMUNITY LAND RIGHTS HOLDERS

Currently, there is no legislation in place in Myanmar to recognize community land and resource tenure rights, but the Association Law of 2014 could potentially be used to assist communities or groups wishing to secure formal recognition and protection of their community tenure rights and would allow for registration at the township level without payment of any fee. However, there is a question as to the current applicability of this law since the implementing rules and procedures have not been enacted.

In addition to the Association Law (2014), communities or groups in Myanmar seeking formal recognition and protection of community land and resource tenure could potentially use provisions from the Farmland Law of 2012, which permit the issuance of land use certificates to farmland in the name of organizations.

In the countries reviewed here, rights holders have included villages; individuals; organizations of various kinds; and IP identified in statute, constitutions, or through registration processes. Myanmar's population comprises the ethnic majority Bamar people, and a large number of ethnic minorities who live in upland or borderland areas. As such, decisions will need to be made regarding which groups' community tenure rights will be recognized. Whatever way the rights holders are identified in law, these groups will need to be recognized as legal entities through either existing law or new legislation. Examples from the countries reviewed demonstrate that those legally recognized could include associations, cooperatives, producer groups, long-standing villages, cultural or religious groups, or new entities created through legislation that are defined by the government or through a self-selection process.

RECOGNITION AND REGISTRATION PROCESS

In Myanmar, the Association Law (2014) provides a mechanism to create legal entities that may hold assets, and the Registration Act of 1909 provides the procedural framework for issuance of title and registration of deeds in the country. However, the deed registration system in Myanmar is characterized by the overly bureaucratic procedures required to create title free of any liens. While the Forest Law (1992) contains provisions for granting various rights of use over forestlands, such as for village firewood plantations or local supply plantations, the procedures for how this can be accomplished are not clearly defined in the current law, and these resource rights do not confer ownership (Chapter V).

In considering whether and how to recognize community tenure rights in Myanmar, it should be noted that legal recognition need not be limited to registered rights, particularly given the time and capacity that will be required to legally register all land rights nationwide. The Constitution of Myanmar establishes a republic, in which states, regions, divisions, and zones have all been granted legislative authority (Articles 188 and 196) and may enact laws that add additional safeguards for the formal recognition and protection of customary tenure. Malaysia has a similar decentralization of legislative powers and provides examples of the diversity of approaches that may be undertaken in a country with one dominant ethnic group and multiple minorities located in relatively separate geographic areas.

Any certification and registration process must consider at least three salient issues: articulation of the steps in the process (including allocation of responsibilities), management of conflicts, and long-term administration of registered rights. Administration considerations include whether

or not to decentralize or nationalize the process; which organizations can contribute to the process and which authority manages the process; the simplicity, cost, and accessibility of the process; and how easily updates to the registration system can be maintained, including to what extent communities participate in specific steps of the process such as demarcation.

Although the actual steps in the various countries' registration process vary greatly, most require recognition and registration of the group receiving rights and demarcation of the land. Land use and management plan requirements are only required in a few jurisdictions. While such requirements may promote sustainability, they may also slow down the recognition process. Generally, the case studies suggest that the more complex the process and the more entities involved, the lower the likelihood of widespread adoption (e.g., Cambodia and Liberia). As such, in formulating policy in Myanmar, it will be important to consider how best to streamline and simplify the process using participatory and low-cost approaches.

Moreover, formal registration of community land and resource tenure can often lead to conflict within a community and with outside interests. This is particularly true in resource-rich areas or where concessions have been issued. As such, conflict management mechanisms, such as alternative dispute resolution, for both internal and external conflicts should be included in the enabling framework, as well as the registration process. Some countries (e.g., Philippines and Indonesia) have created specific judicial systems to address land conflicts and explicitly incorporated customary law in their decision-making. The Native Courts of Malaysia have been recognized for applying customary law systems to address customary land-related conflicts. Titling programs should test methodologies in places where conflict exists to understand the robustness of approaches for addressing the variety of conflicts that may emerge. Furthermore, it is important to identify if there are any parallel titling programs that will lead to "tenure institution shopping" that may exacerbate conflicts.

LAND TYPES ON WHICH COMMUNITY TENURE IS RECOGNIZED

Existing legislation in Myanmar can only be used to secure rights on certain types of lands. Specifically, the Farmland Law (2012) provides means to secure land tenure recognition, but it only applies to land resources actually classified as farmland in Article 3 of the law. The Forest Law contains provisions to grant various rights of use over forestlands, such as for village firewood plantations or local supply plantations, but there are no provisions that envision the formal recognition of community land and resource tenure. Finally, the Vacant, Fallow and Virgin Lands Management Law (VFV) of 2012 creates a mechanism where public citizens, private sector investors, government entities, and nongovernmental or other organizations may submit an application to lease vacant, fallow, and virgin lands for agricultural development, mining, and other purposes allowed by law (Articles 4 and 5). However, because the intent of this law is to develop land resources commercially, the ability of community owners (customary or otherwise) to manage their lands in accordance with their traditions would be limited.

An important consideration in determining which lands will be eligible for community land and resource tenure recognition will be the level and nature of tenure insecurity being experienced by communities in critical parts of the country, whether it is from agricultural or natural resource extraction investments; encroachment from nearby communities or individuals within the community; active local land markets; or in-migration. These factors can contribute to land scarcity or competition for resources, and clearly increase the demand for clear land title. In such cases, it is imperative that all stakeholders are given a voice at the policymaking table.

The cases reviewed provide examples of how some countries have experienced problems with community tenure recognition on different land types and the types of conflicts involved. For example, Indonesia provides examples of conflicts that have arisen from resource extraction in forestlands where customary rights were not recognized. Such examples may assist policymakers in Myanmar who will need to consider which categories of land should be considered for community land and resource tenure.

RIGHTS CONFERRED

Forms of collective ownership are permitted under the Farmland Law (2012) and VFV (2012), but in general, the rights conferred are limited. Specifically, under the Farmland Law, land use certificates are conditional, and if a community or group breaches the conditions of use, such as by leaving land fallow, the government may impose fines, rescind land use rights, or forcibly remove any structures constructed (Article 12). Under the VFV, long-term

leases may be granted on state land; however, these lands may not be mortgaged, sold, subleased, divided, or otherwise transferred without approval of the government (2012, Article 16).

There are three general options related to alienation and ownership rights found in the case studies:

- **Communal ownership with no rights of alienation.** The community retains the right to access, use and manage the land but is unable to sell or transfer the land. In such situations, there may be requirements for consent and/or compensation if the government (e.g., Indonesia and Philippines) reallocates the land.
- **Communal ownership with rights of alienation for individual community or non-community members.** Privatizing individual claims serves as the basis for individualized title (e.g., Mexico, Philippines, and Cambodia). In some cases, individuals may also receive compensation if they choose to leave the communal ownership group (e.g., Cambodia). Alienation rights may also be conferred through leases granted to third parties (e.g., Botswana or Mozambique).
- **Communal ownership with alienation rights for community's land.** Full rights of alienation can exist for communal lands such as in Mexico.

In Myanmar, where the government owns the land and concession agreements are proliferating, it may be important to address how existing concessions within a community's lands will be returned upon completion of the concession term.

OTHER CONSIDERATIONS

In addition to the issues articulated above, the following additional dimensions have been flagged for consideration in the development of a program to support recognition of community land and resource tenure:

- **Political Will and Support.** A realistic assessment of existing political will and support is critical for programmatic success and efficient use of resources.
- **Scale and Location.** To ensure efficient progress in community land and resource tenure certification and registration, the process must be carried out at scale attending to the importance of diverse geographies and contexts across the country.
- **Enabling Legislation.** Legislation should provide strong safeguards, including a simple and efficient means to recognize rights and register them, if deemed appropriate. Related to this, examples from Cambodia, Ghana, and Liberia suggest that donor-supported initiatives or pilots in testing community land and resource tenure registration are most effective when they are part of a process for creating new legislation or building guidance on the process for obtaining titles. It is valuable to provide interim protections until the final registration is approved, particularly since the full process can be lengthy and slow. Careful and consistent use of terminology (such as communal versus collective lands) is important to ensure correct interpretations and use of appropriate protocols for efficient registration.
- **Administration and Governance.** How will the registration of land and subsequent transfers be carried out? In addition, attention to the type of land governance body as well as mode of representation and decision-making will determine the extent to which gender and social inclusion dimensions will be addressed. Questions of tax obligations also need to be clarified.
- **Capacity Building.** The processes involved in community tenure recognition will require capacity building for actors operating at various levels. This should include both education and outreach provisions, as well as technical training.
- **Role of CSOs.** CSOs can be an important ally in supporting the community tenure certification and registration process, particularly in carrying out activities at scale. This requires mechanisms for the development of close collaboration between the government and CSOs that permit CSOs to maintain their independence while maintaining constructive dialogues with governmental bodies regarding the best implementation approaches.
- **Monitoring.** Monitoring programs are important to track progress and make necessary adjustments to the community rights certification and registration process.

Community land mapping in Sierra Leone. (photo: Nick Thomas)

Finally, the case studies point to principles that can help guide policymakers. These include:

- **Simplicity and ease of process** for establishing rights is critical, with Cambodia providing an example that is not simplistic and can be contrasted with the Philippines, Mozambique, or Botswana.
- **Participatory and low-cost approaches to demarcation**, such as those developed in Botswana, should be strongly considered.
- **Support by government, CSOs, and donors** should be consistent and long term.
- **Transparent and accessible registries** for maintaining records demonstrated in the Philippines and Mexico provide models of best practice. Establishing local registries and providing free registration are key components.

There is a growing trend globally toward devolution of land governance to community-level institutions. For Myanmar, the lessons summarized here can be considered by the key stakeholders involved in the process of developing a Land Use Policy and related legislation to carve out an approach suited to the unique conditions that exist in Myanmar.

In Colombia, the 1991 Constitution recognized the multiethnic character of its society and conferred collective land rights to both indigenous and Afro-Colombian groups. (photo: USAID Colombia Land and Rural Development Program)

1. INTRODUCTION

This global review of community land and resource tenure recognition approaches seeks to identify lessons from existing experiences, particularly in Southeast Asian countries, to inform the policy and legislative process in Myanmar and contribute to the design of pilots for identifying the most suitable community land and resource tenure recognition approaches within the context of Myanmar.

Section 1.1 sets out the main rationale and approaches to community land and resource tenure recognition. There is no one-size-fits-all method or best practice for such forms of tenure recognition. Any given country's approach needs to be designed to suit the national context and requirements. As such, there is considerable variety in the approaches taken by diverse countries. Section 1.2 establishes the analytical framework used for examining the country experiences. It is necessary to examine the legal and administrative mechanisms that have been established to formalize community land and resource rights in a range of countries and assess how effectively these frameworks have been implemented and operate in practice. This can guide development of pilot programming and stimulate policy debate among stakeholders. Sections 1.3 and 1.4 explain why certain countries were selected for closer examination in Southeast Asia, Africa, and the Americas.

As Myanmar undergoes significant economic and political reform, it has an opportunity to learn from these Asian and global experiences to develop effective legal and institutional frameworks that can promote economic development, national stability, and effective participatory governance. The report continues in Section 2.0 by setting out the statutory instruments and legal mechanisms that select countries in Southeast Asia have developed to recognize community land and resource tenure, as well as lessons learned from the implementation process. Sections 3.0 and 4.0 look at illustrative countries from Africa and Latin America, but focus primarily on specific implementation issues and experiences. Where appropriate, the strengths and weaknesses of these approaches and practices are provided in tabular form so that stakeholders can assess their relevance and applicability to the context of Myanmar. Section 5.0 includes a legislative review of the current formal recognition of community land and resource tenure in Myanmar with a view to understanding how well the legal context, in its present form, can facilitate effective community forms of tenure. This section ends by identifying key questions and lessons learned for the various components of the community tenure recognition process and concludes with a summary of final considerations for legislative and program design.

1.1 RATIONALE AND APPROACHES TO COMMUNITY LAND AND RESOURCE TENURE RECOGNITION

Many countries in the world have addressed the need to provide legal recognition to community land and resource tenure arrangements. Over the last two decades, there has been a growing appreciation that Western forms of titling and registration may not necessarily be the most effective in terms of administering and enforcing local land rights as well as overall costs, particularly in rural communities. Therefore, one of the primary motivations for promoting community tenure recognition is to develop local systems of land governance and protections for rural communities that afford protections against external and often arbitrary incursions in a simple and quick manner, as well as improve social and gender equity. Many countries have been reforming their land policies and laws to bring different types of tenure arrangements, including customary forms of land tenure, into a

Why pay attention to customary tenure systems?

"We ignore at our peril customary tenure systems that govern resource access for approximately two billion people around the world. The risks include perpetuating and aggravating conflicts and violence, further marginalizing vulnerable populations, and increasing the risk of biodiversity loss. On the positive side, thoughtful integration of customary tenure systems into today's resource management strategies can generate significant benefits. These include reducing costs of resource management and administration and increasing tenure security across the board."

Freudenberger, Bruce, Mawalma, De Wit, & Boudreaux, 2013, 7

Customary tenure is a social system

"Customary land tenure is as much a social system as a legal code and from the former obtains its enormous resilience, continuity, and flexibility. Of critical importance to modern customary landholders is how far national law supports the land rights it delivers and the norms operated to sustain these."

Wily, 2012a, 1

formal and standardized land administration system (Byamugisha, 2013).

Legal recognition is being offered to community land and resource tenure arrangements that can either be based on long-standing customary forms of land governance and management, or newly established forms of devolved land governance in which various types of local collectivities such as villages, associations, unions or cooperatives are responsible for establishing clear tenure regulations tenure arrangements. In doing so, it is necessary to move beyond the four main fallacies that prevail in thinking about customary land tenure: that it is old, static, only communal, and primarily informal. Some consider customary forms of tenure to be an obstacle to economic investment and productive growth, even though evidence does not necessarily support such widespread perceptions.

An approach that focuses on community land and resource tenure is not necessarily limited to those communities who largely manage their lands communally or collectively, because it can encompass individualized arrangements within it. Nor is it an approach solely used for indigenous, ancestral, or native communities, because any rural community with long-standing occupation of their lands can potentially be eligible for such protections. As such, the geographical areas covered by such community land and resource tenure arrangements can be extensive such as with the ancestral domains of Indigenous Peoples (IP), or they can be small land parcels managed by a local-level land governance body.

Much of the writing on community land and resource tenure recognition to date has focused on the experience with customary land tenure. Much less has been written about new types of devolved land governance through other forms of local collectivities than traditional customary institutions.

As prominent customary tenure expert Liz Alden Wily stated, "Customary land tenure is a major global system for landholding" and the "customary sector remains strong and active" (2012a, pp. 2 & 4). In Africa, some 90 percent of land remains under customary tenure (Deininger, 2003). Customary tenure is typically characterized by a number of different features (Lawry, 2013). A household's or individual's right to use or hold land in a given area is dependent on accepted membership in the social or political community, be it based on ethnic group, clan, or family that holds the overall land rights on a collective level. Typically, all members of the community have some form of access and use rights leading to better social equity than purely individualized tenure arrangements. However, historically these customary forms of tenure were not officially recorded in registries, because it was traditional forms of authority that possessed the knowledge of how rights had been allocated to the community's members.

The 2003 *World Bank Policy Review Report on Land Policy* acknowledged that customary tenure may enable land relations to be managed in a more flexible and location-specific way and may be best placed to reduce encroachment (Deininger, 2003). Customary tenure represents an affordable and decentralized form of land governance that can attend to local complexity, needs, and changes while providing protection in the face of external threats (Bruce, 2013).

The global commonalities in the principles of customary regimes are striking

"These norms stem from the shared template of community-based regimes. This is expressed in:

a. community-based jurisdiction over landholding,

b. territories, domains or community land areas: acknowledegement within the customary sector that each community owns and controls discrete areas (and may access others by arrangement and which themselves become customary rights of access),

c. collective ownership or possession and control over naturally communal resources such as forests, rangelands, and marshlands, and

d. the tendency for the size of customary territories or domains to be periodically adjusted so that they remain at the scale at which community-based control can be effective"

Wily, 2012a, 7-8

Legal recognition of customary lands

"In customary systems, legal recognition of existing rights and institutions, subject to minimum conditions, is generally more effective than premature attempts at establishing formalized structures. Legally recognizing customary land rights subject to a determination of membership and the codification or establishment of internal rules and mechanisms for conflict resolution can greatly enhance occupants' security. Demarcation of the boundaries of community land can remove the threat of encroachment by outsiders while drawing on well-defined procedures within the community to assign and manage rights within the group. Conflicts historically often erupt first in conjunction with land transfers, especially to outsiders. Where such transfers occur and are socially accepted, the terms should be recorded in writing to avoid ambiguity that could subsequently lead to land-related conflict."

Deininger, 2003, xxvii

"Customary tenure recognition" is an umbrella term that covers a range of approaches for granting legal recognition of customary forms of land tenure (Knox, Giovarelli, Forman, & Shelton, 2008). Legally, recognizing the collective rights of a community to their lands offers important strengths for the effective governance of lands (Freudenberger, Bruce, Mawalma, De Wit, & Boudreaux, 2013; Wily, 2012a, 2012b). To date, numerous countries have given legal protections to customary tenure including customary land governance institutions (Deininger, 2003). In addition to overall constitutional protections, there are a number of ways customary tenure areas can be identified for the purposes of statutory recognition.

Although it offers advantages when compared to individual titling, it has to be recognized that customary tenure is a "living institution" that can be undermined by the very process of codification (Freudenberger, Bruce, Mawalma, De Wit, & Boudreaux, 2013). Overall, when the costs of not providing legal recognition of customary land tenure become clear, then the momentum for legally establishing those rights is set into motion.

It is clear there is no single best or good practice that can be identified for customary tenure recognition (Fitzpatrick, 2005). A variety of approaches can be found that range from minimal intervention (where a simple property rights institutional structure is created) to significant intervention to alter the institutions responsible for governing the community's land relations. Strengthening customary or community tenure can be accomplished by building the capacity of traditional leaders or establishing new types of institutions, such as decentralized "land boards" and/or elected village councils that involve more representative involvement.

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security, established in 2012, affirm the importance of recognizing and respecting all legitimate tenure rights holders and their rights, whether formally recorded or not (Food and Agriculture Organization of the United Nations [FAO], 2012). This includes indigenous peoples and other communities with customary tenure systems that exercise self-governance of land, fisheries and forests. Some key dimensions need to be kept in mind when determining an approach suitable to Myanmar. A balance needs to be found between the objectives of the state and the local needs of diverse types of communities within any country.

These dimensions include:

- National legal context (including the constitution);
- Current level and type of land tenure insecurity faced by diverse types of communities;
- Level of intensification of agricultural practice and associated land scarcity;

The future of customary tenure

"In the past, most countries thought that with time and 'modernization' they could simply erase customary tenure systems, replacing them with statutory systems based on titled private property. Experience now shows that this is not realistic (at least in the short term) and not desirable since customary tenure systems have attributes and strengths that respond to real needs in many countries. Furthermore, as customary systems are undermined, they leave a void that statutory administrative systems are ill equipped to fill, given the limited administrative capacity in many countries. For these reasons, policymakers now seek some sort of accommodation with customary tenure and are looking for guidance and experience with how these issues have been dealt with in other countries."

Freudenberger, Bruce, Mawalma, De Wit, & Boudreaux, 2013, 1

- Level of political will of the government and influential political players;
- Level of external intervention needed for equitable and integrated governance of community land rights;
- Types of lands to be included in recognition and registration processes (e.g., settlement, agricultural, forests, shifting or swidden cultivation, hunting, water bodies, sacred/cultural sites, etc.);
- Level of financial and administrative capacity of the government and community-based authorities at the national and local levels;
- Involvement of one dedicated agency or ministry or multiple agencies and at what levels (localized/decentralized, or national);
- Cost of establishment and long-term administration of a land registry;
- Availability of long-term support for communities by government or civil society organizations (CSOs) for education, legal aid, and monitoring; and
- Availability of suitable technologies to facilitate mapping and data organization.

In the case studies that follow, these issues are examined in more detail to identify a set of parameters suited for Myanmar's community land and resource tenure recognition process.

1.2 ANALYTICAL FRAMEWORK

To capture important and applicable lessons for Myanmar, each country's legislative provisions and implementation experiences are examined to identify community land rights holders, recognition and registration process, customary law application, limitations on land types included in community land governance arrangements, and the type of rights conveyed through formal recognition and/or registration. The following are key types of questions that guide this analysis and could inform land policy development in Myanmar:

- **Community Land Rights Holders**. This identifies the entities in which land rights are vested. Key questions include:
  1. Who holds community rights and in what entity is land vested?
  2. How are these groups/individuals defined? For example, is a group defined by the constitution; by statute; or through registration as a legal entity, such as an association or corporation?
- **Recognition and Registration Process**. This refers to the process required in various jurisdictions to attain formal recognition potentially through registration and conflict resolution. This may include demarcation, formation of a legal local governance body and associated by-laws as well as certification. Key questions can include:
  1. What is the community land certification and registration process?
  2. What type of local governance body is to be vested with the community land rights?
  3. Is there a process for adjudicating disputed claims?
- **Land Types Where Community Tenure is Recognized**. Does the statutory recognition of community land rights apply evenly across land use types? For example, some countries have limitations or outright prohibitions on the community rights that may be held on forests, lakes, wetlands, or urban areas.
- **Customary Law Application**. This refers to the extent to which customary law is recognized and applied in areas where customary tenure is prevalent. For example, in many jurisdictions, land may be identified as customarily owned, but the common law[4] applies to its use and management. Key questions include:
  1. Are customary tenure rules codified in statutory law?
  2. To what extent is customary law administered or codified?
- **Rights Conferred**. This refers to the scope of rights conveyed with community land and resource tenure recognition and registration. Typically, rights include access, use, management and exclusion. Alienation rights, however, may range across the spectrum from full alienation rights (such as the right to mortgage, lease, or sell land), to complete restrictions on alienation. Key questions include:
  1. Do the rights cover only community land rights, or both community land rights and the individual or household land rights within it?
  2. Is there a process for individualizing or communalizing specific types of land rights (for example, if a communal forest or grazing area is divided among households), or vice versa?
  3. What provisions exist within the statutory law that permit (or restrict) communities

4 Common law, also called Anglo-American law, is found in England, the United States and other countries colonized by England. Common-law is based upon judicial decisions and on reports of decided cases rather than on legislative enactments. Judicial interpretation of given statutes determine how the law applies.

or individuals from alienating their legally recognized community land tenure arrangements?
4. What forms of compensation are available for individuals leaving the community land tenure system?
5. What are the systems/authorities in place to alienate community lands?

1.3 RELEVANCE OF EXPERIENCE IN ASEAN COUNTRIES

Many Association of Southeast Asian Nations (ASEAN) countries have developed policies and laws that recognize some form of community land rights. Although each country's system has evolved within its own unique historical, socioeconomic, and cultural context, their experiences share some similarities to the contemporary Myanmar context. For instance, Myanmar exhibits a diversity of tenure arrangements, including significant differences between lowland and upland land tenure arrangements, and between ethnically mainstream and marginalized communities. Additionally, Myanmar is experiencing growing pressures on land rights (both agricultural land and commons land), as there is increasing interest from private companies to establish plantations to grow palm oil, rubber, and other key commodities. Accordingly, this study looks specifically at Cambodia, Indonesia, Lao People's Democratic Republic (PDR), Malaysia, and the Philippines.

Lao PDR shares a culturally porous border with Myanmar's northeast and is inhabited by some of the same ethnic groups. These groups have analogous histories and cultures, and they have typically managed their lands according to customary law with little influence from national governments. Lao PDR and Myanmar are both dominated politically and economically by ethnic groups that are permanent agriculturalists (Lao Luum in Lao PDR, and Burman [Bamar] in Myanmar). Moreover, in terms of national systems of government, the military plays an influential role in policymaking in both countries. Both governments have pursued policies that discourage upland shifting or swidden cultivation practiced by ethnic minorities and have a history of conflict involving highland ethnic minority populations.

Cambodia also has a significant ethnic minority population with a land administration system governed by customary practices. While not openly engaged in armed conflict as in Lao PDR and Myanmar, these ethnic minorities are marginalized within Cambodia's political landscape. They typically live, as in Myanmar, in areas with rich forests and natural resources. Cambodia too has a vibrant civil society active in policy development and stakeholder dialogues. These groups, often with international donor support, have positively influenced the development of IP rights within the national legal framework, even if the result has been less than ideal provisions that are inadequately enforced.

Types of national legal systems are important considerations for the development of a legal framework. Malaysia, like Myanmar, is a former British colony and shares a common law system. The actual development and interpretation of common law in Malaysia, especially as informed by court decisions and rulings on customary land titling, can influence how legal interpretation proceeds in Myanmar. For example, common law decisions on customary claims to land rights by indigenous peoples in other Commonwealth jurisdictions, such as Australia and Canada, have greatly influenced the Malaysian trajectory. In Malaysia, courts have found that the customary rights of IP were not automatically extinguished at the time of colonization. This led to judicial rulings in favor of IP land claims and the repeal of provisions within legislation that discriminated against indigenous customary land rights. In addition to sharing a common law system with Myanmar, Malaysia also has ethnic minority communities located in high-value natural resource regions.

In contrast, Cambodia and Lao PDR both operate under a Civil Code (a remnant of the French colonial period). While Indonesian property law is strongly influenced by its time as a Dutch colony under a civil code, the land law is based on a mix of civil code and customary law with the latter holding more sway in areas of the archipelago nation that are dominated by ethnic minorities. Like Malaysia, Indonesia's courts have looked to common law countries in judicial decision making regarding customary law involving IP and their resource-rich lands.

Among these countries, the Philippines has developed the most comprehensive approach to recognizing ancestral domains or native title through the groundbreaking Indigenous Peoples Rights Act (IPRA) of 1997. As in Myanmar, the indigenous population in the Philippines is located in remote parts of the country where the influence of formalized legal systems has been limited.

1.4 LESSONS FROM AFRICA AND THE AMERICAS

While the socioeconomic, historical, and cultural context in Africa and the Americas differs greatly from Southeast Asia, several innovations in the

recognition of community or customary tenure rights can inform the thinking and development of Myanmar's land policy and legislation.

For the purposes of this study, the African experiences of Land Boards in Botswana and Customary Land Secretariats (CLS) in Ghana provide insight into how administrative bodies can be created to integrate formal and customary land administration mandates. Liberia's experience with the Land Rights Policy (LRP) highlights the constraints posed by limited resources and little political support while Mozambique's experience with long-term leases on customary lands demonstrates implementation challenges. In Latin America, Brazil's resource conflict on indigenous lands provides insights into approaches for resolution. Colombia, with its ethnic diversity, illustrates how recognizing the customary rights of indigenous and Afro-Colombian populations in post-conflict areas can be implemented. Mexico's *ejido* model also provides a well-studied and longstanding example of codified communal rights in the agrarian landscape.

Lands formally classified as reserve forests in Myanmar can be de-gazetted so as to enable villagers to obtain land use certificates. (photo: Nayna Jhaveri).

2. SOUTHEAST ASIA COUNTRY EXPERIENCES

The approaches to recognizing community land and resource tenure statutorily in the five ASEAN nations (Cambodia, Indonesia, Lao PDR, Malaysia, and Philippines) selected for study diverge significantly in terms of overall approach, legal frameworks, administrative structure, and implementation successes. Their experience varies considerably in terms of when such formally recognized rights were established, how they have been implemented, their levels of tenure security, and the approach taken to learning from and reforming these community land tenure arrangements. For each of these five countries, an overview of both the legislative provisions and experiences with implementation of laws is addressed below. Tables 2a and 2b on the following pages summarize the main legal dimensions of community land and resource tenure approaches in the five selected countries.

2.1 CAMBODIA

Following a largely unsuccessful first attempt to privatize land rights in the 1980s,[5] Cambodia (Kingdom of Cambodia) launched a second round of programs in the early 2000s. Land titling and administration is part of the government's strategy to promote agricultural development (particularly rice production) for increasing growth and reducing poverty. A new Land Law[6] (2001) and the multi-donor-supported Land Management and Administration Project ([LMAP] 2002–2008) were aimed at improving land tenure security and enhancing the formation of efficient land markets (USAID, 2011a). The Land Law provides for individual titling in most of the country while the opportunity to obtain communal land titling is available to IP. The law also provides for Economic Land Concessions (ELCs) to support agro-industrial development, as well as Social Land Concessions (SLCs) as a form of pro-poor land allocation. These can only be granted after state public lands have been converted into state private land.

For indigenous communities, communal land titling offers a clear option to secure rights over their own land and protect them against third-party interests (Grimsditch & Henderson, 2009). It affords indigenous communities the ability to manage their community land according to their traditional customs. IP form about 1.5 to 5 percent of the population, living mostly in the forested northeast. Indigenous communities manage about four million hectares of Cambodia's forests (Pen & Chea, 2015).

2.1.1 LEGAL ANALYSIS

The Land Law of 2001 provides the means by which the government may formalize customary ownership to IP through a grant of communal title (Art. 26). Sub-decree No. 83 on Procedures for Registration of Land of Indigenous Communities of 2009 (SD83) further elaborates on the law by articulating the registration process for IP lands.

Community Land Right Holders

Customary land rights are vested in and apply to IP. The Land Law of 2001 identifies IP as peoples that "manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use" (Art. 23). However, to be legally recognized as an IP group and eligible to hold a collective title, IP must organize as a legally recognized entity with registered by-laws (SD83, Arts. 5, 8).

5 This land titling program inadvertently benefitted high-ranking officials. Village conflicts were commonplace because military officers, senior officials, or shadow companies were able to gain effective control over village lands.

6 This law was developed with civil society consultation through the Bar Association.

TABLE 2a: KEY CHARACTERISTICS OF THE LEGAL FRAMEWORKS FOR COMMUNITY LAND AND RESOURCE TENURE RECOGNITION IN FIVE SOUTHEAST ASIAN COUNTRIES

COUNTRY	LAND VESTED IN	CUSTOMARY TENURE RULES CODIFIED IN STATUTORY LAW (Y/N)	ADMINISTRA-TIVE AUTHORITY FOR CUSTOMARY LAND	DELIMITATION, CERTIFICATION, AND/OR TITLING AT COMMUNITY, ETHNIC GROUP, INDIVIDUAL, OR HOUSEHOLD LEVEL?
Cambodia	Ethnic minority groups that are registered with the Ministry of Rural Development and Ministry of Interior	No, but required to be documented as part of the land titling process	Ministry of Land Management, Urban Planning, and Construction	Community level, although individuals may apply for individual private title
Indonesia	Limited rights are vested in customary owners (indigenous peoples)	No	Ministry of Forests, and the National Land Agency (BPN)	Titled rights can be acquired by an individual; no certification or titling mechanisms in place to recognize customary rights
Lao PDR	Individuals, villages, and organizations (created through Association Law)	No, land must be managed consistent with applicable statutory law	National Land Management Authority agencies. At local level, this is the Village Land Unit and Village Authority	Land may be certified and/or titled at the individual, village, and organizational levels
Malaysia (Peninsular Malaysia)	Malay	No, but permitted if they do not contradict the law	Determined by the state authority	Individual or organizational level
Malaysia (Peninsular Malaysia)	Orang Asli	No, but permitted if they do not contradict law or regulation	Department of Orang Asli Affairs	Tenancy rights at the individual, household, and community levels
Malaysia (Sarawak)	IP identified in the Constitution	Yes, documented and applied by native courts if it does not contradict statute	Department of Lands and Surveys	Responsibility of the state
Philippines	Recognized IP and indigenous cultural communities (ICCs)	No, however, the law legitimizes the rights of IP/ICCs to manage their customary lands according to custom and tradition	National Commission for Indigenous Peoples (NCIP)	Titled at the community or ethnic group level; individual title possible within communal land, or certification for freehold title outside of communal title areas where ancestral claim can be proved

TABLE 2b: KEY CHARACTERISTICS OF THE LEGAL FRAMEWORKS FOR COMMUNITY LAND AND RESOURCE TENURE RECOGNITION IN FIVE SOUTHEAST ASIAN COUNTRIES

COUNTRY	ALIENATION PROCEDURES	INDIVIDUAL RIGHTS WITHIN COMMUNAL RIGHTS	APPLICATION ACROSS LAND TYPES
Cambodia	The community has no rights of alienation	Individuals may receive individual private title or can request compensation for their customary holdings if they opt to leave the community	Only available for residential and agricultural lands, including shifting cultivation (fallow) lands, and small plots of sacred and burial forestland
Indonesia	Constitutional Court recognizes customary rights and requires consent for concessions on customary land	Individuals may acquire private title to customary land	Rights to forestland were more restrictive prior to recent Constitutional Court decision providing recognition of customary ownership of land in the forest estate
Lao PDR	Communal lands cannot be transferred	Land within a collective or communal title may be managed in conformity with tradition (e.g., allocated to individuals) if it is also consistent with the law	Certification/title only available for degraded forests and agriculture; water use and protection rights may be allocated
Malaysia (Peninsular Malaysia)	Cannot sell to non-Malay	No communal rights	Only applies to Malay Reserve Lands which do not include forestlands
Malaysia (Peninsular Malaysia)	No rights of alienation	Individuals have tenancy rights but no right to title	Aborigines Areas and Reserves are declared by the state but do not include Reserve Lands including forests
Malaysia (Sarawak)	No rights of alienation	Consistent with customary law	Does not include forest reserves, and forestlands may easily revert to the state through Forest Code
Philippines	Transfers not permitted under the law	Individuals may petition for titled rights both within communal lands, or based on an ancestral claim outside of titled ancestral lands	Customary rights apply across all land types

Indigenous people in Cambodia's O'Rona village discuss community land use planning and how to use and manage their resources sustainably. (photo: Winrock International)

Recognition and Registration Process

The process to register IP lands is outlined in SD83. The registration process is initiated with the submission of an application to the District/Khan Office of Ministry of Land Management, Urban Planning, and Construction (MLMUPC), which is responsible for implementing procedures related to the registration process. However, before an application can be filed, several preconditions must be met. First, the community must self-identify, organize, and apply for recognition to the Ministry of Rural Development (MRD). Second, and assuming that the MRD recognizes the community, the community must draft and approve by-laws to govern their organization. Third, the community must submit an application to the line agency offices of the Ministry of Interior for approval (commune, district, provincial, Ministry) (Sophorn, Errico, & Phalla, 2010). Assuming these steps have been followed, a community may then submit an application for a communal land title to the MLMUPC. This process officially involves demarcation by the district-level MLMUPC and documentation of the customary rules related to land ownership and management. In practice, most of the pilot communities first demarcated their lands with technical assistance from a nongovernmental organization (NGO), such as the Wildlife Conservation Society, as part of the titling application submission to the MLMUPC. Public notice of the demarcation, and resolution of conflicts related to the claim, must be resolved before the communal title is received and registered.

Customary Law Application

While customary land law is not codified in the statutory law, the Land Law of 2001 provides for its recognition and implementation on IP lands, subject to conformity with general laws governing land (Land Law, Art. 26). Prior to registration of communal title, SD83 requires the community to develop rules that outline the land use and management system of the community (Art. 8). In theory, this provision ensures that customary law and practice is documented.

Customary land law, however, is not recognized until the titling process is complete. Although there are interim protections available by law,[7] in practice, few communities have benefited from such protections during the lengthy titling process.

Land Types Where Community Tenure is Recognized

The Land Law states explicitly that indigenous community lands are "those lands where the said communities have established their residences and where they carry out traditional agriculture," including areas reserved for shifting cultivation (Art. 25). This is further clarified in SD83 which, in addition to conveying land for residences and agriculture, provides for the transfer of state-owned lands to communities for spiritual forests (up to seven hectares), cemetery lands in forests (up to seven hectares), and reserved lands necessary for shifting cultivation (Art. 6). These limitations are further elaborated in SD83, Article 7, which explicitly states that IP communities may continue to use and benefit from other state lands in conformity with their traditional customs. However, these rights are subject to approval by, and agreements with, government line agencies responsible for their management. This includes use of forestlands, non-timber forest products (e.g., resin, honey), and water sources. The process for requesting this approval is determined by the responsible line agencies.

Rights Conferred

While IP communities may hold title to land once granted by the state, the land is still considered

7 In May 2011, the Ministry of Interior and MLMUPC issued an Inter-Ministerial Circular on Interim Protection Measures to protect the communal lands to which IP have submitted communal ownership titling applications but are awaiting the titling process. Once the application is complete, the provincial governor initiates the process for establishing interim protections and will publicly display and circulate this by-law notice to all ministries (Ewers & Kesaro, 2012).

A community from the ethnic Bunong group in Mondulkiri Province receive their collective land title. (photo: GIZ)

state public property, and neither communities nor individual families may dispose of it (Land Law, 2001, Art. 26; SD83, Art. 4). Importantly, however, no other entity outside of the community may acquire rights to the communal land (Land Law, 2001, Art. 28). However, once communal ownership rights are conveyed to the IP community, individuals within the community may acquire individual private ownership of a portion of the communal land holding (Land Law 2001, Art. 27), and members of the community who are leaving the community (or who otherwise opt to relinquish their interest in the collective property) are eligible for compensation for their individual residential and agricultural holdings within the communal ownership (Land Law, 2001, Art. 14).

2.1.2 IMPLEMENTATION

Challenges Arising From Limited Scope of Land Rights

Despite these positive developments, land problems and conflicts have continued apace both for individual titling and for communal titling. The problem is the worst in Cambodia's northeast region, which is resource rich and the home of some 23 ethnic minority groups (Vize & Hornung, 2013). Land, therefore, remains the key issue in Cambodia in the early 21st century.

This is partly because the Land Law only covers agricultural, housing, and shifting cultivation land; therefore, there is less security for those with preexisting rights on urban lands, forest lands, and seasonal lakes, which were not included in LMAP's systematic land registration process (Baird, 2013; So, 2010). This was the outfall of a project design that sought to avoid lands under dispute but which would have benefitted the most from tenure security (Dwyer, 2013; So, 2010). In addition, only allowing indigenous communities the right to obtain communal land titles excluded those long-standing non-indigenous communities that have managed their land and forest collectively (Baird, 2013).

Development of Process and Challenges

Since the Land Law of 2001 did not set out a clear roadmap for how communal titles were to be obtained (Vize & Hornung, 2013), a "Collective Land Title" pilot project commenced in 2003 and eventually culminated in the 2009 SD83. In March 2004, the Council of Land Policy formed an Inter-Ministerial Task Force for the Study of the Registration of Indigenous Land Rights (International Labor Organization, 2008). In November 2004, members of the task force took a study trip to the Philippines to examine the indigenous people's communal land titling approaches. In addition, the International Labor Organization's "Support to Indigenous Peoples in Cambodia" Project, beginning in 2005, became an important avenue for the development of by-laws. It initiated a project with the Department of Local Administration for developing by-laws in three pilot indigenous communities (in Ratanakiri and Mondulkiri provinces) as well as strengthening NGOs working at the provincial level. More recently, a handbook has been prepared to support the collective land registration process (Ewers & Kesaro, 2012).

This has been a complex process, as two kinds of by-laws needed to be created: one developed from a participatory land use planning process that delineated boundaries and land use, and the other a set of governance by-laws (required under the Land Law of 2001) that allowed the community to be established as a legal entity. The Support to Indigenous Peoples in Cambodia Project's evaluation of by-law development observed that participatory land use planning typically takes much longer than expected. To scale up the process more efficiently, three key recommendations were put forward:

1. Establish an inventory of previous research and publications relevant to IP land rights;
2. Establish a mechanism for closer collaboration between official bodies and NGOs; and
3. Develop training tools and model by-laws in indigenous languages.

In the end, the sub-decree put forward a complicated and time-consuming process that involved three ministries. In addition, it required communities to demonstrate that they are a "traditional culture," thereby excluding those indigenous communities that no longer use their indigenous language or traditional farming practices (Keating, 2013). Moreover, there are considerable differences among the different IP groups in terms of their customary level of "communalness" in property rights systems, ranging from individualized to very collective (Simbolon, 2009).

Limited Results to Date

Overall, by August 2014, only eight communities

(out of the 167 who have applied so far) had completed the process of communal land titling (Pen & Chea, 2015). Six of these were supported by the Wildlife Conservation Society[8] which reported that it took nine years to complete the process (pers. correspondence). Those who have received their titles have had limited ability to enforce their rules and regulations. There have been calls for a community-based administrative process, together with supporting funds, to strengthen the Indigenous Community Committee for both obtaining title and implementing by-laws (Pen & Chea, 2015). There remains considerable opportunity to improve the overall process. Importantly, research into land titling in six upland villages in Mondulkiri and Ratanakiri provinces indicates that positive experiences were exemplified by the involvement of a well-trained and engaged CSO for increasing the capacity of upland communities to make informed decisions; and the absence of external pressures (such as conflict, harassment, or misinformation) (Vize & Hornung, 2013).

Recent Titling Efforts

To speed up the land titling process, a new phase was initiated in June 2012 with Order 01 on *Measures for Strengthening and Increasing the Effectiveness of the Management of Economic Land Concessions* that aimed to redress widespread problems associated with the granting of ELCs. The order placed a moratorium on issuing new ELCs and existing concessions were to be reviewed (Grimsditch & Schoenberger, 2015).

One month later, a new national land titling program was launched that would cover those residing in ELC areas and forest concessions, as well as people living in communities that were in the process of applying for communal land titles. Additional instructions were issued, stating that the communal titling program was to be halted due to the complex and expensive nature of the process, while at the same time those seeking individual title among indigenous communities were informed that they would need to opt out of the communal titling process (Grimsditch & Schoenberger, 2015; Milne, 2013; Pen & Chea, 2015).

Numerous upland communities have reportedly been under pressure to obtain private land titles rather than communal titles which has resulted in villagers missing the opportunity to secure larger holdings, since private land titles only apply to currently cultivated land, whereas communal titles can be also be issued for fallow lands and limited sacred and burial forest lands (Human Rights Watch, 2013; Vize & Hornung, 2013). Once private titles are obtained (even in areas where communal titles are in the process of being developed), households will be legally unable to be included within the communal title. In any case, land sales have continued illegally even where communal land titles have been awarded (France, 2015). Furthermore, NGOs have been unable to monitor the process.

The major strengths and weaknesses of the communal titling process in Cambodia are summarized in Table 3. There has not only been limited progress in communal land titling among IP, but presently, there is significant confusion among communities as to whether it affords the best protection, when the individual titling option has led to "tenure institution shopping."

Conflicts between individual title and communal title

Conflicts are often increased when applying for individual title precludes membership within a communal title. In the case of Cambodia, implementation of *Order 01* resulted in indigenous communities being asked to choose between obtaining individual or communal land titles. As many households were interested in obtaining individual titles, particularly given the lengthy process for acquiring communal title, this created a divisive situation and undermined community members' ability to secure title to their cultivated land, fallow land, forests, spiritual areas, and cemeteries (Grimsditch & Schoenberger, 2015).

8 These six communal land title applications were supported in part by USAID.

TABLE 3: MAJOR STRENGTHS AND WEAKNESSES OF THE LAND-RELATED SYSTEMS CONCERNING COMMUNITY LAND AND RESOURCE TENURE IN CAMBODIA

STRENGTHS	WEAKNESSES
• IP provided with communal land title through Land Law of 2001 and Sub-decree 83 of 2009. • Shifting cultivation, spiritual forests, and cemetery lands are included; with approval from government line agencies, other lands (such as forestlands), non-timber forest products, and water sources can potentially continue to be accessed. • Individual households can obtain title to their lands. • Individuals that leave the community are eligible for compensation of their individual customary holdings. • Pilot process helped to identify implementation rules for IP registration, bylaw documentation, and land demarcation.	• Lack of political will. • Restricted to IP communities. • Those living in urban areas, in forest lands, or around seasonal lakes were not eligible. • Forest lands beyond seven ha each of spiritual and cemetery areas and seasonal lakes not permissible. • Title contingent on continuation of traditional practices by community. • Complex, lengthy, and expensive process involving multiple ministries. • Limited results to date since 2009. • Those who elect for individual title may not be able to join communal titles. • Granting of ELCs and SLCs continue on lands claimed by IP who are still awaiting title. • Land in conflict cannot be titled even though the facts on the ground are changing, which tends to reduce the area of land eventually titled to IP. • Difficult to demonstrate continuous use post-conflict. • IP often do not fully understand the process, especially the technical demarcation (mapping) and bylaw documentation, or their rights.

2.2 INDONESIA

The Republic of Indonesia has more than 1,128 indigenous groups across the archipelago, with many living on lands officially classified as "state forest areas" (Moniaga, 2008–2009). The national IP organization, *Aliansi Masyarakat Adat Nusantara* ([AMAN] Indigenous People's Alliance of the Archipelago) estimates that there are between 50–70 million IP in Indonesia (International Work Group for Indigenous Affairs [IWGIA], 2015a). Indigenous land rights are an intensely contentious issue, with more than 8,000 disputes and 600 court cases filed by indigenous communities in the last decade. Importantly, 2012 was a major turning point for the recognition of customary tenure arrangements of indigenous communities. In a landmark case, Indonesia's Constitutional Court ruled (No. 35/PUU-X/2012) in 2013 that the customary forests of IP should not be classified as "state forest areas."

2.2.1 LEGAL ANALYSIS

In Indonesia, land administration is the responsibility of the *Badan Pertanahan Nasional* ([BPN] National Land Agency), which has offices at the central, provincial, and district levels. *Bakosurtanal* is the national coordinating agency for surveying and mapping. After years of centralized governance, Law No. 22 of 1999 decentralized land affairs to the regional line agencies of the government. This was reinforced by the Revised Law on Local Government in 2004, which provided more autonomy to local governments over the development of local laws and regulations. In contrast, the Ministry of Forestry (recently merged with the Ministry of Environment in 2014) remains a centralized institution.

Community Land Rights Holders

In Indonesia, customary land rights emanate from the Constitution (1945), which recognizes traditional communities and their customary (*adat*) rights to land within limitation: as long as they conform with "societal development and principles of the Unitary State" and in compliance with applicable law (Art. 18[B]2). This evolved from regulations implemented during the Dutch colonial era when two systems of land law were developed and recognized: a civil code that required registration and titling of land and was usually limited to western owners; and *adat* lands where native Indonesian customary rights were acknowledged, but not registered or formally recognized.

The Constitutional Court judgment was the result of a petition filed by AMAN (with two other NGOs) because the weak use rights offered to IP under the Forestry Affairs Act of 1999 (FAA) did not afford the level of protection established under Indonesia's Constitution. This will affect about 12 percent of Indonesia's national territory, some 20,000–32,000 villages, and 40 million people who live on Indonesia's state forestlands.

Participatory mapping of IP lands

The JKPP working together with AMAN have been actively mapping customary lands in Indonesia since 2010. AMAN estimates that about 40 million hectares of land (mostly forests) have been occupied by indigenous peoples.

By December 2014, 4.8 million hectares of indigenous lands have been mapped and submitted to the One Map Initiative. The aim of the One Map Initiative is to bring together land use, land tenure, and other forms of spatial data into one unified database in Indonesia. It aims to help resolve disagreements generated by the use of different maps and data in various ministries.

Recognition and Registration Process

To acquire rights in forestlands, Indonesian law requires that the community must exist in its traditional form, have leaders and institutions, occupy a defined area, and have legal institutions to uphold customary law; and that the forest area must be traditionally harvested for the community's daily needs (FAA 1999, Art. 67[1]). In addition, before these rights may be acquired, the community must be legally recognized through the promulgation of a regulation documenting their customary authorities and acts (Art. 67[2]). This represents codification of customary law.

Land Types Where Community Tenure is Recognized

While the Basic Agrarian Law of 1960 (BAL) provides the statutory framework for land management and administration in Indonesia, it is important to note that the Basic Forest Act of 1967 (BFA) circumvented the administrative procedures and authority of the BPN when it classified 70 percent of Indonesia's land area as forestland (Arts. 2–4). As a result, the majority of Indonesia's land base has been administered by the Ministry of Forestry through the BFA and is not subject to the BAL. The BFA and the FAA recognize customary forestlands but classify these lands as state lands (Arts. 1[6], [4]). Communities may acquire customary use and management rights from the Forestry authorities (FAA, Art. 34) for these lands in the form of a village forest or a "customary forest" (*hutan adat*) license. This license permits communities to use customary forests for meeting their daily needs as long as they manage the forests according to customary law and in line with national laws.

Indonesia's Aliansi Masyarakat Adat Nusantara participates in a workshop on participatory mapping. (photo: AMAN)

Customary Law Application

Despite the constitutional basis for recognition of customary rights and law, in practice, customary rights are quite limited in Indonesia's statutory law. For example, the Basic Agrarian Law of 1960 (BAL) is the foundational legislation for land management and administration in Indonesia but does not include provisions to register communal rights or title. Further, while individuals may use customary rights as a basis for acquiring private title, individuals must extinguish their customary rights and conform with private land law rights to do so (e.g., rights of ownership, exploitation, building, use, lease, clearing, or collecting forest products through the acquisition of registered title [BAL, Art. 16]). While this does serve to strengthen individual private property rights and related registration systems, it may also serve to erode the legitimacy of customary rights. One way in which customary land law could be applied more formally is provided in BAL Article 2(4), which allows for the delegation of authority for land management and regulation to *adat* communities. As of 2011, this provision has not been implemented (Wright, 2011).

Rights Conferred

A 2012 Constitutional Court decision is likely to affect how customary land rights are incorporated into the statutory law (Constitutional Court Decision 35/PUU-X/2012). In that case, the classification of customary forests as state land in the Forestry Law (Arts. 1[6], 5[1], 5[2]) was challenged by an *adat* community with the support of NGOs. The Ministry of Forestry had issued a concession on the customary forestland of the community without consultation or consent from the community, or compensation for the loss of rights. The community claimed that this violated their constitutional rights under Article 18(b)2, which provides for recognition and protection of customary rights.

The Constitutional Court found that the FAA's definition of customary land as state land deprived *adat* communities of the same rights as other legal subjects in respect to forest resources and that the FAA's definition was unconstitutional. The Court also found that traditional community rights cannot be frozen or extinguished so long as *adat* communities meet the requirements of a traditional community under the Constitution which requires such communities to "remain in existence" (Art. 18B[2]).

While the rigorous requirements under the FAA to qualify as a recognized traditional community remain in place (see *Recognition Process* subsection above and FAA 1999, Arts. 67[1]–[2]), the removal of customary forestlands from the state's forest estate has significant implications for the recognition of customary ownership. It appears that "since Article 18B(2) of the Constitution prohibits the state from preventing traditional communities from accessing and using forests to fulfill their needs, in line with their respective customary laws," (Butt, 2014: 68) a community's customary rights cannot be extinguished or restricted (for example, through licensing to concessionaires) without the prior consent of *adat* communities and just compensation. An example of the impact of this ruling is the recent passage of the Village Governance Act of 2014, which states that a village government has an authority to perform tasks defined by its "right of origin." As explained in Section 2.2 of this Act, among the most common "right of origin" is communal customary land administration.

2.2.2 IMPLEMENTATION

Impacts of the Constitutional Court's Ruling

Implementation of the Constitutional Court's ruling has faced considerable obstacles. In response, the Ministry of Forestry issued a decree stating that communities must provide official documentation for such rights to be recognized. The Law on the Recognition and Protection of the Rights of Indigenous Peoples, currently in draft, is expected to provide a set of stronger protections for IP customary land rights across the country enabling the Constitutional Court's ruling to be realized in practice.

In preparation, AMAN, together with the National Community Mapping Network (JKPP) and others, has been actively mapping customary lands. In mid-November 2012, 256 maps made by communities were submitted to the national Geospatial Information Agency as part of the government's One Map Initiative that began in 2012. As of December 2014, 4.8 million hectares of lands claimed by indigenous groups have been put forward to the One Map Initiative. These maps have helped to substantiate the positive ruling by the Constitutional Court. Currently, there are pilots in seven provinces for facilitating official recognition of indigenous territories; some provinces, such as Jambi, are engaged in province-wide recognition activities.

On September 1, 2014, the Vice President's newly created National Program for the Recognition and Protection of Indigenous Peoples was signed by nine ministries and agencies. The program has set out a number of goals including the creation of new laws and regulations, legal reform, administrative tools, and institutional strengthening of indigenous peoples and local governments (IWGIA, 2015a). In the same

year, Indonesia's Commission on Human Rights began a set of hearings to investigate the state of land disputes among IP in forested areas, including those affected by oil palm plantations or mining (Bell, 2014; Moniaga, 2008–2009); 2,230 communities have requested investigations.

The newly created Ministry of Agrarian and Spatial Planning will be tasked with recognition of indigenous territories. Therefore, the positive momentum generated by the Constitutional Court ruling is likely to begin an extended period in which the customary communal rights of large numbers of indigenous communities on forestlands or otherwise will become recognized and protected. The major strengths and weaknesses of community land and resource tenure in Indonesia are summarized in Table 4.

TABLE 4: MAJOR STRENGTHS AND WEAKNESSES OF THE LAND-RELATED SYSTEMS CONCERNING COMMUNITY LAND AND RESOURCE TENURE IN INDONESIA

STRENGTHS	WEAKNESSES
• Constitution recognizes traditional communities and their customary (*adat*) rights to land. • Community customary rights cannot be extinguished or restricted without prior consent of *adat* communities and just compensation. • individuals may use customary rights as a basis for acquiring private title.	• No means to register communal title. • Individuals may use customary rights as a basis for acquiring private title but must extinguish their customary rights and conform with private land law rights. • The process to acquire rights in forestlands (70% of *adat* lands) is complex; the community must be legally recognized through regulation documenting customary authorities and acts; exist in its traditional form; have leaders and institutions; occupy a defined area; have legal institutions to uphold customary law; and traditionally harvest for the community's daily needs.

2.3 LAO PEOPLE'S DEMOCRATIC REPUBLIC

Starting in the 1990s, the Government of Lao People's Democratic Republic began a process of land titling and land allocation beginning in urban and peri-urban areas and then moving into rural regions. Permanent land use certificates were formalized in urban and peri-urban areas, and temporary land use certificates were determined for agricultural and forest lands (USAID, 2013a). By 2006, this resulted in about two-thirds of rural areas being given temporary land use certificates, which are valid for three years. These allocations were developed rapidly and there was no proper consideration of customary tenure arrangements. Even so, they have led to reduced conflict and improvements in agricultural growth. There is presently no clear mechanism for transforming temporary land use certificates into permanent ones (USAID, 2013a).

Thereafter, there have been important milestones in formalizing land titling, allocation, and management. These include: a) the Land Law of 2003 that provides an enabling framework for the management, protection, and use of land; b) the development of the Prime Minister's Decree 88 of 2008 on the Implementation of the 2003 Land Law (MD88); and c) the development of a Land Policy (currently in draft form). These laws and policies enable communities, cooperatives, and other forms of associations to establish collective or communal tenure.

Since 2012, communal or collective land, a widespread practice throughout the country, has become an important issue within the reworking of legal and policy frameworks governing land administration and management in Lao PDR (USAID, 2013a). The *Five-Year National Socio-Economic Development Plan* (2011–2015) includes the objective of developing community land titles aiming to issue 1.5 million title deeds (Sayalath et al., 2011). In contrast to Cambodia, Lao PDR does not restrict communal or collective title to indigenous peoples only (Baird, 2013). Within Lao PDR, communal or collective land was defined broadly in MD88 as "all land parcels and natural resources which are available within the territory of the Lao PDR for which the state has granted the right to collectively use by villages, organizations and state organizations."

2.3.1 LEGAL ANALYSIS

Community Land Rights Holders

Under the Constitution of the Lao PDR (2003), all land is owned by the national community and managed by the state (Art. 17). However, as described in Ministerial Decree 101 of 2005 on the Implementation of the 2003 Land Law (MD101) and MD88 of 2008 on the Implementation of the 2003 Land Law, the state may allocate land rights, including

Collective land rights not restricted to indigenous peoples

In Lao PDR, collective or communal land rights can be established by a range of rights holders that include customary land users, villages, as well as state, political, national construction front, mass and socio-economic organizations. In some cases, such as for village clusters or groups (*kumbahn*), they would need to form an association under the Association Law. Communal land rights are therefore open to a range of communities and are not restricted to indigenous or ethnic minorities populations.

those that are based on customary land ownership (MD101, Art. 23; MD88, Art. 26). These rights may serve as the basis for the acquisition of a land use certificate, land survey certificate, or land title by an individual or organization.

Recognition and Registration Process

The administrative authority responsible for all land administration in the Lao PDR is the National Land Management Authority (NLMA). This agency has provincial, district/city, and local-level agencies that have discrete responsibilities related to land management. At the local level, the Village Land Unit is responsible for providing data for the land documents registration (including customary land claims) upon request from individuals or organizations. The land file must be certified by the Head of the Village and is then forwarded to the District Land Management Authority that inspects and surveys the land. The Provincial Land Management Authority is then responsible for issuing and registering certificates or title.

Individuals and organizations may request and be issued land use certificates, land survey certificates, or land title for customary land as described below:

- Land use certificates allow use of the land based on limitations specified in the law for the particular land category and convey management, protection, use (usufruct), and inheritance rights to individuals. For organizations, land use certificates do not include the right to transfer, lease out, grant concession, put in share, or use as collateral. These may be used as the basis to obtain a land survey certificate or land title.
- Land survey certificates convey temporary (generally three-year) use for agriculture and forestlands and may be converted to title. Land survey certificates cannot be transferred, shared, used as a guarantee, or leased, but they may be inherited and may serve as the basis for an eventual land title.
- Land title conveys the most rights to the holder. For individuals, this includes the right to use it as collateral, to share, sell, exchange, lease, and give as inheritance (MD88, Art.16). However, consistent with Article 59 of the Land Law (2003), and as clarified in MD88, organizations and villages holding a land title have only use rights and do not have any rights to transfer, lease, use as share, or guarantee (Art. 20).

Individuals may formalize some of their customary claim to land through a land registration application process described in MD88. This involves the acquisition of a Certificate of Land Ownership History, a document that memorializes the historical use of the land; presents evidence (such as testimonials) provided by witnesses and neighboring landholders; and includes acknowledgement by the village administrative authority where the land is located (Art. 26). This application is put together by the Village Land Unit, the local authority of the NLMA. Surveys are conducted by the District Land Management Authority, and certificates are issued by the Provincial Land Management Authority (Art. 15). Once a Certificate of Land Ownership History has been registered, a land survey certificate (conveying land use rights with no rights of alienation), land use certificates (conveying temporary use rights and limited transfer rights), or land title (conveying permanent use and alienation rights) may be registered.

While some collective or communal rights can also be formalized, the types of entities that can apply for such rights is limited to "[s]tate, political, national construction front, mass and socio-economic organisations" (Land Law, 2003, Art. 59). Villages are government administrative units with the village members registered with the administration, and may be considered political organizations, but are also explicitly identified in MD88, Art. 26 as potential holders of collective title along with organizations (MD88, Art 3). While it is clear that villages may apply for collective title, *kumbahn* (village clusters or groups of villages that self-identify as a collective group) or other groups would have to form an association under the Association Decree (2009) to apply for collective rights over customary land.[9] This

9 It is interesting to note that the definition of entities that may apply for collective use rights was scaled down significantly with the adoption of MD88. Instruction 564/NLMA, promulgated in 2007, had defined organizations eligible for collective title as any of the following: "cooperative, collective organization, community, group of people,

Mr. Khamla, bamboo group leader of Lao PDR's Ban Napo village's collective bamboo forest. (photo: Tina Schneider)

has the advantage of allowing communities to define themselves but provides little protection for rights holders that are not included in an association.

Customary Law Application

While both individuals and organizations may formalize customary land rights, the customary law itself is not formalized in statute; all land must be used and managed consistent with the applicable law.

Land management authorities have the responsibilities to settle land disputes (Land Law, 2003, Art.10 and 81). However, given the rural character of Lao PDR, the many ethnic minorities, and the limited infrastructure providing access to district authorities, it is likely that the application of customary practices in conflict resolution will remain the norm.

Land Types Where Community Tenure is Recognized

Initially, customary lands were defined under MD101 as lands that were cleared and developed for "regular, continuous and long-term manner" (Art. 23). Potentially, this could have limited parcels to permanent agricultural lands and residential areas. However, MD88 clarified that customary lands could also include lands used "through the state land allocation plan of the concerned land parcel" (Art. 26). This opened up the definition to cover some types of forests, non-permanent agricultural lands, and other lands so long as they fall within a land allocation plan of the government.

For organizations seeking rights over collective land, this definition is more broadly presented in the *Ministerial Instruction 564 of 2007 on Adjudication for the National Land Management Authority* (MI564). Collective lands are identified as "land allocated to households for doing agriculture production during seasons with no individual having definite ownership, use forest, production forest, sacred forest, lands for organizing traditional/religious rites, common pasture and other lands commonly used by the community" (MI564, Art. 1.5).

Individuals, villages, and organizations may claim their customary agricultural, water, and forest land with some limitations.[10] For individuals, agricultural land

ethnic group for the lands to be collectively used with no individual having definite land use right." (MI564, Art. 1.5). This Instruction was overridden by MD88 (Art. 38).

10 It should be noted that customary use may serve as the basis for the

is limited to one hectare per working person per family for rice farming; three hectares per working person per family for industrial crops, annual crops, and fruit tree orchards; and up to 15 hectares per person per family for grassland for growing grass for animal husbandry (Land Law, 2003, Art. 17). For organizations, the area available for the organization to acquire land rights upon is assessed on a case-by-case basis by the Land Management Authority but is based on the productive ability of these organizations (Land Law, 2003). Land use certificates for individuals and organizations are issued for three years, but they may apply for title after three years if they have managed the agriculture lands in conformance with its agricultural purpose and within the law (Land Law, 2003, Art. 18).

For forestlands, individuals may acquire limited rights over degraded and deforested forestlands of up to three hectares per working person in a family (Land Law, 2003, Art. 21). In contrast, organizations may acquire rights to forest areas "based on their actual productive capability" (Land Law, Art. 21) but these areas may not include protected forest, preserved forests or un-exploited forestland (MD88, Art. 7). As with agricultural lands, the forest must be used in conformance with the forestland allocation plan[11] for three years under a temporary land use certificate. Following the three-year period, title may be issued to individuals or to organizations (Land Law, Art. 22). MD88 is explicit that rights on protected, preserved, and unexploited forestlands may not be acquired (Art. 7), although this does allow for rights in production forest areas. This is consistent with the Forest Law of 2008, which states that natural forest and forest is the property of the national community (Art. 4). However, the Forest Law (2008) does provide for customary use that is in accordance with laws and regulations related to timber use and harvest of forest products in non-prohibited forests for household use, but it must be done in accordance with a plan and village regulations (Art 42).

The Land Law also covers some island and water land areas that are defined as "land which is submerged or surrounding of water sources, including: submerged land, head waters, river banks, island, newly formed land, land caused by water receding, or land caused by the change or the diversion of water ways" (Land Law, 2003, Art. 23). Specifically, use and protection rights to wetland areas may be allocated to individuals or organizations through an application by the administrative authority of the village to the district administrative authority for a land use certificate. So long as the water and water resource managing authorities and the Science, Technology and Environment Agency "have inspected and found that the use of the said land has no negative impacts on the water area" then the land may remain under the use rights of the individual or organization (Land Law, 2003, Art. 26).

claim, but that individuals, villages and organizations can also request non-customary areas as collective land through the same process.

11 Land Allocation Plans would define the different land uses and classifications, e.g., agriculture, protected forests, etc.

Rights Conferred

As stated above, rights of alienation are dependent upon the type of registered rights received and whether the owner is an individual or an organization (collective). For individuals, land use certificates convey temporary use rights and limited transfer rights. In contrast, organizations or collectives hold only temporary use rights (no transfer rights). Similarly, individuals holding land title have permanent use rights and full rights of alienation, while organizations hold only permanent use rights. Land use certificates may not be transferred in any way regardless of whether the holder is an individual or organization (collective).

2.3.2 IMPLEMENTATION

Procedural Challenges

Although the importance of ensuring that communal lands are not converted to agricultural or tree plantations has been recognized since the mid-2000s (Department of Lands, National Management Authority & Land Issues Working Group, 2012; Liu & Sigaty, 2009; Seidel et al., 2007), there is currently no clear process in practice on how either communal or collective land rights can be registered (Land Issues Working Group, 2012; Sayalath et al., 2011). This has primarily been the outfall of a political context in which priority has been given to land leasing or concessions to investors. In combination with the prevalent lack of public understanding about legal land rights, there has been little progress on the issue of communal or collective land rights.

The experience of the only two districts where communities have successfully obtained collective land rights offers insights into the process and outcome to date (Schneider, 2013). In 2011, the first collective land use certificates were awarded by the District Department of Natural Resources and Environment for five village use forests (2,189 ha of bamboo) in Sangthong district of Vientiane capital. This was part of a SNV-Gender and Development Association (GDA) Bamboo Value Chain Project. In 2013, villagers resettled by the Nam Theun 2 hydropower dam also received collective land titles in Nakai district of Khammouane Province. Here, about 20,000 ha of forest and agricultural land was awarded permanent title in 14 hamlets. Both sets

of collective tenure, however, afford different sets of rights and had to go through different processes (described below), which still remain poorly recognized and have not become the content of any new Ministerial Instructions.

In Sangthong, a temporary title was obtained (that could be turned into permanent title), whereas in Nakai, permanent title was obtained for resettled households. Both were exempt from taxes. Each underwent different types of processes for obtaining these titles: Sangthong drew on MI564 and MD88, while Nakai drew on Instruction 1668/2008 (Schneider, 2013). In both cases, there is a different type of local decision-making body among collective land members. The "collective land" includes different types of land uses. In both cases, women knew less about rules and processes. Collective land rights conferred ease of management, reduction of conflict, protection from outsiders, and environmental protection. Immediate income or tangible economic benefit were not raised by villagers as a primary benefit even though they supported collective land titling. Donor support was needed to carry out the titling since villagers could not have financed this.

Despite these small but positive gains, it remains unclear how other Lao villagers can obtain communal or collective tenure. It is important to recognize that these communal tenure developments occurred at a time when the NLMA and its line agencies at the provincial and district level were being incorporated into the new Ministry of Natural Resources and the Environment (MONRE). Protection and conservation of forests is MONRE's responsibility, while production forests are the responsibility of the Ministry of Agriculture and Forestry. The dynamic complexity of the situation therefore added to the difficulties in completing the process smoothly. The experiences in Sangthong and Nam Theun (building as they did from donor-supported initiatives in communal tenure [World Bank, Australian Department of Foreign Affairs and Trade, and *Deutsche Gesellschaft für Internationale Zusammenarbeit* [GIZ] as well as the work of the Land Issues Working Group) offer guidance on the development of law and policy to support communal or collective tenure.

Issues for Future Clarification

A number of important points have been raised by examining these two experiences. Firstly, the terms "communal" and "collective" land are both used within the legislation and policy on land. MD 88 of 2008 only refers to collective land, whereas Instruction no. 1668/NLMA 2008 only mentions communal land. Despite the fact that earlier studies have noted that "communal" or "collective" land is not fully or adequately defined (Land Issues Working Group, 2012), the situation remains ambiguous. "Communal" refers to land that is used together by communities, and "collective" land to those used by cooperatives, production groups, or associations which collectively use land (as stated in Draft Land Policy of May 2013) (Schneider, 2013). How the rights and institutions associated with each of them are interpreted by the government, however, remain unclear. In both successful cases noted above (Sangthong and Nakai), the word "collective tenure" was the category under which rights were obtained. An extended legal and implementation discussion of each case can be found in Schneider (2013).

Secondly, even though new instructions on the implementation of land title formats and survey approaches were issued by the NLMA's Cabinet Office in 2010, no further clarity on the issue of communal land titling has emerged (Schneider, 2013). Additionally, tax liabilities on communal land remain unclear and include such questions as:

1. Should there be tax liabilities for fallow land (which is extensive)?
2. Who should be responsible for tax payments?

Thirdly, in the draft Land Policy, two broad types of rights have been delineated: land use rights (which includes rights to sell, transfer, and inherit land) and land utilization rights (which only allow for access and use). To simplify, land use rights have been allocated to collective land, and land utilization rights for communal land (where the government asserts a stronger right of intervention). The Land Policy does not state which institution or agency is authorized to propose, delineate, and approve either of these two land category types.

There has been little progress over the 10 years since the creation of the 2003 Land Law. Although 2012 was a turning point with the government publicly declaring support for the process of establishing collective/communal title, there remains a lack of clarity as to how such titles can be obtained. The major strengths and weaknesses of the communal or collective land titling approach are summarized in Table 5. It is hoped that the finalization of the Land Policy will open the door to streamlining and clarification of how titles for communities can be obtained (be they for agriculture, forest, shifting cultivation land, or otherwise). The major strengths and weaknesses of community land and resource tenure in Lao PDR are summarized in Table 6.

TABLE 5: COMPARISON OF SANGTHONG DISTRICT AND NAKAI DISTRICT COLLECTIVE TITLES

Temporary	Permanent
Specifically chose parcels	All land unless individually owned, state managed (hospitals, schools, etc.)
In name of community, unclear how membership conferred	In name of community, specific families, and direct descendants

Source: Schneider, 2014

TABLE 6: MAJOR STRENGTHS AND WEAKNESSES OF THE LAND-RELATED SYSTEMS CONCERNING COMMUNITY LAND AND RESOURCE TENURE IN LAO PDR

STRENGTHS	WEAKNESSES
• Applies to all lands, not only indigenous peoples' customary lands. • Wide range of organizations eligible to apply for collective title. • Covers a broad range of land use types: agricultural, forests, grasslands, water bodies, and others.	• Lack of clear practical guidance as to where communal or collective titles apply. • Lack of clear process on how communal or collective land titles can be obtained. • Administrative reorganization at the ministerial level slowed down the process. • Land Policy needs to be finalized for clearer guidance to be provided on how titles can be obtained.

2.4 MALAYSIA

Malaysia is made up of Peninsular Malaysia (with 11 states) and the two large states of Sabah and Sarawak (with considerably lower population densities) on the island of Borneo. Although all states come under the authority of the federal Government of Malaysia, Sabah and Sarawak have, for historical reasons, their own distinctive laws and governance systems that convey a level of autonomy (Vaz, 2012). In Peninsular Malaysia, the predominant group is Malay, followed by ethnic Chinese and Indians and others. Only about one percent of the population is Orang Asli, translated as "aborigines" or "original peoples." On Sabah and Sarawak, however, indigenous communities or Orang Asli form the predominant population having their own ancestral domains and cultural practices. Sixty percent on Sabah are indigenous, made up of 32 different ethnic and sub-ethnic groupings; on Sarawak, 50 percent are indigenous with 38 ethnic and sub-ethnic groupings. The focus of the legal analysis is on the recognition of native or indigenous customary land tenure in Peninsular Malaysia and Sarawak, while the assessment of the implementation experience focuses on Sabah and Sarawak.

In general, indigenous groups have had to contend with insecure tenure conditions despite provisions in state and federal laws for recognition of *adat* (customary laws) and native land rights (Bulan, 2006; SACCESS, 2012). The interpretation of these stipulations has not favored strong protections for indigenous communities, especially in the face of growing competitive pressures on land and natural resources. Laws facilitating the compulsory acquisition of land (for timber, palm oil, and other key commodities) have been used to resettle communities, often with minimal compensation. Therefore, most ancestral land has been alienated to plantation companies, rezoned as conservation areas, or retained as state land (Lunkapis, 2013). In response, indigenous communities have submitted many complaints to the National Human Rights Commission of Malaysia as well as submitted numerous court cases against the government and developers (Zulhilmi, Abidin & Wee, 2013).

2.4.1 LEGAL ANALYSIS

Community Land Rights Holders

Malaysia's Federal Constitution of 1957 recognizes customary law as an integral part of the country's legal system (Art. 160). However, in statute

and practice, customary law is only applied to Malay, Aborigines (Orang Asli), natives and their communities (each defined separately below). Customary land rights have evolved differently for each of these groups in large part because the Federal Constitution also confers land administration and regulation to the states (Art. 74[2]). As a result, customary land rights are best examined at the state level. Because an exhaustive analysis of all of Malaysia's 13 states is not feasible for this analysis, the assessment here focuses on customary law as it applies to the Malay of Peninsular Malaysia; the Orang Asli or Aborigines in Malacca on Peninsular Malaysia; and the native peoples of Sarawak on the island of Borneo.

PENINSULAR MALAYSIA – MALAY RESERVE LANDS

Recognition and Registration Process

Malay Reservations have been set aside in each of the nine Malay peninsular states exclusively for native Malays through various instruments pre- and post-dating independence. The definition of Malay is defined in the Constitution (1957) as a person who professes the religion of Islam; habitually speaks the Malay language; conforms to Malay custom; and can trace their lineage to Malaysia prior to independence (Art. 160). However, the Federal Constitution, in addition to conferring land administration and regulatory rights to the states, also allows states to define "Malay" for the purposes of reservations of land (1957, Art. 89[6]). Accordingly, the definition of Malay varies across state jurisdictions.

In Malacca and Penang, for example, ownership of Malay Reserve lands is restricted to "Malay" individuals and to "Malacca Customary Land Companies." In these states, the definition of Malay conforms with the Federal Constitution definition cited above, while the Malacca Customary Land Companies must be incorporated under the law. These companies must comprise all Malay membership; prohibit transfer of shares to non-Malay explicitly in its articles of incorporation; and has as one of its purposes "to deal in customary land" (National Land [Malacca and Penang] Code, 1963, §94[1]). In contrast, the definition of Malay in Kedah and Perlis includes descendants of Arabs and Thais (Zaki, Hamzah, Ismail, Awang & Hamid., 2010). These reserves have been registered and are conveyed in accordance with the modern Malay land administration system.

Customary Law Application

A National Land Code (NLC) was passed in 1965 to provide uniformity in land management and administrative guidance to the states. It promotes the use of the Torrens System[12] of land registration and it is particularly relevant in Peninsular Malaysia. Under the NLC, each of the states may identify an Administrative Authority for land management (NLC, §12) whose land administration and registration responsibilities include rule-making regarding the control, management, and leasing of reserve land (NLC, §14). Peninsular Malaysian states have not codified specific provisions of customary land law.

Rights Conferred

It is important to note that registration of these claims was initiated under ordinance pre-dating independence to secure land rights for indigenous Malays in the face of high levels of in-migration by foreigners (see Customary Tenure of Land [Settlement of Malacca] Ordinance, 1952; and Customary Tenure [State of Negeri Sembilan] Ordinance, 1952). A remnant of that legacy is the restriction that Malay Reserve lands may only be conveyed to other Malay individuals and companies.

PENINSULAR MALAYSIA – ORANG ASLI LANDS

Community Land Rights Holders

Aborigines, or Orang Asli, are defined in the Federal Constitution (1957) as the Indigenous Peoples of the Malay Peninsula. To be considered Orang Asli, a person must meet the criteria set out in the Aboriginal Peoples Act (APA) of 1957. In addition to

12 The Torrens System was established in Australia in the late 19th century and has been widely adopted throughout British Commonwealth countries. Under the Torrens System, a central register of land holdings is maintained by the state. For each property, there is a single indisputable land title (recorded in the registry) that includes all transactions for that land. This registry provides a guarantee of title to anyone included in the register and eliminates the need for deeds or title searches.

Native Courts in Sarawak

Native Courts address native customary land disputes, breaches of native customary law (*adat*), and applications from natives to be identified as native communities. *Adat* can be found in unrecorded oral traditions, administrative codes, legislation, as well as judicial decisions. Based on a landmark decision in April 2015, the Court of Appeal ruled that the civil court does have the jurisdiction to review decisions of Sarawak's Native Courts.

being a descendent of a male aborigine, a claimant must speak the aboriginal language, follow their customary way of life, and adhere to aboriginal customs and beliefs (APA, §3). That said, infants adopted from birth and children of non-aborigine fathers may claim status providing they meet the remaining criteria and remain a member of the community (APA, §3).

Recognition and Registration Process

Under the APA, Orang Asli have limited rights over Aboriginal Reserves, Aboriginal Areas, and Aboriginal Inhabited Places. Aboriginal Reserves are declared by the Administrative Authority as exclusively inhabited by Aborigines (APA, §7). Aboriginal Areas are declared similarly but may include areas that are predominantly inhabited by Aborigines (APA, §6); and Aboriginal Inhabited Places are places inhabited by an aboriginal community but have not been declared as Aboriginal Area or Aboriginal Reserve by the state (APA, §2).

Customary Law Application

Customary law is not explicit in the law, and while communities are permitted to live according to their custom and tradition in Aboriginal Areas and Reserves, regulations related to management and use of that land may be promulgated by the state (APA, §19).

The APA created a Department of Orang Asli Affairs currently housed under the Ministry of Rural Development. The APA allocates administrative authority to the Director of this Department but recognizes the authority of the Orang Asli Headman over matters related to custom and belief (APA, §4). The Director has the authority to remove a Headman (Art. 16[2]).

Land Types where Community Tenure is Recognized

The Courts of Malaysia have recognized the customary rights of Orang Asli communities over lands that were not gazetted as Aborigines Areas or Reserves (for example, the *Kerajaan Negeri Johor v Adong* 1997 case). In that case, the Court provided compensation to Orang Asli peoples for lands that had been taken for a dam project. The Court found that they had been deprived of their customary lands and livelihoods and were thus eligible for compensation, even though the lands were not classified as Aboriginal Areas (Bulan with Locklear, 2008). Aborigines may also occupy Malay Reservation, reserved forest, or game reserves but must comply with state prescribed rules and may be removed by the state (APA, §10).

Rights Conferred

The APA does not convey title; it only conveys tenancy rights (APA, §8). Specifically, the state conveys rights to individual aborigine; members of any family; or to members of any aboriginal community (APA, §2). Orang Asli have no rights to "transfer, lease, charge, sell, convey, assign, mortgage or otherwise dispose of any land," except by permission of the Administrative Authority (APA, §9). Aboriginal Reserves and Areas can be revoked by the state [APA, §§6(3), 7(3)] and alienated, leased, occupied by a licensee, or otherwise disposed by the state. Because Orang Asli are considered tenants, in these cases, they are only entitled to compensation for the loss of fruit or rubber trees (APA, §11) although the state may provide other compensation (APA, §11).

Community maps of customary lands

Local experts address native customary land disputes, breaches of native customary law (*adat*), and applications. Local residents typically possess expert knowledge of the local geography, territory and land use patterns. As such, there has been a global growth in the use of participatory mapping methods that combine modern cartographic techniques with participatory methods for setting out the knowledge of the physical and social geography of the local terrain. Participatory mapping is a powerful tool that enables rural as well as marginalized communities to represent their knowledge for the purposes of establishing land rights as well as engaging in land use planning.

In Sarawak, the Borneo Resources Institute has been working since 1996 with Dayak communities to carry out community-based mapping of their native customary lands to protect them against private-sector logging concessions. Such community maps were used in disputes such as the landmark 2000 case of Rumah Nor longhouse community vs a pulp-and-paper company. Although the court had favored the community, the response of the Sarawak government was to enact the 2001 Land Surveyors Ordinance that regulated land surveying approaches making community-based mapping illegal (Bujang, 2004). As a result, there is now reliance on an expert-based approach involving cartographic mapping.

SARAWAK – ORANG ASLI LANDS

Recognition and Registration Process

The Administrative Authority in Sarawak over Lands is the Department of Lands and Surveys. However, the Native Courts (established in Sarawak and Sabah in 1992) has limited jurisdiction over native issues, including some land issues. The Sarawak Land Code (SLC) of 1958 provides for a Register of Native Rights to record Native Customary Rights and titles (SLC, §7A[2]). However, this has not yet been established (Bulan, 2007).

The SLC includes five classes of land:

1. *Mixed Zone Land,* where both native and non-native persons may hold private title;
2. *Native Area Land*, where natives hold customary title and non-natives may acquire limited rights;
3. *Native Customary Land*, which was either recognized and created prior to January 1, 1958, or created by the state by the conversion of state land to Native Communal Reserve (a subcategory of Native Customary Land);
4. *Government Reserves,* which are used for public purposes; and
5. *Interior Area Land*, which is a remainder category but where native customary rights may be created after 1958, subject to a permit (and necessitating a change in classification to *Native Customary Land*).

Native customary rights can be acquired on Interior Area Land by natives in one of five ways as described in the SLC provided that a permit for Interior Area Lands has been issued. The five methods, all of which must have been undertaken prior to January 1, 1958, include clearing virgin forest for occupation; planting fruit trees; cultivating or occupying land; using the land as a burial ground; or using the land as a right of way (SLC, §§ 5[1]–[2]). Until a title is issued by the state, natives are considered licensees. Once title is issued, a Native Communal Reserve is created and natives may then use the land in accordance with customary law so long as it does not contradict statutory law (SLC, §6[2]).

Customary Law Application

Natives hold customary land rights in Sarawak. A native of Sarawak must be a citizen and member of one of the 28 ethnic groups named in the Federal Constitution, or "of mixed blood derived from these groups" (Art. 161A7). However, the Native Courts established in 1992 to address native issues in Sarawak and Sabah have the authority to consider applications from non-natives for native status (Bulan, 2007).

The Native Court's mandate extends to include many civil and criminal issues in Sabah and Sarawak, and may take into account the customary law in its rulings. The Native Custom Ordinance of 1996 provides for codification of select native customs and legalizes such codes so long as they are not inconsistent with existing law or are "found repugnant" (Art. 9).

Land Types Where Community Tenure is Recognized

Reserve Forests are Government Reserve Lands under the land classifications of Sarawak, and so cannot be considered Native Area Land, Native Communal Reserve, or Native Customary Land. The recently passed Sarawak Forests Ordinance (2015) contains a process by which subsisting rights or privileges may be claimed in forest reserves or protected forests, but these rights are subject to the control of the Director (§21). Further, the Minister of Forests maintains the right to extinguish any "subsisting rights or privileges" over forest reserves or protected areas (§22). This is done simply by posting in the Government Gazette, a local newspaper and notice at the District Office in the area (§22).

Rights Conferred

Under §5(4) of the SLC, the Government of Sarawak may terminate native customary rights created under §5(1)(2), which requires compensation to be paid to "any person having lawful rights." Such land will revert to the government. This would apply to licensees (prior to acquiring title).

2.4.2 IMPLEMENTATION

Orang Asli Experience

In Malaysia, common law recognizes preexisting rights under native law and custom. This is facilitated by the Malaysian Constitution's recognition of written law, common law, and customs and usages. Since the Adong court case of 1997, when 52 Orang Asli aboriginal families successfully obtained compensation for ancestral lands (that were not gazetted as an Aboriginal Reserve) taken over to construct a dam, Malaysian courts have utilized the doctrine of common law native title for indigenous land rights established through the 1992 Mabo vs. Queensland case (Bulan, 2012). As such, both statutory rights under laws and regulations as the 1954 Aboriginal Peoples Act or the 1958 Sarawak Land Code, as well as common law protections, has been available to aboriginal or native communities. With more than a hundred title cases pending in Malaysian courts, the principles established by the Mabo case afford greater protections for Orang

Asli and native communities against government or corporate commercial interests.

Sarawak Experience

Only a small percentage of the land classified as native customary lands has been titled to date. There remains a logjam in titling native customary lands. This is despite the fact that the 2000 Land Code amendment aimed to make registration of native customary lands easier so that they can become available for joint agribusiness ventures (Bulan, 2006; Majid Cooke, 2006). Investigations in the late 2000s by the *Suruhanjaya Hak Asasi Manusia Malaysia* ([SUHAKAM] National Human Rights Commission of Malaysia) into human rights complaints from Sarawak revealed that 158 out of 287 complaints were about native customary land rights (Bulan with Locklear, 2008). Their analysis concluded that there is has been a gap between native communities and government authorities in their perception and understanding of the 1958 Sarawak Land Code. Their report recommended a review of the 1958 Land Code so that it can better promote the rights of indigenous communities to their customary lands covering specifically:

1. The recognition of customary rights;
2. The difficult burden to establish ownership through documentary evidence;
3. Protection of land rights, and where alienation is according to law, provide for just compensation; and
4. Fiduciary obligation of government officials to consult and obtain consent from native communities prior to taking action that may infringe on their native title rights.

A more recent and comprehensive study of indigenous land rights in Malaysia (SUHAKAM, 2013), based on complaints received between 2002–2010, confirms that in the case of Sarawak, the 1958 Land Code's strict definition of native customary rights fails to take into consideration the traditional and cultural practices of native communities. For example, it considers settlement and cultivation to be primary indicators of inhabitation, whereas native practices include areas for hunting, gathering, as well as sacred and commemorative sites.

There are numerous other procedural obstacles to the recognition and protection of native customary rights that reduce the number of claims that need to be approved. Where there are conflicts between communities over boundaries, the perimeter survey that is needed to process the application is cancelled. Once the area has been surveyed, no more native land claims can then be submitted in the future.

Moreover, access to topographical maps and aerial photos (from 1954) is restricted and only publically available during community dialogue sessions. Community maps have been disallowed under the 2001 Land Surveyor Ordinance, thus only validating an expert-based approach that relies on cartographic mapping (SUHAKAM, 2013). Extended delays in processing because of these issues have led to weak protections for native communities together with the rapid issuance of provisional leases by the government to third parties (for commercial development) or forest land gazetting. Moreover, there is no effective monitoring mechanism for tracking complaints and their resolution. Finally, there has been inconsistency in the handling of applications for native customary lands.

Sabah Experiences

In the case of Sabah, native communities are eligible to apply for communal title to convert customary rights to statutorily recognized tenure under the Sabah Land Ordinance (1930; Section 76 and 77). Even so, many have preferred to obtain individual title (as Section 77 allows for subdivision with the approval of the Collector of Revenues). In 2009, however, the Department of Lands and Survey sought to fast track the issuance of communal title to spur joint venture agriculture development schemes on those communal lands considered idle or non-productive (Lunkapis, 2013; Vaz, 2012). In general, though, it has not been easy to obtain title individually or communally because of overlapping claims, survey costs, long processing times (at times more than 20 years), environmental protection zoning, and overlaps with protected areas (Doolittle, 2005). The 1992 Native Courts Enactment provided for a Native Court system that adjudicates *adat* law systems and can help resolve long-standing conflicts.

An alternative route is available by applying to become a Native Reserve (under Section 78 of Sabah Land Ordinance), which creates a different line of authority and management from that afforded by communal title. However, if a reserve is not maintained according to the rules, it is easy to revoke the title leading to an insecure tenure situation. Reserves are not commonly applied for, and the last application in 1999 still awaits approval (Lunkapis, 2013). In general, there is considerable confusion over what constitutes a communal title. Native communities and the Department of Land and Surveys often support different interpretations. Table 7 provides an overview of the major strengths and weaknesses of the various types of community land and resource tenure arrangements in Malaysia.

TABLE 7: MAJOR STRENGTHS AND WEAKNESSES OF THE LAND-RELATED SYSTEMS CONCERNING COMMUNITY LAND AND RESOURCE TENURE IN MALAYSIA

STRENGTHS	WEAKNESSES
• The statutory recognition of customary land rights is available to the majority Malay ethnic group, to *Orang Asli* (aboriginal), as well as native peoples. • Doctrine of common law supports indigenous land rights. • Native Courts Enactment of 1992 permits adjudication of *adat* law systems, particularly to address long-standing conflicts.	• High burden to establish ownership through documentary evidence. • Long processing times for obtaining native customary title. • Conflicts among communities over boundaries results in the perimeter survey being cancelled. • Aerial photos and topographical maps are restricted, and only available for community dialogue sessions. • Community maps are not allowed under amendments to the 2001 Surveyor Ordinance. • Only rights to settlement and cultivation areas eligible for registration; rights to areas customarily used for hunting/gathering and sacred sites are not.

2.5 PHILIPPINES

There are a number of initiatives in the works for improving land management and administration in the Republic of the Philippines (Eleazar et al., 2013). Among these, the customary land tenure provided to IP territories is an important component. The 1987 Constitution of the Philippines provides protection for both the identity and rights of what it terms "indigenous cultural communities" (ICCs) as well as autonomous regions (in the Cordillera and Bangsa Moro/Mindanao) (USAID, 2011b). The state shall "protect the rights of indigenous cultural community to their ancestral lands to ensure their economic, social and cultural well-being" (Philippines Constitution, 1987, Art. 12, §5). Reliable data on the indigenous population is not available,[13] but it is estimated that they make up about 17 percent of the Philippine's population and include 110 different ethnolinguistic groups across the archipelago.

Ten years later, the Indigenous Peoples Rights Act (IPRA) of 1997 created a landmark piece of legislation for protecting the ancestral domains of ICCs. It establishes four pivotal and inter-related bundles of rights: ancestral domains and lands, self-governance and empowerment, social justice and human rights, and cultural integrity (Roy, 2014). It enables the creation of Certificate of Ancestral Domain Title (CADT), Certificate of Ancestral Domain Claim (CADC), Certificate of Ancestral Land Titles (CALT), and Certificate of Ancestral Land Claims (CALC).[14] Claims can be converted to titles by a process of petitioning.

13 Although a national census was carried out in 2010 that included an ethnicity variable, no official figure on percentage of population that is indigenous has been provided (IWGIA, 2015a).

14 Ancestral domains are defined in IPRA as "all areas generally belonging to IP/ICCs comprising lands, inland waters, coastal areas, and natural resources therein"; whereas ancestral lands are more narrowly defined as "land occupied, possessed and utilized by individuals, families and clans."

It is one of the few laws for IP globally that includes a requirement for free, prior, and informed consent (FPIC). The National Commission on Indigenous Peoples (NCIP) was created to implement the legislation. Its members are appointed by the Office of the President and does not guarantee representation by IP themselves. Its responsibility is to issue the various titles associated with the IPRA.

2.5.1 LEGAL ANALYSIS

The basis for the recognition of customary land rights of IP in the Philippines is enshrined in the Philippines Constitution of 1987 (Art, 2, §22). This constitutional provision also paved the way for the enactment of the 1997 IPRA. The Supreme Court has upheld these by ruling that the rights of dominion (state claim to land) only applied to unoccupied or unclaimed portions of the Philippines at the time of colonization (see Republic of the Philippines, 2000). Accordingly, ancestral lands are deemed private lands based on customary or native title.

Community Land Rights Holders

Customary land rights are limited to, and may be vested in and applied to, IP/ICC. As it applies to customary land law recognition, IP/ICCs are defined as either:

> A group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as an organized community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits (IPRA, §3h).

However, recognizing that many indigenous communities have been displaced from their ancestral lands, IPRA also includes:

> Peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains (IPRA, §3h).

Recognition and Registration Process

As stated above, NCIP oversees the implementation of IPRA (1997) and is the administrative authority over ancestral domain lands. As the primary government agency through which IPs/ICCs may seek government assistance and through which assistance is extended (§44a), NCIP has the responsibility to issue CADT and CALT (§44e) and promulgate the necessary rules and regulations for the implementation of this Act (§44o).

The process to title Ancestral Domains is outlined in IPRA §52 and is initiated either by NCIP or a petition signed by a majority of the members of an IP/ICC. The process is led by the Ancestral Domains Office (ADO) of NCIP that initiates a census of all IP/ICC members and records oaths by elders or the community testifying to the claim over the land. Additional documentation of proof of Ancestral Domain is required to authenticate the claim and may include written testimony regarding customs, traditions, political structures, and organizations; pictures depicting long-term occupancy; historical accounts and agreements; survey plans; anthropological data; genealogical surveys; and pictures or descriptive histories of traditional forests, rivers, and other geophysical features. Following this, a perimeter map with major features is prepared, along with a report summarizing the documentation provided as proof of Ancestral Domain, both of which are made available through public notice. Assuming no conflicts, a recommendation is forwarded to the NCIP to issue a CADT in the name of the community that includes a list of all the community members identified through the census process. The ADO also assists the communities to resolve conflicts.

The process to title Ancestral Lands (resulting in the issuance of a CALT) is outlined in IPRA (1997, §53). CALTs are issued outside of CADT areas; individuals, families, or clans may apply for this title. To file a claim, an applicant must file testimony from elders and other documents that attest to the possession or occupation of the area since time immemorial. The ADO may request further proof as well (IPRA, 1997, §53d). The application must be posted locally and in local, provincial, and regional NCIP offices for no less than 15 days, and must be published for two weeks in a newspaper (or radio if newspapers are not available) (IPRA, §53e). Following this, the NCIP arranges for a survey of the land (IPRA, §53f). Conflicts arising from the claims are managed by the ADO; once resolved, a full report is sent to the NCIP to issue a CALT (IPRA, §53g).

Customary Law Application

While customary law is not codified in the statutory law, IPRA (1997) provides for its recognition and application within CADT areas with regard to the governance of property rights or to determine ownership (§2b). More specifically, IPRA requires the application of customary law to negotiate "the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and the conservation measures" (§7b); resolving land conflicts (§§ 7h, 63, 65–66); transferring land or property rights to/among members of the same IPs/ICCs (§8a); obtaining FPIC within the community (§§ 35, 58); and in determining penalties for violations of the IPRA (§72).

In addition, IPRA (1997) recognizes IP/ICC judicial systems and institutions (§15) and conveys the right to use customary law in the adjudication of land disputes within CADT areas (§7). This is bolstered by explicit calls for the primacy and use of customary laws and practice in disputes related to "property rights, claims and ownerships, hereditary succession and settlement of land disputes" (§§ 63, 65). As the IPRA administrative authority, NCIP may assume jurisdiction over claims and disputes only after all remedies under customary law have been exhausted (§66), although its decisions can be appealed by petition to the Philippine Court of Appeals (§67).

Land Types Where Community Tenure is Recognized

The statutory recognition of customary rights applies across all land types, including forests that otherwise are considered government lands under the Forestry Law. CADT lands transfer ownership from the state to IP/ICC. The transfer process is outlined in the IPRA (1997) and requires the NCIP to notify the appropriate authority and "terminate any legal basis

for the jurisdiction previously claimed" (IPRA, §52i). However, it should be noted that under the Revised Forestry Code of 1975, "all lands above 18 degrees slope automatically belong to the state and classified as forest lands" (§15). This classification applies regardless of the whether the land is forested.

Rights Conferred

IPRA §5 states explicitly that the indigenous concept of ownership, while both individual and communal, applies to all generations, and so may not be "sold, disposed or destroyed." That said, it is possible for individual members of the IP/ICC to claim their customary rights to land through a CALT (§12) provided they have been in possession of the land prior to 1967 and exercise this option before 2017. By exercising this option, individuals receive an individual title subject to the Commonwealth Act or the Land Registration Act. Otherwise, customary law and tradition determines the allocation of lands within the Ancestral Domain to individuals, families, or clans (§53a). While ownership cannot be transferred, the right to develop land and resources is permitted (§7b).

2.5.2 IMPLEMENTATION

The Registration Process

Although the process for issuing CADTs/CADCs was slow to begin with, it eventually picked up momentum. By February 2001, the NCIP had only approved nine of the 181 CADT applications (Ewers, 2011). By 2013, 158 CADTs had been issued for 4.3 million hectares and 257 CALTs issued for 17, 293 hectares (Eleazar et al., 2013). This covers about 56 percent of total eligible area (which is considerably less than the 90 percent coverage considered the best practice by the Land Governance Assessment Framework[15]). About 3.4 million additional hectares are going through social preparation, survey, or process for approval.

In January 2013, however, a Joint Administrative Order was signed by the NCIP, Department of Agrarian Reform, Department of Environment and Natural Resources, and Land Registration Authority to establish a unified mechanism for the settlement of conflicts related to the different types of tenure managed by the four agencies on indigenous lands (IWGIA, 2015b). In doing so, it suspended the issuing of any titles where conflicts existed. As a result, this order has come under considerable criticism by indigenous rights advocates because it has led to a slowdown in CADT registration since 2012. In turn, more efforts have been directed by ICC groups toward stronger recognition for Indigenous and Community Conserved Areas that are voluntarily managed by indigenous and local communities through customary laws and other measures for sustainable management (IWGIA, 2015b).

There has also been concern over the 2002 and 2006 NCIP guidelines for processing FPIC because they were considered more favorable to companies with large development projects such as in the mining sector. In light of this, a new revision was issued in early 2012 that aimed to redress some of these concerns (IWGIA, 2015b).

Altogether, the achievements in titling of IP lands is a significant achievement. The set of protections offered by the IPRA of 1997 contain features not typically found elsewhere: a) formal recognition of customary land rights (in the form of ownership); b) safeguards against land alienation; c) redress mechanisms for addressing land disputes while accounting for customary law; and d) inclusion of IP in major decision making (Roy, 2014).

There remains considerable concern over the lack of substantial implementation. With further funding and logistical support, however, the full set of goals can be realized, particularly if the overly complex procedure followed by the NCIP can be simplified. Presently, the evidentiary burden is overly heavy.

Remaining Challenges

Research by a human rights and democracy NGO in the Philippines in 2005 indicated that many interviewed indigenous groups were aware of their land ownership rights, their right to develop and use natural resources, and their right to stay on their lands (Metagora Philippines Project, 2006). They also acknowledged that customary law was the primary source of adjudication for any disputes. Their concerns, however, revolved around the lack of understanding about the difference between ancestral domain and lands, displacement issues, the lack of protection and capacity by the government, ongoing violation of IP rights, and the issue of non-compliance with FPIC policy by mining companies. Academic research in the Cordillera points to some unexpected problems that have been faced in equitably implementing the IPRA (Prill-Brett, 2007):

1. There has been a prevailing assumption that ICCs are homogeneous and as such, the identification and delineation process has excluded some

15 The Land Governance Assessment Framework has been developed as a diagnostic tool to help evaluate the legal framework, policies, and practices regarding land governance, and to monitor improvements over time (Deininger, Selod & Burns, 2012). It was developed through a collaborative process between the World Bank and its partners.

among a cultural community who are coastal dwellers. This has resulted in their failure to obtain rights to coastal area settlements, shorelines, and the sea. Moreover, with greater integration into modern economic systems, local communities are not necessarily practicing their traditional form of production any longer.

2. Within indigenous communities, there may be several types of property regimes, rather than a single form, that need to be considered in the development of CADT/CALT.

3. At times, a CADC application can include, to simplify the application process, an entire administrative area (such as a municipality or province) that does not necessarily correlate with the traditional Ancestral Domain. There is no historical precedent for customarily managing a large administrative area such as an Ancestral Domain through a regional mechanism.

4. The creation of a CADC over an entire administrative area that has not been customarily managed can create problems for ensuring sustainable management of this territory.

5. The very creation of a newly defined Ancestral Domain produces new opportunities for elite control of the process, leading to inequitable access and breakdown of internal customary law arrangements, which themselves are not uniform across a domain.

6. As the government itself has decentralized, there have been increasing conflicts over administrative boundaries, and therefore over boundaries of Ancestral Domains and land. The stronger role of local governments in local development has given them the power to undermine the awarding of titles to IP. At times, the municipal government becomes the holder of the Ancestral Domain title rather than the indigenous community.

7. On occasions, communities will bypass their customary law to draw on statutory law if they opportunistically see a window to greater benefits.

Addressing issues of heterogeneity in terms of diversity as well as gender within ICCs is an important area for improving equity, reducing conflict, as well as enhancing sustainable management of natural resources (Crisologo-Mendoza & Prill-Brett, 2009). Procedures for dealing with overlapping claims are also poorly developed, slowing down the process of confirming titles. This is particularly troubling because a Joint Administrative Order was issued by government agencies that work on land titling suspending the issuance of Ancestral Domain titles where there were overlapping claims. There have been suggestions that the IPRA (1997) should be revisited in light of these experiences to identify more carefully tailored approaches to indigenous land rights (Prill-Brett, 2007). Table 8 provides a summary of the major strengths and weaknesses of the ancestral domain titling offered under the IPRA.

TABLE 8: MAJOR STRENGTHS AND WEAKNESSES OF THE LAND-RELATED SYSTEMS CONCERNING COMMUNITY LAND AND RESOURCE TENURE IN PHILIPPINES

STRENGTHS	WEAKNESSES
• Customary land rights and autonomy recognized in statutes. • Constitutional entrenchment of land rights regime and autonomy. • Grant of formalized titles that transfer land from state to communities. • Law recognizes both individual and community rights. • Customary law determines allocation of rights within the community. • FPIC process legally enshrined. • Customary dispute resolution legally recognized. • APO assists in resolving disputes. • Rights of displaced IP/ICC groups to ancestral domain recognized.	• Funding, logistical, and manpower shortages in the National Commission on Indigenous Peoples. • Bureaucratic and procedural complexities in land-titling process causing evidential burden. • FPIC process inadequately followed. • Prevailing assumption that ICCs are homogenous, which leads to exclusion of coastal dwellers and inadequate recognition of rights to coastal settlements, shorelines, and sea. • Law requires communities to practice traditional forms of production, but ICCs are increasingly integrated into modern economic systems. • Multiple types of tenure regimes not adequately recognized by CADT/CALT. • Stronger role of local governments enabled through decentralization undermines awarding of titles to IP/ICC. • Suspension of titles to areas with overlapping claims.

3. EXPERIENCES IN AFRICA

This section provides an overview of the developments in four countries in Africa: Botswana, Ghana, Liberia, and Mozambique. Ghana, Botswana, and Liberia have the longest experience with recognizing customary lands as having community property rights (Wily, 2012c). Of these, customary lands in Ghana and Mozambique are particularly under threat from foreign direct investments in large-scale agribusiness (Byamugisha, 2013). In Botswana, one of the first countries in Africa to formalize customary law in statute, the function and composition of Land Boards as an administrative body are explored for their strengths and weaknesses in maintaining the integrity of customary law and decision-making. Ghana's Land Title Registration Law of 1986 requires land under customary ownership to be registered under an incorporated entity but this law has yet to be rolled out in rural areas. By introducing Customary Land Secretariats (CLS) as a supportive institution owned and established by communities (with donor assistance) that provides administrative capacity for customary land recognition, Ghana has been able to register some limited customary land areas. Liberia's Land Rights Policy (LRP) is examined for the potential conflicts and challenges that may arise in its implementation, particularly given the strong donor influence on its development.

Finally, Mozambique's experiences with land reform have led to a very progressive land law that formalizes customary land ownership and recognizes it as the dominant land title in the country. The means to enable commercial economic development on customary lands is provided through land leases in Mozambique; this process and experience are explored for their strengths and weaknesses.

3.1 BOTSWANA: CUSTOMARY LAND BOARDS

Botswana has a population of under 2.3 million pastoralists and an area of 581,730 square kilometers (or less than four people per square kilometer). The Tswana, an ethnically dominant group represent 79 percent of the population. This is followed by the Kaswana (11 percent) and Basarwa (or Bushmen) (3 percent), with the remainder representing other groups and non-African ethnicities. In contrast to other South African Development Community countries, because Botswana's post-independence policy aimed to increase the lands categorized as "tribal," this offers some notable lessons. Botswana is one of the first countries to recognize, modernize, and codify customary systems of land tenure. At Independence in 1966, almost half of the land was considered tribal land (48.8 percent), with the remainder classified as state land (47.4 percent) and a small percentage held in freehold title (3.7 percent). In 1966, the Tribal Land Act (TLA) was passed representing one of the first legislative attempts to recognize, modernize, and codify customary systems of land tenure in Africa (Knox, Giovarelli, Forman, & Shelton, 2008). This Act was later amended in 1993. Botswana's policy to increase tribal lands has been a

Registering communal and individual land rights together

"Benin, Burkina Faso, and Côte d'Ivoire have piloted cost-effective and participatory rural land tenure maps to register individual and communal lands; further refinements are planned with a view to scaling up."

Byamugisha, 2013, 4

Registering communal lands quickly and effectively

"Tanzania has surveyed almost all of its communal lands; about 60 percent have been registered, at an average cost of about US$500 per village. Ghana and Mozambique are poised to scale up their communal land registration pilots."

Byamugisha, 2013, 3

Africa: Customary lands and the commons

"Few commons are acknowledged as the property of communities in national land laws. Exceptions include the village land areas of mainland Tanzania (approximately 60 million hectares), the stool, skin, and family lands of Ghana (18 million hectares) and the delimited community areas of Mozambique (7 million hectares). Most of the remaining 1.4 billion hectares of untitled rural lands are claimed by the state, although some are delimited as trust, tribal, zones de terroir, or other land classes which at least acknowledge that customary occupancy and use dominate in those areas."

Wily, 2012a, 3

successful one with some 70 percent of lands falling into that category today (Organization for Economic and Cooperation Development [OECD], 2014).

The TLA's main objective was to convert customarily held land claims into formal, legally recognized, and secure title that would be governed according to prevailing customary laws, but administered through a modern, formalized administrative system. To do this, the former custodians of land rights (chiefs and headmen) were replaced by legally incorporated Land Boards composed of customary leaders, government-appointed members, and community-elected representatives. Originally, only 11 Land Boards were created with each Land Board administering a vast area. To increase the efficiency of the Land Boards and build on more localized knowledge, the Establishment of Subordinate Land Boards Order of 1973 created a system of more localized land boards, although these entities still administer vast tracts of land (Knight, 2010).

In a significant move under the TLA (1993), the traditional chief's rights to grant, change, restrict, transfer, or cancel use rights were transferred to the Land Boards (Art. 13§1). Additional administrative responsibilities were also allocated to the Land Boards, including land use zoning; planning; record-keeping; formulating and enforcing policies for sustainable management; and (importantly) allocating land for residential, commercial, or industrial land uses under the common law (Art. 17). Another important distinction with considerable impact on the role of the Land Boards and traditional authorities was the individualization of rights. Under customary law, families were given land rights to tracts of land. However, under the Land Board system, title is granted to individuals, not families. There are not any provisions to recognize family members' rights.

Originally, the membership of Land Boards included one-third representation from the chief and customary representatives, one-third representation elected locally, and one-third representation appointed by the Ministry of Lands. However, there has been an erosion of customary representation on the Land Boards: chiefs and customary leaders have been replaced by officials appointed by the Minister of Lands. Now the Land Board comprises 12 members: 5 selected by the local community; 1 representative from the Ministry of Agriculture; 1 representative from the Ministry of Commerce and Industry; and 5 members appointed by the Minister of Lands. Importantly, the members selected by the community are not directly elected by the community; instead, potential nominees must submit applications to the Land Board selection committee, which shortlists candidates for community election (Knight, 2010).

The result of this reconfiguration is that Land Boards heavily represent government interests, and the role of traditional leaders has been watered down. However, headmen still play a vital role in the governance of tribal lands. Specifically, local knowledge held by a headman is required to provide information on the availability of land and to assist with the identification and demarcation of the boundaries of tribal land. These requirements are codified in the regulations.

Another important change to the recognition of customary rights and the role of the Land Boards occurred in 1975 with passage of the Tribal and Grazing Policy. This policy provided Land Boards with authority to lease and cede large tracts of communal grazing lands to private cattle ranchers. This resulted in 50-year leases to land that often impinge on traditional pastoralists land rights, because these rights also include the right to fence off the land and establish boreholes (Knight, 2010).

As the Land Board has evolved over time, these and other changes give rise to criticism that the Land Boards have departed from their original mandate to uphold customary law (Knight, 2010). This is primarily due to support for the privatized ranching schemes that the government promotes (Wily, 2012c). The changing constitution of the Land Boards has meant that there is less accountability to local people and weaker adherence to custom. An additional critique is that the failure to provide adequate resources and strengthen the capacity of Land Boards has led to poor decision-making and management of land and related natural resources.

Adaptive learning in Botswana

"Reviews of the Botswana experience suggest that it has been largely successful, crediting much of this success to the gradual adaptation of the law over time. The earliest version was one that included traditional authorities on the land boards and only provided for customary land allocations to tribesmen originating from each board's particular tribal territory. Later the law was amended to remove traditional authorities from land boards and to expand eligibility for customary land rights to all Batswana citizens. Application procedures are also simple and low cost, keeping administrative costs reasonable."

Knox, Giovarelli, Forman, & Shelton, 2008, 11

Hybrid governance bodies

Botswana's Tribal Land Boards comprise community elected representatives and government appointees and so differ significantly from customary administrative systems that were dominated by chiefs. While this does provide for more transparent and democratic land administration institutions, the actual application of customary law and practice in land administration has been significantly reduced. Further, the presence of government appointees provides opportunities to promote government land agendas over the interest of customary practice.

3.2 GHANA: CUSTOMARY LAND SECRETARIATS

In the Republic of Ghana, land ownership can be grouped into two major categories: state and customary. State-owned lands, which represent approximately 20 percent of the land area, are further subdivided into state lands and vested lands. State lands are lands that have been acquired in the public interest under the State Lands Act of 1962 and the 1992 Constitution (Art. 20). These lands are under the jurisdiction and management of the state. Vested lands, on the other hand, are owned by both the state and customary owners with the legal title vested in the President of Ghana and a beneficiary interest vested in the original customary owners (e.g., stool, skin, clan or family).[16] These vested interests represent about two percent of the land in Ghana. If the state leases vested land for development, the vested owners are entitled to rent it (Nara, Mwingyine, Boamah, & Biitir, 2014).

The remainder, and vast majority of land in Ghana, is under customary ownership with ownership rights held by the stool, skin, clan, or family, depending on the ethnic group (USAID, 2013b). The role and rights of customary law are well articulated in the 1992 Constitution of Ghana that explicitly recognizes "that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the state shall recognize that the managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin, or family concerned and are accountable as fiduciaries in this regard." [Art. 36(8)].

There are currently two laws governing land registration: the Land Title Registration Law of 1986 (PNDCL 152), and the Land Registry Act of 1962.

16 The stool, skin, and family are recognized in the Constitution of Ghana as holders of land rights. Stools and skins are physical and spiritual embodiments of the people that they represent.

The headperson of Faisako village in Zambia's Maguya Chiefdom discusses the village map with a facilitator. (photo: Jeremy Green)

Currently, the PNDCL 152 is only applicable in the major urban areas of Ghana (Nara, Mwingyine, Boaha, & Biitir, 2014), but it is expected that it will replace the Land Registry Act of 1962 throughout the country. Importantly, PNDCL 152 requires the registration of all customary and common law interests in land after a process of identification, adjudication, and survey of boundaries. Further, PNDCL 152 requires that stool, skin, and family interests must be registered in the name of an incorporated entity. Currently, there are allodial[17] land rights as well as customary freehold land rights; Ghana is one of the few places in Africa where customary freehold land rights are given in situations with permanent farming (Wily, 2012a).

The Administrator of Stool Lands, a decentralized office with 30 district-level offices, supports the demarcation of customary landholdings to generate revenue from land vested in customary authorities in addition to researching land issues (USAID, 2013b). Although the Office of the Administrator of Stool Lands disburses the revenue collected from stool land, there has been frustration on the part of customary authorities that only 22.5% of this revenue returns to the land owners.

Ghana's land markets have been described as "undisciplined" and characterized by conflicting claims, vandalism, land litigation, and insecurity of title (Kakraba-Ambeh, 2008; Nara, Mwingyine, Boamah, & Biitir, 2014). Starting in 2003, Ghana, with the support of donors, created and strengthened Customary Land Secretariats (CLS) in an attempt to address these shortcomings and better implement the law to ensure uniformity of application. The CLS concept built on existing Land Secretariat structures in Kumasi (Asantehene's Land Secretariat), Kyebi (Akyem Abuakwa Land Secretariat), and Accra (Gbawe Kwatei Family Land Secretariat). Although these organizations had customary land responsibilities, they were not functioning effectively.

As with the Land Boards in Botswana, the CLS have both customary and formal land administration responsibilities and play an important role as an intermediary institution between legal systems by improving efficiencies and record keeping. They have had a mixed record, with some fully operational and others barely functioning. Unlike the Botswana Land Boards, however, CLS are established and owned by landholding communities, and their membership is not prescribed by statute or regulation. The CLS are governed by traditional leaders (chiefs, heads of clans) through a Land Management Committee. Like Land Boards, CLS deal directly with government agencies including the Lands Commission, Office of the Administrator of Stool Lands, District Assemblies, and the Town and Country Planning Department (Biitir, Nara, & Amwyaw, 2015).

Customary Land Secretariats as supportive institutions

More than 80% of Ghana's land base is considered customary land, and it is anticipated that registration of land in an incorporated entity, which is mandatory in major urban areas, will be required on customary lands in future. While Customary Land Secretariats can play an important role in the support of these registration processes, their reliance on donor funds, and informal role in the registration process, has at times led to issues of their legitimacy both within customary communities, and with government agencies with formalized registration mandates.

Importantly, and unlike Botswana, CLS were expanded significantly as part of a donor-supported initiative (the Land Administration Program [LAP]) to support the Government of Ghana in improving customary land accessibility and processing of customary land documentation, and improving information flows between land administration and state land agencies (USAID, 2013b). Since 2003, LAP has established 38 CLS based on the following criteria: existence of some form of traditional land secretariat, strong central customary authority, a large area of influence, and the consent of the traditional authority (Nara, Mwingyine, Boamah, & Biitir, 2014). However, it should be noted that these 38 CLS represent only a fraction of the customary land base of Ghana.

The CLS created prior to 2008 were formed quite differently than those created after 2008. Specifically, those created prior to 2008 were identified by a top-down process where the public land sector agencies identified customary land areas. As a result, these CLS were viewed by customary landowners as being a long arm of the government and its agencies and therefore lacked legitimacy within traditional communities (Biitir, Nara, & Amwyaw, 2015). Since 2008, prospective CLS are required to write a proposal to LAP expressing their willingness and capacity to establish and manage a CLS that will be supported by LAP.

17 Allodial title is land freely held, without any obligations to a superior landlord.

In contrast to the Botswana Land Boards, CLS roles and responsibilities are not clearly articulated (Nara, Mwingyine, Boamah, & Biitir, 2014), nor necessarily understood by the population at large. For example, a reportedly widely held misconception is that the CLS are responsible not only to register documents, but also to prepare all of the related documentation.

CLS responsibilities generally include outreach and awareness activities related to land issues, facilitation of the preparation of documentation on land transactions for registration, supervision of land uses within their jurisdiction, site inspection and registration of lands, and persuasion of land disputants to resort to the CLS for redress (Nara, Mwingyine, Boamah & Biitir, 2014). However, not all CLS perform all of these tasks. In addition, although CLS do not always have adequate financing and logistical support to fulfill these responsibilities (Biitir, Nara, & Amwyaw, 2015), donors are interested in continuing to improve their effectiveness given the promise of quicker implementation.

Finally, it should be noted that these issues have contributed to issues of legitimacy. It has been suggested that since CLS are the result of a project initiative, they may lack legitimacy with government agencies holding land administration responsibilities. This could explain the reported lack of cooperation from the Municipal Assembly and other Land Sector Agencies experienced by some CLS (Nara, Mwingyine, Boamah, & Biitir, 2014). The new bottom-up approach to CLS formation has mitigated this, but formalizing these structures in legislation could provide the legitimacy that is currently endowed to Botswana Land Boards and Mozambique's Community Land Committees.

The average cost of demarcating boundaries has also come down: the use of alternative dispute resolution methods to help traditional authorities agree on boundaries before surveying is done has considerably reduced the cost from the US$500 to US$700 per kilometer cost in the early years (Byamugisha, 2013).

3.3 LIBERIA: IMPLEMENTING A LAND RIGHTS POLICY

The modern Republic of Liberia was settled by freed slaves from the United States in the early part of the 19th century. While the settler population limited landowning rights in their settlements to settlers or "civilized" indigenous peoples, starting in the early 20th century, legislation was passed that recognized the customary rights of indigenous people and provided means by which customary land could be titled. As such, Liberia was quite possibly the first state to recognize the customary land rights of its indigenous population in Africa.

Through most of the early part of the 20th century, clans, chiefdoms, and individuals could acquire title to land through a number of mechanisms, including Aboriginal Land Grant Deeds, which convey fee simple ownership; Public Land Deeds and Tribal Territory Deeds, which could not be sold, transferred, or assigned without the consent of the government; and Tribal Certificates, which conveyed an interest that could be converted to a Public Land Deed. However, in 1956, the Aborigines Law overturned the 1949 Hinterland Act (which had created a process to recognize customary title) and designated all land not under private ownership as "public land" and property of the state (Wily, 2007). What followed was an era characterized as growth without development in which the Government of Liberia issued concessions to international companies to develop and/or exploit rubber, timber, oil palm, and minerals without compensation to communities. Today, it is estimated that more than 23 percent of Liberia's territory has been granted to commercial entities for management by the government through agreements ratified by the legislature.[18]

The Community Rights Law of 2009 (CRL) (with Respect to Forestlands) and the 2013 Land Rights Policy (LRP) have reintroduced recognition of customary ownership (LRP, §4.2) and, in the case of the CRL, ownership of forest resources (CRL, §2.2[a]). While the CRL applies only to forestlands and resources, the new LRP recognizes customary ownership across all land types as a legitimate land classification. Once implementing legislation is enacted to implement the LRP, customary land rights will be placed on par with individually titled land rights (LRP, §6.2.2). The proposed definition of customary land in the policy is expansive: "land owned by a community and used or managed in accordance with customary practices and norms, and may include, but is not limited to: wetlands, communal forestlands, and fallow lands" (LRP, §6.2.1). Importantly, and as in Mozambique, the policy proposes that "[c]ustomary [l]and rights, including the rights of ownership, use or management, are equally protected as Private Land rights, whether or not the community has self-identified, established a legal entity, or been issued a deed" (LRP, §6.2.1).

The LRP also proposes that all customary land ownership will be memorialized in deeds issued

18 Agriculture concessions total 1,140,408 hectares; Forest Management Concessions and Timber Sale Contracts total 1,072,266 hectares; and Mining Concessions total 113,256 ha (see Land Commission of Liberia, 2012).

Community members contribute to the development of a preliminary map of village boundaries and resources as part of the process to recognize community rights to forestlands in Liberia. (photo: Vaneska Litz)

to legal entities representing the community (LRP, §6.3.1), although the types of legal entities involved are not clear. As in Mozambique, it is proposed that management authority will rest in community representatives that must be selected in a way to ensure equitable representation of all community members (LRP, §6.4.1). Similarly, it is proposed that the community's representatives' decision-making be conducted in a way that ensures equitable representation and accountability to all community members (LRP, §6.4.1). The policy recognizes that this is an ambitious agenda and proposes that the government assist communities to self-define, obtain deeds, establish the community as a legal entity, demarcate boundaries, and put in place required governance and management procedures (LRP, §6.6.1). This will prove to be a challenge in a country with very limited resources.

To operationalize this policy, a Land Rights Act (LRA) has been drafted and presented to the legislature. The draft has adopted the LRP's definition for customary land and has further strengthened these rights by declaring that registration of rights is not a necessary precondition for enforcement of customary land rights.[19] That said, the proposed LRA does present guidance for identifying customary lands and organizing a representative body that can undertake the registration process. Specifically, the draft LRA outlines a Confirmatory Survey process by which all land will be surveyed to determine the "size and boundaries" of each community's customary land, and it requires the community to create a Community Land Development and Management Association governed by by-laws and managed by an elected representative governing body (LRA, Art. 35, 36). However, it should be noted that the CRL also provides for the organization of similar governance institutions and surveys. While the conflicting mandates of these institutions is clearly of concern, the fact that fewer than 10 community forests have been created since the law was enacted is indicative of the capacity of the Government of Liberia to implement these policies.

It should also be noted that recognition of customary ownership of resources could also trigger conflict in areas where there are existing concessions. This

19 The draft LRA also defines the bundle of rights associated with customary ownership to include use, management, exclusionary rights, and some rights of alienation (Art. 33).

could be particularly controversial where concession agreements contain provisions that grant concession holders the right to clear land and sell any merchantable timber without payment of royalties or other payments to the Government of Liberia.

Finally, it should be noted that the LRP was drafted with significant input and influence of donors, although led by the Land Commission—a body appointed by the president. While endorsed by the Executive, this policy will completely change the way that land has been viewed and managed by Liberia's ruling elites, which may have an impact on the level of successful implementation. Liberia's Forestry Reform Law (2006) was also heavily influenced by donors; although it is a model for progressive and sustainable forest management, it has not been fully implemented and is often circumvented (Wily, 2007).[20]

3.4 MOZAMBIQUE: COMMUNITY LAND LEASES

The "right of use and benefit" (*Direito de Uso e Aproveitamento da Terra* [DUAT] in Portuguese) is embedded in the Republic of Mozambique Constitution and 1997 Land Law and provides secure and renewable tenure covering a term of 50 years (Knox, Giovarelli, Forman, & Shelton, 2008). DUAT is available to individuals, communities, and investors. Specifically, the Constitution of Mozambique (1990) provides all Mozambican people with the use and enjoyment of land (Art. 109§3); that such rights may be granted to individuals, groups, and corporations (Art. 110§2); and recognizes and respects rights acquired through inheritance or occupation "unless there is a legal reservation or the land has been lawfully granted to another person or entity" (Art. 111).

These constitutional provisions provide an enabling framework for Mozambique's Land Law of 1997 that has been recognized for its integration of customary land rights into the formal legal structure (Knight, 2010). The Land Law (1997) provides three ways by which land use rights may be obtained, through:

1. "Occupancy by individual persons and by local communities, in accordance with customary norms and practices which do not contravene the constitution" (Art. 12[a]);
2. "Occupancy by individual national persons who have been using the land in good faith for at least ten years" so long as there are no other legal rights attached to the land (Art. 12[b]); and
3. "Authorization of an application submitted by an individual or a corporate person" to government land administrators, which may then allocate 50-year leasehold rights, after consultation and approval by the community within which the land requested is located (Art. 12[c]).

The latter is the only means by which foreigners and national and international companies may obtain use rights under the law. All three of these rights are private rights and may be conveyed to men, women, and local communities through individual or joint titling (Art. 10§§1,2).

The commitment to recognition of customary rights is manifested in Article 14§2, which allows for rights to vest without registration of claims: "the absence of registration does not prejudice the right of land use and benefit acquired through occupancy… provided that it has been duly proved…" This means that customary community land rights are on par with other land rights and are entitled to full legal protection, regardless of whether that ownership claim is registered. Further, these rights are perpetual, inheritable, and may be transferred within the community or to outsiders.

While registration of rights is not required, customary owners can register their claims through a formal titling and registration process outlined in the technical annex to the Land Law. This process is prioritized particularly when the State or investors intend to develop new economic activities/projects on community lands (Knight, 2010). The process of "delimitation" involves district-level state cadastral officials and requires:

1. Creation of an advisory working group that will lead the process;
2. Community outreach and awareness raising regarding the process;

20 As of the time of this writing, several ongoing lawsuits are being pursued to prosecute members of the Forestry Development Authority for violations of the forestry law involving more than 1 million hectares of illegal concessions.

Investors consult with community land owners

Mozambique's Land Law recognizes community use and benefit rights (DUAT) to customary land regardless of whether those claims are formally registered. For communities, DUAT includes the right to refuse potential investors leasehold rights to proposed investment areas on community customary land. Despite this, the state registration of investor DUAT has far outpaced registration of community DUAT.

3. Participatory appraisals and mapmaking processes;
4. Development of a computer-generated map, sketch plan, and descriptive report; and
5. Verification and approval of community boundaries by the community.

Once these rights are registered, the community acquires a legal status that enables the community to enter into contracts with investors (Knight, 2010).

The mandatory process to establish leasehold rights also reflects the importance the Land Law has placed on the recognition of customary ownership rights regardless of whether those rights are registered or not. Specifically, this mandatory process requires potential investors to consult with the community/ communities where the proposed lease is located to determine whether the area is free and unoccupied (Art. 13§3). If the land is within customary boundaries, then communities can refuse to lease the land, or they can jointly engage in a survey of the proposed land with the district administrator and the Cadastre Services. The survey must be signed by at least three of the community's nine representatives[21] and by the owners or occupiers of neighboring land" (Land Law Regulation Decree, 1997, Art. 27§2). Following consultations, the District Administrator must issue a statement that outlines the partnership terms between the holders of the land and the lessee (Regulation, Art. 27§3).

While this process requires consultation with communities, concerns have been raised regarding the limited safeguards that have been put in place to protect customary rights over lands that have been leased to investors. For example, it has been noted that while investors have a much higher level of sophistication than communities, there is no requirement for the communities to be represented by legal counsel during consultations (Knight, 2010).

In addition, despite the intent of the law to recognize and protect customary rights, the registration of investor rights has far outpaced the rate at which community claims have been registered. By 2010, only 10% of the communal lands (231 communities) had been delimited; it has been a slow process that costs somewhere between US$2,000 to US$10,000 per community (Byamugisha, 2013). This has been attributed to communities' lack of awareness regarding the law and their legal rights, limited financial and technical capacity of the government to implement the law, lack of political will, and prioritization of investment over community rights (Knight, 2010).

A review of the approach has recommended moving away from a sporadic approach toward a systematic delimitation process, strengthening the capacity of land administration services, and well-designed participation of local institutional authorities (Byamugisha, 2013).

21 The law and regulations require the formation of a Community Land Committee. The Community Land Committee is responsible to the community in all matters pertaining to land. The committee comprises three to nine people (some of whom must be women), and they must be selected by the community. There is no further guidance on the requirements for representation, which allows the diverse communities of Mozambique to select their representatives according to their own criteria.

Community forest boundaries are demarcated as part of the nine-step process to secure community rights to forests in Sinoe County, Liberia. (photo: Vaneska Litz)

4. EXPERIENCES IN LATIN AMERICA

Community land rights and their governance mechanisms in Latin America vary greatly due to strong pre-Columbian indigenous traditions for collective land ownership; the Spanish and Portuguese colonial influence with its legacy of slavery; and the varied Hispanic, Afro-Latin, indigenous, and mixed race ethnic groups present throughout modern Latin America. This chapter provides overviews of three countries (Brazil, Colombia, and Mexico) that are of particular interest for community land rights recognition in Myanmar. Brazil's indigenous lands offer constitutionally conferred self-rule, permanent and exclusive land use rights (without independent sovereignty), and administration by an executive branch agency, all within the context of constant pressure on and conflict over rich natural resources. The Colombian case offers differentiated approaches to customary rights recognition for both indigenous and Afro-Colombians in the context of conflict, post-conflict, and a legacy of weak state presence in its isolated rural areas. Finally, Mexico's *ejido* system established through one of the world's most far-reaching land reforms, demonstrates that both individual and collective land tenure traditions can coexist within the same system and highlights the importance of local land governance institutions to manage rights equitably and effectively (Deininger, Byerlee, Lindsay, Selod, & Stickler, 2010).

4.1 BRAZIL'S INDIGENOUS LANDS

Historically, the Republic of Brazil has always had one of the highest inequalities of land distribution in the world. As late as the 1990s, as much as 45 percent of the arable farmland was owned by just 1 percent of the population (USAID, 2011d). Dating from the Portuguese colonial slavery period until 1967, when attempts at land reform were made under the military government, rural and agricultural land use was highly concentrated in large plantation-style feudal farms and ranches (*latifundios* and *fazendas*). As a result, Brazil has one of the most active land reform movements in the world.

An important part of the land reform that began in the 1970s has been the recognition of IP lands. Brazil is characterized by considerable sociocultural and environmental diversity. The 1973 Statute of the Indian is a law that guarantees rights to the land inhabited or occupied by indigenous communities, irrespective of whether a title officially exists. Article 231 of the 1988 Brazilian Constitution also recognizes the inalienable rights of indigenous communities to the lands they have traditionally occupied. Legally, indigenous groups are not the sovereign owners or rulers of their lands; the Constitution only grants them "permanent and exclusive" use rights to all resources, except subterranean and water. The use of the territory's water and mineral resources (including for hydropower, mining, and hydrocarbons) can only be authorized by the Brazilian Congress. Because Brazil is a signatory to the International Labor Organization (ILO) 169 convention requiring free, prior, and informed consent, affected communities must be consulted and assured participation in decision-making. The Constitution (1988) also recognizes the rights of Afro-Brazilian communities to *quilombo* lands (villages established by former slaves).

According to the most recent census, Brazil's indigenous population is only 0.43 percent of the overall total, yet they have rights to 699 tracts of indigenous lands (*Terras Indigenas* [TIs]) that cover 13 percent of its overall territory, most of which are located in the sparsely populated Amazon basin. The National Indigenous Foundation ([FUNAI] *Fundação Nacional do Índio*) is the federal agency (part of the Ministry of Justice) with the responsibility for indigenous lands. FUNAI functions as the gatekeeper and interlocutor among indigenous groups, their TIs, and the rest of the Brazilian state and society. It was established as part of the 1973 Statute of the Indian. FUNAI's authorities and land-related responsibilities with respect to TIs include, but are not limited to (USAID, 2011d):

Demarcation process

The demarcation process in Brazil for indigenous territories includes identification and delimitation, demarcation, legal ratification, and agrarian regulation. While these steps are termed "participatory," the government plays a significant role at each stage in this lengthy and protracted process.

- Mapping and protecting traditional indigenous lands;
- Establishing and maintaining border security of TIs by preventing invasion by outsiders;
- Approving and facilitating investigations and surveys of indigenous groups;
- Managing the protection of "uncontacted" indigenous groups (FUNAI currently identifies 77 indigenous groups with uncontacted, voluntary isolation, and/or initial contact status);
- Defending indigenous communities and serving on their behalf in a public affairs role to stimulate national interest in indigenous affairs; and
- Overseeing land supervision to prevent predatory and/or illegal extractive activities by prospectors, squatters, loggers, mining corporations, and others.

FUNAI leads the initial identification and definition of potential TIs by either directly conducting or commissioning an ethnographic and geographical survey of the area, which is published as a public proposal (Garcia, 2015). FUNAI then submits the proposal to the Ministry of Justice for review, comment, and/or approval. Once approved, FUNAI begins the in situ process of physically demarcating the new TI and resettling any non-indigenous "illegal" residents. The final approval process, known as "homologation," finishes when the President issues a decree enabling the official registration of the new indigenous land. This entire "demarcation process" (that includes identification and delimitation, demarcation, legal ratification, and agrarian regulation) is a cumbersome and slow process over which the government has considerable power. That, together with the government's role in sectoral policy, has meant that the state continues to hold considerable administrative rights within indigenous territories. In practice, although there has been a process of "participatory demarcation," the indigenous communities have often just been observers to the demarcation process given the role of external experts (Neves, 2008).

After the Government of Brazil missed their first self-imposed deadline in 1978 for the demarcation of all indigenous lands, it issued a new five-year deadline with the new 1988 constitution, which it also missed. Today, more than 25 years later, the process is still underway. Delays and missed deadlines have been extremely common due to legal disputes from non-indigenous communities that arise during the objection period. In 2008, the Brazilian Supreme Federal Court issued an important ruling in favor of indigenous groups, which resulted in the eviction of more than 200 non-indigenous rice farmers and set an important precedent for more than 100 other similar cases before the Brazilian justice system (BBC, 2008). The current Presidential administration of Dilma Rousseff has declared and/or homologated the fewest indigenous lands of any Brazilian president since the process was first established (Instituto Socioambiental, 2015).

Given the importance of the Amazon region and the large number and size of TIs compared to the very small indigenous population, indigenous land rights recognition has been criticized by some who argue that it diminishes Brazil's economic potential. Even so, only a small fraction of indigenous peoples' lands have been demarcated and recognized so far. The threats to indigenous rights include rapid expansion of large-scale ranching and agriculture, as well as a boom in extractive industries (illegal logging, gold mining, oil and gas exploration/extraction), and infrastructure development, such as highways and hydropower dams, within the Amazon. FUNAI in particular has been criticized by indigenous groups for supporting infrastructure and extractive activities on their lands and more generally failing to protect their lands from external interests fully (USAID, 2011d). There has been an escalation of land conflicts over indigenous territories because of these growing competitive pressures on resource-rich lands.

4.2 COLOMBIA: CUSTOMARY LAND RIGHTS AND MULTI-ETHNIC COMMUNITIES

As with Brazil, Colombia historically has also experienced unequal land distribution, with just over 50 percent of the rural arable land owned by about 1 percent of the population. In the early 1960s, the Revolutionary Armed Forces of Colombia together with other social forces led to the birth of the FARC (*Fuerzas Armadas Revolucionarios de Colombia*), an illegally armed leftist insurgent group that advocated large-scale agrarian reform. They began a violent internal and primarily rural conflict against the state, in conjunction with right-wing paramilitary groups that has lasted more than 50 years. The long civil war has killed hundreds of thousands, displaced up to one out of every eight Colombians, weakened social capital, and exacerbated economic inequalities. While the Government of Colombia (GOC) has been negotiating a peace agreement with the FARC since 2012 in Havana, Cuba (and a tentative cease-fire is in place), the conflict combined with narco trafficking-related violence has inflicted havoc on rural Colombia.

Land tenure is particularly insecure for indigenous peoples, women, and Afro-Colombians, who have

Afro-Colombian community land mapping. (photo: USAID Colombia Land and Rural Development Program)

been displaced by the conflict disproportionately more than any other groups. About 10.6 percent of Colombia's population are Black ("Afro-Colombian," primarily descended from the colonial African slave population), and 3.4 percent are Amerindian. From the 1960s until the early 2000s, the GOC attempted several land reform initiatives as a counter-insurgency policy for pacifying the rural conflict. Almost 40 years of state-led land reform have done little to affect overall land distribution; between the 1960s and 1990, the Gini coefficient[22] of the operational land distribution fell by only 3 percentage points, from 0.87 to 0.84 (Deininger, 1999). After several unsuccessful attempts at large-scale land reform in the early 2000s under Plan Colombia, the GOC shifted to a more market-oriented, neoliberal approach to rural development based on large-scale agribusiness promotion. Presently, because of the ongoing Havana peace negotiations, the GOC and the FARC are demonstrating a renewed interest in land reform.

Colombia's 1991 Constitution recognized, for the first time, the multiethnic character of its society and conferred collective land rights to both indigenous and Afro-Colombian groups. Colombia, which has the second-largest Afro-descendant population in Latin America after Brazil, passed Law 70 in 1993 (In Recognition of the Right of Black Colombians to Collectively Own and Occupy their Ancestral Lands), which recognizes the right of Afro-Colombians to own and occupy collectively their traditional lands located principally in Colombia's Pacific coast region. These lands have typically been

22 Gini coefficient of inequality is a commonly used measure of inequality on the basis of distribution of family income. The coefficient varies between 0, which reflects complete equality, and 1, which indicates complete inequality.

uncultivated rural land next to rivers of the Pacific Rim. It also recognized their unit of governance, the Community Councils (*Consejos Comunitarios*), for the administration of their collective territories. The law defined "black communities" as:

> The group of families of Afro-Colombian descent who possess their own culture, share a common history and have their own traditions and customs within a rural-urban setting, who demonstrate and preserve consciousness of an identity which distinguishes them from other ethnic groups (Perram, 2013).

In 1993, the GOC also passed Law 60 in which Article 25 made the fiscal and governance relationships between the Colombian state and indigenous reserves the same as municipalities. It recognized the authority of the reserve and its leader (called a *cabildo*) as a unit of local government and stipulated that indigenous reserves, in the same way as municipalities, would benefit from a certain percentage of state resource allocation proportional to the population found in the reserve.

In the two decades since the new Constitution and the enacting of Laws 60 and 70, Colombia has made great strides in awarding collective titles to indigenous and Afro-Colombian communities. Now approximately 40 percent of Colombia's territory is titled for these two categories of collective land rights, with nearly one-third for indigenous reserves (much of which is located in the sparsely populated Amazon region) and about 7–8 percent for Afro-Colombians (primarily in the Pacific Coast region, where 84 percent of the territory in Choco is collectively titled). Environmentally, ethnic territories are of critical importance for the protection of natural resources, as they contain half of Colombia's primary forests. Colombia's IP comprise only 3.4 percent of the population but belong to 87 officially recognized tribes. While 80 percent of the indigenous population live in just the three departments of La Guajira, Cauca, and Narino, the population density is very low. The Indigenous Affairs Division of the Ministry of Interior has 567 reserves on record that cover approximately 365,000 square kilometers.

There are significant differences between the rights of indigenous and Afro-Colombian communities and how their collective territories are governed. Indigenous reserves are legal, social, and political entities with a collective title that is owned and managed in a sovereign way with full private property and resource rights, excepting subterranean mineral rights, according to traditional indigenous laws (Rights & Resources Initiative, 2014). There are no restrictions on the type of lands that can be recognized as indigenous reserves, except the existence of a valid ancestral claim. In October 2014, President Santos signed a decree to create a dedicated system to operationalize the administration of IP territories until Congress can issue the Organic Law on Territorial Regulation. In contrast, Afro-Colombian territories under collective title are not sovereign communities nor independent units of local governance. The GOC, through its main land titling agency the Colombian Institute of Rural Development (INCODER), allocates and collectively titles forested land to Afro-Colombian communities. Afro-Colombian communities exercise fairly extensive land and natural resource use rights on their lands, but they must adhere to GOC policies and regulations for sustainable use.

Differences between indigenous and Afro-Colombian collective land titles

There are significant differences in Colombia between the land rights of indigenous and Afro-Colombian communities and how their collective territories are governed. Indigenous reserves are legal, social, and political entities with a collective title that conveys full private property and resource rights, and are administered in accordance with traditional indigenous laws. In contrast, Afro-Colombian communities may receive a collective land title but are not considered sovereign communities.

Assuming that the GOC and the FARC can negotiate a road to peace, implementing truly integrated rural development and equitable land reform in post-conflict regions that have been underserved by permanent state presence for half a century will be a tremendous challenge. Colombia's new Victims and Land Restitution Law (2011) is an important step that should restore millions of hectares of land to displaced communities, among them Afro-Colombians and IP; USAID is supporting the Government of Colombia to implement this and other laws related to land and rural development. Successful implementation of the law will depend on the GOC's ability to protect entire displaced communities from the powerful armed groups that oppose the restitution of these lands and are often the same groups that initially displaced the victims (Human Rights Watch, 2011). The recent reform of Colombia's system for distributing royalties from

mineral and hydrocarbon extractive industries also potentially offers a great opportunity to increase public and private funding for the traditionally marginalized regions where indigenous reserves and Afro-Colombian lands are located.

4.3 MEXICO: THE *EJIDO* EXAMPLE

Communal lands under Mexico's customary land rights system are called *ejidos* and have historical roots in indigenous communal land traditions dating back centuries. Several centuries of Spanish colonialism upended this strong communal land tradition, with large feudal farm communities called haciendas that distributed 94 percent of Mexico's territory to just 1.5 percent of the population. This extreme inequality of land distribution was one of the factors that ultimately led to the Mexican revolution from 1910–1917. In response, large privately owned lands were broken up into smaller land holdings and converted into agricultural land grants to peasants.

Communal land tenure was one of the principal reforms of the Government of Mexico's 1917 Constitution, which established three forms of land tenure: private, public, and social. The social property, or *ejido* land, was worked by its members, known as *ejidatarios*. Progress on agricultural and *ejidal* land reforms was marginal until 1922, when the National Agrarian Commission issued a Circular addressing *ejido* tenure in detail and then in 1925, when the Law of Family Patrimony in *ejidos* codified aspects of it (Barnes, Digiano, & Augustinus, 2015). Reform continued slowly throughout the 1920s, but by 1930, traditional *ejidal* holdings still only represented about 6 percent of agricultural lands. It was not until 1934, when President Lázaro Cárdenas passed the Agrarian Code, that agricultural land reform began in earnest. Between the 1930s and late 1970s (the active period for land redistribution), more than 30,000 *ejidos* were titled to indigenous groups, peasant communities, and worker organizations, representing more than five million rural Mexicans and covering approximately 50 percent of Mexico's territory (over 92 million hectares), including 80 percent of its forests, an area the size of Egypt (Barnes, Digiano, & Augustinus, 2015; Perramond, 2008; World Bank, 2001).

The land reform process granted land to communities of 20 or more members. *Ejido* land tenure typically comprises three jurisdictional land categories: communal lands (typically forests, pastures, and water resources), individual use parcels (for family farming and animal husbandry), and individual use urban housing lots known as *solares*. All *ejidos* (as well as indigenous lands) have the same governance structures composed of three bodies:

A view of a Mexican ejido in San Luis Potosi shows the large commons land in the background. (photo: Rebeca Rivera)

1. A General Assembly, a legislative and rule-making body comprising all *ejidatario* members;
2. The *Ejidal* Council that acts as the executive branch with a president, secretary, and treasurer, and is elected by the General Assembly for a term of three years; and
3. The Supervisory Council with *ejidatarios* who serve as president and two secretaries who provide oversight to the other two bodies and ensure that all laws, rules, and regulations are complied with.

The National Agrarian Registry (RAN) was set up for the *ejido* system of land tenure with offices in each of Mexico's 31 states that made most of its property transactions free for *ejidatarios*. The RAN and the Agrarian Attorney's Office (*Procuraderia Agraria*), through their local offices in all 31 states, provide for all national- and state-level administration, including setting, adjudicating, and enforcing *ejido* policy and regulations, and processing and registering all land-based transactions (inheritances, private titling, registering, sales, leases, joint ventures, etc.). The Agrarian Attorney's Office also functions as an ombudsman representing the rights of *ejidatarios* before the Agrarian Tribunal, the *ejido* conflict resolution body.

Three groups of stakeholders each with different rights are recognized by *ejido* law: *ejidatarios* (the community leaders and shareholders of the *ejido*), possessors (those with land use rights), and residents (all other inhabitants of the *ejido*, typically family members and relatives of the *ejidatarios*) (Barnes, Digiano, & Augustinus, 2015). The *ejidatarios* are those original members who signed the *ejido* title and/or those to whom *ejidatario* rights have been conveyed via inheritance. The most recent *ejido* census (Mexico National Institute of Statistics, 2007) identified 4.2 million *ejidatarios* with an average membership of 134 per *ejido*. High average age (60) and low gender representation (20 percent of *ejidatarios* are women and only 2 percent of them have served as *ejido* president) are two serious demographic concerns for the *ejido* system. Possessors are those to whom individualized land use rights in the *ejido* have been sold, leased, rented, or otherwise conveyed. There are approximately 1.5 million possessors in *ejidos* across Mexico and they are allowed voice, but no vote, in the General Assemblies. All the remaining inhabitants who have resided in the *ejido* for a minimum of a year comprise the residents.

Until 1992, *ejido* titles were, by definition, legally inalienable and unencumberable, meaning that *ejido* lands could not be bought, sold, mortgaged, leased, rented, or otherwise transacted. An *ejido* land title could only be passed on in its entirety to a single hereditary beneficiary (spouse, common-law partner, or child), but it could not be split among parties. Over decades, these restrictions decreased the economic productivity of *ejido* lands and, particularly in the context of the economic downturn of the early 1980s, encouraged legal reform (Barnes, Digiano, & Augustinus, 2015). The inability to sell, lease, mortgage, split, or otherwise transact *ejido* land meant that, demographically speaking, ownership shifted to older and less efficient farmers, making it difficult for younger farmers to access land and reducing capital investment compared to local private lands. In addition, local governments were unable to acquire *ejido* land for urban expansion, which encouraged the development of informal settlements. This resulted in capital investment within *ejidos* being substantially lower than in surrounding private land because of the legal and administrative restrictions on *ejidos*.

In 1992, the neo-liberal, reform-minded presidency of Carlos Salinas introduced major reforms to the *ejido* tenure framework to address the aforementioned constraints by allowing *ejido* land to be privatized to increase productivity and attract investment to rural Mexico (USAID, 2011c; World Bank, 2001). This involved an amendment to Article 17 of the Constitution and creation of a new 1992 Agrarian Law. This reform ended land redistribution and brought about four major changes. First, it enabled *ejidos* to privatize the land with a two-thirds vote and permitted *ejidatarios* to sell their land to outsiders as any other private property. Second, it allowed all *ejidatarios*, regardless of whether they privatized, to sell their individual use parcels within the *ejido* community. Third, it allowed *ejidos* to enter into joint ventures with outside companies and individuals. Fourth, to support accessible and effective agrarian justice, 42 *Tribunales Unitarios Agrarios* together with an appeals court, (the *Tribunal Superior Agrario*) were established (World Bank, 2001). As a protection measure for natural resources, however, communal forestland remained restricted—it could not be legally subdivided.

Prior to the reform, while officially recognized, individual parcels were not titled or certified. At the time, it was widely anticipated that the reforms would lead to the downfall of the *ejido* system and communal property in Mexico. However, while over 50 percent of *ejidos* had sold some land to outsiders, less than 10 percent were fully privatized, and those were mostly limited to rapidly urbanizing areas with increasing property values (Perramond, 2008).

Following the 1992 reforms, the Program for the Certification of *Ejido* Land Rights and the Titling of Urban House Plots (PROCEDE) was the national initiative to foment further outside investment in *ejido* lands by regularizing and certifying all *ejido* lands (World Bank, 2001). PROCEDE issued certificates to individual parcels, a share of the common *ejido* land, and individual title to the individual urban housing lots, effectively enabling the collateralization and/or monetization of those property rights to facilitate further investment via credit and joint ventures (Barnes, Digiano, & Augustinus, 2015). Importantly, PROCEDE allowed *ejidos* to recognize new members based on actual occupation. By late 2012, approximately 90 percent of all *ejido* land had been regularized and certified.

In sum, *ejidos* have demonstrated that communal and individual land rights can effectively coexist within the same system while also successfully managing natural resources, particularly forests. Creating a special registry (RAN) for *ejido* lands, separate from the private land registry, and making its transactions free of charge ensured an effective "pro-poor" land reform process. Increasing access (through Internet and mobile transactions) to registry services will further incentivize investment in rural Mexican *ejido* lands. Additional effort is needed to ensure gender and intergenerational equity in conveying *ejido* property rights, to improve both the land registration and title systems, as well as community-level awareness of land rights (USAID, 2011c).

Ejidos can also include large areas which are reforested but not in current use. (photo: Rebeca Rivera)

Large-scale *ejido* registration achieved

Between the 1930s and late 1970s (the active period for land redistribution), more than 30,000 *ejidos* were titled to indigenous groups, peasant communities, and worker organizations, representing more than five million rural Mexicans and covering approximately 50 percent of Mexico's territory (over 92 million hectares), including 80 percent of its forests, an area the size of Egypt. By late 2012, about 90% of all *ejido* lands had been regularized and certified.

Creating a special registry (RAN) for *ejido* lands, separate from the private land registry, and making its transactions free of charge ensured an effective "pro-poor" land reform process.

Prior to 1992, Mexico's communal lands were legally inalienable. Reforms introduced post-1992 created alienation rights as well as a certification process for individual parcels within the *ejido*. Despite concerns that this would undermine the communal land rights system, the *ejido* form of land ownership remains a significant and important land administration category today. This approach demonstrates that communal and individual land rights can coexist within the same system.

Villagers in Myanmar's Bago region consider for the first time an aerial photograph of their land area. (photo: Nayna Jhaveri)

5. ANALYSIS AND CONCLUSIONS FOR MYANMAR CONTEXT

The legislative framework in Myanmar currently contains limited provisions for formally recognizing and protecting the wide variety of community tenure arrangements that exist across the country. While the recently enacted Farmland Law (2012) and the VFV (2012) contain provisions that could be used by local communities to secure tenure over areas of land for agricultural purposes, these legislative enactments were not specifically designed for supporting a form of a communal title over land resources. Moreover, such tenure arrangements would not include forestland and other natural resources. As such, there is a need for specific language in a comprehensive umbrella National Land Law that would provide clear authority from Parliament to establish rules and procedures for the formal recognition and protection of community land and resource tenure arrangements in the country.

The government is currently engaged in a process of developing a National Land Use Policy, which is intended to guide the development of a new National Land Law. The sixth draft (May 2015) of this policy includes a chapter on the "Land Use Rights of Ethnic Nationalities," with language aimed at creating a process for the formal recognition and protection of community tenure (customary or otherwise) arrangements in the country. This language states that the new Land Law should include provisions for the registration of customary lands, including forestlands (Draft National Land Use Policy, 2015, Part 8). It is difficult to ascertain whether the government will formally endorse the promising language in the draft policy or how such language might be incorporated into a National Land Law. Future legislation may provide the legal mechanisms for formal recognition and protection of community tenure arrangements in the country.

As Myanmar prepares to develop its National Land Use Policy and enabling legal framework, examples from other countries may assist policymakers. Although conditions in each of the countries reviewed vary considerably, there are some important lessons and emerging best practices that can inform the development of Myanmar's community land and resource tenure recognition approaches. The sections below summarize salient issues and questions for policymakers that are drawn from the above case studies and are organized around the key elements that provide structure to the case study analyses.

5.1 COMMUNITY LAND RIGHTS HOLDERS

5.1.1 MYANMAR CONTEXT

As in Lao PDR, the Constitution of Myanmar (2008) identifies the government as the ultimate owner of all lands in the country (Article 37). However, like Lao PDR, permanent land use rights may be granted by the government, which could include the formal recognition of community tenure through the issuance of title in the name of a community, group or association.

While there is no legislation currently in place to recognize community tenure rights, legislation recognizing the land ownership rights of associations, not-for-profits and other organizations could be built upon. Specifically, the recently enacted Association Law (2014) could theoretically be used to assist communities or groups wishing to secure formal recognition and protection of their community tenure rights if the law requires community or customary owners to be organized as legal entities for having a title or tenure right. The Association Law provides the legal framework for the formal legal recognition of not-for-profit organizations established by two or more people for a common interest or program (Article 2). Importantly, any registered local organization under this law has the right to own properties or assets (Article 28).

Considering the scope of a local community or group's objective is geographically limited to the area of the community tenure they are seeking to have recognized, this law permits registration at the township level without payment of any fee (Article 15). That said, there is a question as to the current applicability of this law, as the Ministry of Homeland Affairs has yet to enact the necessary implementing rules and procedures. Without implementing rules and procedures, it may be difficult for township

authorities to recognize a local community or group as a legal entity formally. This would impact a local community or group's ability to have title or tenure rights recognized in their name under other legislative enactments. Lessons from Cambodia, where legal registration of indigenous entities has proved difficult may provide valuable lessons in legislative reform or development efforts.

In addition to the Association Law (2014), the Farmland Law (2012) permits the issuance of land use certificates in the name of organizations (Art. 6, 7). Communities or groups seeking formal recognition and protection of community land and resource tenure could potentially use these provisions for issuance of a land use certificate in the name of the community or group, but these are currently limited to classified farmlands. Additional limitations are discussed below.

Finally, it is conceivable that a community or group seeking formal recognition and protection of community tenure might seek application under various provisions found in the VFV (2012). However, the intent of this Law is aimed at commercial applications. As such, it is unlikely that the government would permit the Law to be used for formally recognizing community tenure arrangements.

5.1.2 ANALYSIS AND CONSIDERATIONS

The countries examined revealed a diversity of land right holders and arrangements. These range from villages, individuals, organizations, as well as IP identified in statutes, constitutions, or through a registration process. In the Myanmar context, community land and tenure recognition could be solely focused on ethnic minority communities, or it could be an option available to all long-standing communities. While there may be administrative advantages associated with focusing on minority communities, such an approach could also exclude others who seek to obtain similar forms of land tenure security and protection and raises questions about how these groups' land rights are to be recognized.

In any case, decisions will also need to be made regarding the institutional entities that will be recognized and entitled to obtain community tenure recognition. The process must consider whether existing customary institutions or new governance institutions will be required to act as the institutional node for local land governance. In Myanmar, this could include associations, cooperatives, producer groups, long-standing villages, and cultural or religious groups. In defining new entities, it will be important to consider whether the community self-selects as in the Philippines, or whether, as in Indonesia, strict criteria for membership is developed externally. Given the mobility of Myanmar's population, questions regarding the rights of first occupants as well as latecomers to an area may also need to be addressed, along with the status of migrants or internally displaced peoples.

Another critical piece is the consideration of whether individual titling within communal areas is appropriate, and how such rules can be developed and applied. If individualization of title within a community title is a priority (where, as in Cambodia for example, individualization of title is a state objective) additional rules may need to be developed to compensate those individuals and households that choose to leave the community.

Finally, it is recommended that a clear process for registration of title is articulated in the law. Experiences in Indonesia, where titles are not issued, suggest that administrative evidence of ownership (through title, certificate or otherwise) can minimize conflict and competition over resources. More importantly, in Lao PDR, where titles are issued, ambiguity in the process has drawn criticism and raised questions about its legitimacy.

5.2 RECOGNITION AND REGISTRATION PROCESS

5.2.1 MYANMAR CONTEXT

There are several mechanisms that could form the basis for a community land and resource tenure registration process. Specifically, should rights holders be required to register as legal entities, the Association Law provides such a mechanism, which involves a process that requires applicants to provide information on objectives, internal committee structure, membership, assets, and other required information (Articles 5, 7).

The Registration Act (1909) provides the procedural framework for issuance of title and registration of deeds in the country and is the foundation for the current deed registration system in Myanmar. However, the deed registration system in Myanmar is characterized by the overly bureaucratic procedures required to create title free of any liens (perfect title). For example, it is reported that the process of perfecting title in the country can take upwards of six months to complete and requires the direct involvement of multiple ministries. The case studies suggest that this complicated system could create administrative difficulties and delays in any system for the formal recognition of community tenure

unless a distinct and streamlined system for formal recognition and protection of such tenure is created.

While the Forest Law (1992) contains provisions for granting various rights of use over forestlands, such as for Village Firewood Plantations or Local Supply Plantation, the procedures for how this can be accomplished are not clearly defined in the current law, and the rights conveyed are limited (Chapter V).

Finally, in considering how to recognize community rights, it should be noted that the Constitution establishes a republic, in which states, regions, divisions, and zones have all been granted legislative authority (Articles 188 and 196).[23] These government bodies may enact laws that add additional safeguards for the formal recognition and protection of community tenure provided that they do not directly conflict with the laws, rules, and regulations enacted at the national level of government and that the additional safeguards fit within the boundaries established in Schedules 2 and 3 of the Constitution. Malaysia has a similar decentralization of legislative powers and provides examples of the diversity of approaches that may be undertaken in a country with one dominant ethnic group and multiple minorities located in relatively separate geographic areas.

5.2.2 ANALYSIS AND CONSIDERATIONS

The actual recognition process must consider at least three salient issues: articulation of the steps in the process (including allocation of responsibilities), management of conflicts, and long-term administration.

In some countries, new administrative authorities have been created to oversee or support the process (e.g., Ghana, Botswana, and Philippines); in others, existing institutions have received this mandate (e.g., Lao PDR). Some of these institutions are highly centralized (e.g., in Indonesia, the Department of Forestry has overseen the process of recognizing "customary forests"), while others exist at the local level (e.g., in the Philippines). It is also necessary to minimize the number of government agencies involved in the entire process to streamline the application steps (such as in the Philippines). Situating land registries at the local level also makes them accessible and more transparent for the communities involved. The composition of administrative entities is an important consideration. The case studies suggest that government entities (even those with community representation) may "water down" the customary practices associated with recognition of community land title (see Botswana and Cambodia for examples) and promote the agenda of the government over community objectives. Clearly, formalizing community rights requires government involvement to legitimize the process. However, in formulating an appropriate policy for Myanmar, a balance between government objectives and community representation in the process will need to be struck and consideration of how many (and which) government agencies should be involved in the process.

The actual steps to recognize community tenure lands vary significantly across countries, although the process usually involves some the recognition, certification, and registration of the group receiving rights and demarcation of the land. Recognition and registration of groups may follow existing association or corporate law (as in Ghana and Malaysia, which require incorporation of groups), or can create new processes (see Cambodia, Indonesia, and Lao PDR).

Demarcation processes also vary across jurisdictions. In formulating a process, policymakers will need to consider who will participate in the process, and to what extent the process is driven by localized knowledge and participation, or by expert-driven processes such as remote sensing technologies. In the Philippines and Lao PDR, for example, communities are given the evidentiary burden and clear processes to identify their members and their lands. In contrast, in Indonesia, the process for indigenous groups to acquire rights requires a lengthy and cumbersome process that is wrought with ambiguity. In Malaysia, aerial photos and topographical maps are restricted and only available to the community during consultation sessions.

Regardless of the approach adopted, the case studies suggest that the more complex the process, and the more entities involved, the lower the likelihood of widespread adoption (e.g., Cambodia and Liberia). Further, it could be speculated that protracted processes may further the implementation of government agendas over community or customary rights recognition.

As such, in formulating policy in Myanmar, it will be important to consider the best way(s) to streamline and simplify the process using participatory and low-cost approaches. Included in this is consideration of which and how many government agencies should be involved in the process recognizing that complexity leads to delays in registration. Related to this is whether registration of community or customary land claims should be mandatory: the best practice would be to recognize pre-existing rights without registration (e.g., Liberia and Mozambique). Finally, particularly in areas where competition for land

23 States and regions sit at the same level in the overall governance hierarchy in the country.

is high, interim protection measures should be considered for communities undergoing a lengthy titling process (e.g., Cambodia).

Other potential aspects of the recognition process may involve the preparation of a land use or management plan. Whether these plans are required prior to issue of title will need to be determined. While such plans can promote sustainability of land use, they may also create bottlenecks in the recognition process.

The recognition of community land and resource tenure can often lead to conflict within a community and with outside interests. This is particularly true in resource-rich areas or where concessions have been issued. As such, conflict management mechanisms for both internal and external conflicts should be included in the recognition process and enabling framework. Some countries have created specific judicial systems (e.g., Philippines and Indonesia) to address conflict issues and have incorporated customary law in their decision-making.

Formal registration of community land and resource tenure can often lead to conflict within a community and with outside interests. This is particularly true in resource-rich areas or where concessions have been issued. As such, conflict management mechanisms, such as alternative dispute resolution, for both internal and external conflicts should be included in the enabling framework, as well as the registration process. Some countries (e.g., Philippines and Indonesia) have created specific judicial systems to address land conflicts and explicitly incorporated customary law in their decision-making. The Native Courts of Malaysia provide an example of customary law systems that is recognized for addressing customary land-related conflicts. Titling programs should test methodologies in places where conflict exists to understand the robustness of approaches for addressing the variety of conflicts that may emerge. Furthermore, it is important to identify if there are any parallel titling programs that will lead to "tenure institution shopping" that may exacerbate conflicts.

5.3 LAND TYPES WHERE COMMUNITY TENURE IS RECOGNIZED

5.3.1 MYANMAR CONTEXT

Land rights are often a source of conflict. Therefore, an important consideration for Myanmar will be the level and nature of insecurity being experienced by communities in critical parts of the country, whether it is from agricultural or natural resource extraction investments; encroachment from nearby communities or individuals within the community; or in-migration. These factors can contribute to land scarcity and competition for resources and clearly increase the demand for clear land title. In such cases, it is imperative that all stakeholders are given a voice at the policymaking table.

Existing legislation in Myanmar could only be used in a limited way to secure community land and resource tenure rights. Specifically, the Farmland Law (2012) provides the means to secure land tenure recognition, but it only applies to land resources actually classified as farmland in Article 3 of the Law. This would not include forestland (Reserved Forestland or Public Protected Forestland, as defined in the Forest Law), village grazing lands, or any lands not used for agricultural purposes within village boundaries, such as lands used for housing.

The Forest Law (1992) covers all forest resources in the country, including those that are protected (Reserved Forest land and Protected Public Forest land) and those that exist on Public Forest lands that are commonly referred to as Unclassified Forest. The Forest Law contains provisions for granting various rights of use over forestlands, such as for Village Firewood Plantations or Local Supply Plantation, but there are no provisions in the current Forest Law that envision the formal recognition of community tenure over forests.

Finally, the VFV (2012) creates a mechanism where public citizens, private sector investors, government entities, and NGOs or other organizations may submit an application to lease such lands for agriculture development, mining, and other purposes allowed by law (Articles 4 and 5). Virgin land includes areas of natural forest that are unclassified (not defined as Reserve or Public Protected Forest under the Forest Law) and is land that has never been cultivated (Article 2). However, because the intent of this law is to develop land resources commercially, the ability of communities to manage land in accordance with their practices and traditions would be limited under this law.

Given these limitations, policymakers will need to consider what types of land might be open to community tenure recognition processes, and what mechanisms are needed to identify and clarify this decision.

5.3.2 ANALYSIS AND CONSIDERATIONS

The cases examined above provide examples of land types on which community land and resource tenure is recognized. For example, Indonesia provides examples of conflicts that have arisen from resource extraction (e.g., forest concessions) in forestlands

that were not formally recognized as customarily owned. Such examples may assist policymakers in Myanmar who will need to consider which categories of land should be open for community title (e.g., settlement areas, individual or common agricultural land, different types of forestlands, shifting cultivation/fallow areas/rotational upland crop zones, fish ponds, etc.).

5.4 RIGHTS CONFERRED

5.4.1 MYANMAR CONTEXT

While some forms of collective ownership and/or land use are permitted under the Farmland Law (2012); the VFV (2012); and the Forest Law (1992) in Myanmar; these are limited. Specifically, while the Farmland Law establishes a private land use property right that includes the rights to sell, exchange, access credit (encumber land with debt), inherit, and lease (Article 9), land use certificates are conditional. If a community or group breaches the conditions of use, such as by leaving land fallow, the government may impose fines, rescind land use rights, or forcibly remove any structures constructed (Article 12).

Under the VFV (2012), the government can grant what can be considered long-term leases on state land, for a period of up to 30 years covering up to 50,000 acres (2012, Articles 10 and 11). However, such vacant, fallow, or virgin lands that are leased may not be mortgaged, sold, subleased, divided, or otherwise transferred without approval of the government (Article 16).

In terms of recognizing ownership rights, it is important to note that the constitution could be interpreted to guarantee the right of citizens to appeal decisions made regarding land rights to an independent judiciary (Articles 11 and 19). This could potentially be used to contest government decisions that negatively impact the community's land tenure claims.

5.4.2 ANALYSIS AND CONSIDERATIONS

The case studies reveal a wide range of ownership and alienation rights associated with the recognition of community land and tenure rights. However, generally speaking, three options may be considered in the development of Myanmar's enabling framework for community land and tenure recognition:

- **Communal ownership with no rights of alienation.** The community retains the right to access, use, and manage the land but is unable to sell or transfer the land. In such situations, there may be requirements for compensation or FPIC if the government (e.g., Philippines and Indonesia) reallocates the land.
- **Communal ownership with rights of alienation for individual community or non-community members.** Privatizing individual claims serves as the basis for individualized title (e.g., Mexico, Philippines, and Cambodia). In some cases, individuals may also receive compensation if they choose to leave the communal ownership group (e.g., Cambodia). Alienation rights may also be conferred through leases granted to third parties (e.g., Botswana or Mozambique).
- **Communal ownership with alienation rights for community's land.** Full rights of alienation can exist for communal lands such as in Mexico.

In Myanmar, where land is owned by the government and concession agreements are proliferating, it may be important, as in Liberia, to address how existing concessions within the community's lands will be returned upon completion of the lease term.

5.5 OTHER PROGRAM DESIGN CONSIDERATIONS

Other program design consideration include the national legal context (including the constitution); the current level and type of land tenure insecurity faced by communities; the appropriate level of external intervention in governance of community tenure rights; the cost of establishment and implementation; the availability of long-term support for communities by government or CSOs (for education, legal aid, and monitoring); and the availability of suitable technologies to facilitate mapping and data organization for land administration. In developing an effective policy and legal framework for Myanmar, policymakers may wish to draw from the experiences of other nations, as they may be instructive both for their weaknesses and strengths.

In addition to the issues articulated above, the following issues have been flagged for consideration in the development of a program design to support recognition of customary communal tenure.

Political Will and Support: Examples from Ghana and Liberia suggest that government support is critical to adoption and implementation of legal recognition of customary tenure. A realistic assessment of existing support is critical for programmatic success, as well as the efficient use of resources.

Scale and Location: The scale and location of the process needs to be considered in program design. Identifying how the community tenure recognition process will be implemented at scale is important from the outset. This requires recognition that different approaches may be needed for different types of cultural and physiographic contexts across the country, as well as for areas with high levels of conflict.

Enabling Legislation: Legislation should provide strong safeguards, including a simple and efficient means to recognize rights and register them, if deemed appropriate. Related to this, examples from Cambodia, Ghana, and Liberia suggest that donor-supported initiatives or pilots in testing community land and resource tenure registration are most effective when they are part of a process for creating new legislation or building guidance on the process for obtaining titles. It is valuable to provide interim protections until the final registration is approved, particularly since the full process can be lengthy and slow. Careful and consistent use of terminology (such as communal versus collective lands) is important to ensure correct interpretations and use of appropriate protocols for efficient registration.

Administration and Government:

Capacity Building: The processes involved in community tenure recognition will require capacity building for actors operating at various levels. This should include both education and outreach provision, as well as technical training in the process. Training tools, templates (in local languages), and review of research findings on community tenure rights are critical.

Role of CSOs: CSOs can be an important ally in supporting the community tenure process, particularly in carrying out activities at scale. This requires mechanisms for the development of close collaboration between government and CSOs that permit CSOs to maintain their independence while maintaining constructive dialogues with government agents regarding the best implementation processes.

Monitoring: Monitoring programs are important to track progress and make necessary adjustments to the community tenure rights registration process.

5.6 FINAL CONSIDERATIONS

Establishing enabling legislation, regulations, and policies for community rights recognition, as well as certification and registration (if appropriate), is clearly the first step in Myanmar. However, analysis of the implementation of the law (or lack thereof) in other countries suggests that the likelihood of success is improved by a number of factors, which could serve as guiding principles for policymakers. These include:

- Simplicity and ease of process for establishing rights, with Cambodia providing an example that is not simplistic and can be contrasted with the Philippines, Mozambique, or Botswana;
- Participatory and low-cost approaches to demarcation such as those developed in Botswana;
- Consistent and long-term support by government, CSOs and donors; and
- Transparent and accessible registries for maintaining up-to-date records as demonstrated in the Philippines.

In addition to the elements discussed above, there are a number of other considerations that will determine the best approach for Myanmar, both in terms of national law and regulations, as well as for individual communities obtaining title to their land. As in any country, there is a need to balance the objectives of the state and the local needs of diverse types of communities. To assist in the policy dialogue, some of these larger policy questions are presented below.

- Is there a need to intervene within specific types of communities to build a more nationally coherent approach?
- Is there a need for external involvement to help adjust unequal social relationships towards more socially inclusive and gender-equitable forms of rights and governance?
- Is there recognizable political will among the government and influential political players to support such a community land rights agenda?
- Is the financial and administrative capacity of the government at the national and local levels sufficient to govern and manage community land tenure rights?

There is a growing trend toward devolution of land governance to community-level institutions. Such an approach offers many advantages since it is based on existing and functional tenure arrangements, permits flexibility, and can be carried out in a quicker and more cost-effective fashion. There are numerous lessons offered by the experiences of countries in South-East Asia, Africa and Latin America. For Myanmar, these lessons can be considered by the key stakeholders involved in the process of developing a Land Use policy and related legislation to carve out an approach suited to the unique conditions that exist in Myanmar.

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