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# BRIEF

## COMMUNITY LAND AND NATURAL RESOURCE TENURE RECOGNITION: REVIEW OF COUNTRY EXPERIENCES

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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.<sup>1</sup> 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

<sup>1</sup> This brief is a summary of the publication Jhaveri, N., Litz, V., Girard, J., Oberndorf, R. & Stickler, M. M. (2016). *Community Land and Natural Resource Tenure Recognition: Review of Country Experiences*. Washington, DC: USAID Tenure and Global Climate Change Program. This report benefited from significant contributions by M. Mercedes Stickler and Stephen Brooks of USAID to the research conceptualization, selection and articulation of case studies, as well as overall review. 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.

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*



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

*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. 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, 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 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<sup>2</sup>

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

The ASEAN country case studies include an examination of the “black letter law”<sup>3</sup> 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.

## CAMBODIA

In Cambodia, recognition of customary rights is limited to IP groups under the Land Law of 2001. Three ministries are involved in this complex process, which requires that

2 The main publication contains the full set of references that support the analysis presented in this Brief.

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

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

COUNTRY	STRENGTHS	WEAKNESSES
<b>CAMBODIA</b>	<ul style="list-style-type: none"> <li>• IP provided with communal land title.</li> <li>• A diversity of land types is included, including fallow land as part of shifting agriculture systems, and some forestlands.</li> <li>• Individual households can obtain title to their lands.</li> <li>• Individuals that leave the community are eligible for compensation of their individual customary holdings.</li> </ul>	<ul style="list-style-type: none"> <li>• Restricted to IP communities.</li> <li>• Does not include urban lands, all forestlands, and seasonal lakes.</li> <li>• Title contingent on continuation of traditional practices by community.</li> <li>• Complex and lengthy process involving multiple ministries with limited results.</li> <li>• Those who elect for individual title will not be able to join communal titles.</li> </ul>
<b>INDONESIA</b>	<ul style="list-style-type: none"> <li>• Constitution recognizes traditional communities and their customary (<i>adat</i>) rights to land.</li> <li>• Community customary rights cannot be extinguished or restricted without prior consent of <i>adat</i> communities, and just compensation.</li> <li>• Individuals may use customary rights as a basis for acquiring private title.</li> </ul>	<ul style="list-style-type: none"> <li>• No current means to register communal title.</li> <li>• 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.</li> <li>• The process to acquire rights in forestlands (70% of <i>adat</i> 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.</li> </ul>
<b>LAO PEOPLE'S DEMOCRATIC REPUBLIC (PDR)</b>	<ul style="list-style-type: none"> <li>• Collective or communal tenure applies to all lands, not only IP customary lands.</li> <li>• Wide range of organizations eligible to apply for collective or communal title.</li> <li>• A wide range of land use types is covered: agricultural, forests, grasslands, water bodies, and others.</li> </ul>	<ul style="list-style-type: none"> <li>• Lack of clear practical guidance as to where communal or collective titles apply.</li> <li>• Lack of clear process on how communal or collective land titles can be obtained.</li> <li>• Administrative reorganization at the ministerial level slowed down the process.</li> <li>• Land Policy needs to be finalized for clearer guidance to be provided on how titles can be obtained.</li> </ul>
<b>MALAYSIA</b>	<ul style="list-style-type: none"> <li>• The statutory recognition of customary land rights is available to majority Malay ethnic group, Orang Asli (original peoples), as well as native peoples.</li> <li>• Doctrine of common law supports indigenous land rights.</li> <li>• Native Courts Enactment of 1992 permits adjudication of <i>adat</i> law systems, particularly to address long-standing conflicts.</li> </ul>	<ul style="list-style-type: none"> <li>• High burden to establish ownership through documentary evidence.</li> <li>• Long processing times for obtaining native customary title.</li> <li>• Conflicts among communities over boundaries results in perimeter surveys being cancelled.</li> <li>• Aerial photos and topographical maps are restricted and only available for community dialogue sessions.</li> <li>• Community maps are not allowed under amendments to the Surveyor Ordinance.</li> <li>• Only rights to settlement and cultivation areas eligible for registration; rights to areas customarily used for hunting/gathering and sacred sites are not.</li> </ul>
<b>PHILIPPINES</b>	<ul style="list-style-type: none"> <li>• Customary land rights and autonomy recognized in statutes.</li> <li>• Constitutional entrenchment of land rights regime and autonomy.</li> <li>• Grant of formalized titles that transfer land from state to communities.</li> <li>• Law recognizes both individual and community rights.</li> <li>• Customary law determines allocation of rights within the community.</li> <li>• FPIC process legally enshrined.</li> <li>• Customary dispute resolution legally recognized.</li> <li>• Ancestral Domains Office assists in resolving disputes.</li> <li>• Rights of displaced IP/Indigenous Cultural Communities (ICC) to ancestral domain recognized.</li> </ul>	<ul style="list-style-type: none"> <li>• Funding, logistical, and manpower shortages in the National Commission on Indigenous Peoples.</li> <li>• Bureaucratic and procedural complexities in land-titling process causing evidential burden.</li> <li>• FPIC process inadequately followed.</li> <li>• Prevailing assumption that ICC are homogenous (leading to exclusion of coastal dwellers and inadequate recognition of rights to coastal settlements, shorelines, and sea).</li> <li>• Law requires communities to practice traditional forms of production, but ICC are increasingly integrated into modern economic systems.</li> <li>• Multiple types of tenure regimes not adequately recognized by Certificate of Ancestral Domain Title/ Certificate of Ancestral Land Title.</li> <li>• Stronger role of local governments enabled through decentralization undermines awarding of titles to IP/ICC.</li> <li>• Suspension of titles to areas with overlapping claims.</li> </ul>

COUNTRY	STRENGTHS	WEAKNESSES
<b>BOTSWANA</b>	<ul style="list-style-type: none"> <li>Land Boards that comprise customary leaders, government-appointed members, and community-elected representatives are responsible for land administration.</li> </ul>	<ul style="list-style-type: none"> <li>Composition of Land Boards heavily represented by government resulting in marginalization of traditional authority.</li> </ul>
<b>GHANA</b>	<ul style="list-style-type: none"> <li>Customary Land Secretariats introduced by donor projects to support the process to register customary lands under the 1986 Land Title Registration Law.</li> </ul>	<ul style="list-style-type: none"> <li>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.</li> <li>Reliance on donor funds for expansion and strengthening of Customary Land Secretariats.</li> </ul>
<b>LIBERIA</b>	<ul style="list-style-type: none"> <li>Proposed legislation recognizes customary rights.</li> </ul>	<ul style="list-style-type: none"> <li>Ambitious agenda for organizing communities and registering their rights may be unrealistic to implement.</li> <li>Many customary lands are already under concession agreements.</li> </ul>
<b>MOZAMBIQUE</b>	<ul style="list-style-type: none"> <li>Community ownership is recognized in the Constitution and covers most of the country's land base.</li> <li>Government issues community land leases that include land for expansion.</li> <li>Community land may be leased to investors with consent of community and subject to a community-investor agreement.</li> </ul>	<ul style="list-style-type: none"> <li>Inadequate registration of community land leases compared to estimated area of customarily held land, particularly compared to leases issued to investors.</li> <li>Inadequate safeguards in place to support customary interests over those of more sophisticated investors.</li> </ul>
<b>BRAZIL</b>	<ul style="list-style-type: none"> <li>Demarcation of IP lands is required under the law.</li> </ul>	<ul style="list-style-type: none"> <li>Demarcation process involves limited community participation.</li> <li>Implementation of demarcation requirements has been limited and process protracted.</li> </ul>
<b>COLOMBIA</b>	<ul style="list-style-type: none"> <li>Constitutional recognition of collective land rights of IP and Afro-Colombian communities.</li> <li>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.</li> </ul>	<ul style="list-style-type: none"> <li>Displaced peoples' population presents challenges to implementation.</li> </ul>
<b>MEXICO</b>	<ul style="list-style-type: none"> <li>Long-standing, institutionalized example of formally recognized communal rights in the form of <i>ejidos</i>.</li> <li>Permits communal and individual title in an <i>ejido</i>.</li> <li>Title includes full rights of alienation.</li> </ul>	<ul style="list-style-type: none"> <li>More effort needed to ensure gender and intergenerational equity in conveying <i>ejido</i> property rights.</li> </ul>

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, 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.



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

## 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 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 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, 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

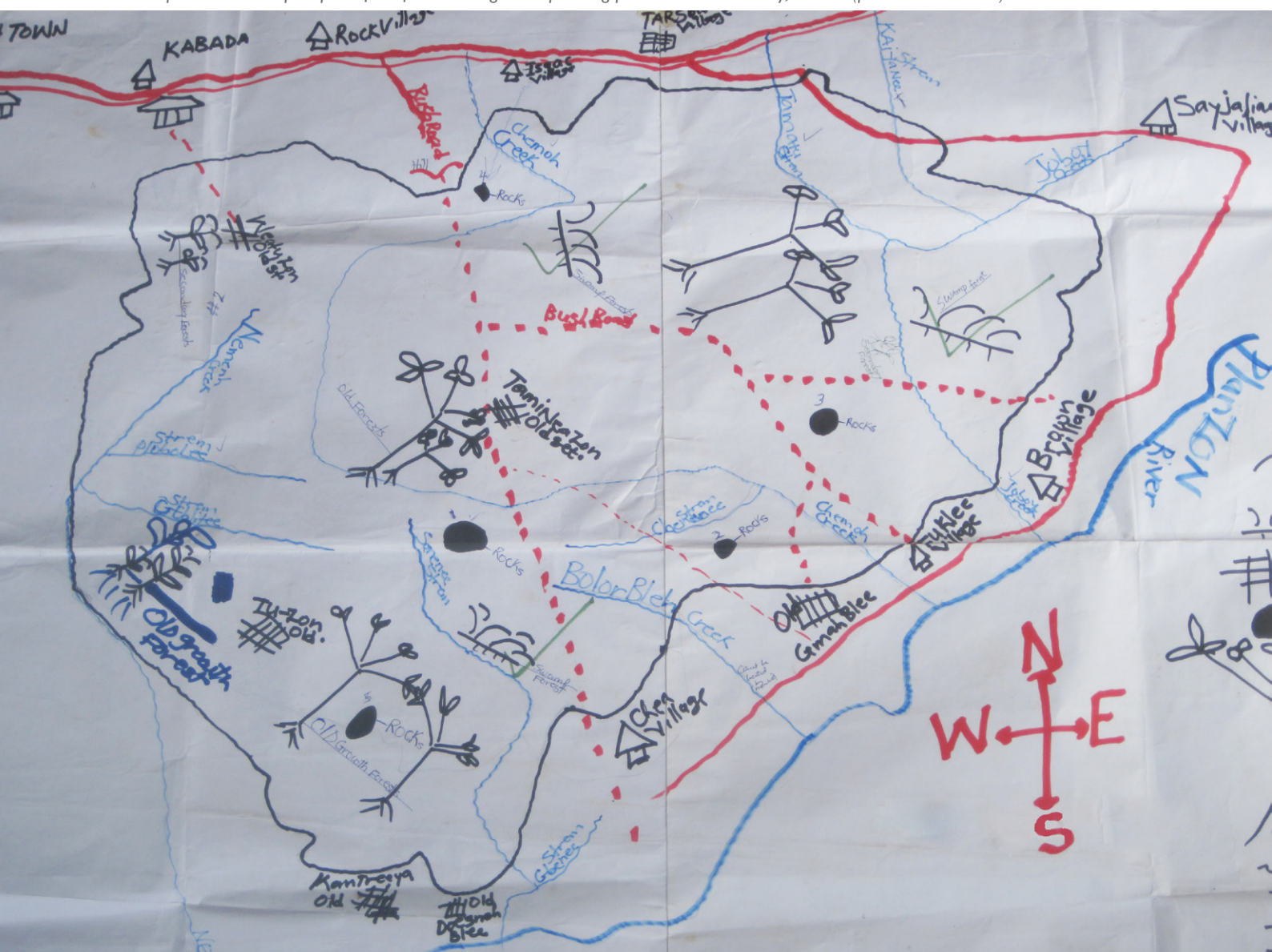
considerations addressed below are questions regarding which groups can be eligible for community land and resource tenure recognition, the types of lands that can be included in such recognition, the process to achieve formal recognition (including certification and registration), and the types of ownership 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

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



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, as demonstrated by the Cambodian and Liberian experiences. 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.

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.

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



**To read the full report and detailed findings, see <http://www.usaidlandtenure.net/customary-tenure>. For further information contact Stephen Brooks, Land Tenure and Resource Management Office ([sbrooks@usaid.gov](mailto:sbrooks@usaid.gov)) or [www.usaidlandtenure.net](http://www.usaidlandtenure.net)**