

*Towards equitable and secure access to land and natural resources for family farmers in the Mekong region*



## ***Thematic Study***

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# **The Recognition of Customary Tenure in Myanmar**



# Thematic Study

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This thematic study is one of four country reports on Cambodia, Laos, Myanmar and Viet Nam that presents a country-level analysis of customary tenure arrangements and identifies opportunities for the recognition of customary tenure.

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## List of acronyms

ALMSD	Agricultural Land Management and Statistic Department (previously SLRD)
CCVfV	Central Committee for the Management of Vacant, Fallow and Virgin Lands
CF	Community Forestry
CFI	Community Forestry Instruction
CSO	Civil Society Organization
DoF	Department of Fisheries
EIA	Environmental Impact Assessment
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
GAD	General Administration Department
IUCN	International Union for Conservation of Nature
LGAF	Land Governance Assessment Framework – World Bank
LUC	Land Use Certificate
LAMP	Land Administration and Management Program (UN-Habitat)
LULASC	Land Use, Land Allocation Scrutiny Committee
MOAI	Ministry of Agriculture and Irrigation (now MOALI)
MOALI	Ministry of Agriculture, Livestock and Irrigation (previously MOAI)
MOECAF	Ministry of Environmental Conservation and Forestry (now MONREC)
MONREC	Ministry of Natural Resources and Environmental Conservation (previously MOECAF)
MRLG	Mekong Region Land Governance project
NGO	Nongovernmental Organization
NLUP	National Land Use Policy
RECOFTC	The Center for People and Forests
SDC	Swiss Agency for Development and Cooperation
SLORC	State Law and Order Restoration Council
SLRD	Settlement and Land Records Department (now ALMSD)
TGCC	Tenure and Global Climate Change Project
TOR	Terms of Reference
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
VFV	Vacant, Fallow and Virgin Lands Management Law

## Executive Summary

This is one of four thematic studies on customary tenure in Cambodia, Lao PDR, Myanmar and Vietnam. These studies seek to present an analysis of customary tenure arrangements in each country and identify key challenges and opportunities for strengthening the legal recognition and protection of customary tenure.

The present study on Myanmar focuses on customary tenure among upland ethnic nationalities, where colonial and state land administration systems have been poorly integrated, allowing customary systems to be sustained over time. Much like under British colonial power, the state has an ambiguous attitude towards customary systems: they are not formally recognized in law but in practice they are tolerated. Customary land is not titled and therefore at risk of alienation. The expropriation of many thousands of acres of farmers' land during the military junta and its cronies since the 1980s, and the increase in foreign investments that has accompanied democratic reforms under the former Thein Sein government, have presented new and intensified risks to customary land, particularly in the uplands where most economic land concessions are granted. Without legal recognition and protection, land under customary tenure is vulnerable to appropriation by the state and commercial interests.

### What is customary tenure?

- Customary tenure is a set of rules and regulations, which have been defined through time by a community to manage their lands and natural resources sustainably. These customary rules or laws have become institutionalized under community or customary structures: they are well known, accepted and enforced by communities. However, they do not form part of official state laws.
- Customary land covers many dimensions, including land for cultivation, forests, grazing land, burial grounds, rivers and water sources.
- Customary communities have strong ancestral and spiritual connection to their land. Right-holders derive their legitimacy as users and shareholders from a (real or perceived) link to ancestors and from residing within the village (i.e. the boundaries of the resources concerned).
- Customary rules and institutions are flexible and subject to revision, allowing them to adapt to changing contexts.

### Tenure arrangements in customary systems

- There are many different types of customary tenure systems in Myanmar, which vary depending on history, geography, resource base, ethnicity and kingship, as well factors such as extent of market integration.
- There can be different types of rights over a particular resource. Rights can be operational (e.g. the right to cultivate a particular plot of land for a certain duration, right to enter a sacred forest area, right to withdraw non-timber forest products) or they may be administrative (e.g. the right to allocate operational rights, including the right to preclude particular uses or users).
- There are also different classes of right-holders: an individual, a family, a clan, a community or a wider ethnic group.

- Customary tenure pertains to:
  - Communal land (e.g. communally tenured shifting cultivation land).
  - A mix of communal land (held at the level of the village/community, a clan or larger ethnic group) and private plots claimed by individuals or households (e.g. paddy land and upland areas with individual or household ancestral claims).
  - Tenure where all land inside the village territory is subject to individual or family claims, but where claims still cannot be alienated to outsiders.

## Key features of customary tenure systems in Myanmar

- Customary tenure is secure and socially legitimate as long as outsiders (persons not living in the village) do not claim the land of the community.
- There is a clear distinction between insiders and outsiders and clear entry and exit rules for membership. Insiders become outsiders if they leave the village. In most such cases, this land is passed on to a relative or is redistributed by the elders and the village chief.
- Only insiders, which are families residing in the village, have rights to access agricultural and forest land in the village territory. Outsiders may borrow land for a single year, but generally they cannot plant perennials.
- Customary tenure provides for the livelihoods of families in the community. Where customary tenure is communal, such as for large tracts of shifting cultivation land, tenure arrangements ensure that no one is landless. All families, including widows, are provided land in the annual lottery for plots.
- Where there is sufficient land, village-based Internal Rules which articulate local 'customary tenure' allow villagers to convert plots of shifting cultivation under communal tenure into informal private claims if the land plots (through investment in labour) are converted to perennials (e.g. fruit trees, tea, rubber) and/or terraces. The informal private claims form part of the customary tenure arrangements and have social legitimacy.
- When land becomes partitioned through conversion of land use (e.g. the planting of perennials and production for the market), customary tenure may still prevail in the sense that Internal Rules prohibit the sale of land to outsiders. Where informal private land claims inside customary tenure systems are registered to obtain a Land Use Certificate (Form 7) issued by the state, customary tenure becomes open to outsiders and it can lead to a breakdown of the system.
- Communities hold clear customary rights in their own eyes and most often also in the eyes of their neighbours, but these rights are not recognized by formal law.

## Legal recognition of customary tenure

- Lack of legal recognition of customary tenure in Myanmar opens up communities to "land grabbing" by the state and by commercial interests. While no one dared to protest in the time of the military junta's government, today land alienation is countered with protests as communities have few legal means of redress.

- The passing of the Farmland Law and the Vacant, Fallow and Virgin Management Law in 2012 has exacerbated land tenure insecurity for ethnic peoples, particularly for those practicing shifting cultivation for which land title is not available. In the upland areas, customary land is at risk when economic land concessions are granted to companies on the pretext that these lands are “vacant” or “fallow”.
- The passing of the National Land Use Policy (NLUP) in early 2016, which includes various provisions recognizing customary tenure, including shifting cultivation, represents a key opportunity to strengthen the formal recognition of customary land rights by the government. The NLUP supports the development of a new Land Law and Rules that need to operationalize “recognition” of customary tenure in all its ways.
- Forest areas may also be under communal tenure, either as customary tenure or induced by establishing a community forest. The 1995 Community Forestry Instruction initiated the promotion of Community Forestry (CF) in Myanmar. CF is also a communal group-tenure arrangement, but it is an induced form of tenure with a user group composition that may comprise only a limited number of persons in the village who apply for a certificate. CF is a form of delegated management for a time-bound period, not a permanent right and the CF Instructions do not allow fallow land to be included in the system. CF certificates are not the same as full titling.

## Opportunities for recognizing and securing customary tenure

There are at least four policy areas that need to be addressed with regards to the legal, social, institutional and cadastral registration of customary tenure. For recognition and registration to be valid against alienation of communities’ customary land holdings in practice, the land in question needs to be demarcated and right-holders legally recognized. Demarcation and registration can take many forms and must be debated and adapted to the constellation of rights found in a particular customary tenure locally.

- Ongoing land zoning efforts should include the **zoning of customary tenure** that also features the fallow land of communities.
- The design and implementation of **pilot procedures** for the recognition and registration of customary tenure need to be linked to the various mapping and documentation initiatives taking place in Myanmar.
- Evidence-based **documentation of customary tenure** can feed into the new Land Law, provided the materials produced are packaged in an appropriate way.
- Many projects are encouraging community participatory mapping, and some try to prepare a precise cadastral map as a basis for future recognition. This, however, involves lengthy and costly procedures and technologies to produce a map with a good level of precision, as required by modern cadastral systems. A map with ‘fuzzy’ boundaries agreed by various stakeholders could serve as a **provisional map** prior to actual land registration.
- While waiting for the drafting of the new Land Law, **interim protection measures** could be put in place. One option is to declare a temporary ban on land transactions (especially concessions, but also sales to outsiders) in the customary tenure areas identified by community themselves, using provisional/ participatory maps noted above. The ban would be lifted after the official recognition and registration of communal customary lands.

- **Registration of customary right-holders** is a precondition for the registration of customary land as it is necessary to know who has rights and who does not. However, the process for registering right-holders needs careful consideration and debate. One proposal operates with two sets of rules: 1) recording of the Internal Rules, which are the existing customary arrangements of the village, and 2) developing Statutes which are the rules of governance and decision making that could form the basis for applying to the General Administration Department (GAD) to set up an association under the 2014 Association Law (see Ewers Andersen 2013). However, there are some concerns that developing Statutes for each village could lead to long delays and, for this reason, should not be a precondition for registration or developing protection measures of communal lands. Another approach would be to have legal recognition of villages as lower administrative units (as is the case of Lao PDR), which then give them a legal basis to become the legal owners of the rights associated with customary tenure on their territory (under communal lands registration and titling).
- Whatever process will be adopted by the government to recognize customary tenure, it is important that **communities be prepared to articulate and defend their customary rights** in front of the technicians that will be in charge of formal recognition, or in front of the courts. Documenting customary tenure is a key way to the build capacity of communities to describe and map the boundaries of communal land and their main internal zoning, as well as describe community customary rules. This activity is linked to the documentation activity described above and would contribute to it, but its objective and focus is different. In the first case, the priority is producing evidence for the government while the focus here is on **empowerment and building the capacity of communities in practice**.

## Scope of the assignment

Customary land tenure is a key thematic focus of national and regional 'Learning and Alliance' (L&A) activities under the Mekong Region Land Governance (MRLG) project. These activities centre on documenting and exchanging information among diverse actors in Cambodia, Lao PDR, Myanmar and Vietnam on various forms of customary rights and developing dialogue with the respective governments around this concept. This study was produced as part of a regional L&A activity on the recognition of customary tenure, coordinated by MRLG, Food and Agriculture Organization of the United Nations (FAO) and Asia Indigenous Peoples Pact (AIPP).

In Myanmar, MRLG partnered with five ethnic youth organizations to document customary tenure in pilot sites in different parts of the country. The findings were shared in workshops and the lessons learned provided input to this report and to the ongoing development of a guidebook for documenting customary land tenure. The present report features evidence from Myanmar based on the Terms of Reference (TOR) provided (see Annex 1). According to the TOR, "all types of customary tenure (in a broad sense) are included in this study, including individual informal tenure recognition, communal one (non-indigenous), on forest as well as agricultural land. The main criterion of customary tenure is that it is socially legitimate." In other words, customary tenure - making up different configurations of rights - can be held by individuals, families, clans or village communities in a wide range of contexts shaped by different histories and geographies of land relations.

Around 80 per cent of land in Myanmar is not titled. If defined as above, customary tenure is not only found in the uplands but also in the lowlands, in places where farming communities with untitled land have internal agreements on whose land is whose. However, lowland communities with individual informal tenure recognition may also represent land held by wealthy farmers, where recognition of possession is based on fear and dependency on the patron for daily labour opportunities. In these lowland communities 30 per cent or more of the population may be landless because land is scarce and land ownership is highly skewed.<sup>1</sup>

In contrast, customary land tenure arrangements in the ethnic uplands are characterized by relatively ensured access to land for people living in the village, if individual rights have not been established to all land.<sup>2</sup> Customary tenure encompasses individual, family and clan use rights. Informal privatization of customary land has occurred in many areas due to, for instance, the influence of new perennial cash crops that establish privateness of use rights with families that have labour and capital to invest. Families with less labour and capital for cash cropping may end up with less land in the long run. However, landless families are seldom found in villages where customary tenure includes access to communally tenured shifting cultivation land. Many of the villages studied under MRLG's customary tenure documentation initiative with ethnic youth organizations report that there is no landlessness in communally tenured shifting cultivation land and that outsiders who come to stay and live in the village will be given access to shifting cultivation land, but not to land for perennials.

In Myanmar, most customary land is overlaid with state land and is not legally recognized as the property of customary owners. The National Land Use Policy (NLUP), officially endorsed in January 2016, does include provisions that recognize customary tenure, indicating a positive development. Still, under Myanmar's Constitution, the recognition and registration of rights in customary tenure would be considered as land use rights (similarly with agricultural land where farmers receive a Land Use Right Certificate and not a property title).

## Scope of the assignment

Article 37 of the Constitution (2008) stipulates that the Union of Myanmar “is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union.” The land of upland communities, especially shifting cultivation land and fallow land regenerating under tree cover is often considered to be state land by agents of Myanmar’s Ministry of Natural Resources and Environmental Conservation (MONREC), previously the Ministry of Environmental Conservation and Forestry (MOECAF). This makes customary land, particularly fallow land under shifting cultivation rotation systems, particularly vulnerable to alienation under the current legislative framework.

The present report focuses on customary tenure among the upland ethnic nationalities where shifting cultivation is widely practiced, as these are the most vulnerable to land alienation due to the rapid increase in agribusiness and other land-based investments. A history of autonomy and a protracted civil war between armed ethnic groups and the military have characterized upland areas as remote. Ethnic groups have lacked voice and representativeness in shaping national affairs and continue to struggle to find means of redressing past and present injustices among which land dispossession is a central issue. In the ethnic Bamar majority lowlands, land appropriation by outsiders has been met with loud protests and demonstrations, particularly since 2012. As mentioned previously, there are instances of customary group-like tenure arrangements among lowland ethnic majority Bamar, where all landed households in a village have informal agreements on the boundaries of their informal possessions. These possessions, wherein each household holds a limited number of acres, could be eligible for Land Use Certificates (LUCs) under the 2012 Farmland Law.

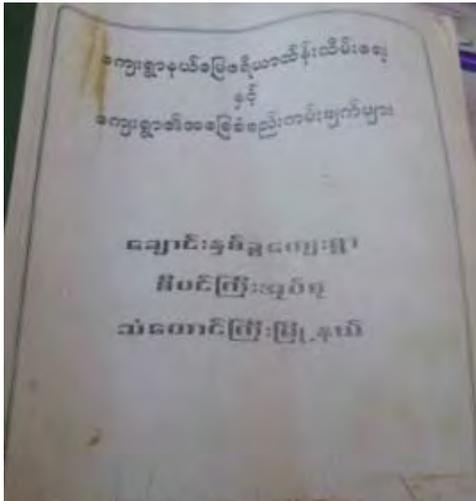
## Key features of customary tenure in Myanmar

There are many customary tenure systems in Myanmar. Customary tenure can be communal in the sense that communally held land is allocated annually to members through a lottery system (e.g. in Northern Chin State). In some cases the land may be collectively laboured (e.g. cleared) before allocation. Customary tenure can also be communal only in the sense of village land belonging to a community and keeping outsiders out. In a typical communal customary tenure system all members of the community have a say and each household has rights on the use and management of the land and natural resources. This is the case in several places of Myanmar where shifting cultivation is practiced. There are also customary tenure systems in Myanmar that are not communal per se, but rather involve certain families or clans laying ancestral claims to land and asking a rent from other villagers for use of that land (e.g. in Southern Chin State around Mindat).

Customary tenure traditionally pertains to agricultural land and forests as well as to inland fisheries. Customary land tenure is a social system embedded in institutional arrangements that signify legitimacy for the group that holds the customary tenure, most often a village community. These communities have strong ancestral relationships to their land. Historically, the legitimacy is linked to the community's perception of an inner connection between history, identity and land and, in former times at least, there was a strong connection to the fertility-granting spirits of the land that would receive ritual offerings by descendants of the first founder. Communities in Southeast Asia consider the founder of the village to be person who first wielded a machete to clear the land ensuring the benevolence of the spirits of the land concerned. In Bamar language this is called the *dama ucha* principle (Lehman, 2003). Descendants (real or perceived) are considered to be the group that holds land, forests and water under customary tenure. This principle is still valid in land use management. For instance, in Chin State, customary communal land tenure in a village territory often dates back to when the village was founded.

Customary tenure is at present mostly found in the uplands and remote areas of Southeast Asia among ethnic/indigenous communities and groups. In Myanmar's ethnic states there are different forms of customary tenure, depending on the nature of the resource and the terrain, the kinship system, the population density, and the extent of land or forest under customary tenure. In general, customary tenure tends to be communal when land resources are expansive and the resource ecology calls for collective action (e.g. clearing and burning land for shifting cultivation). When land and forests are scarce, or in areas where the market has penetrated, a number of individual or family claims often emerge. These claims within customary tenure systems may also be linked to the ritual status of particular members (e.g. some Chin aristocratic clans) rather than to land scarcity.

Thus, customary tenure ranges from tenure that includes no individual claims, to tenure systems wherein certain resources within customary territory are subject to individual, family or clan claims, to tenure where all resources inside a village territory are subject to individual or family claims, but where claims still cannot be alienated to outsiders. A prominent feature of customary tenure is that all the community knows the boundaries and users of specific resources.



**Figure 1.** Kayin rulebook on protecting village lands prohibits selling land to outsiders

Users derive their legitimacy as users and shareholders of customary tenure from living in the village (i.e. living within the boundaries of the resources concerned). In many villages with customary tenure, families also have long-term claims on particular land parcels such as irrigated rice fields inside the village territory. According to village customary Internal Rules, these parcels cannot be sold to outsiders and families have to give up their user rights if they leave the village. Residence in the village is a requirement of customary tenure in many villages in Myanmar (Andersen Ewers, 2015). Even Kayin villages, where former shifting cultivation land has been partitioned among the families in order to plant rubber individually, explicitly ban the sale of rubber parcels to outsiders. Villages have drafted rule books to that effect (see Figure 1).<sup>3</sup>

## Examples of customary tenure on the ground

There is no data available on the extent of land under customary tenure in Myanmar nor is there a unified clear definition of customary tenure on which to base a census. The examples of customary tenure outlined below give an indication of the diversity of customary tenure found in Myanmar.<sup>4</sup> None of these areas have LUCs or titles.

### Customary communal tenure

In the uplands of Myanmar many communities practice shifting cultivation (*shwe pyaung taungya*). The shifting cultivation system is an integrated system involving the use of cleared fields in a fallowed forested area. Fields are used for a limited time after which land is left fallow to allow vegetation to regenerate and soil fertility to be restored. It is by nature an integrated farming system involving a mix of forestland interspersed with agricultural fields. Each village may command around 5,000 to 10,000 acres of land or more for the purpose of annual rotation of cultivated areas and fallows. In such cases the practice of customary *communal* tenure is prevalent. On steep mountain slopes the practice of shifting cultivation and the burning of the slashed debris requires collective action to clear the land and control the fire. Here the nature of the ecology itself lends itself to communal tenure arrangements.

In the northern part of Chin State, communities around Hakha practice customary communal tenure over a 10-12 year rotational fallow cycle at an elevation of  $\pm 2000\text{m}$ . In a given year land plots inside one or two mountain sides (*lopil*) are cleared collectively after the plots inside have been allocated to the families through a lottery system (see Figure 2). Depending on the type of crops grown, cold and warmer *lopils* (according to elevation) may be chosen by village elders and the village chief in a given year. A *lopil* may command 300 to 600 acres of cultivable land when it is cleared, and provide each family with around three acres. Selected areas of village *lopils* can become subject to investment by an individual user and come under permanent cultivation. This happens if someone wants to invest labour in building a terrace on land inside a *lopil* (see Figure 3) or establish an orchard or tea garden. Development of terraces is supported by nongovernmental organizations (NGOs) in Myanmar to increase productivity. Sometimes the terrace is near a house and therefore not on land that is considered common property. If the terrace is built in a *lopil*, the person who wants to build a terrace must ask the village for permission to use that particular plot of land in the customary communal tenure of the village.



Figure 2. *Lopils* in Chin State



Figure 3. Terraces at the bottom of a *lopil*

# Examples of customary tenure on the ground

Preparing terraces or establishing orchards is the first step towards privatization of selected resource niches within the customary communal tenure. The "privateness" of use rights refers to the clarity, specificity, and especially the exclusivity of the rights and not to the identity of the rights-holder (McKean, 1998). These individual claims would still be considered village territory and the farmers are not allowed to sell the asset, except possibly to a relative in the village. In Northern Chin state farmers primarily grow subsistence crops such as millet or sulphur beans in the plots allocated by lottery.

The pilot study carried out by the Ta'ang Student Youth Organization with the support of MRLG shows that Ta'ang communities in Northern Shan State also have communally tenured shifting cultivation land wherein plots are allocated to families annually through lottery. In the Ta'ang village studied, each household uses less than three acres for annual swidden crops as villagers also have permanent upland farmland (sometimes named *taungya*) and tea gardens.

In the Northern Chin and Ta'ang villages studied, outsiders cannot buy land. However, if outsiders decide to settle in the village they will be given access to shifting cultivation land once the head of the household requests the village chief for the right to settle and presents a ritual offering to the spirits (cheroots, flowers and pickled tea in the case of the Ta'ang and millet in the case of the Chin). They may not be given rights to grow perennials immediately.

In both the Northern Chin and the Ta'ang villages the forest inside the village territory is considered common property under customary tenure. Still, though, this common property may be partitioned as there may be areas of forest that make up private firewood forests of single families, the monastery or church.

So far, in Northern Chin State and among the Ta'ang in Northern Shan State the land available for shifting cultivation is sufficient. None of these communities have received offers to buy their land or been encroached on by private investors. A key reason is that these areas are remote, have poor roads and infrastructure and there is as yet little scope for agribusiness. In some areas there is still fighting among armed ethnic groups and the army. However, the customary lands of these communities may be at risk of alienation in the future when roads are built, particularly from mining. Roads are both a risk and opportunity depending on the strength and solidarity of communities and their ability to negotiate and benefit from greater market integration. A 2015 report by Global Witness on the exploitation of jade in Kachin State is an explicit exposition of how opening up areas can lead to resource projects that fill the pockets of business tycoons and politicians at the expense of local Kachin communities (Global Witness, 2015a).

It is doubtful that the formalization of customary land tenure, if catered for in the future Land Law, will safeguard community tenure from mining interests. However, the recent Environmental Conservation Law and required EIA Procedures of 2014 will help communities negotiate with and object to mining companies and protect customary tenure. Recognition of customary tenure by the government should therefore at the very least ensure communities receive fair compensation for the loss of customary rights in the case where they are deprived of these rights by mining and other resource and infrastructure projects.<sup>5</sup>

## Customary tenure with a mix of family level and communal land management

Land sharing arrangements within customary tenure systems have in some areas become less communal over time. This happens due to civil war and displacement, as well as when communities start to grow cash crops, which are often perennials. Once a family plants perennials

inside shifting cultivation land that used to be shared communally, the plot of land can no longer revert to a common pool for redistribution the following year. Such perennials may be fruit orchards (common in Chin State), tea gardens (Shan State and Asho Chin in Magwe Division), or rubber trees (Sgaw Kayin families in Chaung Hnit Kywa village). The tenure practiced in these communities is still considered to be customary, primarily because the village sees all land including forestland inside its territory to be held by the community, and there are rules discouraging the selling or alienation of land to outsiders not living in the village.

The Asho Chin community in Magwe Region studied by the NGO Point under the MRLG supported activity shows such mix of tenure. This village has shifting cultivation land with a five-year rotation cycle and private garden land. The shifting cultivation land features individual claims, but 10 per cent of it (1500 acres) is still considered fully communal. This communal land was left behind by a deceased person whose children moved away. The land is partly forest and partly used for shifting cultivation. The area used for shifting cultivation is allocated to families in annual village meetings. Individual and private claims are not allowed inside this communal land.

Originally, three clan forefathers cleared the land and established the village: Kya Lone Kone, Hle Lone Kone clans, and Tone Lone Kone. Decedents of these three clans claim most of the land. Families may hand over or sell land to other Asho Chin persons that come to live in the village. Outsiders who settled later in the village were allocated less land. A clan family cannot give land outside the clan without asking the clan first. If the clan objects the land cannot be alienated. The beginning of the informal internal privatization of rights of the commons in this village was driven by the need for families to derive income from garden crops after the Yangon-Sitwe Road was built, giving access to markets.

## Customary tenure that is fully partitioned

Customary tenure also features in villages where land is partitioned by informal privateness of rights. If customary tenure (which has traditionally covered shifting cultivation areas with subsistence crops) becomes subject to strong market forces, families may opt for planting tea or rubber and gradually cover the whole village territory with privateness of claims. Families, if they wish to, can then register their land parcel. Once they receive Form-7 and a title for the parcel concerned, the family has the right to sell the land parcel to community members or outsiders.<sup>6</sup> While the village may still feature Internal Rules, which establish that families are not allowed to sell land to outsiders, there are cases where this has happened, such as the small area of rubber plantation in Sgaw Karen village, which was one of the cases documented by the youth organizations.

Another example of customary tenure that is partitioned can be drawn from a study produced by the Land Core Group (Andersen Ewers, 2015). The study documents the case of a Shan village near Lashio in Northern Shan State. This village has 43 acres of irrigated paddy land as well as upland *taungya* land for rainfed rice. The latter comprises 848 acres of upland *taungya* of which some is left fallow in alternate years. This upland *taungya* comprises 21 named landscape blocks of different sizes held by 57 claimants, so some blocks have more claimants and would be partitioned by individual private claims. While this village cannot be said to have communal customary tenure in the same way the villages in Northern Chin and Ta'ang have (where land is allocated by lottery each year), it still wanted to join the Land Core Group pilot study on communal land and requested registration in the name of the village. The village has its own Internal Rules, which stipulate that persons who leave the village and settle elsewhere cannot sell the land but have to hand it over to relatives in the village or the land goes into the common pool for redistribution by the chief and elders. Residence in the village is a condition for accessing land.

## Conclusion on the three modes of customary tenure

The examples described above portray customary tenure that has not been subject to “land grabbing” by the army or agribusinesses with the exception of a small area in the Shan village near Lashio. These examples are therefore relatively devoid of external influences, thus allowing systemic features of customary tenure to be teased out:

1. Customary tenure is secure and socially legitimate as long as outsiders (persons not living in the village) do not claim the land of the community. Customary tenure provides for the livelihoods of families in the community, particularly where customary tenure is communally tenured shifting cultivation land. When customary tenure is communal every family has an equal say and the families are dependent on each other for the use of resources, particularly in shifting cultivation mountain tracts where the management system of clearing and burning is not amenable to partitioning and requires collective action.
2. There is a clear distinction between insiders and outsiders and clear entry and exit rules for membership of the entity that holds customary tenure.
3. Only insiders, which are families residing in the village, have rights to access agricultural and forest land in the village territory. Landless insiders found, for instance, in the Sgaw Kayin village referred to above, would find alternative livelihoods such as working as casual labourers. This tends to happen in villages that have experienced a gradual informal privatization of land plots and where village-based internal trade in land is permitted by Internal Rules.<sup>7</sup>
4. Customary tenure rights are, by definition, held by someone: an individual, a family, a clan, or a village community. Tenure is a bundle of rights and these rights are held by a person, group or entity that needs to be identified. Rights cannot float in the air.
5. The rule in traditional customary tenure is that rights of access to land depends on residence in the village and no one in the village can sell land to outsiders (i.e. persons not living in the village). This rule was observed back in the 1920s and 1930s in Myanmar (Furnivall 1920; Stevenson 1943). When land becomes partitioned through change of land use (e.g. the planting of perennials and production for the market), customary tenure may still prevail in the sense that no one with privately claimed plots is allowed to sell to outsiders according to the Internal Rules and even sale to villagers internally needs the agreement of the village chief and elders.
6. Insiders become outsiders if they leave the village. In most cases, this land is passed on to a relative or is redistributed by the elders and the village chief.
7. Outsiders may borrow land for a single year, but generally they cannot plant perennials.
8. Where there is sufficient land, village-based Internal Rules allow villagers to change plots of shifting cultivation under customary (communal) tenure into informal private claims if the land plots (through their investment in labour) are converted to perennials (e.g. fruit trees, tea, rubber) and/or terraces. The informal private claims form part of the customary tenure arrangements and have social legitimacy.
9. The boundaries of the land and forest under different customary tenure arrangements are known to all members of the village and neighbouring villages, but they have not been demarcated by GPS or the like.

## Examples of customary tenure on the ground

10. In most cases, neighbouring villages agree to the boundaries.
11. While villagers consider village territory their own land, the government (namely MONREC) may also consider parts of the land to belong to a forest estate, thus producing an overlay of claims in certain areas.
12. Shifting cultivation communities with customary tenure do not distinguish between forest and agricultural land in the way government agencies do, because much of the forest is fallow land and therefore part of the agricultural system. Together the areas make up a managed productive landscape in the eyes of the villagers.
13. Customary communal tenure ensures equity. All families, including widows, are provided land in the annual lottery for plots. In customary tenure systems that organize internal land management around individual claims, vulnerable families that lack labour or are hit by disease rely on relatives for support out of these relatives' own assets within the village tenure arrangements.
14. Where informal private land claims inside a customary tenure system are mapped and registered by ALMSD (formerly SLRD) to obtain a Land Use Certificate (LUC) for parcels claimed, the role of customary tenure changes: the village land becomes open to outsiders and the customary tenure system may break down.
15. When a village wants to avoid private land registration of individually claimed plots in the village territory (as happened in the case involving Pa-Oh villagers in Southern Shan state),<sup>8</sup> the village may ask for communal land registration of all agricultural land including fallow land in the name of the village.
16. Land registration of customary tenure cannot take place unless the right-holders and boundaries of tenured assets are identified and agreed.

## Land tenure insecurity and dispossession

As previously noted, the areas of customary tenure from which examples were drawn have not been subject to land registration although many of the privately claimed plots within the customary tenure would qualify for government-issued LUCs under the 2012 Farmland Law. Communities hold clear customary rights in their own eyes and in the eyes of their neighbours but these rights are not recognized by law. This does not matter as long as the land is not in danger of being taken or encroached on by external parties. However, the current drive for land-based investments in agribusiness, mining, hydropower but also conservation projects pose a real risk for communities whose lands are under customary tenure, particularly those areas with road access that are more accessible.

For example, the Kayin communities in Tharyawaddy District, where USAID supported a Tenure and Global Change (TGCC) project, recently initiated mapping of community land in a village tract, with the expectation that some areas would be under customary tenure. However, it turned out that communities had been losing land to so-called afforestation projects, where MOECAF (now MONREC) issued rights to outsiders to establish plantations in what was termed degraded forest (fallow land), and where SLRD had reallocated land with reference to the 2012 VFV Law (Interview 2, 2015).

There are numerous studies and documented cases of land alienation and land confiscation in Myanmar over the last two decades. The Land Core Group of the Food Security Working Group (FSWG) has produced various documents on land tenure and land confiscation (Land Core Group, 2010, 2012; FSWG, 2011) and there are several reports and academic papers analyzing the land situation in Myanmar (see for example, Hudson-Rodd et al., 2003; Hudson-Rodd and Htay, 2008; Tom Lantos Human Rights Commission, 2013; Kramer & Woods, 2012; Karen Human Rights Group, 2013). Villages with customary tenure, including customary communal tenure, face an uphill struggle defending their land against land concessions issued by the Ministry of Agriculture, Livestock and Irrigation (MOALI) or plots for plantation establishment issued by MONREC. While Northern Chin and Ta'ang villages described above are remote and without easy road and market access, other areas with customary tenure have been subject to land grabbing, particularly in Northern Shan State where Chinese businessmen have collaborated with the army and government officials to acquire land from villages for rubber and other cash crops (Kramer & Woods, 2012; Woods, 2012; Global Witness, 2015b).



**Figure 4.** Farmers initiating Gandhian ways of protest by claiming land under customary tenure back through jointly ploughing the land (Photo: Han Win Aung, Source: DVB, 16 Oct 2014)

Increasingly, local communities have publicly expressed their grievances and called for more accountable processes for concession granting (see Figure 4). In response to the problem of land disputes, the previous Thein Sein government established two bodies to deal specifically with land issues: the Land Use and Land Allocation Scrutiny Committee and the Parliament's Land Investigation Commission, which providing a channel for directing public complaints. In the first half of 2016, the new National League for Democracy (NLD) government created the Central Reinvestigation Committee for Confiscated Farmlands and Others Lands (CRC) as well as corresponding Regional/State committees to pursue the work. However, these committees have so far not been able to deal with the sheer number of land disputes submitted, many of which originate in the previous military government. Channels for resolving land disputes and accessing justice remain limited. Some legal NGOs and farmers are taking land seizures cases to the courts, but these efforts are hampered by the questionable independence of the courts, and current laws that do not sufficiently recognize land holdings under customary tenure or without LUCs.

# Legal and regulatory framework for agriculture and forest land

According to the 2008 Constitution all land in Myanmar is considered state land under eminent domain. Thus, farmers will be given a LUC when their land parcels are mapped and registered under the 2012 Farmland Law. Land that is not eligible for registration comprises, among others, the parcels of land of shifting cultivators that lie fallow. These may be “vacant” besides being “fallow”, in the eyes of MOALI and therefore included in concessions granted to agribusiness companies and other developers.

Forestland covers approximately 48 per cent of Myanmar’s land area, but deforestation due to excessive legal and illegal logging has emerged as a significant problem. The country lost 19 per cent of its forest cover between 1990 and 2010, and the speed of deforestation has doubled from 97,000 ha of forest destroyed each year before 2009 to an average of 185,000 ha per year since (EIA 2015).

## Regulation of land for cultivation

A number of existing legal provisions enable the government to give individuals or entities (ranging from community forest user groups to companies) Land Use Certificates or leases/concessions of specific time duration. These provisions are embedded in the 1995 Community Forestry Instruction, the 2012 Farmland Law, VFV Law and the Foreign Investment Law.

MOALI is responsible for implementation of the Farmland and VFV laws. In the Farmland Law “farmland” is defined as paddy, *ya*, *kiang*, perennial plants, *taungya*, *dhani*, garden land for vegetables and flowers and alluvial land. Paddy land may be irrigated or rainfed, thus paddy land means “rice fields”. In the Farmland Law the word *taungya* indicates permanent upland fields and not rotating fallow farming fields or shifting cultivation, which is named *shwe pyaung taungya*. The rotating fallow farmland is mentioned only in the Rules under the Farmland Law (Article 116), which stipulates the intention to do away with shifting cultivation.

Article 3 of the Farmland Law defines an “agriculturalist” that can be awarded a LUC. Article 3 (j) includes a “farmers’ organization” as a right-holder. The latter is defined as a body “that is formed in accord with any law issued to support the development of the rural economy.” Article 6 specifies the entities that “have right to farming” and this includes in Article 6 (b) an organization, a government department, a government organization, an NGO or a company. Article 7 (b) stipulates that the organization/association must be “desirous to carry out agriculture in the farmland”. This is the article of law that the 2015 study by the Land Core Group used to define procedures for land registration in the name of the community as a legally incorporated entity or an association (see Andersen Ewers, 2015).

The VFV Law defines the role of the Central Committee for the Management of Vacant, Fallow and Virgin Lands (CCVFV) under the MOAI and it informs on the modalities of concessions of VFV lands for business development. The VFV Law defines the meaning of vacant, fallow and virgin land where the first two types of land are land areas that were used or “tenanted in the past and abandoned for various reasons and without any tenant cultivating it [now] and lands which are specifically reserved by the State” (Ch1, Part 2e). Virgin land is “wild land” including nullified forest reserves and land that was never cultivated (Ch1, Part 2f).

The central committee can give companies rights to use VFV land for 30 years covering an area from 5,000 acres up to 50,000 acres for the growing of perennial plants/industrial crops.<sup>9</sup> Due to the way that “vacant” and “fallow” land is defined, many areas of land that are under rotational swidden cultivation and used by farmers and community groups as grazing land or in other traditional or customary manner would be classified as vacant or fallow. The Farmland Law may be revised and aligned with the development of the new Land Law to reflect the 2016 NLUP.

## Regulation of forest land and community forests

Regulation of the forestry sector in Myanmar occurs through the Forest Law (1992), the Myanmar Forest Policy (1995), the Community Forestry Instruction (1995) and the Forest Master Plan (2001). There are also area-specific policies such as the Integrated Plan for Greening of the Dry Zone of Central Myanmar (2001–2030). The Forest Department under MONREC controls Reserved Forest Land and Protected Public Forest Land, both provided for under the 1992 Forest Law. Public Forest Land is controlled by several bodies including the Forest Department (MONREC), MOALI, CCVfV, ALMSD and the General Administration Department (GAD).

Myanmar’s 30-year National Forest Master Plan (2001) recognizes Community Forestry (CF) as a tool for achieving sustainable forest management and improving the livelihoods of rural communities. CF is defined as forestry operations involving the local community. The Community Forestry Instruction’s (CFI) definition of community forestry entails afforestation and the establishment of woodlots where there is a lack of fuel wood or other products for community use as well as the planting of trees and the extraction and use of forest products to obtain food supplies, consumer products and incomes at the farmer level.

Like customary tenure, CF is group-based tenure. However, the CFI allows for a user group composition that comprises only a limited number of persons in the village who apply for a CF certificate. The establishment of CFs has led to elite capture (Springate-Baginski, 2013; Interview 1, 2015). CF resource management rules do not always take into account pre-existing community organizations and land use. Many communities that manage forests under customary tenure do not want to register their forest as a CF because the rules in the CFI are seen as a straitjacket. In some instances communities want to use their forest to open up new shifting cultivation land and leave other landscapes to regenerate into full forest elsewhere.

The government has set a target of allocating 919,000 ha of forestland to forest user groups by 2030. As of 2011 only six per cent of this target (42,148 ha) had been allocated to CFs. To meet the national target some 20,000 ha of land would need to be transferred to communities every year. In contrast, the allocation of land for private plantations began much later in 2006 and has since overtaken the land allocated to CFs. Out of the 700 or so CFs established by 2014, more than half are located in Southern Shan State, many with good natural forest. Smaller areas have been established in Magway, Mandalay and Rakhine States with the support of United Nations Development Program (UNDP), Japanese International Cooperation Agency (JICA) and the UK Department for International Development (DFID). In addition, the NGO FREDa has helped establish CFs in mangrove areas in the Delta. Expansion of CF has been limited in other parts of the country where there has been less donor assistance. Procedures for setting up a CF are cumbersome and in contrast to a concession, a CF provides no income to MONREC.

RECOFTC (the Center for People and Forests) together with FAO have conducted forest policy governance training in Myanmar since 2010. In 2013 the President's Office issued an instruction to the Forest Department to establish CF demonstration plots in every Region and State and to promote CF activities that could help food security and the reduction of poverty. As the Government of Myanmar has no funds set aside for this activity it gave RECOFTC an opportunity to attract Norwegian funding for a large community forestry project in Myanmar. RECOFTC's new project, 'Scaling Up Community Forestry in Myanmar' (SuComFor project), will cover seven regions and states and envisages a landscape approach with a mosaic of CFs without uncontrolled 'gaps' in between. A five-year Memorandum of Understanding (MoU) between Forest Department and RECOFTC was signed in Jan 2013 under which RECOFTC will support the establishment of a Community Forestry National Working Group and prepare a National Community Forest Program Strategy. Project deliverables include "100 CF communities covering at least 40,000 ha formally recognized and operating according to CF management plans" (RECOFTC, 2014: 47). Other outputs include training, development of networks and demonstration sites and inputs to policy.

A paper on community forestry and shifting cultivation written by Springate-Baginski for Pyoe Pin in 2013 addresses ways to legitimise swidden cultivation practices and establish tenure security (in forests) by reinforcing customary authorities, revising land legislation, handing over community forests and protecting against land grabs (Springate-Baginski, 2013). While some authorities would like to see customary upland rotational fallow agriculture converted to CF, it may not match the requirements of managing agricultural rotating fallow *taungya* as a common property. Clearly, CF is also a communal group-tenure arrangement, but it is a form of delegated management for a time-bound period only, not a permanent right and it does not allow the fallow land to be included in the system. CF certificates are not the same as full titling of the incorporated village association's common property parcels. In customary communal tenure all resident villagers are right-holders. In contrast the present CF instructions of 1995 have allowed for elite capture, as the Instructions allow a group in the village, not the whole village, to be a right-holder. Thus, CF instructions are not supportive of the equity of access and benefit sharing that regular customary systems entail.

The government recognizes that parts of land demarcated as "forest estates" have in fact been under agricultural cultivation for decades and a call has been made to reclassify the land. MONREC is presently degazetting "forest" areas where human settlements of more than 50 households are found to cater for land use change that has occurred over the last decades. Farmers will need to provide tax receipts to prove their claims to land. In case of nullification of forest gazettelement, farmers are required to register their land with the ALMSD as per the Farmland Law. It is expected that this ongoing reclassification will primarily apply to the lowlands. In other areas MONREC may hand over "degraded forests" for afforestation through private investment in plantations irrespective of whether the so-called degraded forest in fact is the fallow land of a village's rotational fallow farming system.

## Regulation of shifting cultivation

Most upland communities in Southeast Asia have practiced shifting cultivation or rotational fallow *taungya* agriculture for centuries under customary tenure. Today this shifting cultivation is most often combined with permanent agriculture of selected cash crops such as tea in separate fields, as described in previous sections. Scholars have debated this agricultural system for decades.

Most notable among these are Harold Conklin (1957) and J.E. Spencer (1966), who described 18 distinct types of shifting agriculture within Southeast Asia alone. Most authors agree that rotational farming systems can be seen as comprehensive landscape management systems, where different crops and trees occupy a single tract of land rotating over time (Fox et al., 2000).

MONREC indicates that it would like to assist upland farmers to bring their rotating fallow farming fields and their village forests under a registered community forestry title, and to use the land for “agroforestry”, which is one of the allowed modes of managing a community forests according to the 1995 CFI. Using the land for agroforestry means communities can plant trees at spaced intervals and use the land in between the trees for agricultural crops for a number of years until the tree crown cover becomes too dense for sunlight to reach the crops. However, if there is no donor to support a community forestry project it is easier and more rewarding for MONREC to hand out so-called “degraded” forests to companies to establish plantations.

While the official line in most countries in the Mekong region is anti-shifting cultivation, in practice not much is done to discourage it. Exceptions include enforced resettlement in the Lao PDR and the handing out of so-called degraded forest/fallows for plantation establishment by companies, as in the case of the Vietnamese HAGL rubber company in Southern Laos (see Global Witness, 2013). There has been some support by government agencies to assist communities to convert shifting cultivation to more permanent and a possibly more productive land use. It has primarily been NGOs, however, who have supported selected shifting cultivation farmers in constructing terraces or establishing orchards to enhance food security and livelihoods. Normally, the authorities have received annual tax payment from shifting cultivation communities without hesitation.

## The National Land Use Policy

The NLUP includes various provisions recognizing customary tenure, including shifting cultivation. Although the term “customary” is never clearly defined in its territorial, social, institutional and legal sense, the NLUP states that:

- The government of Myanmar will protect customary rights;
- It will prepare customary land use maps;
- It will reclassify customary lands;
- It will formally recognize customary rights;
- It will register customary land use rights, also for shifting cultivation that is recognized as subsistence agriculture;
- It will monitor whether the customary land use rights of ethnic nationality groups have been formally recognized and protected;
- It will facilitate research in order to determine appropriate procedures for the formal recognition and protection of customary tenure rights.

Registration as put in the NLUP may cover territorial, cadastral, social, institutional and legal registration and these concepts need teasing out. To this end, the NLUP notes that “Customary land use tenure systems shall be recognized in the National Land Law.” As there are many modalities of customary tenure in Myanmar it is important to ensure the future Land Law specifies the rules and process for the registration of customary tenure for a village. While waiting for the Land Law to be developed and for mechanisms operationalizing customary tenure “recognition” to be worked out, a key source of hope in preventing further land appropriations may lie in Article 68 of the NLUP, which states that “land allocation to any land user, other than for public purposes, shall be temporarily suspended until these lands are reviewed, recognized and registered as customary land.”

Although some limitations remain in the NLUP, it clearly opens doors for advocating for greater recognition and protection of customary tenure in Myanmar. The platform created by the NLUP along with ongoing initiatives supported by development partners working in collaboration with Myanmar government agencies and civil society organizations constitutes a key building block for the ‘Learning and Alliance’ activities of MRLG and partners.

## Opportunities for recognizing customary tenure

The interest in advocacy for protection of customary tenure is a call for tenure security and respect for ethnic and local communities' traditions and norms for using, allocating and managing land. Particularly where customary tenure is communal, such as for large tracts of shifting cultivation land, these tenure arrangements ensure that no one is landless. Addressing legal responses to customary tenure insecurity is in line with the FAO's Voluntary Guidelines on Responsible Governance of Tenure (2012) which call for "the legal recognition of tenure rights of indigenous peoples and other communities with customary tenure systems" (Part 3), the UN Declaration of Human Rights, the UN Declaration on the Rights of Indigenous Peoples (2007), IUCN Protected Area Management Principles and UNESCO World Heritage inscription criteria. The World Bank Land Governance Assessment Framework (LGAF) clearly uses as one of its main criteria "the extent to which the range of existing land rights is legally recognized."<sup>10</sup>

Below is a list of potential activities to take the recognition and protection of customary tenure forward.

### Elements of the NLUP as opportunities

The NLUP is a key opportunity for improved active recognition of customary tenure through support of the development of a new Land Law, which will need to operationalize "recognition of customary tenure" in all its ways. In contrast to the Rules under the 2012 Farmland Law (Article 116), the NLUP recognizes shifting cultivation as subsistence agriculture. The NLUP uses the terms "customary land use/practices" and "customary rights" in several places. In addition to customary rights the NLUP includes the concept of "communal property rights,"<sup>11</sup> but elsewhere only the word customary is used which opens the door to different modalities of customary tenure.

There are at least four policy areas that need to be addressed with regards to the legal, social, institutional and cadastral registration of customary tenure. For recognition and registration to be valid against alienation of communities' customary land holdings in practice, the land in question needs to be demarcated and right-holders registered.<sup>12</sup> Demarcation can take many forms and must be debated and adapted to the constellation of rights found in a particular customary tenure locally.

Zoning of land is an activity in high demand by the government, but not immediately geared towards the recognition of customary tenure. Because it is often carried out as a top down exercise stipulating what cash crops farmers ought to grow, land zoning can present a somewhat skewed approach to land use planning at the district level. Nevertheless, it may be implemented to include a zoning of customary tenure that also features the fallow land of communities. This is an approach that the EU-supported project on the Implementation of District Land Cover Mapping and Zonation has taken in Bago (see Annex 2). An option would be to demarcate a 'fuzzy' boundary around customary tenure in the ongoing zoning of the land, which would serve as an interim protection measure until more precise mapping can be done (see also further below).

The design and implementation of pilot procedures for the recognition and registration of customary tenure (including customary tenure documentation pilots supported by MRLG) should also be linked to the mapping interventions taking place in Myanmar at present under donor support. All development partners in Myanmar are concerned about the need to map customary tenure, but these activities are incipient and none of them have done it systematically so far except indirectly through supporting MONREC in the Implementation of District Land Cover Mapping and Zonation Project (see Annex 2).

Many projects are encouraging community participatory mapping, and some of them try to prepare a precise cadastral map as a basis for future recognition. This, however, involves costly procedures and technologies in order to produce a map with a good level of precision, as required by modern cadastral systems. As the Land Administration and Management Program (LAMP) advisor noted, it would be interesting to use a map with 'fuzzy' boundaries agreed by various stakeholders. This map needs to be registered by a competent authority for its validity. It would serve as a provisional map prior to actual land registration and it would reveal who has interests where. ALMSD, MONREC and GAD must agree on this provisional map, in particular if it is a map that shows state land boundaries.

## Documentation of customary tenure to inform the future Land Law

Evidence-based documentation of customary tenure can be produced through initiatives such as the one undertaken by ethnic youth organizations with the support of MRLG. There are also various other local groups involved in documenting customary tenure (see, for example, ECDF 2016; RKIPN & TripNet 2016). These case documentations could feed into the elaboration of the new Land Law, provided the materials produced are packaged in an appropriate way. It is important to know what specific rights are found in diverse customary tenure systems and how they differ from village to village depending on resource endowment, ethnicity, kinship systems, internal individual rights regimes, market proximity and external threats. Such research can help pull out the systemic characteristics of customary tenure that can inform the next steps and the formulation of the new Land Law and associated rules in Myanmar.

## Develop interim protection measures for customary tenure

The NLUP intends to recognize, register and map customary tenure. While waiting for the drafting of the new Land Law, interim protection measures in line with Article 68 of the NLUP could be put in place before procedures for recognition and registration can be developed.<sup>13</sup> One option is to declare a temporary ban on land transactions (especially concessions, but also sales to outsiders) in the customary tenure areas identified by community themselves, using provisional/participatory maps noted above. The ban would be lifted after the official recognition and registration of communal customary lands. The government may argue that interim protection measures are not necessary as the Land Law and associated rules will be developed quickly. However, the likely delay of a formal registration process, inevitable given the magnitude of the area and number of villages/communities where customary tenure predominates, calls for such interim measures. Some experts have advocated a simplified recognition process that is legal and valid until formal registration is achieved.<sup>14</sup>

## Develop pilot institutional mechanisms for the recognition of customary tenure

MRLG could tag onto community mapping projects and through studies assist to establish evidence-based procedures for all the institutional aspects (in contrast to the technical ones) of protecting customary tenure. This would constitute a major empowerment initiative for the communities. There is also a need to identify the appropriate legal response to address customary tenure insecurity. This requires addressing the interface between the customary and statutory systems and setting the terms under which land moves from one system to another in the legal and regulatory framework (adjudication, mapping, registration and adequate compensation when customary land is expropriated for public interest purpose). A first step has been taken through customary tenure documentation activities, but many of these studies do not probe deep enough into legal, institutional and governance aspects.

## Clarify the legal status of communities or villages

Registration of right-holders also needs careful consideration and debate. One approach to giving legal status to communities in Myanmar includes addressing two sets of rules: the Internal Rules which is the recording of the existing customary tenure arrangements of the village, and developing Statutes which could be the basis for formalization of rules of governance and decision making. The Statutes could be taken to GAD with a request for the village to incorporate legally as an association under the 2014 Association Law. The reason is that Article 6 of the Farmland Law allows associations to obtain Land Use Certificates so if a village became an association it could then request a LUC from MOALI for all land under customary tenure (see Andersen Ewers, 2013). Another approach would be to have legal recognition of villages as lower administrative units (as is the case of Lao PDR), which then give them a legal basis to become the legal owners of the rights associated with customary tenure on their territory (under communal lands registration and titling).

Concerning the formal recognition of the Statutes and associated customary rules and institutions by the state and local government respectively, it is necessary to make clear:

- Decision making and governance structures among right-holders through the development of Statutes
- Representation of the community and roles and responsibilities of representative bodies (e.g. a land committee composed of elected respected elders, village chief and women, which can act as the custodian of the customary land on behalf of all village members)
- Relationship between legal entity and elected representative body
- Conflict resolution mechanisms
- Interaction with outsiders
- Developing, changing and endorsing of community Statutes and Internal Rules
- Rights of individual members vis-à-vis the rights of the community
- Termination of membership and restrictions on membership rights
- Rules applying to the dissolution of the community as legal entity/association

In addition to the development of Statutes, the advantage of recording existing customary Internal Rules is that it makes it possible to communicate these to local authorities such as village tract administrators and to the judicial system, which can support community leaders in enforcing the customary rules if conflicts arise, internally or externally. This means that the administrative and judicial system would recognize the plurality of norms and support the enforcement of customary rules, as long as they don't conflict with the formal law.

However, in some instances and often for political reasons, developing Statutes and documenting specific Internal Rules for each village could become a cumbersome process, requiring high level of technical support and involving various steps, and this could result in large delays in the process of recognition of communal customary lands, as observed in Cambodia. This is why some organizations and practitioners are now convinced that formal registration of Statutes and Internal Rules should not be a precondition for registering or developing protection measures of communal lands.<sup>15</sup>

## Empower communities and grassroots organizations to defend their customary rights

Whatever process will be adopted by the government to recognize customary tenure, it is important that communities be prepared to present and defend their customary rights in front of the technicians that will be in charge of formal recognition, or in front of the courts. Past experiences of “participatory processes” led by government show that if the farmers and communities are not prepared and don’t know their rights, they might be intimidated and end up losing some of their territory and resources. Ensuring communities are ready to explain what their rights and customary rules are would make any formalization exercise much more efficient.

With this in mind, MRLG initiated a Learning and Alliance activity on customary tenure documentation in Myanmar in partnership with a number of national and local organizations. This documentation implies both the capacity to describe and map the boundaries of the communal lands and their main internal zoning, resulting in participatory maps which don’t need to be geographically exact (such as the ‘fuzzy’ mapping already discussed) and the capacity to describe the community customary rules (including who is part of the community and who is not). This is a long-term investment, as methods have to be tested and adapted to local contexts and environments. Capacities need to be developed in a number of areas including conducting participatory action research, gaining common understanding of specific terminology on customary rights across different languages, training of trainers at different levels until it can reach communities themselves. The challenge is huge, but the potential impact is also very important. This activity is linked to the one on ‘documenting customary tenure’ (see above) and will contribute to it, but its objective and focus is different. In the first case, the priority is producing evidence for the government while the other is focused on building the capacity of communities in practice.

## Community forestry

Working to expand Community Forestry in Myanmar may not capture customary tenure as long as the CFI have not been amended to ensure participation and inclusion of all traditional users in CF user groups. As of October 2016 there is a new draft of the CFI ready but it still allows for the formation of forest user groups without specifying group membership rights and rules vis-à-vis non-group members of the same village.

## Regional comparisons and dialogue

The MRLG project covers four Mekong countries (Cambodia, Lao PDR, Myanmar and Vietnam). Lessons from the four countries so far confirm the importance of understanding the variety of customary tenure systems through studies to see how the different systems of customary rights can be legally recognized through documentation, mapping and registration. This will help ensure legal validity of customary tenure in line with FAO’s Voluntary Guidelines on the Responsible Governance of Tenure. It is also important to better understand the views of the Mekong governments on customary tenure, and what it means to submit a collective and customary claim to land parcels that are under the eminent domain of the state.

## Endnotes

1. Landlessness is most severe in Yangon Region (40%), Bago Region (41%) and the Ayeyarwaddy Region (33%) (UN-Habitat, 2012: 15). See also USAID (2010), which reports that Mon State features six of ten townships with a landlessness rate of at least 95 per cent.
2. Private rights in the context of customary tenure should be understood as informal private rights where the “privateness” of property rights refers to the clarity, specificity, and especially the exclusivity of the rights, and not to the identity of the rights-holder (see McKean, 1998).
3. MRLG study tour with ethnic youth organizations to Chaung Hnit Kywa, Sgaw Karen village in Thandaung Gyi township of Karen State, May 2015.
4. Examples were collected by the author during field work.
5. It should be noted that the Government of Myanmar signed up to the Extractive Industries Transparency Initiative (EITI) in 2014, which is a global standard for extractive industries requiring governments to publish information on revenues generated from oil, gas and mining projects, including how revenue makes its way through the government and benefits the public (see [www.eiti.org](http://www.eiti.org)). An initial EITI report was submitted to international auditors in January 2016, and Myanmar is expected to become a fully compliant EITI member state by January 2017.
6. Form-7 certificates were created with the 2012 Farmland Law and function as a farmland work permit certificate for people with right to farm a particular plot of land. Form-7 confers on the farmer various property rights over the farmland, including the rights of possession, use, benefit, sale, mortgage, lease, exchange, inheritance and gift. Form-7 has allowed some customary land to be privatized, leading to conflicts within communities in some cases.
7. In Cambodia, indigenous communities have rights to cadastral communal land registration under the 2001 Law. Internal rules developed with reference to the 2009 Sub-decree on Procedures of Registration of Land of Indigenous Communities specify that there is a ceiling to how much land a family in a village can buy and accumulate from others internally in the village. This rule was devised to avoid the emergence of landlessness among fellow villagers that were right-holders in the formalized communal/collective tenure.
8. This was recorded by one of the ethnic youth organizations under the MRLG-supported study.
9. The duration of a concession under the VFV Law differs to that of the 2012 Foreign Investment Law, which allows the granting of concession for up to 70 years.
10. See <http://go.worldbank.org/21M7S7AZO0>
11. Article 7 of The Guiding Principles states that the aim of the NLUP is to “recognize and protect private and communal property rights of citizens as included in the constitution.”
12. This is in line with World Bank LGAF recommendations: “Since customary tenure can come under pressure from settlers and outsiders encroaching on land held under customary tenure, an important step in enforcing customary tenure rights can be the mapping/survey of the boundaries of land held under customary tenure and the recording of rights holders.”

13. In Cambodia, the Government-Donor Coordination Committee in September 2007 identified the need “To adopt the RGC’s Policy on Registration and Use Rights of Indigenous Communal Land and pilot interim protective measures (identification, mapping, classification and provisional endorsement of indigenous land legal claims) to safeguard the indigenous community’s land in two provinces within the framework of provincial level state land management committees and district working groups as per Sub-Decree #118 [on state land management].” The hitch with the Cambodian interim protection measures was that it could only be applied for communities that already had agreed to Statutes and incorporated legally as one right-holder in the eyes of the land administration agency that would be responsible for registering land under customary tenure.
14. Habitat researchers have over the years developed a Social Domain Tenure Model which may be applied, see <https://www.fig.net/resources/publications/figpub/pub52/figpub52.pdf>
15. The lead author (Kirtsen E. Andersen) strongly believes that registration requires clear identification of right-holders and that customary tenure cannot be registered by the state unless the names of all right-holding families are recorded in the legal entity (e.g. an association) in whose name the parcels making up the customary land are vested. Customary tenure should not be registered unless the community in unison defines the Internal Rules by which they will manage and share the land and have both documents kept by the village tract administration, Tract Land Use Council and Farmland Administration Board at tract level.

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Interview 1: Member of the Environment Rehabilitation-conservation Network (MERN), February 2015.

Interview 2: Nick Jewell, consultant to the EU project on “Support to MOECAAF on implementation of District Land Cover Mapping and Zonation” under the overall project: Strengthening Policy Development to Meet Millennium Development Goals in Myanmar/ Burma (DCI-ASIE/2012/290-462), November 2015.

Interview 3: Nick Thomas and Rob Oberndorf, Tetrattech staff working on implementation of the USAID Tenure and Global Change (TGCC) project, November 2015.

Interview 4: Joan Bastide, CDE advisor on the SDC-supported OneMap project, November 2015.

## Annexes

### Annex 1: Terms of reference of the study

The 'Learning and Advocacy Plan of Activities' of the MRLG project centres on documenting and exchanging information on various forms of recognition of customary rights, as well as on developing a regional advocacy strategy with the governments around these concepts and proposals.

The short-term strategy on the recognition of customary tenure will be executed over a period of one year through the Regional Learning and Advocacy Activity co-implemented by MRLG and FAO. This consultancy responds to the Activity Proposal (Annexed to this Contract, Annex 2) and addresses the short term strategy objectives of:

1. Documenting the 'on-the-ground' reality (not just the theory or implications) on the practice of customary tenure and related issues for further discussion and identification of gaps and needs.
2. Engaging in a dialogue with governments on challenges and opportunities related to the recognition of customary tenure.

Actions envisaged in the strategy are a stock-taking exercise to document and exchange information on the (lack of) recognition of customary rights and the exchange of good practices in Cambodia, Lao PDR, Myanmar and Vietnam. FAO tenure analysis reports previously conducted may be used, and the LGAF Tenure Analysis questionnaire may also inform this exercise. A regional workshop will be held to share experiences among countries and disseminate results of the stocktaking exercise. During the kick-off workshop, participants will discuss the main questions to be addressed by the stock-taking exercise/study and a TOR will be developed for this specific activity task.

Main questions as formulated during the MRLG Regional Consultation and Planning Workshop in March 2015:

- What types of rights, responsibilities and restrictions exist relating to customary rights in law and in practice under customary land ownership, use and management?
- Who are the right holders in law and in practice?
- What is the object of the tenure right ("for what")?
- What is the setting for governance and administration of the rights and the support to the communities?
- Which methods for customary rights recognition and technical requirements exist (What would be needed at a technical level to identify the right)?
- How does obtaining secure tenure right(s) have an impact on livelihoods?
- How does understanding and enforcement of customary tenure vary among ethnic groups in different regions of each country?

- How does customary tenure affect women, youth, vulnerable and traditionally marginalized groups in society?
- Are there conflict resolution and grievance mechanisms in place?
- What are the obstacles to reinforcing customary tenure and which actors are most influential in determining if those obstacles can be removed?
- Is it possible to find concrete evidence to prove the mutual benefits of customary tenure?

The results will be consolidated at the country level and will be synthesized at regional level. Evidence and experience from other countries of the region should also be incorporated as much as possible.

### **Key Questions for Country level Studies**

The objectives of the studies are:

1. Understanding the situation of CT, problems and opportunities for legal recognition
2. Initial recommendations for the road map/ action plan and alliances

All types of customary tenure (in broad sense) are included in this study, including individual informal tenure recognition, communal one (non-indigenous), on forest as well as agricultural lands. The main criteria of customary tenure is that it is socially legitimate.

## **1. Understanding/ describing the situation of customary tenure**

### **1.1 Historical background and context**

### **1.2 Customary tenure on the ground/ in practice**

- What is the importance/ extent of CT in the country
- Who are the main customary tenure right holders?
- What is the object of the tenure right (“for what”)?
- How does understanding and enforcement of customary tenure vary among ethnic groups in different regions of each country?
- How does customary tenure affect women, youth, vulnerable and marginalized groups?
- Problems/erosion of customary tenure systems (to what extent privatization of land under customary tenure is taking place?)
- Are there conflict resolution and grievance mechanisms in place?
- How does non-formalized customary tenure defend its land against land concessions and other forms of encroachment?
- Success stories by communities
- How does obtaining secure tenure rights impact livelihoods?

## 1.3 The government/ institutional/ legal system

- What is the setting for governance and administration of the land rights and support to communities?
- Is customary tenure mentioned in the law? If yes for what context, under which definition?
- What types of rights, responsibilities and restrictions exist relating to customary rights in law (under customary land ownership, use and management)?
- Who are the right holders in law?
- Regulation of swidden agriculture
- Community forests and tenure arrangements
- (If applicable) Which are the methods and process for customary rights recognition and what would be needed at a technical level to identify the right?
- (If applicable) What are the main difficulties met in the recognition process?

## 1.4 What are the main opportunities for improved customary tenure recognition?

- New Legal/ policy opportunities
- Implementation of existing policies for recognition of customary
- Other major projects/ programs/ initiatives to be tapped on/ or form alliance with

## 2. Action plan and alliances

- Recommendations for policy influence
- Elements of advocacy (messages)
- Proposed Multi-stakeholders alliances
- Capacity building for alliances / network (on CT)
- Opportunities/ pathways for community empowerment

## Annex 2: Major land projects in Myanmar

Below is an overview of four different land projects in Myanmar under implementation in 2015-2016 funded by USAID, the Multi-donor Trust Fund Program LIFT, the European Union (EU) and the Swiss Agency for Development and Cooperation (SDC).

### ***USAID –Tenure and Global Climate Change (TGCC) Project***

The Tenure and Global Climate Change (TGCC) Project (2013-17) initially provided support to the formulation of the NLUP. In 2015, it started implementing pilots for land tenure and property rights interventions in Myanmar related to resource boundaries, land use planning and administrative boundary adjudications. These pilots put emphasis on strengthening the rights of women and institutionalizing the processes to document and formalize rights (USAID 2015).

While the USAID brief does not mention “customary tenure” the TGCC project has focused on this issue through support to the formulation of the NLUP and when initiating the pilots in 2015 (Interview 2).

The TGCC project has two pilot sites: one in Minrock in Southern Shan State and one in Tharyawaddy district in Bago Region West (Interview 3). The initial criteria for selecting the sites were that villages were located in forest areas and that customary land tenure could be observed. However, when starting the work it was found that customary tenure no longer existed, many people were landless, some people had paddy land with LUC Form-7, and MOECAAF (locally) had issued licenses to businessmen to afforest areas (fallows) with plantations. Plantation owners could prohibit communities’ access to the land. In Tharyawaddy, SLRD had also issued land for cashew plantations comprising blocks of 50 acres. The preliminary conclusion on the pilot in Tharyawaddy is that much more land than expected had been given to outsiders, under the VFV Law. The project has prepared image maps from open source, public domain and Google Earth as this is within the technical capacity of officers.

TGCC is also participating in USAID’s “Global Tenure Study” which includes desk research on customary tenure, which concludes that there must be certificates of customary ownership (CCO). Certificates would be an official document recognized by all courts in the country as proof of legal ownership of customary land, the community would have a map attached to it to prove land boundaries. CCOs would be subject to easy procedures to obtain and amend according to the law. Moreover, land registered under CCOs would be transferable and mortgageable with a view that CCOs could later be turned into freehold titles.

It seems that these conclusions do not sufficiently consider the magnitude of social engineering required to clearly define who the right-holders are and in whose name the formalized customary tenure would be held, as well as in defining the internal management rules that determine, for example, the conditions under which a family may ask for land to be excised to get a freehold title. The conclusions fall short of defining the role of land demarcation, the possibility of a nested hierarchy of rights and the role of state land authorities in the mapping of land, not only the village neighbours. Different tenure regimes can coexist (e.g. communal and individual rights; rights over land combined with rights over trees and access to pastures) and institutions can overlap.

### ***LIFT funded Habitat project – Land Administration and Management Program (LAMP)***

LAMP was a two-year program that ended in March 2016. It was funded by the multi-donor trust fund LIFT and implemented by HABITAT that supports SLRD/ALMSD in the very technical aspects of land survey and cadastral land registration, including the correction of the old Kwin maps. The work involves updating and requires data capture and geo-referencing of satellite imagery and subsequent digitising of Kwin maps and image maps and the mobilisation of land survey teams. A Kwin map is a cadastral survey unit that covers about 500 acres. SLRD/ALMSD has maintained all original cadastral map sheets for agricultural land from its traditional cadastral survey since the establishment of the department in 1906. Since this time, however, Kwin maps have only been prepared for lowland areas and not in upland areas with customary tenure. So there will be no Kwin maps available for geo-referencing of customary tenure.

The Kwin map is fundamental to the Cadastral System in farmlands because it shows the boundaries of the farmland holdings, which must be referenced by land titles (Land Use Certificate). It also is referenced by the land tax assessment record system and by other land reporting functions.

The project advisor confirmed that the project only works in the lowlands with Bamar communities where Kwin maps already exist. Based on experience from elsewhere in the world, he suggested that it is possible to demarcate “fuzzy boundaries” around customary controlled land, but that these boundaries must be agreed upon by various stakeholders.

## ***EU Support to MONREC on implementation of District Land Cover Mapping and Zonation project***

This project also works on mapping (or zonation as the NLUP calls it) and covers Tharyawaddy in Bago Region. Initially the project also covered Toungoo, also in Bago Region. The sites are near Yangon, but stretch east into ethnic Kayin areas. Land use / land cover (LULC) mapping using Rapid Eye satellite imagery was the first phase of the process. Zonation mistakes resulting from LULC errors are to be rigorously avoided, it is said, as these quickly result in the entire process being discredited and disregarded at the local level.

The origin of this EU initiative came from EU consultations with the Land Use Allocation and Scrutiny Committee (LUASC), a Cabinet-level committee established in July 2012 with MOECAF chairperson. The Committee was tasked with addressing land grievances from farmers whose land had been grabbed by private companies and the army. It selected Toungoo as it is near Naypyitaw and satellite imagery was used (Rapid Eye) with 5m precision. LULC mapping has been done for one million acres in Toungoo, but the question now is what the government will use it for. The project drafted a Land Management for Toungoo, but in fact the government only wanted “zoning”.

The EU project works in Tharyawaddy at present. This is where the Habitat project has covered one village tract working on kwin maps. The EU project covers much larger areas than the Habitat project that focuses on the nitty gritty of technical cadastral land survey.

## ***SDC – OneMap***

The OneMap project started in the first half of 2015 in collaboration with MOECAF/MONREC and SLRD/ALMSD and completed its Inception Period in November 2015. SLRD/ALMSD heads the interdepartmental group for OneMap. The OneMap project aims to address the critical problem of lack of accessible data on land use, land cover, and land tenure in Myanmar on which to base future regulations and laws. The database resulting from the project is seen as a government-managed open access spatial data platform on land. The project is Swiss funded and implemented with technical assistance from the Centre for Development and Environment (CDE), Bern University. Technical support will enable the “cleaning”, verifying, harmonizing, and integration of land-related spatial data sets across departments.

The background documents for the project emphasises that land governance in the uplands of Myanmar is complex and that current land laws do not adequately address tenure regimes for rotating fallow systems and customary traditional tenure. It is envisaged that thematic foci will be determined through a process of stakeholder consultation during the inception phase with potential to include customary tenure data for upland cultivation areas.

An outcome of the project includes the means to ensure participation of local communities and non-government stakeholders in data verification. As the Swiss country strategy focuses on support to east Bago Region, Kayah State, Kayin State, Mon State and northern Tanintharyi Region, it is expected that the OneMap project will focus in these regions and states and that specific links to SDC-supported projects are established, such as the MRLG Project as well as to the EU-supported land cover pilots in Bago. In relation to the MRLG Project, OneMap will link up to regional land governance data/information sharing platform. As the project document resulting from the Inception Phase was not available at the time of writing, the proposed linkages cannot be examined. OneMap works with SLRD/ALMSD to create a whole data model and use small drones. Most data to be collected is geo-referenced and can be overlaid with, for example, customary tenure (Interview 4). Initial focus is in Tanintharyi to link with the work conducted by Habitat in Bago. The plan is to cover hotspots (conflicts) and customary tenure. In the process for uploading data links will be established with conservation NGOs such as WCS and FFI.

### **Annex 3: Fisheries and recent introduction of group tenure**

The 2008 Constitution delegates responsibility for the management of inland freshwater fisheries to States and Regions. The Freshwater Fisheries Law issued by the State Law and Order Restoration Council (SLORC) in 1991 was designed primarily to provide a framework for commercial exploitation of the fisheries and contains few principles on conservation or social considerations. Recently the Ayeyarwaddy Region issued its own law for inland fisheries and Rakhine is on its way to doing the same. Working with inland fisheries initiatives may not yet help to revitalize customary tenure until the regulations on joint management and lessons learned from ongoing initiatives such as the Network Activities Group, Pyoe Pin and the FAO project, are consolidated.

The present governance of inland capture fisheries in Myanmar is primarily based on annual license tenders or leaseholds (public auction) that are issued by the Department of Fisheries (DOF) for delineated areas in addition to “open fisheries” for which a license is needed. DOF’s main focus has been getting revenue from tenders. The tenders or leases are bought by business people who then sublet to fishermen through middlemen against payments in money or catch, often against advances paid. The goal of these businessmen and middlemen has been to catch as much fish as possible and reap maximum resource rent with little attention paid to the sustainability of fisheries.

The system is structurally linked to the means by which revenue is raised by the State Governments that depend on taxes on inputs - as opposed to taxes on income or profits. In the fishery sector these include charges for tendered licenses-to-fish, gear taxes (essentially on nets) and road tolls levied on commercial produce being carried out of the State. Leasable fisheries in Myanmar imply that rights to fish are allocated to businessmen/buyers against a fee through a bidding process. Leasable fisheries are operated by the business people who pay the fee by simultaneously sub-leasing to fishermen. Areas are sub-let to fishermen by businessmen/middlemen who provide partial payment up front and later pay the rest in fish at fixed (reduced) prices. This means the existing system does not allow fishermen to get market prices for fish, which provides little incentive to protect fishery resources.

A gradual change is taking place in inland fisheries through the introduction of joint management arrangements which means tenure is shared between groups of customary fishermen and government agencies and the businessmen earlier reaping the resource rent are kept at bay. In May 2011, the DOF granted FAO responsibility to organize the management of 16 fisheries that normally would be tendered to businessmen under “village fisheries societies” in Bogale Township in the Ayeyarwaddy Delta.

The FAO project modus operandi is an agreement with the DOF to pilot the transfer of tender lots for stow nets to local communities. The fishing area put under the project has been measured by GPS and declared by DOF as a “Special Fishing Management Area” of 32 square miles. Declaring an area “special” allowed for the introduction of new management regime.

Besides FAO, the Networks Activities Group (NAG), the LIFT Tat Lan Project in Rakhine, the Pyo Pin and WorldFish work on similar issues to introduce a new system of inland fisheries management which is customary in the sense that customary fishermen now have rights and benefits which they did not have before.

*The **Mekong Region Land Governance** Project aims to contribute to the design of appropriate land policies and practices in the Mekong Region, responding to national priorities in terms of reducing poverty, improving nutrition, increasing economic development, and supporting family farmers, so that they can be secure and make good decisions on land use and land management. MRLG is operating in Cambodia, Laos, Myanmar and Viet Nam since April 2014, with the support of SDC and the German cooperation. For more information on MRLG, please visit [www.mrlg.org](http://www.mrlg.org).*

*The **MRLG Thematic Study series** examines major themes related to land tenure in the Mekong Region. It is aligned with strategic priorities of MRLG and is intended as background document for all relevant MRLG partners. As such, the series consists of a synthesis of existing references in a particular theme, which can be complemented with additional enquiries and studies. The production of Thematic Study is usually undertaken at the initiative of MRLG but we also accommodate proposals originating from outside the programme.*

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