

COMMUNAL TENURE AND THE GOVERNANCE OF COMMON PROPERTY RESOURCES IN ASIA

LESSONS FROM EXPERIENCES IN SELECTED COUNTRIES



*Villagers get help from Buddhist monks to ordain a state forest
to become a village-based community forest, Thailand*

Kirsten Ewers Andersen

April 2011

COMMUNAL TENURE AND THE GOVERNANCE OF COMMON PROPERTY RESOURCES IN ASIA

LESSONS FROM EXPERIENCES IN SELECTED COUNTRIES

Kirsten Ewers Andersen

April 2011

The designations employed and the presentation of material in this information product do not imply the expression of any opinion whatsoever on the part of the Food and Agriculture Organization of the United Nations (FAO) concerning the legal or development status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. The mention of specific companies or products of manufacturers, whether or not these have been patented, does not imply that these have been endorsed or recommended by FAO in preference to others of a similar nature that are not mentioned. The views expressed in this information product are those of the author(s) and do not necessarily reflect the views of FAO.

Photography: Kirsten Ewers Andersen

List of abbreviations

ABD	Asian Development Bank
CADT	Certificate of Ancestral Domain Title (Philippines)
CCBA	Climate, Community and Biodiversity Alliance
CFUG	Community Forest User Group (Nepal)
CHT	Chittagong Hills Tract
CO ₂	Carbon Dioxide
CPR	Common Pool Resources
DFID	Department for International Development (United Kingdom)
FAO	Food and Agriculture Organization
FDI	Foreign Direct Investment
FPIC	Free and Prior Informed Consent
GPS	Global Positioning System
GTZ	<i>Gesellschaft für Technische Zusammenarbeit</i> (the German development corporation)
IFAD	International Fund for Agricultural Development
IIED	International Institute for Economic Development
ILC	International Land Coalition
ILO	International Labor Organization
IPRA	Indigenous Peoples Rights Act, Philippines, 1997
LFP	Livelihoods Forestry Program
LHF	Leasehold Forestry
MOI	Ministry of the Interior
NCPI	National Commission for Indigenous Peoples (Philippines)
NGO	Non-governmental Organization
NMLA	National Land Management Authority
NTFP	Non-timber Forest Products
OP	Operational Plan
PDR	Peoples' Democratic Republic (Laos)
PLUP	Participatory Land Use Planning
REDD	Reduced Emissions from Deforestation and Degradation
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Program
UN-REDD	United Nations Reduced Emissions from Deforestation and Degradation Program
VCS	Voluntary Carbon Standards
WB	World Bank
WRI	World Resources Institute

Table of Contents

Summary	1
1. Background	3
1.1. What is communal land tenure?	3
1.2. A renewal of the historical interest in communal tenure	4
1.3. Governments' recognition of communal tenure	6
1.4. Communal tenure: protection against poverty and environmental degradation	7
1.5 Systemic and legal features of communal tenure arrangements	8
1.6. The need for match between institutional arrangements and resource characteristics	10
2. Communal Tenure as Indigenous Peoples' Collective Rights	14
2.1. Background for Indigenous Peoples' Collective Rights	14
2.2. Legislative Variations of Indigenous Communal Tenure	15
2.3. Indigenous Peoples' Special Communal Tenure in the Philippines and Cambodia	20
2.4. Mapping	23
3. Communal tenure as delegated management	26
3.1. Community Forest User Groups in Nepal	26
3.2. Leasehold Forestry and Pro-poor Targeting in Nepal	28
3.3. Communal Tenure as Delegated Management in other Asian Countries	29
4. Governance considerations in communal tenure	33
5. REDD/REDD+ carbon money and communal tenure	36
Bibliography	40

Summary

This paper presents an overview of the distinctive features of communal tenure in different community-based land and natural resource management systems. Communal tenure refers to situations where groups, communities, or one or more villages have well defined, exclusive rights to jointly own and/or manage particular areas of natural resources such as land, forest and water. These are often referred to as *common pool resources*: many rural communities are dependent on these resources for their livelihood. In communal tenure, both the boundaries of the resource owned in common and group membership are clearly defined. These are necessary conditions to exclude outsiders and to secure the rights of group members so that these rights cannot be taken away or changed unilaterally.

Two models of communal tenure are presented in the paper; these models differ in terms of the function of the state, the length of tenure and the characteristics of the resource system concerned. In the first model, the *permanent title* model, the state fully and permanently hands the land over to local indigenous communities for private collective ownership. In this situation, the resource system is often multi-faceted, comprising agricultural lands as well as forest, water and pasture land. Permanent title for indigenous peoples' communal land is a special claim supported by national legislation and by international conventions, covenants and declarations that many countries have endorsed. Examples of permanent title in Asia include the Philippines and Cambodia, where legislation provides for collective rights of indigenous communities. In many instances such as Cambodia, Philippines or, for instance, Papua New Guinea, the indigenous groups or communities that are eligible by law for private and permanent communal tenure need to become a legal entity to be recognized as a communal right-holder by the state. This may require community incorporation. However, the process of incorporation can be cumbersome for people who are not necessarily literate in the national language or in the demands of state bureaucracy.

In the second model, the *delegated management* model, the state maintains ownership of the resources and delegates management to local groups, most often villages, for a specific period of time, with the possibility of renewal. Such agreements are generally subject to national legislation only. In this case, the resources are often uniform and relate to, for example, community forestry, community fishery, pasture or irrigation group tenure that all come in many different forms with different bundles of rights. This model is far more common than the first, with Nepal, India, Thailand, Cambodia or Mongolia providing examples.

In addition to these two general models, one may still find traditional customary communal tenure in remote communities. Here the state does not actually regulate or intervene in the management of resources, but all local communities in the area would know of the local rules of harvesting and withdrawal rights.

Both the permanent title in communal land and the delegated management model may originate from an existing customary arrangement, where the rules are known and have been adhered to by right-holders – and their neighbors – for generations. The state can acknowledge these existing communal systems through formalization of existing rules and rights. In a different situation, where customary arrangements are no longer present and the resource is degraded and under open access, the formalization of

delegated management of, for example, a new community forest, may imply setting up or *inducing* communal tenure institutions, where they did not previously exist.

Inducing institutions is a major exercise in social engineering; the resulting induced institution must be carefully aligned with the physical and natural characteristics of the resources or resource system and, ideally, should build on an existing set of norms in the community. Where governments and/or donor projects have a pro-poor approach in inducing communal tenure for natural resource management, the pro-poor targeting mechanisms must be mainstreamed in the institution building.

In all communal tenure systems, the physical and biological characteristics of the resource system factor decisively into the regulatory frameworks that communities establish. One must match with the other. In situations where both subsistence and market value products can be withdrawn from the resource system there are also many kinds of interlinked and embedded rights: the communal tenure is usually embedded within a larger nested hierarchy of institutions.

Nowadays the communities will often need support and recognition by the state in order to manage effectively their common pool resources. As a consequence, communities will need to establish two sets of rules: (i) those rules that constitute the community as an entity in the eyes of the state and (ii) those that define internal rules of benefit sharing. Whereas constitutional rules define the community as a legal entity, internal community rules establish the management rights in the resources and the fair appropriation of benefits.

Interest in communal tenure and common property resource management has risen since the 1980s among academics, governments and international development organizations working on land and natural resources management. Debates on communal tenure are still ongoing in many countries in Asia, in the context of market pressures and dynamics, which call for privatization to increase productivity, and in the context of big business vying for a stake in valuable land and other natural resources, in some instances leading to land grabbing. The current market driven pressures on natural resources create both challenges and opportunities for communities and governments. Overall, policies and institutions that promote accountability and good governance over these resources, both by the government at national and local level and by communities, are required. Some specific approaches, such as communities' mapping of their territories, are proving useful tools to safeguard their lands, although they are not sufficient conditions: the wider political and regulatory environment must be supportive too.

Communal tenure will very likely play a significant role in the policies and actions for climate change mitigation. With the emergence of initiatives for Reduced Emissions from Deforestation and Degradation (REDD and REDD+), governance and benefit sharing of carbon finance become critical questions in defining who owns the carbon stocked in forest. Marketable community rights to this special resource unit (stocked carbon) must be supported by national legislation that favors communal tenure of some of the carbon properties. This may lead to a separation of rights to carbon from the broader rights to the forest and land, an aspect not yet addressed by theoretical work on communal tenure.

1. Background

1.1. What is communal land tenure?

Communal tenure refers to a situation where a group holds secure and exclusive collective rights to own, manage and/or use land and natural resources, referred to as common pool resources, including agricultural lands, grazing lands, forests, trees, fisheries, wetlands or irrigation waters. Communal tenure – as can be noted in by its prevalence in Africa and Asia for centuries¹ – can be customary and age-old, its rules relying community decisions, or it can be newly designed for a specific purpose.

This paper deals with two main modalities of communal tenure. The first model concerns permanent communal tenure rights held by indigenous communities in their ancestral domain, where the state permanently relinquishes for good its rights to the land; the second model, delegated management, refers to temporary communal tenure, wherein the state maintains ownership of the land but delegates management of the resources on that land (for instance, a state forest, a fishery or a pasture) to a group of people for a specific number of years. Most often management is delegated to a village, but can also be to a local government authority above the village level. This arrangement is often renewable.

The word tenure refers to an enforceable bundle of rights. There are many kinds of tenure rights, for example, the state owns public lands, including forests, as state tenure; and private individuals have private tenure on their private plots. In addition, groupings of people, such as villages, can have communal tenure on some or all of their land. Customary communal tenure is endorsed by village rules, which neighboring villages generally know and comply with. Where the state endorses communal tenure, the tenure rights are enshrined in a regulatory framework such as the Land Law, the Forestry Law or special acts for indigenous peoples' rights.

Many *de jure* state lands are not managed according to the law and rules. They are left without management and turn into what generally is called *open access* areas. In this case there are no workable rights and rules to exclude anyone. Everyone can use the land or resources in question. Such resources are often highly degraded. Previously, some scholars would call such open access areas for common property land and lament the 'tragedy of the commons'.² However, analyses since the 1980s clearly show that the commons differ from open access resources in that they have management and apply rules of local governance and that tragedies are *not* the usual outcome.

Tenure can be understood as a *system* of many different bundles of rights that are enforceable. These can operate simultaneously and overlap on the same piece of land, thereby constituting a hierarchy of rights. For example, grazing land may have primary users from the nearby village, secondary transhumance users in certain seasons and tertiary season users defined by kinship or mutual reciprocity.³ Likewise, a state forest may formally be state tenure, but at the village level the customary tenure clearly

¹ World Resources Institute 2005 *The Wealth of the Poor: Managing ecosystems to fight poverty*

² Basurto, X. and E. Ostrom 2008 *Beyond the Tragedy of the Commons*, W08-25; and Bromley, D. & M. Cernea 1989 'The Management of Common Property Resources. Some Conceptual and Operational Fallacies' World Bank Discussion Paper, 57

³ See Robert Wade 1989 *Village Republics. Economic Conditions for Collective Action in South India*. Orient Longman Ltd.

defines which part of the state forest belongs to the village. Another example is when one village has rights only to firewood and mushrooms in a particular forest, while another village may have rights in timber and firewood, as well as rights in higher value non timber forest products (NTFP) and mushrooms in the very same area of forest. Given the potential complexity of these overlapping rights, it is highly important that externally implemented forestry projects understand the configuration of rights in order to support the individual, institutional and state stakeholders in the protection of the forest.

In common property or common pool resources theory, communal tenure can be defined as self-governing forms of collective action by a group of people, often a village. Common-pool resources (CPR) are subject of collectively held rights in a resource system, such as a forest, which provides products that villagers can use. The products that are appropriated or withdrawn, for instance, tree resin, nuts, fodder leaves or timber, are the resource units of these systems. Common property theory addresses five kinds of rights, namely access, withdrawal, management, exclusion and alienation. Access pertains to the right to enter a defined physical area and enjoy non-subtractive benefits (e.g. to camp or rest in the area). Withdrawal is the right to harvest resource units or products of a resource system (for example, cut trees, collect resin, catch fish, or divert irrigation water). Management is the right to regulate internal use patterns and transform the resource by making improvements. Exclusion refers to the right to determine who has access and withdrawal rights, and how those rights may be transferred. Finally, alienation concerns the right to sell or lease management and exclusion rights.⁴

These characteristics of common property regimes have been subject to significant analysis since the 1980s (further discussed below) and have informed the development or crafting of induced institutions to establish CPR regimes for local level environmental management of land and forest, where institutions no longer were found. As will be further discussed in this paper, the conditions of withdrawal, management and exclusion appear to be the most important features of such induced institutions.

1.2. A Renewal of the Historical Interest in Communal Tenure

Prior to the publication in 1861 of *Ancient Law*⁵ by the English jurist Henry Sumner Maine, the accepted view among Western jurists in the nineteenth century had been that the origin of the concept of property was the occupation of land by a single proprietor and his family. However, Maine insisted that, “it is more than likely that joint ownership, and not separate ownership, is the really archaic institution, and that the forms of property that will afford us instruction will be those that are associated with the rights of families and of groups of kindred.” He viewed the nineteenth century Indian village as “an assemblage of co-proprietors” and noted that the “the attempts of the English functionaries to separate the two may be assigned some of the most formidable miscarriages of the Anglo-Indian administration.”⁶

⁴ Schlager, E and E. Ostrom 1992 “Property-rights regimes and natural resources: A conceptual analysis”. *Land Economy* 68(3) p.249-262

⁵ Maine, Sir Henry Sumner 1876 *Ancient Law. Its connection with the early history of society, and its relation to modern ideas*, London

⁶ Ibid. p.259-260

More than 100 years later, an interest in communal tenure and common property has reemerged among academics, governments and international development organizations working on land and natural resource management issues. With the advance of the state, increasing land privatization and competition between concessionaires and outsiders for the same land, communities, NGOs and other civil society organizations call for the state to legally recognize customary communal tenure to safeguard community interests and the environment. Because the state holds eminent domain over all property within its boundaries, in order to formalize communal tenure it must provide a legal framework for collective land rights and support the development of group statutes and bylaws.

This renewed interest in formalizing communal tenure arises partially from the observation of alarming degradation of natural resources, particularly where the state had nationalized forests that previously were under local community/communal tenure – the state assumed sole ownership, but was unable to protect the forest. An often-cited example is the *Nepal Private Forest Nationalization Act 1957*, which led people to feel that they had been dispossessed of the forests. Until this Act, villagers used the nearby forest to meet local demands of fuel, fodder, poles and timber; the management system for these activities was based on locally developed sustainable practices that were regularly revised. Change came after 1978 with the rapidly developing concept of community forestry, which delegated management and withdrawal rights to the villages again. Nepal offers several lessons learned on communal tenure in the form of delegated management for community forestry and leasehold forestry (LHF) (Chapter III).

In the academic field, the United States National Academy of Sciences established a Panel on Common Property beginning with a conference on Common Property in 1985 and the published proceedings in 1986.⁷ This inquiry was supported by research funds to assess systematically differing institutional arrangements for the effective conservation and utilization of jointly managed resources, and to contribute to efforts to rehabilitate and manage soils, water resources, forests and rangelands. Since then, the Workshop in Political Theory and Policy Analysis, Indiana University, under the leadership of Elinor Ostrom, has set the framework for analyzing the evolution of institutions for collective action and has contributed greatly to the knowledge about common property.⁸ As a result, professionals in the field of international development of land and forest management understand the need for prior analysis of existing tenure in order to align planned interventions with the tenure situation or in order to craft new institutions learning from the past CPR regimes. The research has highlighted the need for supportive government regulatory frameworks, and for the development new, viable institutions, where none remained.⁹

⁷ *Proceedings of the Conference on Common Property Resource Management*, prepared by the Panel on Common Property Resource Management, Board on Science and Technology, National Research Council, National Academy Press, 1986

⁸ See <http://www.indiana.edu/~iascp/> hosted by Workshop in Political Theory and Policy Analysis | 513 N. Park Avenue, Bloomington, USA

⁹ See Ostrom, E & J.M. Walker 1989 Communication in a Commons: Cooperation without External Enforcement, Paper presented at the American Political Science Association Meeting, Atlanta, Georgia, August 31 - September 3; Ostrom, E. 1999 Self-Governance and Forest Resources, CIFOR Occasional Paper No 20; Ostrom, E. 2002 Reformulating the Commons, *Ambiente & Sociedade* - Ano V - No 10 - 1^o Semestre de 2002; and Ostrom, E. 2007 The Challenge of Crafting Rules to Change Open Access

As a result of the increasing knowledge base regarding common property, communal tenure and collective action, governments and international organizations are increasingly recognizing the social, economic and environmental benefits for communal tenure, particularly among indigenous communities, as elaborated below.

1.3. Governments' Recognition of Communal Tenure

The term 'indigenous peoples' is a term used in the Philippines, Cambodia, India and Nepal. These countries have recognized in their legislation the special concerns and/or rights of indigenous communities to hold communal land tenure. In Cambodia the Land Law of 2001 has a chapter 3 on indigenous peoples collective land titling and in the Philippines a specific comprehensive act *Indigenous Peoples Rights Act (IPRA)* of 1997 was passed. Although, in fact, all Asian countries have endorsed the *United Nations Declaration of Indigenous Peoples' Rights* of 2007, the concept of indigenous peoples is not recognized in a number of Asian countries including Vietnam, China, Lao Peoples' Democratic Republic (PDR) and Myanmar. Here the terms 'ethnic minorities' or 'ethnic groups' are used. These countries do recognize that ethnic minorities are marginalized and that they make up the poorest communities in the country, and thus specifically target these groups with a number of poverty alleviation programs, because they are poor rather than because they are indigenous.

Many ethnic groups and indigenous communities in India, Bangladesh, Nepal, Myanmar, Thailand, China and Viet Nam have called for communal rights in land, including ancestral domains and forests; yet, many indigenous communities in these countries are not prepared to stake their own claims, as they are unfamiliar with land laws, may be illiterate, and may not speak the language in which legislation is drafted. In comparison, in the Philippines, the indigenous communities are well organized and have strong non-governmental organizations (NGO) to represent them. In addition, the Philippines have a long history of freedom of expression for indigenous communities and NGOs. In Cambodia, indigenous communities are illiterate and depend on NGO support to understand the law and the requirements. Besides Philippines and Cambodia also Nepal and India have recognized indigenous peoples' rights. In Nepal indigenous communities' claims are emerging by 2009, as the country ratified the International Labor Organization (ILO) Convention 169, the *Indigenous and Tribal Peoples Convention*, 1989. In India the *Tribal Forest Rights Act*, 2006 was promulgated to address old grievances and provide poor tribal communities with rights in forest land, allowing each verified tribal household or other permanent forest dwellers up to five hectares.

With regards to communal tenure, many Asian states have shown a preference for delegated management – aligned with existing customary tenure or as induced institutional development – as the preferred form of communal tenure, because the land remains state land. This can be noted by Asian governments' widespread endorsement of communal tenure in the form of community forestry and community fishery, with most countries having legislation and detailed guidelines for implementation. This is facilitated by the fact that in the delegated management model

the resource system is often uniform in nature, for example a forest or a lake. Another potentially appealing characteristic of the delegated management model to governments is the taxability of any increased productivity of the resource system and any product harvested, such as NTFP or timber for the market. On the contrary, in the permanent collective title for indigenous peoples the resource system is not uniform and it may comprise agricultural land, forest, grazing lands, streams and fisheries and only the actual agricultural land may be subject to taxation.

1.4. Communal Tenure: Protection against Poverty and Environmental Degradation

Many remote communities, which harbor a vast knowledge of their own resource systems, practice customary communal tenure. They are at the same time often the poorest communities in a country in terms of monetary income, but not necessarily in terms of subsistence and the variety of their diet.¹⁰ Despite being monetarily poor, these communities would undoubtedly be able to continue their practices for many years if undisturbed by the state, the market and/or outside business interests. Thus, enhanced tenure security, including security of communal tenure, can be a key strategic element in alleviating rural poverty, securing livelihoods¹¹ and avoiding landlessness – often caused by land appropriation by outside interests. These communities' high dependency on natural resources for livelihoods, and the fact that they often reside in remote areas with valuable timber or mining resources, puts them at risk as land and traditional common pool resources become attractive to influential businessmen. This has been a source of conflict, as documented in daily news in several countries.¹²

A legal claim by indigenous communities for communal tenure is one way to ensure their livelihood and avoid landlessness; because of the associated costs of individual tenure, often this is not an option for local communities. However, the process to actually obtain the communal tenure title deed is very cumbersome and communities need support to advance their claim. Local communities find the collective land registration process difficult because of the complicated legal language, the required interaction with government officers and the need to complete all the formalities and steps of registration.

Communal tenure can ensure livelihood and at the same time be a key element in environmental protection. This tenet is sometimes questioned by those that purport that population pressure is the cause of degradation and that land tenure institutions should change towards private individual ownership to provide appropriate investment incentives. Otsuka¹³ has examined the alleged investment shortcomings in communal

¹⁰ Sometimes when these communities are resettled as in the Lao PDR and lose access to their normal habitat children's growth become stunted and the villagers lack nutrients, calcium, phosphorus and dietary oils which otherwise are available from forest greens and edible roots, snails, fish, water weeds, fish and frogs.

¹¹ Deininger, K. 2003 *Land Policies for Growth and Poverty Reduction*. World Bank

¹² See, for example, the Cambodian Daily.

¹³ Otsuka, Keijiro 2001 *Population Pressure, Land Tenure, and Natural Resource Management in Selected Areas of Africa and Asia* Foundation for Advanced Studies on International Development http://elsa.berkeley.edu/users/bardhan/e271_f01/oct15.pdf

See also Ostrom and Hess, 2007 *Private and Common Property Rights* Workshop in Political Theory and Policy Analysis, Indiana University, W07-25 11/29/07 for lessons learned that have challenged the presumption that private property is necessarily superior to common property

tenure and concluded that, in the context of commercial tree growing under African and Asian communal tenure systems, the management efficiency of commercial tree fields is generally comparable to other ownership systems. He also found that communal land tenure institutions in no way deter investment, for instance in agro-forestry, irrespective of the levels of tenure security. Otsuka notes that in Sumatra, a number of commercial trees were planted under communal ownership systems as widely and actively as under more individualized ownership systems. These findings indicate that communal tenure institutions can provide sufficient incentives to invest in enhancing the productivity of the resource system, because there are internal rules that assign rights to individual households, while protecting the outer boundaries. The case of leasehold forestry in Nepal described below also depicts this arrangement.

1.5. Systemic and Legal Features of Communal Tenure Arrangements

In communal tenure the right-holder is defined as an exclusive group, where everyone is aware of the criteria for membership. Internally, group members – usually organized in households – can hold individual permanent or temporary rights to particular resource niches within the common property, whether a standing crop or a seasonal product, a piece of land, part of a lake, or trees in the forest, but these rights cannot be bestowed to an outsider. In indigenous communities, a few households of non-indigenous people may live in the village, and they may or may not be considered members of the right-holding group. In delegated management arrangements, group members must also be defined; often, the members are simply the community that holds communal tenure over a forest or a community fishery.

Customary communal tenure of village forest land can often be found within the boundaries of forests that formally are classified as state land, but the state does not interfere as long as the forest is not harmed; often the state may not have the manpower to manage the forest anyhow. In north Thailand, Mien indigenous villages each hold separate communal tenure of *matao* trees¹⁴ in legally gazette state Reserved Forests. Each village harvests *matao* nuts, and individual village households sell the nuts from ‘their’ particular niche. In this case, the customary communal tenure is for special resource niches of the village forest, which is within the state Reserved Forest. Outsiders can freely collect other resource units, such as mushrooms for local consumption.

Equity internally generally characterizes customary communal tenure regimes. The poor have equal rights to resources, but if they have no use for the resource units they can sell them or exchange for new products with others in the group. In India the experience from *Sukhomajri* shows how even the landless poor can hold rights in irrigation water held as communal tenure, and sell these rights to others in the group that own land. Thus, rights over impounded water in the dam area have been equally shared by both landholders and the landless in the village, so that benefits of rainwater harvesting are equally shared between community members. Furthermore, the initiative has ensured that a portion of the incremental gain is ploughed back to create social capital.¹⁵

¹⁴ *Arenga westerhoutii* Griff.

¹⁵ <http://povertyenvironment.net/files/CASE%20India.pdf>

Benefit sharing in the traditional customary systems may also have seasonal lotteries or, as said, tradable quotas so that the poor group members benefit from rights that they cannot use themselves. Similarly, it was observed for the Philippines that while membership in a social group (family, band or tribe) entitled a *Batak* person to resource access, there was no precedent for *excluding* access. Requests for food or land could not be denied to fellow kin and no one was likely to be turned away (as a sort of social insurance policy against frequent lean periods).¹⁶ As described below, Tay villages in northern Vietnam were seen to protest against the 1993 *Land Law* that individualized rights in paddy rice fields, as normally these fields would be re-distributed in the village each year according to needs and equity concerns.

The size of the land or resource as well as its natural endowment impacts the institutional arrangements, i.e. the size of the group. When collective rights are formalized the size of the right-holding groups differs because of variations in the size of the particular area that is subject to communal tenure. For example, each of the ancestral domains in the Philippines is made up of the combined territories of the whole indigenous people/tribe living in many neighboring villages, often synonymous with a present-day local administrative authority. In contrast, in Cambodia the ancestral domain – or territory recognized for collective titling – is that of one village only. In Cambodia many different indigenous groups, Brao, Tampuen, Kryng, and Jarai live intermingled in villages next to each other, and here the village historically has been the unit of land and forest management. In 1893, a French traveler remarked that “the savages’ society is essentially anarchic and it has only one centre, the village.”¹⁷ He further noted that, “in the same people, the villages maintain their autonomy and they are in no way grouped under one authority.”¹⁸

When formalizing communal tenure, two sets of rules must be defined. First are the group statutes or bylaws that set up the group constitutionally as a legal entity in the eyes of the state. These constitutional rules deal with the governance mechanisms, general assembly, committees, and the rules for changing the internal rules, and the relationship with local government authorities. Second are the internal operational rules, which are determined by the group. These internal rules establish the individual rights held by group members to agricultural land and specific resource niches. The internal rules pertain to how the land is managed and shared. The concrete internal rules can be very complex and vary tremendously among the various groups, to reflect both socio-economic characteristics, including status and rights of women, the size of the area, the nature of the resource units, the ecological characteristics of the resource system, including the conditions of biological reproduction.

Internal rules must stipulate the arrangements for particular resource niches. These tenure niches can be defined by the kind of products harvested (e.g. resin), the tools that can be used, the places where withdrawal can take place, and the seasons for withdrawal. For pastures, the internal rules would relate to kind of livestock that can be put on the commons (including when and where), and/or rules for lending, mortgaging or selling rights in the resource. Group members know the characteristics, the

¹⁶ McDermott, M.H. 2000 *Boundaries and Pathways: Indigenous Identities, Ancestral Domain, and Forest Use in Palawan, the Philippines*. IASCP 2000.

¹⁷ Cupet, P. 1998 *Among the Tribes of Southern Vietnam and Laos*, White Lotus 1998 by Walter E.J. Tips, originally published as ‘Chez les Populations Sauvages du Sud de l’Annam’ in *Le Tour de Monde*, vol 65, 1893 Paris

¹⁸ Ibid.

variability and the internal claims on resource niches, as well as the resource units that can be sustainably harvested over time and space. Some practical academics suggest that one should avoid getting lost in the “intricacies and nuances of these regimes”;¹⁹ however, the robustness and fairness of the internal rules are decisive factors for the communal tenure institutions’ sustainability

The internal rules in delegated management are less complex, as the community’s rights in the resource system are not permanent and the resource is (somewhat) uniform. Because the state still owns the land or water, the community cannot lease out the community forest/fishery or mortgage it for loans in the bank. Where communities already practice an informal customary communal tenure, the new legal rules that formalize the arrangement tend to adapt to the customary rules, as with community forestry in Nepal. It is more difficult when delegated management institutions are established or induced as communal tenures in open access areas, because questions will arise concerning the precise boundaries of the area, the identity of the rights-holders, and how to avoid a situation wherein only the influential members benefit.

Both kinds of rules must be strong; otherwise the system will collapse when faced with increasing pressures and penetration by market forces. Therefore indigenous communities seeking state recognition of their ancestral domain need guidance on how to formalize their internal rules. These rules must deal with not only how to share the agricultural land and the forest resources, but also the rights of the individuals to bequest or mortgage his or her rights internally to descendants and of the community to lease out communal rights. Also the rights of the non-indigenous persons living in an indigenous community must be defined.

1.6. The Need for Match between Institutional Arrangements and Resource Characteristics

A resource system may be subject to many kinds of rights depending on its characteristics, such as the products or resource units it holds or how large an area the resource covers. A forest, for example, may be subject to a range of customary rights held by adjacent villages, with some having rights in all resource units, some only in fodder leaves, and some only in dead litter from the forest floor for compost, while others have timber rights as well. There is also a significant difference between high-value resource units such as timber and subsistence-value resources units such as mushrooms. Where products have high market value, there is a risk of monopolization by influential stakeholders if internal rules do not prevent this.²⁰ Characteristics, such as the fugitivity of fish that swim across boundaries also impact the institutional arrangements that govern their use.

In forests with resource units of market value, such as the *matao* forest palm trees in north Thailand where a Mien village has appropriated the common pool resource inside the state Reserved Forest, all households in the village share this resource. Each community household holds rights under communal tenure to a particular stretch of

¹⁹ Lynch, O. 2006 *Securing Community-based tenurial rights in Tropical Forests of Asia: An overview of current and prospective strategies*, WRI, Centre for International Development and Environment

²⁰ Andersen, K. E. 2005 “Institutional Flaws of Collective Forest Management”, p.349-353 in *AMBIO, a Journal of the Human Environment*, Stockholm, Sweden

forest. The characteristics of *matao* resource units are that these trees are evenly spread out in the forest, and no one can monopolize the harvest of the nuts, as is the case with resin trees in eastern Cambodia and Laos. In both instances, the strong social networks in indigenous communities mitigate the risk of monopolization. The communal tenure's internal rules would allow for individual appropriation of specific high value resource niches, while subsistence products are not partitioned.



The Mien village of indigenous people in the Nan province of Thailand is located in Reserved Forest of the government. Here households can collect Matao nuts from wild palm trees. The Mien village has divided the forest inside the village territory into resource niches claimed by individual households. One household can collect from one stream to the next, another household between two other streams. In the neighboring village the resource endowment of matao is less and the households of that village have decided that half of the households collect in alternate years. The map is an outcome of a small research project.

In cases where the resource units represent a very high market value, such as timber, the resource system cannot easily be partitioned equally, nor can the harvesting be partitioned. In such cases, the income from timber sale accrues to the whole village for joint use – for instance, the building of a school or a road, as noted in Nepal's timber harvesting community forests. Where the resource system covers a large area, such as an ancestral domain in the Philippines, the communal tenure of the domain is partitioned according to residence, agricultural land, products that can be harvested, kinship and potential ancestral individual claims.

Resource units are fixed in the ground (trees or grassland) or fugitive (fish). Fugitive resource units may be subject to different kinds of tenure rights, including communal rights. Government-sponsored community fisheries can be found in places that historically employ customary tenure arrangements, such as in the Tonle Sap in Cambodia. Elsewhere, particularly in rivers where boundaries for fish movement cannot be established, many fisheries are open access. Thus, lakes are more amenable to communal tenure because of the ability to establish boundaries.

In some countries the government may auction the rights to catch fish in a lake annually to the benefit of a well to do businessman who empties the lake capturing the resource rent. Or the government may try to change the system to benefit the poor. Fisheries in Oxbow Lakes in Bangladesh in the 1990s provide an example of a fugitive resource that became subject to an induced communal tenure. An International Fund for Agricultural Research and Development (IFAD)-Danida project in Bangladesh in

the 1990s aimed to assist poor (Hindu) fishermen to form groups and establish temporary communal delegated management tenure in fisheries of several inland oxbow lakes. The idea was that the groups would earn an income from increasing the productivity of the resource system by releasing fingerlings of carp that used different ecological niches (e.g. bottom and surface feeders) that the communities bought through micro credit from an NGO. Poor fishermen resident in villages around the lake made up the rights-holders in the Lake Management Group – an induced institution. Members had shares according to internal rules determined by the village's location, technology applied, season and credit/investment brought forward; the overall resource system, however, was held as a communal tenure. The way the use of nets and brush piles (fish aggregating devices) as a technology to catch fish and the variation according to season of the year were mechanisms that were clearly aligned with the institutional framework of an all-encompassing Lake Management Group and local village-based groups in a nested hierarchy. The sale of fish allowed for repayment of loans to the NGO.

Inducing a communal tenure institution in this Bangladeshi fishery was not easy. While the internal distribution of rights *within* lake management group followed the above features related to equipment, location and season, the system also created outsiders. This raised issues about who could be a group member in induced institutional development – only those who took credit to release fingerlings or also others? Questions also arose about rights to 'miscellaneous fish', which occurred naturally and were *not* a result of an investment in carp fingerlings; and also about the rights of female-headed households that were not members of the Lake Management Group, and their rights to 'miscellaneous fish' (non-carps). Did the changes to the resource system, through release of fingerlings, mean that the Lake Management Group had acquired *all* rights to the benefit stream from the resource, including rights in the miscellaneous fish? Furthermore, what about the villagers who owned the tilled paddy land surrounding the lake in the dry season that would be submerged in the rainy season – what rights did they have? Jute-retting families held other kinds of rights independent of season, but since their tenure niche was not fish there was no conflict.

The example above shows how technology, season and resource characteristics impact on the way viable institutional frameworks for communal tenure can be induced. For most natural systems it is necessary to analyze whether the products harvested are available seasonally or year-round; their natural distribution in the forest, rangelands or lakes, and whether the products are amenable to monopolization; whether the productivity can be enhanced, for example by fingerlings or land enclosures; whether the resource systems can be partitioned for particular (temporary) niches; whether the products have a market or mainly a subsistence value; whether the resource system is endowed with high natural capital or is degraded; whether it contains only uniform natural resources such as a forest, an irrigation system, or a lake, or diverse resources, such as agricultural land including paddy land and swidden fallows, forests and streams. It must also be considered if the resource system can be partitioned with equal shares to all, according to internal rules, while still keeping its status as *one* communal title vested in a local community or group; and, finally, whether it is possible meet the costs of initiating and maintaining collective action.

Where the state cedes the land to the incorporated indigenous community, the collective rights of the community-group members are permanent, as long as they

remain a single community. This makes the full consensus and thorough understanding of their internal benefit sharing rules by all members highly important. The rationale behind the Cambodian Land Law when it was formulated in the late 1990s was of a community of indigenous peoples, where all would share and take turns in having rotating access to swidden lands for temporary rice crops, while the rest would lie fallow. However, in the 2000s the development of individual households' perennial cash crop fields of cashew nuts in old swiddens changed the resource system characteristics, and could threaten community rules to ensure equity and community cohesiveness if they did not adapt. Yet, in Cambodia's indigenous communities, villagers consider collective ownership to be their culture, their preference and the best protection against land loss to outside agribusinesses and internally they set a ceiling of 5 ha of cash crop. The indigenous communities in Cambodia are small and village-based; the villages are 'autonomous', and, as previously noted, individuals internalize norms with non-conformity resulting in guilt, anxiety and ostracism. Thus, the individual households are generally still able to resist the attraction of short-term benefits, despite outsiders' frequent efforts to tempt them relinquish their land.

The following sections highlight procedural lessons learned from communal land titling in Asia, through both the permanent titling of indigenous communities' lands as well as the delegated management of resource systems. In Chapter II the characteristics of private communal tenure of the indigenous communities in the Philippines and Cambodia are examined, followed in Chapter III by the analysis of the time-bound – but renewable – delegated management of a forest held in communal tenure by a community group. The characteristics of communal tenure arrangements discussed in Chapter I are found typified in each of these modalities; the combination of these features is decisive for the robustness and sustainability of communal tenure.

2. Communal Tenure as Indigenous Peoples' Collective Rights

2.1. Background for Indigenous Peoples' Collective Rights

A common characteristic of indigenous people is the centrality of their connection to their land and natural surroundings, which provides for social identification and for spiritual and cultural distinctiveness. It reflects indigenous peoples' economic and cultural dependence on ancestral lands.

Indigenous communities are widespread throughout Asia; however their representation vis-à-vis a country's total population varies highly. In Southeast Asia, the *Philippines* have around 140 indigenous ethno-linguistic groups representing 12% of the country's total population. They live in 50 of 78 provinces. In Cambodia, on the other hand, indigenous peoples make up a mere 1% of the population. They are divided into many different small groups, which are located mainly in two eastern provinces, and speak a diversity of Mon-Khmer and Austronesian languages. The Lao PDR is highly diversified with 49 different ethnic groups making up approximately 40-50% of the population.²¹ In Thailand, ethnic groups make up 2% and in Malaysia up to 5% of the population, depending on the definition used. In Sarawak and Sabah, Malaysia, the indigenous groups represent the majority of inhabitants, and in Viet Nam, ethnic minorities represent 14% of the population living in the north and in the Central Highlands. Mainland China recognizes 55 other 'nationalities', including Russians and Uzbek, comprising 105 million people, mostly concentrated in the northwest, north, northeast, south, and southwest. In China and other countries where the terms 'ethnic group' or 'ethnic minority' are used, long-standing minorities, or indigenous peoples, are grouped with newer ones, such as Khmer in Vietnam, or Russians in China.

In South Asia, India's Scheduled Tribes constitute 10% of the population, amounting to 80 million people, who by the Forest Rights Act 2006 have been singled out as the collective recipients of rights in forest land. In Nepal there are now over 50 recognized groups of indigenous peoples that comprise about 40% of the total population.²² In August 2007, Nepal ratified the ILO Convention on Indigenous and Tribal Peoples (No.169) and became the first country in South Asia to ratify this Convention and the second Asian country (following the Philippines) to do so. In Bangladesh, the Chittagong Hill Tracts (CHT) constitutes the home to 12 indigenous groups, which have had a strained relationship and an open dispute with the government in Dhaka due to land loss to immigrants from the lowlands. Nationalization of lands and forests, creation of reserve forest, ignoring the customary rights of indigenous people on land and forest, the construction of a hydroelectric dam, and the frequent displacement of indigenous people and resettlement of lowland people into CHT have had severe impact on use and management of land and forest resources in the region.²³

In an international human rights context, indigenous peoples are deemed to have primordial rights to their lands. This is expressed in international declarations,

²¹ Government of Laos Peoples' Democratic Republic 2010 *People and Culture of Laos*
<http://www.laoembassy.com/people&Culture.html>

²² ILO 2008 *Protecting the Rights of Indigenous Peoples in Nepal*
http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Broadcast_materials/Documents/lang--en/docName--WCMS_097891/index.htm

²³ Rasul, G. and G.B.Thapa. No date. *State Policies, Praxies and Land-use in the Chittagong Hill Tracts of Bangladesh* n.d. <http://www.sasnet.lu.se/EASASpapers/8GolamRasul.pdf>

conventions and covenants (e.g. the 2007 UN Declaration on the Rights of Indigenous Peoples, the ILO's Conventions 107 and 160 on Indigenous and Tribal Populations (held in 1957 and 1989, respectively), as well as in selective national legislation. Internationally, some scholars have questioned the concept of an essentialist indigenous identity. They see ethnic identity as situational and performative or indigeneity not in terms of a set of cultural characteristics, but as a process of (a) ethnic or territorial marginalization, (b) self identification as indigenous, and (c) identification as indigenous by other actors including the transnational indigenous movement.²⁴

The international framework stipulates self-identification as the basis of an indigenous community, along with culture, language, history and territory. This stipulation is at odds with some Asian countries' preference to use the term ethnic minorities or ethnic groups to categorize long-standing minorities together with more recent ethnic immigrants, such as the Khmer in Vietnam, or Russians in China. As a result of this practice Asian indigenous peoples feel that they suffer equally serious losses of rights due to the domination by peoples of non-European descent, and have consistently objected to these discriminatory arguments. For indigenous communities, the political objectives of communal land claims carry a demand for clear recognition of local people's livelihood dependency, poverty reduction, ancestral rights and the need to compensate for grievances that result from a collective experience.

The following highlights legislative variations in indigenous peoples' land rights in selected Asian countries followed by a more detailed analysis of the requirements and processes of implementing communal tenure for indigenous communities in the Philippines and Cambodia.

2.2. Legislative Variations of Indigenous Communal Tenure

In comparison to developing countries in developed countries indigenous peoples' rights have been argued in court to refute the concept of *terra nullius*. Under this doctrine, for instance, in Australia, empty, unsettled or unpopulated land could earlier be claimed by anyone, who would settle and develop it. But the Australian Supreme Court abandoned it in 1992 in the Mabo Decision.²⁵ This decision deemed the doctrine to be culturally arrogant in that it presupposes that land, which is not developed or used – as a European would use it - is undeveloped or unpopulated. The decision recognized rights the indigenous peoples' ancestors held when the Crown assumed sovereignty. The Crown could not grant those rights. The people already had, and have, them.²⁶ In Cambodia legislation is in place, but cannot support court cases easily and the indigenous peoples in South and Southeast Asia do not have the strength to go

²⁴ Melissa Marschke, David Szablowski, and Peter Vandergeest *Indigenous Peoples Scoping Exercise. Synthesis Report*. IDRC Working Paper 21, January 2007. This paper does not discuss the definition of indigenous peoples' identity. Some analysts hold that identity is in part formed through the process of struggle in a world of unequal power relations and that identity is situational and, as such, responds to threat and opportunity. Thus, rhetorical strategies and political alliances are part of what constitutes identity (Li 2000). If the view of ethnic identity as a given, primordial identity is rejected in favor of the idea of identity as an unstable historical construction, the question of agency (and 'authenticity') remains. In the UN Declaration on Indigenous Peoples' Rights, self-identification is the criterion.

²⁵ *Mabo and Others v. Queensland* (No. 2) (1992) 175 CLR 1 F.C. 92/014

²⁶ Neate, G. 2002 *Valuation of Land Subject to Native Title*, 24-28 June 2002, Statutory Regimes, Australian Property Institute and the University of Queensland

to court; NGOs, however, such as Ad Hoc and CLEC in Cambodia support court cases for indigenous communities against land grabbing and they support their claims for communal land title.

The Land Law of Cambodia 2001 was developed with help from several international NGOs and the Asian Development Bank (ADB) that all were instrumental by end of the 1990s to have Chapter 3 on 'communal immovable property' of monasteries and indigenous communities, respectively, included in the Land Law.²⁷ Likewise in the Philippines, the indigenous communities themselves along with civil society supported the promulgation of a separate law on indigenous peoples' rights.

In Malaysia the Dayak's rights to land were recognized and protected by law under the 1957 *Sarawak Land Code* through its alignment with the *adat* or customary law in Sarawak, which does not recognize private ownership of land. The usufruct rights system allowed the individuals to use the land but the community – as a group – exercised the legal rights. As explained by a native elder, "The land belongs to the countless numbers of people who are dead, the few who are living, and the multitude of those yet to be born".²⁸ In later years, however, these rights were not strong enough against the power and influence of the forestry sector industries, and timber licenses were issued over Native Customary Lands in violation of the Sarawak Land Code. In 1996 the *Forests (Amendment) Ordinance Part II on Forest Reserves* gave the Minister of Forests power to extinguish all subsisting rights or privileges over a forested area by notification in the government Gazette.²⁹

These developments have led the Dayak repeatedly to call for respect of their land rights, especially over the last two decades, sometimes leading to an intensification of conflicts between indigenous peoples and the logging and plantation industries. All Native Customary Land areas would be considered 'idle land' in need of large-scale development to alleviate poverty – an argument used in the 1970s to promote logging and industrial trees plantations. However, in a 2001 court case at the High Court of Kuching, Malaysia, the judge ruled in favor of Iban communities seeking the removal of the Borneo Paper and Pulp Company from their lands. The ruling implied that natives in Sarawak enjoy collective rights to their customary land, and that these rights extend over all the lands they have customarily used and occupied (including the 'tall forest' and not just their areas of permanent cultivation). Moreover, the ruling found that their rights do not depend on an affirmative act of recognition by the state.³⁰

Further cases that contest the extension of logging concessions over native lands and questioning the constitutional validity of forest laws and extinguish native rights in

²⁷ ADB agreed to the proposed revision of the 1992 Land Law as one of the policy reform measures under its Agriculture Sector Program Loan and provided technical assistance for drafting the new land law of 2001. See Indira Simbolan 2009 'Law Reforms and Recognition of Indigenous Peoples' Communal Rights in Cambodia' in ADB *Land and Cultural Survival. The Communal Land Rights of Indigenous Peoples in Asia* Edited by Jayantha Perera

²⁸ Colchester, M. 1992

²⁹ Perera, Jayantha 2009 'Land Development Policies and the Impoverishment of Indigenous Peoples in Sarawak, Malaysia' in ADB *Land and Cultural Survival. The Communal Land Rights of Indigenous Peoples in Asia* Edited by Jayantha Perera

³⁰ <http://news.mongabay.com/2010/0127-sarawak.html>

areas that were unilaterally deemed to be Permanent Forest Estate are now expected.³¹ Although the ruling set a precedent that strengthened native claims to customary lands in Sarawak, the community of Sungai Sekabai has been battling developers ever since. A timber company at the root of the dispute has cleared much of the forest around the community, replacing it with acacia plantations, despite the 2001 court decision. A new court case, supported by international legal NGOs, is pending. Similarly in Indonesia, the rule of *adat* and customary laws and tenure previously prevailed, but the later 1999 Forestry Law classified *Adat* Forests as State Forests vesting rights in the state.³²

In India, tribals have been singled out as a communal category of right-holders under the *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act* 2006.³³ Its introduction states that it is an “Act to recognize and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded...” Clearly, the Act is meant to address age-old grievances. Further legislation has been realized as activists and human rights movements challenged the eminent domain of the government and called for tribal rights and a secure constitutional recognition thereof in the 1990s, leading to the 73rd Amendment of Constitution and a separate piece of legislation in 1996, as an annexure, specifying special provisions for *Panchayats* in ‘Schedule V’ areas (tribal). It simultaneously brought the village council (the *Gram Sabha*) to center stage and recognized the traditional rights of tribals over community resources – meaning land, water and forests. The Joint Parliamentary Committee made the local village government of Gram Sabha the final authority in the process of rights settlement and removed the land ceiling of 2.5 hectares in order to cater to shifting cultivators’ fallow lands.³⁴

In Vietnam, ethnic minorities represent the largest proportion of impoverished communities, comprising 44.7% of the poor and 59% of the hungry in Vietnam.³⁵ As such, 14% of them are singled out for special attention through poverty reduction programs, which often address land-related issues. Historically, communal land tenure was the norm among Vietnam’s indigenous communities. During colonial rule, French researchers noted that, “there is no land in the Moi country [Central Highlands] without an owner but that most of it was collectively owned”³⁶ and they continue to

³¹ Colchester, Marcus, Tom Griffiths, Fergus McKay and John Nelson. 2004 “Indigenous Land Tenure: challenges and possibilities”, in *Land Reform, Land Settlement and Cooperatives*, 2004/1 Groppo, J (Ed.) FAO

³² Contreras-Hermosilla, A. 2005 *Strengthening forest management in Indonesia through Land Tenure reform: Issues and Framework for Action* with contributions from Elfian Effendi, Juni Thamrin, Sulaiman Sembiring, and Martua Sirait http://www.forest-trends.org/documents/files/doc_107.pdf

³³ Perera, Jayantha 2009 ‘Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006: A Charter of Forest Dwellers’ Rights?’ in ADB Land and Cultural Survival. The Communal Land Rights of Indigenous Peoples in Asia Edited by Jayantha Perera

³⁴ Patnaik, S 2007 *PESA, the Forest Rights Act, and Tribal Rights in India*. Proceedings from International Conference on Poverty Reduction and Forests, Bangkok, 2007. One state, Orissa which hosts many tribal communities has by 2009 distributed 81,865 acres of forest land among tribal families, 2 acres per family. The Orissa Land Revenue Minister is quoted saying “Of the total 304,530 applications by tribals living in forests, 28,400 people had been provided with land rights documents (*pattas*).” <http://www.theindiapost.com/2009/10/13/orissa-gives-forest-land-rights-to-28400-tribal-families/>

³⁵ World Bank 2009 *Country Social Analysis. Ethnicity and Development in Vietnam*.

³⁶ Gourou, P. 1945 [1940]: 455 quoted in WB 2009, p.167

explain that, “For the duration of its use the *ray* [swidden field] is the private property of the one who has cleared it; once abandoned, it reverts to the community, and the person who had cultivated it retains no rights to use it”.³⁷ The French gradually realized that each village occupied a definite territory, and that a non-native to the village had no right to cultivate a parcel within the territory without authorization.

Vietnam, like other former *de jure* communist countries, such as Lao PDR and China, has now embraced the market and given up on communist style cooperatives in order to individualize rights in agricultural land as personal/household use rights. The 1993 Vietnam Land Law was the first step; however, many ethnic minority communities contested private land titling (of usufruct rights). Introducing private rights in communal lands became problematic for the Vietnamese state because many different people could use the same plot of land at different points in time. It was difficult to determine who the single owner of any given plot of land was. The ‘allocation as is’ principle meant that land would be allocated to the household that was *currently* using it, which created a differentiation between households within and among villages. In some Tay villages in Son La province, communities accepted that so-called ‘forest land’ (degraded uplands) would be allotted to households; however, they did not accept that irrigated rice fields would be privatized, as these had long been under collective management and distributed periodically (once every three years) based on the number of members of the household.³⁸ The Tay wanted this traditional system recognized, so they refused to accept individual land tenure certificates for these fields.

A revised Land Law of 2003 now in Vietnam provides in Article 71 for a kind of communal land tenure stating that, “land allocated by the State to a community of citizens shall be used to preserve the national identity through the habits and customs of ethnic minority people”.³⁹ This wording “community of citizens” may be a response to major public conflicts in the Central Highlands, where community land was an issue that figured prominently in the 2001 and 2004 public protests by thousands of ethnic minority people, who demonstrated in towns and cities. This led to the deployment of national army and police forces and the arrest of an unknown number of people.⁴⁰ This 2003 revision means that it now is legally possible to institutionalize communal tenure of lands, but it has not yet been done. Occasional remnants of communal land tenure are observed. A World Bank study on ethnicity and development in Vietnam highlighted that, among others, Quang Tri province has showed that communal land tenure rules have remained predominant over state rules, that land within the communities was still allocated to households each year by designation of the village elder and that individual private land tenure rights were not widespread or recognized.⁴¹

In the Central Highlands of Vietnam the indigenous peoples may have wanted to maintain their old system of communal land tenure from before the mode of communist collectivization, but it is increasingly difficult due to pervasive changes and in-migration of lowland Vietnamese Kinh households following reunification.

³⁷ Ibid.

³⁸ Sikor, T. and D. Truong 2002 “Agricultural policy and land use changes in a Black Thai commune of Northern Vietnam, 1952-1997”, *Mountain Research & Development* 22(3): 248-255

³⁹ Government of Vietnam 1993 *Land Law*

⁴⁰ Kerkvliet, B.J. 2006. “Agricultural Land in Vietnam: Market tempered by Family, Community, and Socialist Practices”. *Journal of Agrarian Change* 6(3), 2006

⁴¹ World Bank 2009 *Country Social Analysis, Ethnicity and Development in Vietnam*

Between 1976 and 2001 the population of the four Central Highlands provinces more than tripled from 1.2 million to over 4 million, yet the indigenous population only grew from 600,000 to approximately one million. Migrants, mostly lowland Vietnamese Kinh, moved from the plains to new economic zones in the Central Highlands and now occupy the ethnic minorities' communal lands. Also ethnic minorities from the north have migrated to the Central Highlands as they themselves were squeezed out of their own lands.

Presently, no examples of indigenous communal right-holding systems in Vietnam remain, except possibly in very remote villages or as a new modality of community forestry. Communities, academics and NGOs have criticized this development, but where the market has taken over and perennial commercial crops are growing in the fields, it will be very difficult to revitalize communal tenure for agricultural lands except to demarcate outer boundaries and develop internal rules against selling the land to outsiders. For the ethnic minorities, the communal tenure option of Article 71 of the Land Law may help them (if implemented to their benefit) to withstand and/or be compensated when Vietnamese or Chinese companies wish to make use of their lands for coffee, rubber or heavy bauxite mining.⁴² As in Cambodia and Philippines, NGO and donor support will be necessary to build local capacity for requesting communal tenure. Recognized communal tenure would also feed into rights of compensation if forced to give up the land.

For several years, in the Lao PDR, the National Land Management Authority (NLMA) has been considering communal tenure (used by many of the ethnic groups that make up almost half of the population) for selected areas. Studies on modalities for communal tenure carried out for GTZ⁴³ have raised many issues.⁴⁴ There is heavy competition from foreign direct investments (FDI) by Chinese, Vietnamese and Thai agribusinesses obtaining concessions to grow jatropha, rubber, sugarcane, and cassava on the traditional common lands of local communities. Also, in terms of land administration, the government of Lao PDR would need to solve the problem of taxation of communal lands, as all farmers must pay taxes. Assuming that communal lands include fallows, whether taxes will be paid on fallow land, and the question which individuals or what body must pay the tax on communal lands, remain unresolved issues. The NLMA has issued Ministerial Instruction 564 on *Adjudications Pertaining to Land Use and Occupation for Land Registration and Titling* (2007), which is pursuant to the Land Law (2003) and Property Law (1990); it defines collective land and establishes the rights and limitations associated with it. This instruction, however, has yet to be implemented. The government's push for land registration in Lao PDR from 2011 onwards will need heavy facilitation to ensure communal agricultural and forest land is registered.

In East Timor by mid-2009 a debate was ongoing on the draft Land Law, which did not allow for registration of traditional communities' collective titles. The draft law states that ownership rights shall not be granted to a claimant for a property located "within the State's areas of public domain", which, in fact, overlays the communities'

⁴² See, for example, <http://www.viettan.org/spip.php?article8408>

⁴³ Gesellschaft für Technische Zusammenarbeit (the German development corporation)

⁴⁴ Seidel, K., K. Phanvilay, B. Vorachit, L. Mua, S. Boupphachan, R.B. Oberndorf. 2007 *Study on Communal Land Registration in Lao PDR*. Land Policy Study No 6 under LLTP II, GTZ

customary lands.⁴⁵ There is some limited provision in the draft relating to communal lands, but – ultimately – the government will have the final say on who may use communal lands in East Timor, the only obligation is a consultation with the relevant traditional community, according to the present draft's Article 26. Article 19 provides that only national legal entities may hold ownership rights, a stipulation of concern among stakeholders because traditional communities in East Timor are not considered a legal entity, as there is no law that confers corporate status on traditional communities.

In East Timor, as elsewhere, communities, academics and civil society are urging governments to recognize customary rights. Although stakeholders recognize that there is also an ongoing individualization of rights in cultivated community areas, they hold that these rights should belong – first of all – to the customary landholders as a communal category of proprietors (like Tribals in India). Stakeholders calling for communal title in the development of East Timor's Land Law look to Mozambique for guidance. Here legal protection of communal title is obtained through customary and good faith land occupation.⁴⁶

China has a law on Regional Ethnic Autonomy that defines the relationship between the central government and the ethnic autonomous regions; however, there is no provision for communal land titling of indigenous communities, as communal tenure is considered to be primitive and backward. Features in the *People's Daily Online* describing ethnic minorities refer to the “situation in Jinghong, Menglong and Xiding... (where) *primitive* communal land ownership still remained” (emphasis added).⁴⁷

2.3. Indigenous Peoples' Special Communal Tenure in the Philippines and Cambodia

The two countries are compared below to examine details of two of the three processes that are of particular importance towards collective land registration for indigenous peoples:

- incorporation of the community as a legal entity, and
- mapping of territories.

The third feature, the intricacies of the formulation of internal benefit sharing rules and matching these to the characteristics of the resource system has been illustrated above already.

Indigenous peoples represent 12% and 1% of the Philippines and Cambodia's populations, respectively. The indigenous peoples in the Philippines have a separate legal act of 84 articles, the *Indigenous Peoples Rights Act* (IPRA) of 1997 that defines their rights, while Cambodia has a *Land Law*, 2001, with only 6 articles. In the Philippines a National Commission for Indigenous Peoples (NCIP) was set up to cater

⁴⁵ Warren, W. 2009 “New Brazilian Land Law – Lessons for East Timor? *East Timor Law and Justice Bulletin*. <http://easttimorlegal.blogspot.com/2009/06/new-brazilian-land-law-lessons-for-east.html>

⁴⁶ Norfolk S and C. Tanner 2007 *Improving Tenure Security for the Rural poor – Mozambique*. Country case study, support to Legal Empowerment of the Poor. LEP Working Paper 5. FAO.

⁴⁷ “The Hani Ethnic Minority” *People's Daily Online* n.d. <http://english.people.com.cn/data/minorities/Hani.html>

to communal land titling and issue the Certificates of Ancestral Domain Title (CADT). Titling has already taken place in the Philippines although initially a slow process. By February 2001, the NCIP national office had approved only 9 of the 181 CADT applications.⁴⁸ But subsequently it has gained momentum.

Cambodia's Land Law provides in chapter 3 for the "Immovable Property of Indigenous Communities"; Article 23 of this chapter defines an indigenous community as "...a group of people that resides in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use". Article 26 explains that ownership of immovable property "...is granted by the State to the indigenous communities as collective ownership. This collective ownership includes all of the rights and protections of ownership as are enjoyed by private owners."

Titling proper has not yet taken place in Cambodia and no special agency has been established or authorized like the Philippines. In Cambodia the responsibility lies with the Ministry of Interior (recognition of village as legal entity), the Ministry of Rural Development (certifying that the community is, in fact, indigenous by having own language, customs, rituals and the like) and the Ministry of Land Management that will measure the land and issue title when and if the other two ministries have endorsed the process and when and if the community has developed internal rules.

In Cambodia the community must incorporate as a legal person and develop constitutional statutes and bylaws to be endorsed by the Ministry of Interior. Thereafter, the community must formulate internal rules for land management and sharing of the land. Once both set of rules are in place the Ministry of Land Management can issue collective title. In the Philippines there is no requirement for legal incorporation. This requirement of a legal status may have been resolved in the Philippines by awarding collective title to local government institutions in areas where the local populations are mainly indigenous. For example, the Higa-onon is a large ancestral domain, covering 10,054.88 hectares within the areas of the two local government authorities of Impasug-ong and Malitbog in Mindanao, hosting seven to eight communities, forests and sacred places.⁴⁹

Legal corporate status is the basis for a more permanent group right in communal tenure. It goes for indigenous peoples' title but is also applicable to some extent for delegated management. It allows the group to interact with society at large as a single body.⁵⁰ The group must be well defined. In order to be enforceable against the state the rights must be exclusive and there must be certainty about the rights-holders.⁵¹ In

⁴⁸ ADB, 2002a *Indigenous Peoples / Ethnic Minorities and Poverty Reduction – Philippines*.

⁴⁹ Abeto, R, Z. Calilung, J. P. Talubo and B. Cumatang. 2004 *Community Mapping in the Philippines: A Case Study on the Ancestral Domain Claim of the Higa-onons in Impasug-ong, Bukidnon* Paper presented by PAFID at Regional Community Mapping Network Workshop, Quezon City. See also Marshall, G.R. 2008 on nested hierarchies in tenure relations

⁵⁰ A paper on 'Best Practices' by Daniel Fitzpatrick treats four specific legal options for community incorporation, namely (1) a minimalist approach, (2) the 'agency' method, (3) incorporation of customary groups, and (4) land boards. See 'Best Practice' Options for the legal Recognition of Customary Tenure, *Development and Change* 36(3): 449–475, 2005

⁵¹ Lindsay, J.M. 1998 Creating a legal framework for community-based management: principles and dilemmas - adapted from a paper presented at the International Workshop on Community-Based Natural Resource Management held from 10 to 14 May 1998 at the World Bank, Washington, DC.

Cambodia three pilot communities had their constitutional bylaws endorsed by the Ministry of the Interior by 2008, and up to 40 communities have since gained legal status with the help of NGOs. A Sub-Decree on *Procedures of Registration of land of Indigenous Communities* (pursuant to the Land Law) in 2007 stipulated that besides the constitutional bylaws endorsed by the Ministry of Interior also internal rules must be in place before a title is issued; however, no community has formulated clear internal rules yet by 2010, as this requires legal support, which is not readily available.

The right-holding entity needs definition as does the territory itself to which communal tenure is claimed. The territory of the ancestral domains in the Philippines is several thousand hectares covering many communities. The areas include ancestral lands, forests, pasture, residential and agricultural lands, hunting grounds, and worship areas. They also include lands no longer exclusively occupied by indigenous cultural communities, but to which they had traditional access – particularly the home ranges of indigenous nomadic or shifting cultivators. Ancestral domains also include inland waters, coastal areas and natural resources therein. The IPRA grants the indigenous peoples in the Philippines full authority to determine the extent and boundaries of ancestral lands through self-delineation, and to utilize and dispose of the resources inside their ancestral domains. Related to this authority for use and disposal to resources, the law importantly stipulates that the indigenous peoples and their communities have the responsibility to maintain ecological balance and restore denuded areas.

Quite differently, in Cambodia, where the village is the unit for collective tenure, the claims are for less than 1,000 hectares and for only one community. Unlike the Philippines' processes of self-mapping and self-determination of boundaries, in Cambodia, even though all indigenous communities have undertaken Participatory Land Use Planning and Mapping and defined boundaries among themselves, the Ministry of Land Management decides the extent and boundaries of ancestral lands after the so-called state public land has been mapped.

It is notable, though, that neither the IPRA nor the Cambodian Land Law link the definition of an indigenous rights-holding community to any unique spatial reference of a territory; therefore, a community's claim refers to the territory where they are at the time of application.

Despite the significant procedural differences between Cambodia and the Philippines in terms of their collective titling, both countries rely on support from NGOs, donors and development banks for implementation.



The Kui people in Cambodia conducts a ceremony with a village priest in the forest to jointly confirm their aim to protect the forest and not let any villager 'sell' the forest to outsiders.

In both Cambodia and the Philippines the mapping of territories has provided tools for the communities to build intra- and inter-community (with neighboring villages) consensus, as well agreements with the government. Maps that depict a communal territory also help identify the community as *a* single body and they help reinforce community rights against potential claims by external vested interests wishing to acquire the same land.⁵²

2.4. Mapping

Historically, maps have been produced and controlled by states or colonial powers to support territorialization and control; however, today's disenfranchised groups can also use maps to assert claims.⁵³ Civil society organizations with the tools and means to produce maps have supported the mapping of indigenous peoples' lands in the Philippines. The Talaandig people, who became part of a new movement of indigenous surveyors through the assistance of the NGO Philippine Association for Intercultural Development (PAFID), are an often-cited success story. Equipped with global positioning system (GPS) receivers, these native surveyors use GPS tools to create accurate three-dimensional maps through an innovative process known as participatory 3D modeling, to facilitate cooperation and effective decision-making among indigenous communities and government planners.⁵⁴

This process started with a series of consultations during which key group members, such as elders and leaders, provided information about their territory and discussed their needs and obligations with regard to the land. Sketch maps were produced to identify boundaries and important geographical features. The dimensions and coordinates of these features were verified by GPS ground surveys, and the sketch maps were refined. The mapping followed the principle of 'self delineation', as mandated by the IPRA guidelines for mapping of ancestral domains. Communities validate the territorial maps before they are submitted to the NCIP for review and issuing of title. In just over five years, PAFID and its community partners have mapped over a million hectares of ancestral domains. One project supported by IFAD (2003-2006) worked with PAFID on participatory mapping of the Caraga Region of Northern Mindanao. It supported land use management planning of the ancestral domains and undertook capacity building, in the end supporting a claim of 100,000 hectares of ancestral domains.⁵⁵ The demarcation of territory enhanced local awareness of land management issues and it drew in younger people as 'mappers' and the elders as sources of knowledge.

In Cambodia mapping has also been an important tool in preliminary delineation of village lands and solving boundary issues among neighboring villages. The respective maps each cover the lands of only one village as the future legal right-holding entity. Supported by NGOs and a United Nations Development Program (UNDP) local governance project approximately one hundred indigenous communities' land use and

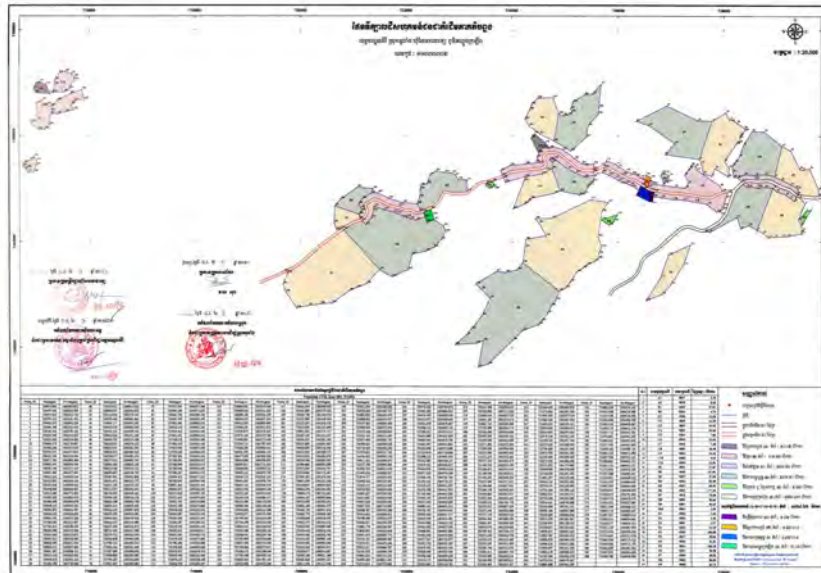
⁵² See also Tanner, C, P.de Wit and S. Norfolk October 2009 'Participatory Land Delimitation' *Land Tenure Working Paper 13*, FAO

⁵³ International Land Coalition 2008 *Participatory Mapping as a Tool for Empowerment – Experiences and Lessons Learned from the ILC Network*.

⁵⁴ Bersalona, R.B and K.M. Zingapan 2004 "Mapping out the Future of Indigenous Peoples in 3D" *ICTPU Update*. Issue 17, March 2004 <http://ictupdate.cta.int/en/Feature-Articles/P3DM-Mapping-out-the-future-of-Indigenous-Peoples-in-3D>

⁵⁵ IFAD 2009 *Good Practices in Participatory Mapping*, http://www.ifad.org/pub/map/PM_web.pdf

land boundary maps were produced in the between 2000 and 2005. A Participatory Land Use Planning methodology guided the process. The PLUP is a concept mentioned in government decrees and, therefore, it was technically possible for provincial officials of the department of land management - with UNDP per diem support - to participate in digitalizing the information collected.



Andong Kroloeung is a Phnong indigenous village in Mondulkiri province of Cambodia. Its communal land is measured, digitalized and then signed by the governor of province in 2010. Its total communal tenure is 1424.6 ha, which is divided into 6 types of land that include: A: burial forest of 10.02 ha, B: paddy land of 31.74 ha, C: residential land 166.94 ha, D: actual cultivated land 636.5 ha, E: spirit forest 5.73 ha, F: reserved land necessary for shifting cultivation 573.33 ha.

The preparation of maps is a source of local empowerment, although in Cambodia these maps do not yet have legal status.⁵⁶ The Ministry of Land Management will re-measure the land according to government procedures in laws and sub-decrees. However, the preliminary maps can help provide evidence required by Cambodia's Land Law for villages to *prove* themselves as an indigenous community by cultivating "lands in their possession according to customary rules of collective use" based on "the factual situation as asserted by the communities, in agreement with their neighbors" (Articles 23 & 25 of the Land Law).⁵⁷ Maps are one way to prove this to outsiders.⁵⁸ A villager taking part in discussions in Cambodia explain that villagers

⁵⁶ Initially, when the process began, the draft bylaws also addressed land management; however, later versions drafted with support from the Ministry of Interior became merely constitutional and administrative. The latter were drafts were those accepted by government. See Kirsten Ewers Andersen "Establishment of Indigenous Communities as Legal Entities, Cambodia – The Development of Bylaws", ILO 2007

⁵⁷ See Adler, D, J Ironside and M Ratanak. 2009 *Mapping and Tenure Security in Cambodia's Indigenous Communities* Discussion Paper October 2009. Heinrich Böll Stiftung Cambodia http://www.boell-cambodia.org/downloads/Mapping_and_Tenure_Security_in_Cambodias_Indigenous_Communities_final.pdf

⁵⁸ An additional corroboration of their identity as indigenous is by 2010 provided in writing by the Ministry of Rural Development that officially is in charge of the "development" of ethnic minorities and which by 2010 has gained a stronger mandate for supporting the indigenous communities' claims.

feel as though their map gives them the ability to struggle (*torsu*) for recognition of their lands. Members of a national indigenous network had been instrumental in bringing ideas of advocacy and legal recognition back to their community and villagers say it will be difficult for outsiders (even powerful people) to take their land if they have a recognized map⁵⁹. The preparation of maps was also a means for the indigenous communities in Cambodia to take a first step to decide on constitutional bylaws⁶⁰.

⁵⁹ Adler, Daniel et al 2009 :et al op.cit. p.11

⁶⁰ Initially when the process started the draft bylaws also addressed land management, but the later versions of bylaws drafted with support from the Ministry of Interior became merely constitutional and administrative and they were the ones accepted by government. See Kirsten Ewers Andersen “Establishment of Indigenous Communities as Legal Entities, Cambodia – The Development of Bylaws”, ILO 2007

3. Communal Tenure as Delegated Management

Unlike indigenous communities' collective titles, delegated management is not a permanent form of communal tenure; rather, it is a village's or group's time-bound contract with the state to manage state public land and natural resources such as forests, wetlands, fisheries, and grazing lands. Such tenure is important for food security, overall livelihoods and environmental protection, as well as protection against losing the land through concessions to outsiders. Community forestry as delegated management comprises far larger areas of land in Asia than the indigenous collective titles. Also referred to as social forestry, partnership forestry or joint forest management, it has developed in most countries since the 1980s. Nepal has the most experience with this form of tenure, which has developed over the last two to three decades.⁶¹

3.1. Community Forest User Groups in Nepal

In the 1950s and 1960s a concern for the protection of natural resources led many Asian countries to nationalize all land, forests and water resources that were not private property. In Nepal the government nationalized all forests under the *Private Forest Nationalization Act of 1957*. Traditionally, before nationalization, customary access and withdrawal rights were regulated among villages. They had rights in different resource units such as fuel wood, timber, fruits, fibers, other NTFP, fodder, and leaf litter from forest floor for composting with manure. As previously noted, the rights were not uniform for every village, but were widely respected. Following nationalization, heavy deforestation occurred; one reason advanced for this deforestation is the disruption of community management systems and that state managed forests, in fact, became open access areas.⁶²

The State realized its inability to protect the forests, leading to several legislative changes aimed at the handing over of forest management to local communities, which resulted in the Forest Act of 1993. It provides authority to the village users for management of forest resources through a community institution called a Community Forest User Group (CFUG), which represented the community of forest users in a village, who were legally authorized to take management decisions. The area of forest and size of a CFUG vary according to circumstances; the areas range from a just a few to over 4,000 hectares, the average being around 80 hectares. Most forests are good natural forests, not degraded forests. On average there are 111 households in a CFUG.⁶³ While the state retains ownership of forests, communities hold the rights to use the forest, sell products and make management decisions – including rules of membership and exclusion. Users cannot sell/lease/share their rights with others.⁶⁴

Ideally a CFUG is synonymous with a village. The management arrangements aligned with the existing traditional tenure regimes as much as possible to encourage

⁶¹ The Regional Community Forestry Training Centre (RECOFTC) in Bangkok has now for many years trained government officers and other stakeholders in the region in various aspects of community forestry, using Nepal as a proto-type example.

⁶² Acharya, K.P. 2002 "Twenty-four years of community forestry in Nepal, International Forestry Review 4(2)

⁶³ Ojha, H, L. Persha and A. Chhatre. 2009. *Community forestry in Nepal: A policy innovation for local livelihoods and food security*. IFPRI Working paper 913

⁶⁴ SANDEE 2004

consensus and administrative efficiency. Once a community is organized as a CFUG, the District Forest Officer can issue a certificate of recognition and the CFUG and the District Forest Officer prepare an Organizational Plan (OP) together during a series of meetings and discussions.

Two separate documents are required for a CFUG: a community constitution and an OP – a requirement parallel to the constitutional bylaws/collective choice rules and the internal rules discussed above for the indigenous communities. The constitutional process covers the identification of users, and the OP sets the rules for forest management and benefit sharing. Users pay membership fees and contribute to the salary for a guard or they undertake guarding themselves. In practice, most households in a village become members of a CFUG. Interest-based sub-groups (such as fuel wood sellers, landless and non-timber forest cultivators) may also be formed to pursue specific interests within the CFUG.⁶⁵

Each CFUG has a management committee, which represents the forest users in the development and execution of village-level management plans that specify the acceptable forest resource uses and the volume of products allowed to be harvested. CFUG meetings and assemblies are organized based on the plans and provisions established by their constitutions. Although decisions can be made either in CFUG committee meetings or in assemblies, every decision made during CFUG committee meetings must also be approved during the assemblies.

CFUGs are required to pay taxes to the government, when they sell any forest products to non-members. The CFUGs can price forest products irrespective of government royalty and use the income for community development. For example, under a DFID-supported *Livelihoods and Forestry Program* (LFP) in Dang district, CFUGs supported annual salaries for 280 teachers spread across more than 100 schools in the District. CFUG funds also paid school fees for more than 100 children from marginalized groups, and contributed to school construction, furniture and drinking water systems. Through these combined activities, funds from Community Forestry in Dang district invested more than NRs 24,270,000 (USD 326,486) into education.⁶⁶ In addition to these successes, management of forests by CFUGs appears to be financially sustainable overall: the average annual operating costs of are estimated at Nepalese rupees (NRs) 119,100 (USD 1,694), 71% is borne by CFUG themselves, 16% by donors and 13% by the government.⁶⁷

The legislation and the formation of user groups in Nepal were strongly supported by the government, and there has been limited dependence on international donors or NGOs. By 2009, 14,500 CFUGs managed more than one-fourth of Nepal's forest area through strong collective action formalized as group tenures. Over time the community forestry groups have merged with higher-level networks. A national apex institution, the Fecofun,⁶⁸ was established, comprising three tiers of Village, District, and Central level committees.

⁶⁵ Ojha, et al op.cit.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ <http://www.fecofun.org/>

The CFUGs have to a large degree been successful, but analyses have shown that the internal benefit sharing is sometimes skewed. This reflects how the existing assets of village households impact on withdrawal benefits. It has highlighting how 22% of total income of rich households comes from the forest, compared to 14% of total income of the poorer households.⁶⁹ The reason for these inequalities is the nature of the main resource units in the resource system. Fodder leaves and compost favor those with assets of land and livestock, because the harvested produce provides proportionally more inputs to well-to-do farmers. The withdrawal of fodder, leaf litter and grass is directly linked to amount of private assets held, such as livestock and agricultural land; thus, the landless and those without livestock do not benefit.⁷⁰ Studies have called for redress of the bias against the poor and suggested the introduction of tradable rights (quotas) for the poor, to women and to marginalized groups, as ensuring their equitable access to benefits is an ongoing challenge. Awareness of issues experienced by the poor, the casteless *dalits* and the disadvantaged indigenous communities of *janajatis* has increased significantly between 2002 and 2009, and gender, equity and good governance issues have been addressed in the newly formed and renewed operational plans.⁷¹

An additional pro-poor community forestry program, leasehold forestry, was additionally established in Nepal for groups of poor that were given management of degraded forest areas.

3.2. Leasehold Forestry and Pro-poor Targeting in Nepal

The Government of Nepal was aware of the risk of inequality in benefits from harvested products within the community forest. In response, the concept of leasehold forestry (LHF) was introduced in the Forest Act's Regulations of 1995. LHF explicitly targets the very poor, with the simultaneous aim of rehabilitating degraded forest areas. Nepal has about 1.56 million hectares of degraded forest that constitute 10.6% of the country's total land area. The idea is to create conditions and assets that would generate an income for poor households that produce raw materials required for forest product-based industries, undertake afforestation and agroforestry, operate tourism or operate insect/butterfly farms. The communal tenure arrangements in LHF target the poor. In this way, LHF has an important policy implication as a new kind of communal property right regime that can address poverty and environmental degradation simultaneously.

While the communal tenure arrangement for a CFUG was aligned to existing customary tenure, the communal tenure arrangement in LHF is specifically for degraded forest areas, which are leased on a 40-year basis. In this case, the area is partitioned among member households and the group members are not a single village, but a group of poor people that may come from several villages. Under a LHF program, a poor household with less than half a hectare land or an annual per capita income below NRs 2,500 (USD 110) at 1993 prices is entitled to receive a certain area

⁶⁹ SANDEE 2004

⁷⁰ . In comparison, timber and fuel wood are final goods that everyone can use equally – even those with less agricultural land.

⁷¹ Yadav, K. K. 2010 *Changing Social Dynamics at Decision-making Level in Community Forest User Groups*. RECOFTC
http://recoftc.org/site/fileadmin/docs/Enews/Changing_Social_Dynamics_in_CFUGs_Final_Kamlesh_K_Yadav.pdf

of degraded land (around one hectare) that it can use to grow and harvest forest-based products (members are encouraged to cultivate and extract improved varieties of grass, fruit, medicinal herbs and trees) for a 40-year period, with the possibility of extending for another 40 years.⁷² An induced institution governs the tenure arrangement under LHF. The household is a member of a group, which is provided leasehold land under a group guarantee. A household that is not a group member does not qualify. Therefore, it is communal tenure as a group right. There is a growing consensus among researchers that the leasehold forestry program has significantly improved the condition of Nepal's degraded forests and created income for the participating households.⁷³

There is also a degree of pro-poor targeting within several CFUGs, which have provided designated areas of the CFUG forest to their landless or near-landless members so that they can earn their living through cultivation of medicinal herbs or other crops. Several CFUGs also give preference to poor members or women in locally created jobs.⁷⁴ Additional pro-poor provisions include subsidized prices for forest products; reservation of positions for the poor, women and casteless *dalits* on CFUG committees and decision-making bodies; special provisions for the distribution of forest products to vulnerable groups (for example, charcoal to blacksmiths, products freely distributed to victims of natural disasters, single women, or conflict victims); allocation of CFUG funds and low interest loans for income-generating activities; and scholarships to children from poor families.⁷⁵

An ongoing discussion in Nepal focuses has been on how to further create benefits for the poorer segments of a village in a CFUG that holds communal tenure. Options may include the provision of an LHF area to the poor members of a CFUG. This, however, would put a burden on the state and increase the workload of District Forest Officer to keep track of the changes. Furthermore, the tenure security of the poor will be a critical issue in relation to providing sustainable incentives to them to invest in the land. If tenure is defined through an agreement between a group of poor households and the CFUG committee, there is no outside regulatory provision, such as a law, to provide legal security to the poor. The layered rights to a shared resource system would need to acknowledge the multiple kinds of rights and define the authorities for their endorsement. Given the high demand for forest land among households of all wealth categories, it is feared that community level agreements with poor and excluded groups may be easily overturned under local pressures and politics.⁷⁶

3.3. Communal Tenure as Delegated Management in other Asian Countries

Nepal's neighbor, India, has experimented with several forms of communal tenure in forestry, some for degraded revenue lands in need of afforestation, and some for forests with good natural resources. There is a large volume of literature on social forestry in India. The first government- supported social forestry initiatives “with, for

⁷² IFAD 2003 *Evaluation of the Nepal: Hills Leasehold Forestry and Forage Development Project*. http://www.ifad.org/evaluation/public_html/eksyst/doc/profile/pi/np.htm

⁷³ Bhattarai, B, S.P. Dhungana and G.P Kafley 2007. “Poor-Focused Common Forest Management: Lessons from Leasehold Forestry in Nepal”. *Journal of Forest and Livelihood* 6(2), September 2007, pp.20-29.

⁷⁴ Ojha,, H et al. 2009 op.cit

⁷⁵ Bhattarai in Ojha, H. et al. 2009 op. cit.

⁷⁶ Bhattarai et al 2007 op. cit.

and by the people” in the 1980s sought to establish monoculture plantations on degraded Revenue Department lands for fast growing species of *Acacia*, *Eucalyptus* and *Casuarina*. The plantations were meant for rotational clear felling and coppicing after eight to ten years and the revenue would be shared between the community and the government. The community rights were vested in the local government, the *panchayat*, which was not necessarily pro-poor. Once it received its 50% share after clear-felling and auction it used the money to pay old electricity bills, digging wells in the Brahmins’ neighborhood and similar activities.

The Revenue Department lands that were planted were previously open access/communal lands for the poor; however, following the change in the resource system (i.e. the plantations), the poor were no longer allowed access to these new resource units, where they previously grazed their goats. Instead the panchayat auctioned the grass that came up among the trees to the rich milchcow owners.⁷⁷ This is a negative example of a social forestry initiative. Later, by end 1980s the concept of interface forestry emerged, which allowed villages next to government reserve forests to participate in forest management and reap benefits as a village with communal tenure in certain specified resource units. In the (communist) state of West Bengal, groups of landless were given land to grow commercial trees as a group and harvest them for sale. In the 1990s the concept of ‘joint forest management’ (JFM) spread as panacea for decentralized forest management in India. The National Forest Policy of 1988 and the JFM resolution of 1990 combined with state level resolutions acknowledged the need to give greater rights and authority to community groups.

In Vietnam delegated management in the form of community forestry has become legally institutionalized, but it is in a pilot stage; in many places, the forest is still controlled by the State Forest Enterprises that hesitate to let go of the land – despite their inability to manage the forests sustainably. A survey undertaken by the Forest Governance Learning Group in 2006-2007 analyzed modalities of community-held forest management in two sites in Vietnam taking part in the Forest Department’s pilot program in 40 communes.⁷⁸ In one Jarai ethnic minority village, initially only nine households were given individual certificates for a total of 139 hectares, which goes against the idea of the village as the communal tenure rights-holder. With the subsequent implementation of a German-funded *Rural Development Project* the whole village got 1127 hectares as communal tenure. The village prepared bylaws and set up forest protection teams because the forest was a good, natural forest from which commercial timber could be harvested sustainably. The cash income is being spent on taxes and levies, patrolling, forest development and loan funds for the poor in the village.⁷⁹

⁷⁷ Andersen, K.E. 2005 “Institutional Flaws of Collective Forest Management”, p.349-353 in *AMBIO, a Journal of the Human Environment*, Stockholm, Sweden

⁷⁸ Nguyen, Q.T., B.A. Nguyen and T.T Ngoc 2008. “Whose Forest Reform Is It? Lessons from Case Studies in Vietnam”. *RECOFTC Policy Brief* No 1, April 2008.

⁷⁹ Nguyen Quang Tan 2003 Differentiation in Benefits from Forest Devolution: Empirical Study from Dak lak province, Central Highland of Vietnam (<http://dlcvm.dlib.indiana.edu/archive/00001159/>) and Nguyen Quang Tan, Thanh Ngoc Tran, Tuan Huy Hoan 2008 Traditional versus New Forms of Community Forest Management in Vietnam: Can they contribute to Poverty Alleviation in Upland Forest Areas? International Association for the Study of Common Property (IASC), Annual Meeting <http://dlc.dlib.indiana.edu/archive/00003956/> and http://dlc.dlib.indiana.edu/archive/00003956/01/Nguyen_218801.pdf

In Mongolia the establishment of community forestry is gradually evolving. Since 1995 private entities have been able to access forest resources through a 15-60-year contract, but the arrangement does not favor community-based initiatives, as the security of these right holders is insufficient.⁸⁰ Lessons from an FAO-supported project⁸¹ highlighted that for communal tenure to take off, there was a need for the government to provide an appropriate mechanism for local groups to make management decisions about their forest resources (i.e. the statutes and the operational internal rules must be in place, the duration must be stated and the law needs to define the criteria and process for group membership appropriately). This would have to be done within the warranted legal principles; once again, emphasis is drawn to the fact that rights of forest user groups need to be exclusive, enforceable and enforced.⁸²

The same principles would also accrue to community fisheries. In Cambodia, a low-lying country with many rivers, lakes and fish resources, community fishery has been established by Sub-Decree in 2005. Community fishery has been introduced for management of parts of the Tonle Sap Lake and rivers, where decades ago, many traditional groups managed the resources according to their own rules. However, due to political circumstances and civil wars the old systems did not continue. Over the last 40 years, Cambodia has therefore seen many different systems, from the original traditional systems to the fishing lot system installed by the French, to no fishing lot management under the Khmer Rouge regime, to fishing lot auctions and sub-leasing after Khmer Rouge. The current trend is towards community fisheries for selected parts of the lake under a Community Fisheries Sub-Decree.⁸³

As in community forestry, a community fishery group in Cambodia must have by-laws, internal regulations, management plans, maps of the community fishing areas and agreements recognized by the competent authorities in accordance with provisions of the Sub-Decree. However, the Cambodian Sub decree for community fishery does not provide for exclusive rights, not even within the demarcated area. But the outsiders' fishing rights are controlled and regulated in the bylaws of the group. The sub decree states that "fisheries resource users who are not the members of the community fishery have the right to enter, leave, and use fisheries resources in the community fishing area, but must comply with the by-laws and internal regulations of the community fisheries, community fishing area management plan, and all other legal instruments that relate to fisheries".⁸⁴ However, a study on some community fisheries in Cambodia has shown that the distribution of benefits at places is uneven, because poor people are less able to fish in areas far from shore due to small boats and limited fishing gear, while the richer executive committee's members with better technology reap more benefits. This is justified by the committee by the extra work its members

⁸⁰ Lindsay, J.M. J Wingard and Zoljargal Manaljav 2006 "Improving the Legal Framework for Participator Forestry: Issues and Options for Mongolia". *LSP Working Paper* 30. Access to Natural Resources Sub-Programme, FAO.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Evans, P, M. Marschke and K Paudyal 2004. *Flood Forests Fish and Fishing Villages, Tonle Sap, Cambodia*. A Collaborative Case Study by FAO, Siem Reap and Asia Forest Network, Research Network Report No 12

⁸⁴ Sub-decree on Community Fisheries Management, Ministry of Agriculture, Forestry and Fisheries, 2005

have to do to manage the use of the resource.⁸⁵ This feature of delegated communal tenure, and also of other tenurial arrangements, indicate that the persons in the group who form committees to oversee management and deal with outsiders need special proceeds from the system.

⁸⁵ Tom Blomley, Prom Tola, Mam Kosal, Eam Dyna and Mark Dubois *Review of Community Forestry and Community Fisheries in Cambodia* Report prepared for the Natural Resource Management and Livelihoods Programme, Final Report, March 2010

4. Governance Considerations in Communal Tenure

Fair-minded governance at national, local and community level is integral to the success of a communal tenure arrangement, whether a permanent tenure or delegated management. At the national level, endorsement of permanent communal tenure has political implications, as the State generally wishes to uphold its eminent domain in the management of land and natural assets both from a financial and environmental point of view. Where communities opt for communal tenure in areas where the State wishes to hand out mining or logging concessions the communities may not be successful. However, where the State realizes the costs of environmental protection and sees a positive impact of communities' collective action for natural resource protection, it may come to a consensus with the communities to avoid future costs of land degradation, deforestation, declining or unmanaged water resources with threats to reservoirs, agriculture and drinking water.

The role of NGOs has proven to be vital for developing appropriate governance in most Asian countries regarding communal tenure arrangements, in particular for indigenous communities. NGOs' technical and legal assistance to local communities lobbying for legislation, mapping territories and developing statutes and bylaws to qualify them as legal entities (where needed) is invaluable to, in particular, the indigenous communities' efforts to secure their land and resource rights. Indeed, the mapping experiences supported by NGOs in the Philippines and Cambodia demonstrated how community empowerment through mapping advances the cause of communal tenure. These experiences noted that certain conditions are central to success, including (a) effective, long-term NGO support in community building, livelihoods development, awareness raising; (b) high pre-existing levels of community solidarity; (c) low-to-moderate pre-intervention levels of outside pressure on lands and (d) processes that were designed with a view to engaging with and obtaining recognition from relevant sub-national authorities and e) an overall supportive national legislation.

Also the promotion of communal tenure as delegated management of, in particular, forests has been dependent on NGOs, civil society and donor-supported projects to pilot the legal and institutional framework. Civil society organizations have proved helpful in laying the foundation for communal tenure – even before the government had established legislation for its recognition. In Thailand, over the last 10-15 years, local communities have claimed forests as community forests long before legislation existed through the help of, among others, Buddhist monks who ritually “initiated the community forest” in the same way as a monk would be initiated (*buad*), by tying saffron robes around the trees in the outer boundary to demarcate the area. Having monks involved meant the villagers could invite local government officials to attend the religious ceremonies – they could hardly refuse.⁸⁶ In Cambodia, by 2010, monks are now involved in supporting villagers in forest protection and afforestation to qualify for carbon finance from REDD+.⁸⁷

⁸⁶ See Andersen, K.E. 2001 “Ordaining Buddhist Forests and Fisheries? One of the many elements of the emerging institutional landscape in forest management in Nan Province, Thailand”, in CM Newsletter of the IUCN Collaborative Management Working Group, Commission on Environmental, Economic and Social Policy (CEESP), No. 5, October 2001

⁸⁷ *Monks branch out into carbon market to protect forest* See <http://www.theage.com.au/world/monks-branch-out-into-carbon-market-to-protect-forest-20101203-18jqx.html>



Thai communities have over many years had help from monks who have ordained village forests as village communal tenure areas while the villagers were waiting for the government to pass the Bill on Community Forestry. The monks tie yellow cloth around trees. In this way they are ‘ordaining’ (buad paa) the forest as a community forest claim. The word ‘buad’ is the same that is used when a Buddhist novice is ordained entering the monastery. By using a word from official ‘high’ religious language the villagers draw upon an established realm of words recognized by the state.

Local government authorities play a special important role in support of communal tenure. In Cambodia the local Commune Councils sign onto the bylaws prepared by communities with the Ministry of Interior. In the Philippines communal title may be vested in local governments for the ancestral domains. In 1993, the Local Government Code in the Philippines mandated the formulation of Municipal and Provincial Development Plans that would play a vital role in recognizing specific areas of common use within ancestral domains – watershed areas and community forests, for example.

The interplay of national and local level organizations enables the consolidation of accountability in the governance framework by involving government and local communities in the development of communal tenure. The rejection of – or negotiation with – outside interests is also easier if local councils and government line officials support the communities. This support can act as a buffer between communities and outside businesses claiming community land. The evaluation⁸⁸ of leasehold forestry in Nepal highlighted the benefits of a good working relationship between a LHF group and the local government to foster a mutually beneficial project and in India the local government of the *Gram Sabha* became in the main actor in recognition of the tribals’ forest rights.

Good governance in the governments’ relations to local communities is of paramount importance in mitigation of climate change, because climate change mitigation depends on local forest protection and afforestation. With the upcoming carbon finance from Reduced Emissions from Deforestation and Degradation (REDD and REDD+) that yields carbon revenue, countries realize that a new way of benefit sharing must be institutionalized. When carbon revenues enter the picture, the institutional arrangements and costs and benefit sharing between local communities and the state

⁸⁸ IFAD 2003 op. cit

become complicated as carbon tenure is unclear. Carbon is not like timber or mushrooms a product that can be withdrawn seasonally from the forest.

5. REDD/REDD+ Carbon Money and Communal Tenure

Climate change mitigation measures and the prospect of carbon revenues have added a new dimension to the discourse around communal tenure as a local means of protecting or augmenting the carbon stock and benefitting local communities as forest guardians at the same time. REDD measures aim at protecting the existing (high) carbon stock in natural forests, while REDD+ augments the stock to include enrichment planting, for example afforestation of degraded areas to gradually significantly increase the carbon stock. Whether REDD and REDD+ will benefit or marginalize forest communities ultimately depends on local and national arrangements for sharing the costs and benefits within the country. Thus, resource tenure is the key. In this case the question arises who owns the carbon?

Delegated forest management as communal tenure could be appropriate for REDD as well as for REDD+ purposes. Many governments have previously faced the choice between supporting decentralized forest management by communities and giving out economic land concessions to big business that would grow rubber, cassava or biofuel on the same lands. With the arrival of carbon finance and initiatives in REDD and REDD+, governments hope to generate income from international sources and voluntary carbon markets, by protecting the carbon stock in their forests or create new carbon through afforestation. In early 2009, an International Institute for Economic Development (IIED) review counted 144 REDD initiatives being pursued by the full spectrum of actors (international financial institutions, regional development banks, United Nations organizations, developed governments and bilateral donor agencies, developing country governments, NGOs, academic/research institutions, standard-setting organizations, private sector organizations and foundations).⁸⁹

While hopes are high about the opportunities that REDD and REDD+ may offer developing countries, there are also risks that REDD and REDD+ schemes may result in governments, companies, conservation NGOs or speculators carving up forestlands, and that forest protection approaches may marginalize rather than empower forest people. For example, Indonesia's REDD Regulation and Law on Forestry allows the state to create a massive system of publicly- and privately-held forestry concessions and carbon sinks in the forests traditionally owned by indigenous peoples without any regard for their rights or existence. As a result of this legal development, the UN High Commissioner for Human Rights/Committee on the Elimination of Racial Discrimination formally requested that the Government of Indonesia considers and observes indigenous peoples' rights when applying for funds from the World Bank Forest Carbon Partnership Facility.⁹⁰ An additional point of contention is whether palm oil and rubber plantations and their carbon dioxide (CO₂) sequestration qualify for REDD+ payments.

Carbon rights are a form of property rights that 'commoditize' carbon and allow trading. This may cause a separation of rights to carbon from broader rights to the forest and land, an aspect not yet addressed by theoretical work on common pool

⁸⁹ IIED 2009 "Tenure in REDD". *Natural Resource Issues*. No 15. International Institute for Economic Development, London, United Kingdom.

⁹⁰

http://www.forestpeoples.org/documents/asia_pacific/indonesia_cerd_response_urgent_action_sept09_eng.pdf

resources. Carbon is not a resource unit that can be harvested like a non-timber forest product, as it must remain where it is in order to sequester CO₂, but it is nevertheless a resource attribute or characteristic that can be measured and valued.

Carbon is a fixed and immovable resource unit and sequestered carbon poses legal challenges. As such, regulatory schemes for REDD must determine who has the right or how many share the right to the carbon stocked in forests, in the land and in the soil. Studies suggest that carbon ownership may either be a separate proprietary interest, *or* a proprietary interest linked to forest or land ownership.⁹¹ Australia is one of the first countries to establish carbon rights, defined as the right to take profit from something on another person's land.⁹²

Carbon rights must be defined in national regulations to develop effective arrangements to channel benefits to the local level. Local level communal tenure of forests could be a vehicle for benefit sharing in a nested enterprise that would enter into a co-management agreement with the state. The first steps towards such an agreement in Cambodia took place in June 2009, when Cambodia's Forest Administration, in partnership with the NGO Pact and Terra Global Capital signed agreements with nine community forestry groups to develop and market carbon credits for a REDD+ project. The nine community forestry groups comprise over 50 villages, whose members have agreed to protect over 60,000 hectares of forest land in the northwestern province of Oddar Meanchey. Earlier in the same month the Forestry Administration and Terra Global Capital had finalized their carbon agreement, marking a critical step in the development of Cambodia's first avoided deforestation project for registration under the Voluntary Carbon Standard (VCS).⁹³ Terra Global Capital has provided the technical work for the carbon measurement and monetization of the project's carbon credits. The local communities managing the nine community forestry sites are highly dependent on support from the NGO Pact and its local provincial NGO partners to work on community consensus building and compliance with forest protection measures.

The World Bank has set up a Forest Carbon Partnership Facility (FCPF) for selected countries that are presently drafting Readiness Preparation Proposals to qualify for the FCPF. The World Bank's FCPF and the UN-REDD Program are leading multilateral initiatives that provide financial support and technical guidance to help prepare developing countries for the 'readiness phase' to participate in future REDD and REDD+ mechanisms under the next international climate agreements. The proposals must address the drivers of deforestation and degradation, the possible solutions, and they are to contain plans for consultations at all levels and benefit sharing arrangements; in addition, the application of World Bank Safeguard Policies, including BP 4.10 on Indigenous Peoples, is obligatory in the Readiness Proposals for FCPF.

A recent conference that vetted the inclusion of safeguards in these proposals noted that many of the Readiness Proposals have identified weak law enforcement and

⁹¹ Costenbader, J (Ed.) 2009. *Legal Frameworks for REDD. Design and Implementation at the National Level* IUCN

⁹² Ibid 2009

⁹³ Pact 2009 *Cambodia Signs Avoided Deforestation Carbon Agreements for Voluntary Carbon Standard Project*. Press release, June 24, 2009

http://www.pactworld.org/cs/news/cambodia_signs_avoided_deforestation_carbon_agreements_for_voluntary_carbon_standard_project

unclear land tenure as key governance challenges for REDD and REDD+. It is still not clear how countries intend to address these issues through their REDD and REDD+ strategies.⁹⁴ Problems for the 'readiness phase' include flaws in existing legal and regulatory frameworks for land tenure, rights to resources, land use planning, forest management, revenue management and decentralization. Therefore, there is a need for tenure reform, land use planning, in order to support these activities, and sub-national levels for the management of REDD and REDD+ revenues must be identified. Further, a local level body must be identified, which is authorized to participate in domestic and international transactions based on greenhouse gas emission reductions and determine how to share the costs and revenues.

Because local communities live in close proximity to the coveted carbon, their behavior – whether they protect or cut down the forest – is as decisive as the curbing of illegal logging and the management of concessions and large infrastructural development. For local communities to participate in REDD+ there is an immediate need to raise awareness and to share information on REDD+ programs and what they entail, as communities presently do not know.

All scenarios under REDD and REDD+ may benefit from seeing local communities as collective entities holding tenure of well-defined carbon properties. It is relevant to assume that the rights vested in the community can be in the form of a communal tenure of some properties of carbon that the community shares with the state that holds an eminent domain over the land and forest. Like all the examples examined above the local communities – unless represented by local government authorities – would probably need to incorporate as a legal entity with constitutional bylaws, and would have to develop internal rules based on community consensus, in this case for a fixed and immovable resource unit that has a market value. The market benefit to the community is money and the internal rules need to stipulate carefully how this money is spent and divided both internally and with the local government and the state. Part of the money may be used to pay some villagers to patrol the forest to protect it and to engage in the required monitoring, recording and valuation of the carbon stock, and another part for community development. Initially, communities may collectively qualify for payment for environmental services (PES) collectively if a framework exists, such as in Vietnam; later, they may become partners in revenue sharing. The use of PES, however, may not be appropriate as the fixed and immovable (or intangible) nature of carbon emission reductions poses challenges in their quantification, and conceptual challenges for their regulation. Incentives for REDD will no doubt require greater and more sophisticated regulatory frameworks than ordinary PES types used for watershed protection.

For indigenous communities that live in the carbon stocked forest or which are involved in afforestation a rights-based approach to REDD+ programming that includes Free Prior Informed Consent/Consultation (FPIC) is warranted. The *UN Declaration on Indigenous Peoples' Rights* includes reference to FPIC under Articles 10, 18, 19, 32 and 41 for activities affecting their land. The *REDD+ Social and Environmental Standards*⁹⁵ prepared through facilitation from the Climate, Community & Biodiversity Alliance (CCBA) and CARE International specify that

⁹⁴ WRI and UN-REDD Program 2010. *Monitoring Governance Safeguards in REDD+* Background Paper Two. Expert Workshop 24th – 25th May 2010, Chatham House, London

⁹⁵ Available from <http://www.climate-standards.org/REDD+/>. See also Griffiths, T. 2007

REDD programs should recognize and respect statutory as well as customary rights to land in the requirement for FPIC. However, in order for FPIC to have real validity, communities must have a legally binding option *not* to consent. This binding framework will probably not emerge anywhere, which is why the World Bank uses the term ‘consultation’ rather than ‘consent’. Still, even the requirement for appropriate consultation based on prior information will only be possible when the legal status of the community has been established and the nature of rights determined in national legislation. This may entail a renewed quest for communal tenure that is now entering an incremental and special sphere where its relation to the outside world is market-based and its internal rules must deal with money and the market as well as the means of protecting/restoring forest and land in which they have a collective stake.

Bibliography

- Abeto, R., Z. Calilung, J.P. Talubo and B. Cumatang. 2004
Community Mapping in the Philippines: A Case Study on the Ancestral Domain Claim of the Higa-onons in Impasug-ong, Bukidnon Paper presented by PAFID at Regional Community Mapping Network Workshop, Quezon City
http://www.landcoalition.org/pdf/08_ILC_Participatory_Mapping_Low.pdf
- Acharya, K.P. 2002 "Twenty-four years of community forestry in Nepal",
International Forestry Review 4(2)
- ADB 2002a Indigenous Peoples / Ethnic Minorities and Poverty Reduction – Philippines
http://www.adb.org/Documents/Reports/Indigenous_Peoples/PHI/default.asp
- ADB 2002b Indigenous Peoples / Ethnic Minorities and Poverty Reduction - Viet Nam
http://www.adb.org/documents/reports/indigenous_peoples/vie/indigenous_vie.pdf
- ADB 2009 *Land and Cultural Survival. The Communal Land Rights of Indigenous Peoples in Asia* ADB edited by Jayantha Perera
<http://www.adb.org/Documents/Books/Land-Cultural-Survival/land-cultural-survival.pdf>
- Adler, D., J. Ironside and M. Ratanak. 2009
Mapping and Tenure Security in Cambodia's Indigenous Communities Discussion Paper October 2009. Heinrich Böll Stiftung Cambodia
http://www.boell-cambodia.org/downloads/Mapping_and_Tenure_Security_in_Cambodias_Indigenous_Communities_final.pdf
- Andersen, K. Ewers 2005 "Institutional Flaws of Collective Forest Management", p.349-353 in *AMBIO, a Journal of the Human Environment*, Stockholm, Sweden
- Andersen, K. Ewers 2001 "Ordaining Buddhist Forests and Fisheries? One of the many elements of the emerging institutional landscape in forest management in Nan Province, Thailand", in *CM Newsletter*, IUCN Collaborative Management Working Group, Commission on Environmental, Economic and Social Policy (CEESP), No. 5, October 2001
- Basurto, X. and E.Ostrom 2008 Beyond the Tragedy of the Commons,
http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/4506/W08-25_Basurto_Ostrom_Beyond_the_Tragedy.pdf?sequence=1
- Bersalona, R.B and K.M. Zingapan 2004 "Mapping out the Future of Indigenous Peoples in 3D" ICTPU Update. Issue 17, March 2004
<http://ictupdate.cta.int/en/Feature-Articles/P3DM-Mapping-out-the-future-of-Indigenous-Peoples-in-3D>
- Bhattarai, B, S.P. Dhungana and G.P Kafley 2007. "Poor-Focused Common Forest Management: Lessons from Leasehold Forestry in Nepal". *Journal of Forest and Livelihood* 6(2), September 2007, pp.20-29.

Bhattarai, S. 2009 Towards Pro-Poor Institutions: Exclusive Rights to the Poor Groups in Community Forest Management. Discussion paper Kathmandu, Forest Action Nepal and LFP. http://www.forestaction.org/pdfs/discussion_paper/Towards%20Pro-poor%20Institutions-%20Bhattarai%20et%20al.%20Discussion%20paper.pdf

Blomley, T., Prom Tola, Mam Kosal, Eam Dyna and Mark Dubois *Review of Community Forestry and Community Fisheries in Cambodia* Report prepared for the Natural Resource Management and Livelihoods Programme, Final Report, March 2010

Bromley, D. & M. Cernea, 1989 '*The Management of common Property Resources. Some Conceptual and Operational Fallacies*' World Bank Discussion Paper, 57

Colchester, M, T Griffiths, F McKay and J. Nelson. 2004 "Indigenous land tenure: challenges and possibilities", in *Land Reform, Land Settlement and Cooperatives*, 2004/1 (FAO) <http://www.fao.org/docrep/007/y5407t/y5407t07.htm>

Colchester M. 2004 "Indigenous Peoples and communal tenures in Asia", in *Land Reform, Land Settlement and Cooperatives*, 2004/1 (FAO). <http://www.fao.org/docrep/007/y5407t/y5407t07.htm>

Contreras-Hermosilla, A. 2005 *Strengthening forest management in Indonesia through Land Tenure reform: Issues and Framework for Action* with contributions from Elfian Effendi, Juni Thamrin, Sulaiman Sembiring, and Martua Sirait http://www.forest-trends.org/documents/files/doc_107.pdf

Costenbader, J. (Ed.) 2009. Legal Frameworks for REDD. Design and Implementation at the National Level. IUCN, Gland, Switzerland. xiv + 200 p.

Cupet, P. 1998. "Among the Tribes of Southern Vietnam and Laos", White Lotus 1998 by Walter E.J. Tips, originally published as 'Chez les Populations Sauvages du Sud de l'Annam' in *Le Tour de Monde*, vol 65, 1893 Paris

Deininger, K. 2003 Land Policies for Growth and Poverty Reduction. World Bank

Evans, P, M. Marschke and K Paudyal 2004. *Flood Forests Fish and Fishing Villages, Tonle Sap, Cambodia*. A Collaborative Case Study by FAO, Siem Reap and Asia Forest Network, Research Network Report No 12

Fitzpatrick, D. 2005 'Best Practice Options for the legal Recognition of Customary Tenure', *Development and Change* 36(3): 449–475

Gourou, P. 1945 [1940] *Land utilization in French Indochina* [Translation of *L'utilisation du sol en Indochine française*]. Washington. DC: Institute of Pacific Relations.

Griffiths, T. 2007 Seeing 'RED'? 'Avoided deforestation' and the rights of Indigenous Peoples and local communities. Forest Peoples Programmes http://www.fern.org/sites/fern.org/files/media/documents/document_4074_4075.pdf

IIED (International Institute for Economic Development) 2009 'Tenure in REDD'. *Natural Resource Issues No. 15* International Institute for Environment and Development, London, United Kingdom.

IFAD (International Fund for Agricultural Development) 2003 *Evaluation of the Nepal: Hills Leasehold Forestry and Forage Development Project*.
http://www.ifad.org/evaluation/public_html/eksyst/doc/profile/pi/np.htm

ILC (International Land Coalition) 2008 Participatory Mapping as a Tool for Empowerment - Experiences and lessons learned from the ILC network
http://www.landcoalition.org/pdf/08_ILC_Participatory_Mapping_Low.pdf

ILO (International Labor Organization). 1989. ILO Convention 169 *Indigenous and Tribal Peoples' Convention* <http://www.unhchr.ch/html/menu3/b/62.htm>

Kerkvliet, B.J. 2006 Agricultural Land in Vietnam: Market tempered by Family, Community and Socialist Practices, for Land, Poverty, Social Justice and Development, International Conference, Institute of Social Studies, The Hague
<http://onlinelibrary.wiley.com/doi/10.1111/j.1469-7580.2007.00715.x-i1/abstract>

Li, T.M. 2000 Articulating Indigenous Identity in Indonesia. Resource Politics and the Tribal Slot Berkeley Workshop on Environmental Politics Working Paper, WP 00-7
<http://www.scribd.com/doc/20262133/Li-TM-Articulating-Indigenous-Identity-in-Indonesia-Resource-Politics-and-the-Tribal-Slot>

Lindsay, J.M. 1998 Creating a legal framework for community-based management: principles and dilemmas - *adapted from a paper presented at the International Workshop on Community-Based Natural Resource Management held from 10 to 14 May 1998 at the World Bank, Washington, DC*.
<http://www.fao.org/docrep/x3030e/x3030e09.htm>

Lindsay, J.M. 2006. Improving the legal framework for participatory forestry
<http://www.fao.org/legal/prs-ol/full.htm>

Lynch, O. 2006 Securing Community-based tenurial rights in Tropical Forests of Asia: An overview of current and prospective strategies, WRI, Centre for International Development and Environment <http://partnerplatform.org/file2.axd/1f7494a9-b45c-466a-befd-99d6adcbde4f/Indian%20Forests.pdf>

Maine, Sir Henry Sumner 1876 *Ancient Law. Its connection with the early history of society, and its relation to modern ideas*, London

Marschke, M., David Szablowski, and Peter Vandergeest *Indigenous Peoples Scoping Exercise. Synthesis Report*. IDRC Working Paper 21, January 2007
http://www.idrc.ca/uploads/user-S/11786494341RPE_Working_Paper_21.pdf

Marshall, G.R. 2008 Nesting, subsidiarity and community-based environmental governance beyond the local level, in *International Journal of the Commons*, Vol. 2, no. 1, January, pp. 75-97

- McDermott, M.H. 2000 Boundaries and Pathways: Indigenous Identities, Ancestral Domain, and Forest Use in Palawan, the Philippines. IASCP 2000
<http://www.indiana.edu/~workshop/wsl/indigbib.html>
- Neate, G. 2002 “Valuation of Land Subject to Native Title”, 24-28 June 2002, *Statutory Regimes*, Australian Property Institute and the University of Queensland
- Nguyen, Q.T., B.A. Nguyen and T.T Ngoc 2008. “Whose Forest Reform Is It? Lessons from Case Studies in Vietnam”. *RECOFTC Policy Brief* No 1, April 2008.
- Nguyen Quang Tan 2003 Differentiation in Benefits from Forest Devolution: Empirical Study from Dak lak province, Central Highland of Vietnam
(<http://dlcvm.dlib.indiana.edu/archive/00001159/>)
- Nguyen Quang Tan, Thanh Ngoc Tran, Tuan Huy Hoang 2008 Traditional versus New Forms of Community Forest Management in Vietnam: Can they contribute to Poverty Alleviation in Upland Forest Areas? International Association for the Study of Common Property (IASC), Annual Meeting
<http://dlc.dlib.indiana.edu/archive/00003956/>
http://dlc.dlib.indiana.edu/archive/00003956/01/Nguyen_218801.pdf
- Norfolk, S and C Tanner. 2007. *Improving Tenure Security for the Rural Poor – Mozambique – Country Case Study*, Support to Legal Empowerment of the Poor LEP Working Paper # 5, FAO <http://www.fao.org/nr/tenure/infores/ltpapers/en/>
- Ojha, H, L. Persha and A. Chhatre. 2009. Community forestry in Nepal: A policy innovation for local livelihoods and food security. *IFPRI Working paper* 913 http://www.forestation.org/pdfs/Working_paper%20CF_Nepal_IFRI.pdf
- Ostrom, E & J.M.Walker 1989 *Communication in a Commons: Cooperation without External Enforcement*, Paper presented at the American Political Science Association Meeting, Atlanta, Georgia, August 31 - September 3
- Ostrom, E. 1999 Self-Governance and Forest Resources, *CIFOR Occasional Paper* No 20
- Ostrom, E. 2002 Reformulating the Commons, *Ambiente & Sociedade - Ano V - No 10 - 1* □ Semestre de 2002
- Ostrom, E. 2007 *The Challenge of Crafting Rules to Change Open Access Resources into Managed Resources*, Paper presented at the International Economic Association roundtable on the Sustainability of Economic Growth, Beijing, China, July 13-14
- Ostrom, E. and C. Hess 2007 *Private and Common Property Rights*, Workshop in Political Theory and Policy Analysis, Indiana University, W07-25 11/29/0W
- Otsuka, K 2001 *Population Pressure, Land Tenure, and Natural Resource Management in Selected Areas of Africa and Asia*. Foundation for Advanced Studies on International Development
http://elsa.berkeley.edu/users/bardhan/e271_f01/oct15.pdf

Panel on Common Property Resource Management 1986 *Proceedings of the Conference on Common Property Resource Management*, Board on Science and Technology, National Research Council, National Academy Press, 1986

Patnaik, S. 2007 "PESA, the Forest Rights Act, and Tribal Rights in India". *Proceedings from International Conference on Poverty Reduction and Forests*, Bangkok, 2007 <http://www.im4change.org/empowerment/forest-and-tribal-rights-61/print>

Perera, Jayantha 2009 'Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006: A Charter of Forest Dwellers' Rights?' in *ADB Land and Cultural Survival. The Communal Land Rights of Indigenous Peoples in Asia* Edited by Jayantha Perera

Perera, Jayantha 2009 'Land Development Policies and the Impoverishment of Indigenous Peoples in Sarawak, Malaysia' in *Land and Cultural Survival. The Communal Land Rights of Indigenous Peoples in Asia* ADB edited by Jayantha Perera

Rasul, G. and G.B.Thapa *State Policies, Praxies and Land-use in the Chittagong Hill Tracts of Bangladesh* n.d.
<http://www.sasnet.lu.se/EASASpapers/8GolamRasul.pdf>

SANDEE. 2004. *Community Forestry in Nepal- Management Rules and Distribution of Benefits*. South Asian Network for Development and Environmental Economics, Policy Brief no 1-04, 2004
http://www.google.dk/search?hl=da&rlz=1T4HPEB_daDK236DK240&q=SANDEE.+2004.+Community+Forestry+in+Nepal-+Management+Rules+and+Distribution+of+Benefits.+South+Asian+Network+for+Development+and+Environmental+Economics%2C+Policy+Brief+no+1-04%2C+2004&aq=f&aqi=&aql=&oq=

Schlager, E. & E.Ostrom. 1992. "Property-rights regimes and natural resources: A conceptual analysis". *Land Economy*, 68(3): 249-262

Seidel, K., K. Phanvilay, B. Vorachit, L. Mua, S. Boupphachan, R.B. Oberndorf. 2007 Study on Communal Land Registration in Lao PDR. *Land Policy Study No 6 under LLTP II, GTZ*

Sikor, T. and D. Truong. 2002. "Agricultural policy and land use changes in a Black Thai commune of Northern Vietnam, 1952-1997" *Mountain Research & Development* 22(3): 248-255.

Simbolon, I. 2009 'Law Reforms and Recognition of Indigenous Peoples' Communal Rights in Cambodia' in *Land and Cultural Survival. The Communal Land Rights of Indigenous Peoples in Asia* ADB edited by Jayantha Perera
<http://www.adb.org/Documents/Books/Land-Cultural-Survival/land-cultural-survival.pdf>

Tanner, C. C.P de Wit and S. Norfolk. 2009. 'Participatory Land Delimitation' *Land Tenure Working Paper 13, FAO*

UN-REDD 2009. UN-REDD Programme Operational Guidance: Engagement of Indigenous Peoples & other forest dependent communities. October 2009.

United Nations 2007 *Declaration on the Rights of Indigenous Peoples*
<http://www2.ohchr.org/english/issues/indigenous/declaration.htm>

United Nations Development Program n.d. “*UNDP and Indigenous Peoples: A Policy of Engagement*” <http://www.undp.org/partners/cso/publications.shtml>

Wade, Robert, 1989 *Village Republics. Economic Conditions for Collective Action in South India*. Orient Longman Ltd.

Wingard J. and Z. Manaljav Issues and options for Mongolia, LSP Working Paper 30 (Access to Natural Resources Sub-Programme) FAO
<http://www.fao.org/es/esw/lsp/workingpapers.html>

World Bank 2009. *Country Social Analysis, Ethnicity and Development in Vietnam*
<http://siteresources.worldbank.org/INTEAPREGTOPSOCDEV/Resources/499760ESW0Whit1C10VietnamSummary1LR.pdf>

WRI 2005. *The Wealth of the Poor: Managing ecosystems to fight poverty*
<http://www.wri.org/publication/world-resources-2005-wealth-poor-managing-ecosystems-fight-poverty>

WRI 2010 *Monitoring Governance Safeguards in REDD+* Background Paper UN-REDD Programme, Two. Expert Workshop 24th – 25th May 2010, Chatham House, London
http://www.google.dk/search?hl=da&rlz=1T4HPEB_daDK236DK240&q=WRI+%092010+Monitoring+Governance+Safeguards+in+REDD%2B+Background+Paper+UN-REDD+Programme%2C+Two.+Expert+Workshop+24th+%E2%80%93+25th+May+2010%2C+Chatham+House%2C+London+&aq=0&aqi=g10&aql=&oq=

Yadav, K.K. 2010 *Changing Social Dynamics at Decision Making level in Community Forest User Groups* http://recoftc.org/site/fileadmin/docs/E-news/Changing_Social_Dynamics_in_CFUGs_Final_Kamlesh_K_Yadav.pdf