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# USAID LAND TENURE PROJECT

## CUSTOMARY LAND TENURE IN BURMA

### INTRODUCTION

The purpose of this report is to provide donors, policy makers and other stakeholders with information on customary land tenure arrangements in Burma, how the current legal frameworks in the country address these arrangements, and ways forward for the recognition, protection and ultimate registration of customary tenure in the country.

The governance of land is of increasing importance in Burma. One of the debates centers on what is the right combination of different property regimes. In literature on property regimes, four types of property are commonly recognized and are defined by who holds the rights<sup>1</sup>:

1. “Private property” is usually held by individuals, households, or legal entities such as associations, partnerships, and corporations;
2. “Public property” is usually state-owned land that serves a public purpose, and can be held in the name of the national public by a trust or global public by a convention;
3. “Common property” is held by some type of community such as a tribe or clan; and,
4. “Open access” land has an undefined ownership and limited management.

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<sup>1</sup> See for example Ruth Meinzen-Dick, *Commons or Communal Land: A Framework for Understanding Property Rights in Practice*, paper written for the 2015 Annual World Bank Conference on Land and Poverty.

There is often a difference between what is recognized by law and the situation on the ground. For example, some forest land may be technically owned and managed by the state as public property, but a lack of state presence in an area means that, in practice, it is open access.

Private property and public property are usually regulated by well-established state law; however, customary land, a form of commons property, is often administered by local community institutions that may or may not be formally recognized by the state. Customary tenure arrangements often have a strong communal nature, and the land resources covered by such regimes are viewed as “owned” by the communities that control these resources, while incorporating elements of individual or household use rights. Land resources under customary tenure can be used by communities for a number of purposes, but are used mainly to meet local livelihood needs: agricultural production, hunting, foraging, grazing, fishing, and spiritual purposes. Customary land tenure arrangements have been in existence prior to the creation of modern state structures or legal frameworks. As a result, they are usually not formally recognized or protected by governments unless they intentionally include them into a wider system of land governance.

Modern states usually seek to strengthen the administration of land resources within their territorial boundaries. Modern land governance systems are dominated by private property regimes, underpinned by titles belonging to individual persons, households, or private entities. Those who promote such a regime also promote the development of strong legal institutions, state regulation, and land markets. As states expand their administrative capacities, they often come into conflict with local communities which assert that the private property regime weakens customary land tenure arrangements.

#### Customary Tenure Regime vs. Private Property Regime

	Customary Land	Private Property
Economic	Communities use the land mostly for their own food source; external financing tends to be limited; this land usually falls outside of state administration and taxation systems.	Important to economic growth and industrial development globally; many people want secure private title for investments; state can tax land and investments on land.
Social	Local customary institutions ensure relatively greater equality of access to land resources for the rural poor.	Does not automatically lead to equity of land access for the rural poor.
Environmental	Sustainable environmental practices are often included in the way land is used, unless there is uncontrolled population growth or decrease in land areas.	With a focus on maximizing market value, natural resources risk being stripped at unsustainable rates, unless laws enforce against it.
Cultural, Historical, Spiritual	The land is a strong part of people’s identity.	Places less emphasis on the different cultural values people attach to the land.

A similar process is unfolding in Burma. Here, the government provides statutory protection for private property and public property. Despite some limited legal instruments available to formally register parts of communities’ customary land resources, customary land tenure is largely under informal arrangements governed by traditional local rules.

The Government of Burma (GoB) is starting to grapple with the issue of customary land tenure. Discussion around this issue features prominently in the ongoing series of post-ceasefire<sup>2</sup> political dialogues to craft a federal governance system, involving the government, military, non-state armed groups, political parties, and civil society groups. Through these discussions, ethnic minorities aspire to

<sup>2</sup> The National Ceasefire Agreement (NCA) was signed between the GoB and eight major ethnic armed groups in October 2015.

have customary tenure recognized and protected by state law as part of the broader process of state-building. Similarly, many rural communities among the lowland-dwelling Bamar majority also seek government recognition of customary use of community commons.

## **UNDERSTANDING CUSTOMARY LAND TENURE ARRANGEMENTS IN BURMA**

Given the ongoing national discourse on land issues as it relates to development, it is important for all stakeholders to fully understand the complexities relating to customary tenure in the Burma context. This increased understanding will lead to better policy formulation regarding the recognition, protection and registration of the various customary tenure arrangements in the country. In this regard, it is important to distinguish between two different types of customary land tenure in Burma. One type exists in the lowlands where, for the most part, the private property regime is used as backed up by state laws. Lowland communities customarily use land commons, such as forests and pastures, for foraging, grazing, and farming. What many lowland communities have deemed to be customary land commons fall across a number of different official categories including reserve forest overseen by the Forest Department, vacant, fallow, and virgin (VfV) land overseen by the Department of Agricultural Lands Management and Statistics, and grazing land overseen by the General Administration Department. Since the GoB's transition to a market economy after 1988, much of the VfV land, and even some of the grazing land, has been allocated to large-scale land investments. While lowland communities have had little recourse to retain these land commons, areas that have been settled on by 50+ households and cultivated for an established period of time<sup>3</sup> were included in a one-off forest land de-gazettement process in 2013. That year, the Forest Department identified 800,000 acres (or 1% of total forests) of encroached land for de-gazettement in both lowland and highland areas.

Another type of customary land tenure can be found in the country's uplands, historically more distant from state administration, where customary institutions remain strong. These include areas such as Chin State, Kachin State, Shan State, Karen State, mountainous areas of Bago Region, Kayah State, parts of Rakhine State, and Special Administrative Areas such as Nagaland. While customary land tenure arrangements are still well-preserved in most of these areas, they are only enforced by non-state authorities in a few areas. For example, the Karen National Union administers land and forest resources under its territorial control according to its own land and forest policies.

The complex land governance system in Burma is very much influenced by British colonial era (1824 – 1948) governance. With the passage of the 1876 Lower Burma Land and Revenue Act, the British granted cultivators the rights to inherit and trade land after having used the land for 12 consecutive years. In effect, a set of laws exported the British system of property rights to Burma. The British, however, treated land resources in ethnic highland areas differently. Unless laws applicable to Lower Burma were specifically extended to what were called *Scheduled Areas*, indirect rule was practiced and customary laws, including those that applied to land and forest resource tenure, were formally recognized. This is demonstrated by the 1895 Kachin Hill Tribes Act and the 1896 Chin Hills Act.<sup>4</sup>

While there is much variation between the different ethnic practices relating to customary tenure, some trends are common between them. Customary lands are governed by locally accepted norms and rules that determine rights of use, management, exclusion, and alienation.<sup>5</sup> They tend to be passed down orally. These rules have traditionally been enforced by community bodies, i.e. a council of elders usually headed by a village chief. Having arisen and evolved since the establishment of the communities, these

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<sup>3</sup> USAID's Land Tenure Project also found cases where land cultivated for an extended period of time remained within reserve forest, especially if these areas did not follow a pattern of lowland permanent agricultural practices.

<sup>4</sup> *Land Tenure Security in Burma's Uplands*, Food Security Working Group, Yangon, 2010

<sup>5</sup> For a theoretical explanation see Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action*, 1990.

rules are accepted, understood, and practiced by the respective communities. Group members are aware of the criteria for membership, although these could be adjusted to the changing needs of a community.

The “collective” aspect of customary land is that a community has some decision-making over the allocation and transfer of the land as a whole. For example, a community that practices shifting cultivation may make a collective decision each year as to which mountain to clear together for cultivation or how to allocate household plots. This can be done by lottery or via an inheritance system that fixes the plot locations for each household. Even when the decision-making is vested in a chief or tribal council, those leaders are supposed to make these decisions on behalf of the whole community. This collective element often breaks down when land changes from customary communal land to private property held by individual households. When households receive individual titles or recognition of private property rights from the state for the land they have been cultivating and stop interacting with the land through their customary norms, this can radically alter their relationship to both the land and to each other.

This is not to say that all decisions must be taken collectively in areas where customary land tenure is found. In fact, there exist elements of “individual” household or clan rights for:

- I. Use of a land plot, such as cultivation decisions or extraction of resources;

2. Management of a plot, such as deciding whether to plant extra trees on a plot;
3. Exclusion, such as the degree to which others are prevented from accessing land resources; and,
4. Alienation, such as the rights to rent, sell, or transfer through gifts or inheritance, though land resources cannot generally be sold to people outside of a community.

Furthermore, customary land tenure rights can be either permanent (e.g. long-term unless rules are violated) or temporary (e.g. allocated on a seasonal/rotational basis, such as through a lottery system, to particular resources within a given resource boundary).<sup>6</sup>

### **WHAT DOES THE LEGAL FRAMEWORK SAY ABOUT RECOGNITION OF CUSTOMARY TENURE?**

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was ratified by the GoB on 13 September 2007. UNDRIP promotes a set of rights “for the survival, dignity and well-being of the indigenous peoples of the world” (Article 43). It mandates states to legally recognize and protect indigenous peoples’ (IPs’) lands, territories, and resources (Article 4) and states that IPs have rights to the resources they acquired in the past or occupy presently (Article 26). The IP rights language remains relatively new in Burma’s political debates, though there is growing recognition of this instrument by different groups of stakeholders involved in the Union Peace Conference.

While the current legal framework does not provide statutory protection to customary land tenure, the 2016 National Land Use Policy (NLUP) says that “customary land use tenure systems shall be recognized in the national land law in order to ensure awareness, compliance and application of traditional land use practices of ethnic nationalities, formal recognition of customary land use rights, protection of these rights and application of readily available impartial dispute resolution mechanism” (Part VIII). The policy defines “customary land” as applicable to all of Burma’s ethnic groups residing in the uplands and the lowlands.

### **Naga Customary Forest & Land Tenure**

Located in three townships in North-eastern Sagaing Region, the Naga Self-administrative Region has a population of approximately 400,000 with seven main tribes. Although variations exist between tribes, there are also some commonalities in relation to customary land tenure arrangements.

Collective land includes: land managed by a tribe or clan; communal forestland; hunting land; watershed areas; rivers, streams, and natural lakes; cultural heritage or “sacred” areas; and, pasture land.

Household land includes: shifting cultivation land; permanent farming plots; orchards; honey bee rock; and, small-scale ownership of forest land.

Breaking with the past, the Conference of the Naga Nationals in 2014 endorsed inheritance rights to female members in the family. In land sales, priority is given to the nearest blood relation: family members, immediate relatives, far relatives, clan members, village and tribe. Thus, customary tenure system retains land within a specific community. In some cases, households might own large areas of land, but traditional values bind these land owners to allow ready access to other community members.

Concerning land disputes, there are judicial boards elected by the people in each village and tribe to settle the matter. The board makes a decision and passes a verdict. In order to solve land disputes, maps created by the British colonial government are sometimes used as reference to demarcate boundaries. There is also a mother board for all the tribes to deal with land disputes between the tribes. Naga people rarely, if ever, settle such disputes in government courts.

Source: Resource Rights for the Indigenous Peoples (RRTIP)

<sup>6</sup> Sources: 1) Andersen, K. E. (2016). *Analysis of Customary Communal Tenure of Upland Ethnic Groups, Burma*. unpublished; 2) Land Core Group. (2010). *Land Tenure Security in Burma's Uplands*. Yangon, Burma

Under the country's current legal framework, there are several legislative tools available for the formal recognition of communities' customary land tenure arrangements. These include the 2016 Community Forest Instruction (CFI), the 1992 Forest Law, and the 2012 Vacant Fallow Virgin Lands Management Law ("VFV Land Law").

The revised 2016 CFI states that communities may establish community forests (CFs) with leases of 30 years, extendable every 30 years at the discretion of the District Forest Officer. One of the most significant changes of the 2016 CFI is its shift from subsistence to commercialization. Within the Forest Department, there is general acceptance that commercialization of CF can contribute to poverty reduction and that this, in turn, will reduce overuse of forest products. The 2016 CFI presents a real opportunity to empower communities in sustainable forest use and management while also helping the government to reach its 10-year reforestation targets. In fact, it is through CFs that the government expects to contribute half the share of its 10-year reforestation target: 770,332 acres of plantations through community forests out of a total of 1,424,588 acres of plantations.<sup>7</sup> With CFs, the challenge is that the size of areas granted are usually much smaller than the area of land under local community customary tenure arrangements. Many upland communities are also reluctant to go through the process of establishing CFs given the complexities of the application process and development of a management plan.

Article 15 of the 1992 Forest Law permits the establishment of community wood lots as a way to mitigate against extensive use and illegal logging. Small in size, about five to 10 acres, wood lots are seen as a much easier way for communities to access fuel wood and timber. In theory, they can be cut a few years after replanting. In practice, only half of them have been maintained, partly because of the time needed to reforest these lots before communities can use them. Again, these are very small in size when compared to the areas of land under community customary tenure arrangements.

The 2012 VFV Land Law states that if a farmer has been cultivating on VFV land for an extended period of time, the cultivator can convert the VFV land into permanent agriculture land and apply for a land use certificate (or Form 7) under the 2012 Farmland Law. This option is being promoted by the departments for forestry and agriculture as a way to halt shifting cultivation and encourage upland communities' transition to permanent agriculture. While this policy has been rejected by most upland communities and civil society groups, groups working on tenure issues in the uplands (such as the non-governmental organization Namati) have identified cases in which some households are opting for formal recognition of permanent household plots (within a larger customary tenure system). This transition to permanent plots is preferred by households characterized by a lack of working age adults, i.e. due to out-migration, and many elders and children. For them, shifting cultivation is too difficult to continue, and they prefer to engage in permanent agroforestry if they are assisted in the transition.

In addition, the 2012 VFV Land Law states that associations involved in agriculture investments can secure up to 5,000 acres at a time to develop an investment project. Under the 2012 Association Law, it is possible for a group of farmers to register themselves as such an association. In practice, there are very few cases of farmers doing this as it requires substantial proof of investment and many farmers do not know the regulations for forming associations.

As demonstrated by development projects working on these issues, upland communities that have opted to use the existing laws to formally secure their lands under customary tenure arrangements have faced several challenges in doing so. One issue is that they have difficulty using tax receipts as evidence supporting proof of ownership for their agriculture plots. Tax receipts are only issued for lands that are actually cultivated, but households may own several cultivation plots across a mountain range in a long

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<sup>7</sup> Source document: 2017 Forest Department's 10-year National Reforestation and Rehabilitation Program (NRRP)

rotational fallow customary tenure system. Without tax receipts, they would need the guarantee of village authorities and elders. Another issue is that no legal mechanism currently exists to register VFV lands viewed by concerned authorities as economically unproductive, such as sacred spaces that have high cultural value for local communities. Finally, land resources under customary tenure arrangements tend not to have updated official maps that clearly delineate their boundaries. Communities may face difficulties in delineating the boundaries of land under customary tenure for formal recognition purposes, for example, in cases where natural boundary markers have worn away or shifted.

## **WHAT ARE OPPORTUNITIES FOR RECOGNITION IN THE SHORT- TO MEDIUM-TERM, AND HOW DO THESE ALIGN WITH THE GOVERNMENT'S DEVELOPMENT GOALS?**

With the growth in social activism since Burma's transition to democracy, many in the government are increasingly becoming aware of the need to address the large swath of areas under customary land tenure arrangements. There are several ways that the government can formally recognize customary land tenure, while promoting its own national development goals.

One opportunity for the government to formally recognize customary land tenure is through the translation of the NLUP into a National Land Law. Following this, appropriate institutional arrangements will have to be put in place. The fact that the law development process could overlap with the post-ceasefire national political dialogue presents an opportunity to translate the outcomes of the dialogue into legal protections for the customary land tenure rights of all ethnic groups. The protection of different forms of land tenure throughout the country can contribute to a more sustainable peace.

Another option is in the government's plans to reallocate VFV land to landless and land-poor communities.<sup>8</sup> Is it estimated by the government that only 20% of the land allocated for agribusiness has been planted. Under the National League for Democracy government, the VFV Land Committee is in the process of reclaiming unused land leased out for agribusiness. With the government's current policy to reclaim unused or poorly used concessions, the government is taking the opportunity to prioritize allocation of reclaimed VFV lands to landless or land-poor farmers who may be more likely to put it to productive use. The GoB could expand this policy to formally recognize community lands classified as VFV that are currently under informal customary tenure arrangements.

Adoption of modern land information management systems in the country can improve delivery of government services. The absence of such a system has created a great deal of inefficiency in the ways that land has been administered and managed. As part of this land information system, accurately mapping land resources in the country under customary tenure arrangements would help the government and communities to fairly decide where and how to formally recognize customary tenure. The Swiss-funded OneMap Myanmar project, as well as USAID's Burma Land Tenure Project, are piloting this approach in areas where customary land tenure exists. In the absence of detailed government land use inventory maps, land resource inventories and boundary maps created with input from local community members can serve as a credible information resource to assist government agencies with land administration and management of these areas.

Since customary land tenure lacks formal legal recognition, this makes it insecure and more vulnerable to land confiscations. A more robust land acquisition process would help to minimize land conflicts and promote more equitable development outcomes. As such, the 1894 Land Acquisition Act, along with subsidiary implementing rules and guidelines, needs to be updated. It may be worthwhile for the government to learn from the experiences of other countries in which customary land makes up significant parts of the land mass. In countries including the Philippines, South Africa, South Sudan,

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<sup>8</sup> For more information, see <https://www.irrawaddy.com/news/Burma/Burma-govt-redistribute-vacant-land.html>

Tanzania, and Uganda, formal title to customary land is not a prerequisite to receiving compensation.<sup>9</sup> In other words, national land acquisition laws often equally apply to land resources under customary tenure as they do to those that have been formally recognized by law. In keeping with Article 10 of UNDRIP, which the GoB has ratified, it is recommended that free, prior, and informed consent principles are applied to areas under customary land tenure arrangements prior to the government finalizing the process of updating the land acquisition legal framework.

Creative approaches for supporting the development of land resources under customary tenure are needed. The way in which lands under customary tenure are currently governed and used limits their ability to generate greater economic growth for the communities holding them. Communities tend to use such land resources for subsistence purposes. Because lands under customary tenure have not been formally recognized and registered in accordance with law, they cannot be mortgaged for loans. As a result, such communities have limited access to financial resources and cannot easily invest in improving their land resources, which results in fewer economic outputs and opportunities of these land resources. Considering the experiences of other countries in the region such as Laos, where lands under customary tenure can benefit from income generating leasing arrangements, legal reforms should be considered to increase options for Burma's rural communities to have more choice in this matter. Creating legal mechanisms for the recognition of lands under customary tenure, in addition to the limited provisions that currently exist, could include mechanisms for communities to structure investments in their land in order to maximize local livelihood benefits. At the same time, safeguards should be put into place to prevent uncontrolled sales to investors. For example, a community that forms an association could access preferential loans to invest in cooperative enterprises on their land. Income from the cooperative could then be used for the collective benefit of the community, while generating tax revenues for the state.

Finally, an assessment of the variations in customary tenure arrangements across the country would help the government arrive at more contextually appropriate ways to formally recognize, protect, and register these land tenure claims. There is a need to better understand which areas of the country have customary tenure arrangements that are the most suitable for formal recognition and registration in accordance with the existing legal framework; what gaps exist in the legal frameworks that hinder formal recognition and registration of claims in other areas; and, what revisions are needed to address those gaps.

## **CONCLUSION**

Burma is undergoing an important period of rapid political and economic transformation. One of the key issues that the GoB will have to address is the way land tenure and property regimes will be organized in order to bring about equitable and sustained development for the majority of its citizens. While the private property regime has become the dominant one around the world, the exclusive reliance on this type of arrangement may not be the most suitable for Burma, which is socially and culturally diverse, as demonstrated by the wide variety of customary land tenure arrangements around the country. While the government has extended some limited legal protections to communities with customary land tenure claims, there are still a number of promising options that it can consider to formally recognize, protect, and register these claims while also promoting its own national development goals.

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<sup>9</sup> Tagliarino, N. (2016). *Encroaching on Land and Livelihoods: How National Expropriation Laws Measure up Against International Standards*. Working Paper. Washington, DC: World Resources Institute. Available online at <http://www.wri.org/publication/encroaching-on-land-and-livelihoods>.



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