



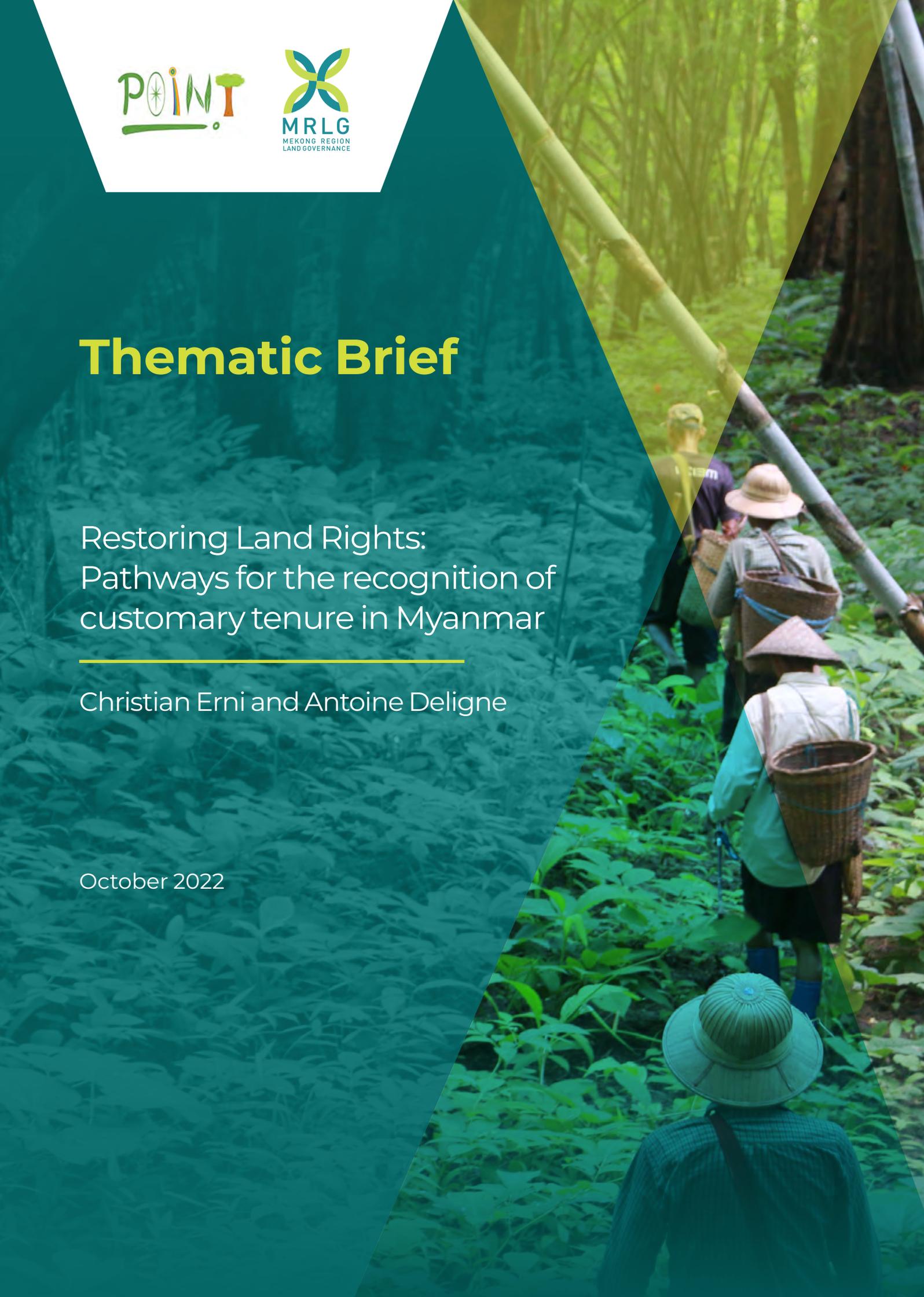
# Thematic Brief

Restoring Land Rights:  
Pathways for the recognition of  
customary tenure in Myanmar

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## Acknowledgements

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## Abbreviations

<b>FPIC</b>	Free, Prior and Informed Consent
<b>IDP</b>	Internally Displaced Person
<b>ILO</b>	International Labour Organization
<b>MRLG</b>	Mekong Region Land Governance Project
<b>POINT</b>	Promotion of Indigenous and Nature Together
<b>REDD+</b>	Reducing Emissions from Deforestation and forest Degradation, plus the sustainable management of forests, and the conservation and enhancement of forest carbon stocks
<b>UNDRIP</b>	United Nations Declaration on the Rights of Indigenous Peoples
<b>VFV land</b>	Vacant, Fallow and Virgin land

## Introduction

### Background and purpose of the study

This report aims to help civil society organisations and other reform actors in Myanmar in discussions on how to recognise and protect customary tenure in policy and practice.

In early 2016, the Government of Myanmar released the National Land Use Policy that set the objective of writing an umbrella national land law that would ensure the *“formal recognition of customary land use rights, [the] protection of these rights and [the] application of readily available impartial dispute resolution mechanisms”* (Part 8: Land Use Rights of Ethnic Nationalities). The government tasked a National Land Use Council to draft the National Land Law. This process was at an early stage when it was interrupted in early 2021. It is doubtful whether it can be resumed any time soon and in what political configuration.

In 2018, the Mekong Region Land Governance Project (MRLG) formed an Alliance for the Recognition of Customary Tenure in Myanmar. The Alliance involved ten civil society organisations that would support the drafting of the law through the identification of different legal options for the recognition of customary tenure. As it is no longer possible to contribute to the law at this time, this analysis now has the general purpose of helping policymakers identify key questions for how to recognise and protect customary tenure rights in the future. The aim is to respond to the aspirations of rural communities, ethnic groups and indigenous peoples. The analysis is the result of an iterative process that included written inputs from the authors and subsequent advice from a technical working group and members of the Alliance.

### What is customary tenure?

‘Land tenure’ refers to how people gain access to land and natural resources. Tenure rights are obtained by rural communities either through statutory tenure (tenure regulated by State laws) or through customary tenure (tenure regulated by customs and traditions).

Customary tenure refers to a community-based system of rights, rules, institutions and practices that determines how land and other resources are used and shared. This system may comprise several of the following features:

- long-term social legitimacy that has been gained over time

- the ability to evolve and adapt to new contexts
- a deep connection to the people’s identity, social organisation, culture and values
- self-governance by the people living on their land
- inclusion of all land-related resources (water, streams, forest, wildlife, and so on)
- the concept of a ‘bundle of rights’: the right of access to and withdrawal of resources, the right of exclusion, management and control, and the right of transfer and alienation of land and resources

### Why the need to protect customary tenure?

In Myanmar, the Constitution and laws do not yet recognise and protect customary tenure rights. Ethnic nationalities, ethnic groups and indigenous peoples have long made claims to these rights. These claims are now increasingly in reference to international legal instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

A number of issues are pressuring and threatening people’s existing rights under customary tenure. These include the emergence of a formal or informal land market; a trend towards the individualisation and privatisation of lands and resources previously under collective customary management; and land acquisitions by State and private sector interests. This insecurity is an important source of conflicts. At the same time, there is increasing acknowledgement that customary tenure systems are an important asset in poverty reduction,<sup>1</sup> biodiversity conservation and climate change mitigation.<sup>2</sup>



Ceremony for worshipping the spirits of the land before the establishment of a new village in Kayah State (Photo: Elena, KMSS)

1 Wily (2012).

2 See various publications on land rights, conservation and climate change by the Rights and Resources Initiative <https://rightsandresources.org/climateandconservation>.

# Mechanisms for the legal recognition and protection of customary tenure

## 1. Understanding the diversity of customary systems

Some forms of customary tenure still exist in all parts of Myanmar and are considerably diverse. Any policy response for the recognition and protection of customary tenure must take this diversity into account. The notion of a one-size-fits-all solution is not realistic. The recognition of different customary systems requires a range of options to be considered which take into consideration the elements outlined below.

### Recognising a customary governance system

The State can recognise customary tenure either as a basis for legal claims within its statutory governance system or as an independent governance system in its own right. In the first approach, the State takes all the decisions about the governance rules. In the second approach, the customary governance system remains in place and is autonomous. The local institutions under customary governance are legitimate and practices have been shaped by practical experience over a long period of time. For this reason, the State should recognise existing governance systems as much as possible rather than imposing external rules.

### Partial and complete systems

A distinction is proposed between 'complete' customary tenure systems<sup>3</sup> where the community is able to enforce its customary rules through their self-government institution, and 'partial' customary tenure systems where registration of State land occurs alongside customary tenure arrangements. In partial systems, customary institutions are often weaker or are only able to manage part of the land and resources.

### Diversity of resources and extent of area governed

The land and resources governed by customary tenure may include all land categories and resources within a territory, or only specific parcels and categories of land – such as forest or grazing

areas. Land could be a single-use parcel, multiple parcels with a single resource, multi-purpose parcels, or the entire territory managed by one or multiple communities.

### Rights holders

The recognition of a customary governance system implies that a collective entity will be recognised as the main rights holder. This collective entity can be a small group of users in a single village, multiple communities, or a whole ethnic nationality. As the rights-holder entity increases in size, so does the importance of how it recognises, allocates and manages the rights of subgroups or individuals within the area under its authority.

### Governing institution

Strong customary governing institutions may retain jurisdiction over their territory, and the full authority to manage all land and resources. If customary institutions have become marginalised or have limited capacity, the State administration may choose to assume complete or partial management responsibilities. Alternatively, a hybrid institution can be formed between the State administration and a customary institution. In this way, management of the land benefits from the respective experience and legitimacy. In other cases, a new independent institution may be created, or changes may be made to the structure and composition of an existing institution to strengthen its capacities. For larger territories that comprise several communities, the law may require new institutions to be set up as legal entities that will hold the collective rights over the area.

### Recognition processes

Formal recognition of rights must follow procedures that may have various levels of complexity and costs. The complexity depends on whether the process involves delineating boundaries, issuing a title, establishing a new governing institution, and so on. A complex process of formalisation may be expected to deliver a higher level of protection. However, costly and overly complex bureaucratic procedures can be problematic for local communities to comply with and may limit the benefits from legal recognition in practice.

3 Erni (2021, pp. 40–41).

Table 1: Key principles of – and comparison between – the options for customary tenure recognition

Option	Key principles	Recognition of customary governance system	Suitable for	Scope	Rights holders	Governing institution	State interference	Process complexity	Legal protection
<b>1. Blanket recognition and FPIC</b>	No registration, only focus on the FPIC process	Yes	Complete systems	Areas and resources affected by outsiders	All resource users and affected rights holders	Existing customary institutions if they exist	Minimal	Low (for the community)	Low
<b>2. Customary tenure zones</b>	Zone border delineation and basic recognition of zone-level customary institution	Yes	Complete systems	All resources within the defined landscape / zone	Multiple communities, (multi-)ethnic groups	Existing or newly formed customary institutions	Low to medium	Medium: depends on mapping and recognition requirements	Medium to high if self-government is legally recognised
<b>3. Land governance by village administrative units</b>	Land governance rights devolved to village-level authorities, based on village delineation	Depends on village authorities	Complete and partial systems	Entire landscape or multi-purpose parcels within the village area	Village community	Village authority with or without involvement of customary institutions	Medium to high	Low	Medium
<b>4. Land titles over territories</b>	Full titling process with possible incorporation of collective rights holders	Yes	Complete systems	All resources within the entire territory	Self-defined community, multiple communities or ethnic groups	Representative body of the rights holders – customary or new institution	Low (high during the titling process)	High	High if good access to remedies
<b>5. Tenure right certificates over parcels of land</b>	Tenure right certification over specific land use areas	Possible, often with restrictions from the State administration	Partial systems	Single or multiple parcels of a specific land use category	Village community or defined user group	Village or user group committee	Medium to high	Medium to high	Medium to high
<b>6. Co-management contracts</b>	Contract between the community and the State administration defining the management rules	Limited, depends on State administration	Complete and partial systems	Specific areas and resources under state public administration	The community residing within or accessing the area	Management committee supervised by the State administration	High	High	Low

## 2. Options for the legal recognition of customary tenure

The six options described below are broadly organised from the simplest to the more complex, and with increasing levels of involvement of government administration. Table 1 provides the key characteristics of each option.

### Option 1. Blanket recognition with the right to FPIC

In this approach, customary tenure rights are protected over all land that is not yet covered by a formal registration status. Blanket recognition does not require the identification and registration of rights holders or the demarcation of land. Governance of the land and resources continues under customary institutions without interference from the State.

Under blanket recognition, communities do not have to prove their rights. If outsiders (individuals, private companies or government agencies) are seeking access to land and resources within areas held under customary tenure, it is the responsibility of these outsiders to assess the impact of these projects on the communities and obtain their consent. The free, prior and informed consent (FPIC) of local communities should be made mandatory by law for any intervention in these areas by outsiders. An oversight committee that includes government and independent third parties would monitor and support the FPIC process.

### Advantages and disadvantages

Blanket recognition is the least complex option in terms of recognition procedures. It does not put a heavy burden on communities but places responsibility on outsiders. No resources are needed for registration, so public resources and efforts can be invested in preventing conflicts related to public or private interventions. This approach provides interim protection for all customary tenure systems before other legal frameworks for more complex forms of recognition are developed. An FPIC law would also represent an important tool for the enforcement and protection of all customary rights under other options.

However, if customary institutions are marginalised, affected by power imbalances, or unable to resolve internal or intercommunity conflicts, this option offers limited protection. In addition, protection against encroachment by small-scale actors and illegal activities may remain weak because there is no delineation of customary areas.

### Option 2. Customary tenure zones

To increase the level of protection of customary areas, some communities may wish to access a higher level of State recognition through the delineation of a customary tenure zone. Within the zone, all land and resources are held under customary tenure and managed by customary governing institutions. The role of the State administration would be confined to delineating and enforcing the external boundaries of the zone.



Upland rice fields in Dawlarsaw village in Kayah State. Trees known for their capacity to restore soil fertility are preserved by the farmers in shifting cultivation plots (Photo: Nay Min Lwin, KMSS)



A group of Asho Chin women from a remote village in Magwe Region carrying agricultural products for sale in town (Photo: Christian Erni)

The customary governing institutions could be recognised through a simple process without the need to obtain a legal personality. Some may remain informal. Others may develop more specific statutes and by-laws without interference from the government in how institutions are created or how they are run.

The scale of these customary tenure zones can vary greatly from a single community to a multi-community zone or even larger territories managed by a specific ethnic group. In Myanmar, Self-administered Zones, or the whole or parts of ethnic states or even regions, could be recognised as customary tenure zones. If entire regions are recognised as such, a special dedicated institution at the zone level may have to be created to play a supportive role, such as in inter-community conflict mediation. Legislation relating to the legal status of the zone and the relationship to higher-level legal frameworks would also have to be enacted. Some environmental and social safeguards mandated by national laws may apply, so some form of State coordination with the governing institution of the zone would be required.

### Advantages and disadvantages

The option of customary tenure zones is more complex than blanket recognition because it requires the demarcation of the perimeter of the zone. In some cases, the governing institution of the zone must have official recognition from the State. The complexity can increase with the size of the zone and the number of communities involved. Nevertheless, this approach remains comparatively simple and requires few financial or administrative resources from the State. *“It would allow customary*

*rights to evolve over time (...), without undue restriction or imposition by a formal legal regime”.*<sup>4</sup>

This option is suitable for strong customary institutions, such as in complete systems. As there is no recognition of a legal entity, customary institutions will not be able to enter into legal agreements with outsiders for the purposes of investment, land lease, or resource extraction. However, FPIC could apply as with blanket recognition. The limited oversight of local institutions also carries the risk of illegal agreements between outsiders and traditional authorities or powerful individuals without the broader consent of the community.

### Option 3. Customary tenure governance by village administrative units

As an alternative to the creation of specific zones, land and resource ownership and governance can be vested in existing administrative units of the State. For example, in Myanmar, the total land area of a village tract could be recognised as a territory collectively owned by its members. The village tract administrators are indirectly elected by the villagers and therefore already enjoy a degree of legitimacy. The institution that would govern land and resources would be existing institutions of the administrative unit (such as the village tract authority), existing customary institutions (like a village council of elders), or a hybrid institution which has a mix of representatives from the customary body and the administrative unit. In all cases, the local authorities would play an intermediary role with outsiders. In this approach, it is important to clarify the extent to which local governance applies and the circumstances in which administrative institutions within the village and beyond may intervene.

### Advantages and disadvantages

This approach is easy to scale up over the whole country and does not require significant additional resources. Clear administrative boundaries already exist so there is no need for further mapping. In addition, the governance authority can be vested at the local level without the need for a complex registration process.

Local administrative units often do not correspond exactly to a specific community area – for example, village tracts include several traditional communities. Local communities may therefore need to clarify their respective rights inside the area.

Community dependence on State administration creates a higher risk of State interference and top-down decision-making processes. Even if local authorities are elected, their authority may be

4 Fitzpatrick (2005, p.458).

limited, especially if traditional authorities are still widely recognised but not included in governance. This approach is therefore more suitable for partial systems with weak customary institutions. A regular concern is elite capture because village chiefs or administrators have vested interests in land management and are often a party in land conflicts.<sup>5</sup>

#### Option 4. Titles over territories

Some communities may want to be recognised as rights holders over their entire territory and have complete autonomy from State administration. To hold full legal authority in all matters related to land governance, the community would acquire a legal personality and obtain a title that would include the complete bundle of rights. Legislation would specify the rights and obligations linked to such a title and how it is issued by the relevant authorities.

Titling usually involves the demarcation and mapping of the territory, plus additional procedures such as gazetting, titling and cadastral registration. Incorporation may be required to become a legal entity and this could be optional and offered as an additional level of protection.

#### Advantages and disadvantages

In principle, titling over territories provides the highest level of legal protection to customary tenure rights. However, it is characterised by a high degree of complexity. Experience in other countries has shown that the State administration often uses its discretionary oversight over the recognition process to delay or prevent legitimate groups from obtaining a title. In addition, communities that have accessed

a title have not always been able to protect their territories from encroachment. This may be because of a lack of access to the courts, limited support from State administrations, or internal conflicts.

This option is suitable for communities with strong customary institutions. Incorporation enables engagement in legal dealings with outside entities, or access to loans from financial institutions. However, incorporation can be problematic in cases of elite capture or if the legal entity is not identical to the original rights-holding group. Given the extent of the rights vested to the community by a title, it is important that the nested rights of individuals and subgroups within the territory are also formally recognised and protected. The process of incorporation may imply changes to the customary tenure system to comply not only with the rules and safeguards defined by statutory law but also with the principles of social justice and good governance. However, the State should avoid *“forcing social change over communities as it is likely that it will be ignored in practice”*.<sup>6</sup>

#### Option 5. Tenure right certificates over parcels of land

In communities where many lands and resources are already managed under statutory law, some people may not want to relinquish those rights to customary institutions. At the same time, they may agree that some collectively used lands (forest, pasture, fishery grounds, and so on) can be managed through such a mechanism. In this case, customary rights can be recognised over parts of the territory, excluding areas under statutory tenure.



The landscape of a Naga village in Lay Shi Township, Sagaing (Photo: Maung Maung Than, RECOFTC)

<sup>5</sup> Boutry et al. (2017, pp. 247–253)

<sup>6</sup> Fitzpatrick (2005, p. 462)



Farmers sowing a shifting cultivation plot in Harsawkhu village in Kayah State (Photo: Nay Min Lwin, KMSS)

A tenure rights certificate for these parcels can be issued for a community or a specific user group with a bundle of rights adapted to their customary tenure rules. The governing rules and by-laws may be defined either by the State administration that has jurisdiction over specific land categories or by the communities themselves.

The formalisation process would require a number of steps: identifying the user group; mapping the land parcels that are held under collective management; and defining the management rules for the resources and the status of the governing entity through a participatory process. As with the option of titles over territories, formalisation may (or may not) include a process of incorporation and cadastral registration. The only difference is that, for tenure rights certificates, rights are recognised over parcels of land instead of over the whole territory.

### Advantages and disadvantages

Tenure rights certificates provide the flexibility to adapt rules and governance to different parts of the village area. This flexibility is necessary in partial systems where collective and individual interests do not match. Recognition gives a renewed legitimacy

to customary governing institutions to manage the lands under collective use. The secured rights are also an incentive to put more sustainable management practices in place. A tenure rights certificate provides strong legal protection, even if it comes with a limited bundle of rights.

This option is even more complex and resource-intensive than titles over territories because the formalisation of rights is required for each separate parcel or group of parcels, and rules may vary from one community to another. Elite capture is also a risk so the certificate may explicitly prohibit the transfer of rights to non-community members to reduce this risk.

### Option 6. Co-management contracts

If State public lands are not eligible for titling or certification, the only legal opportunity for local communities to protect their customary rights may be collaborative management or co-management contracts. In this approach, the State agency that has jurisdiction over the related State lands negotiates a co-management agreement with the communities who traditionally access those areas. The contracts define how they “*share the management functions,*

entitlements and responsibilities for a given territory, area or set of natural resources”<sup>7</sup>.

Co-management is not itself a form of recognition of customary tenure but it can provide space to customary governing institutions to play a role in the management of a particular area or resource. The mapping and zoning of the concerned areas and the design of a management plan helps reach a mutual understanding on how customary tenure and practices can apply. It may involve the creation of a committee that would represent the community or a subgroup. The committee would sign the contract with the State agency and monitor the application of the rules by its members.

**Advantages and disadvantages**

The main advantage of co-management is that it already exists within Myanmar’s current legislation (for example, for community forestry and fisheries) and it provides a more direct avenue for the recognition of rights. However, significant amendments would be required to the related legislation to include the recognition of customary tenure governance.

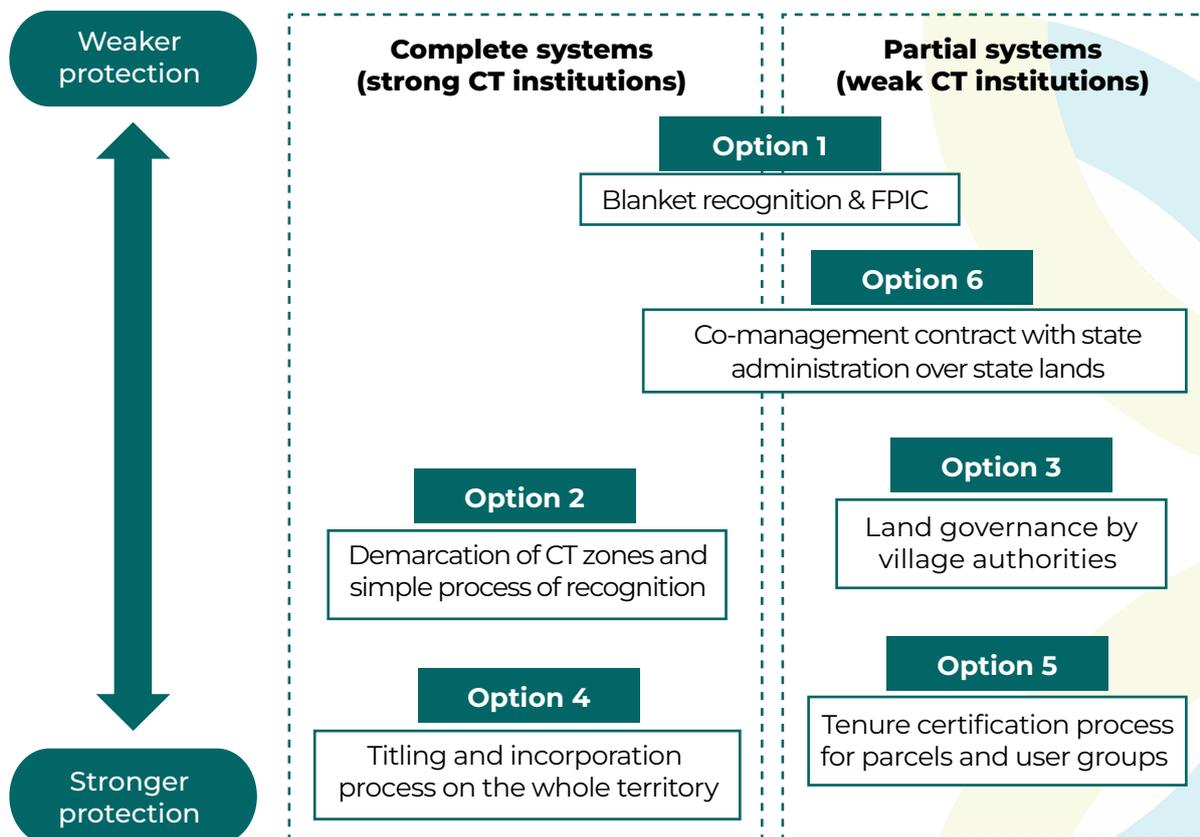
Co-management is relatively complex and costly as it requires the mapping and zoning of the areas concerned and a participatory process of negotiation between the State authorities and the community. Co-management contracts can offer different scopes

and bundles of rights, but they often have significant limitations.

- Tenure security is weak: the State administration can revoke the contract at its own discretion without independent oversight. In addition, the contract is of limited duration.
- Management rules are often defined with limited consideration of existing customary governance systems.
- Co-management areas are limited to a small portion of the land and resources used by the communities. Sometimes these areas are already degraded.
- Communities lack the rights to develop commercial and productive economic activities that generate significant benefits. They do not have the rights to enter into contract with private investors.

These weaknesses are not insurmountable and legislation can be adapted to provide stronger rights. A well-designed co-management system can be a means to achieve the objectives of both the State administration and communities.

The figure below provides a simple summary of the six options for customary tenure recognition with regards to two key aspects: the type of customary tenure system and the degree of protection provided.



7 Borrini-Feyerabend et al. (2007, p.2)

## From ideal types to concrete solutions

Several important cross-cutting issues must be kept in mind when a law is drafted to ensure that these options will work in practice. International experience shows that good legal frameworks are necessary, but never sufficient to ensure that rights are effectively protected.

### Provide interim measures of protection

As new legislation takes time to be developed and become effective, immediate interim measures can be put in place to prevent further loss of customary land. For example, a moratorium on land concessions could be decreed, or new legislation on FPIC could be fast tracked as described in Option 1.

### Keep the law and related procedures simple and accessible to local communities

The recognition process can be kept simple by following these principles:

- Registration should be voluntary and on demand; the law should not extinguish customary rights that have not been formalised.
- FPIC should apply for all external interventions and the obligation to identify and document customary rights rests with outsiders (for example, a government agency or an investor) and not the community.
- Recognition should not be exclusive to specific ethnic groups but allow the self-identification of communities.

- Procedures should be handled by a single office at the lowest administrative level possible.
- Participatory mapping of customary areas rather than expert land mapping should be sufficient.
- Local communities should be recognised as rights-holding entities and incorporation should not be compulsory.
- Procedures should be developed that have progressive steps and requirements for increased levels of protection and allow communities to choose the step they want to reach.
- The law should be kept at the level of rights, safeguards and general principles, and procedures developed for the implementation of rules and regulations that are easier to amend.

### Adapt legislation to the context of federal states

In recent years, numerous ethnic groups in Myanmar have sought to realise self-determination within the framework of a federal union. A new constitution that would strengthen federalism can be an opportunity to further shelter key rights for indigenous communities and define primary safeguards that would apply to all states and guide other legislation. Each state could enact different legislation for the recognition of customary tenure which could be adapted to their specific context. However, some level of harmonisation would be desirable. In many respects, the issues at the level of autonomous states are the same as those relevant at national level and should consider the aspirations of diverse communities.



Community members carrying bamboo to help construct a new house in Yaungkon village, a Tangshang Naga community in Nanyun Township of the Naga Self-administered Zone. (Photo: Christian Erni)



Consultation with Danu women about the customary tenure practices of Taelu villagers, Ywangan township, Southern Shan State (Photo: Natalie Y. Campbell, MRLG)

### When should State authorities intervene in the governance of customary tenure?

The recognition of customary tenure is about recognising the self-governance of communities. However, there are circumstances that may justify interventions by State authorities. Justifications include dealing with outside investors, land grabbing, environmental degradation, a community's inability to enforce rules or resolve conflicts, or insufficient adherence to good governance standards. Problems of internal power imbalance, elite capture, unequal rights of women and migrant settlers are common across communities.

Authorities may address these issues through setting up safeguard mechanisms, ensuring the enforcement of rules, limiting the bundle of rights and establishing supra-community conflict resolution and grievance mechanisms. This should be done in a sensitive and pragmatic manner that encourages but does not impose reform and does not undermine the group's autonomy.

### Overhaul State agencies to improve downward accountability

In Myanmar, land administration primarily serves the interests of the State (for internal revenue generation) or of powerful stakeholders linked to the State. Management of land has been hierarchical with little space for local initiatives. For successful implementation of legal reforms, the administrative culture needs to become more service oriented,

accountable, and responsive to local needs. Potential administrative reforms could include the creation of an oversight committee to deal with community grievances. Alternatively, the creation of a whole new State agency that deals specifically with customary tenure could establish a new management culture and more inclusive staffing of diverse ethnic origins.

### Protect nested rights within communities and multi-community use rights

Under the jurisdiction of a larger customary governing institution, individual members and different subgroups – such as extended families, lineages and clans – may hold different rights to certain plots of land and resources. These nested rights should be respected whether they have been obtained customarily or through statutory tenure prior to the recognition of customary tenure. If stronger protection of customary-held nested rights is necessary, they could be formalised in the community by-laws, for example, or through registration in a community cadastre. For statutory rights, the law can also re-establish the community jurisdiction over these lands by subjecting them to community rules.

Where resources are accessed and used by several communities, the delineation of the customary area should consider these multiple rights and avoid excluding other communities or triggering conflicts. This can be done by defining jointly used customary areas.

## Overhaul of land categorisation to accommodate customary tenure

The existing categorisation of land<sup>8</sup> results in the compartmentalisation of land administration which is not suitable for the management of customary areas. A new land category for customary tenure in multi-purpose areas should be created and encompass all categories, including land under shifting cultivation. Within customary designated areas, the rules related to other categories (farmland, forest land, grazing land, and so on) would not apply or apply only under specific conditions.

The very concept of Vacant, Fallow and Virgin land (VFV land) and the allocation of VFV land use permits has been a major source of land dispossession in Myanmar.<sup>9</sup> The reality is that “[t]here is no vacant land”.<sup>10</sup> For the protection of customary tenure rights, the VFV Land Management Law<sup>11</sup> should be repealed altogether.

Land designated as State forest or protected areas could be renegotiated to take into account the customary governance rights that have been recognised within these areas. This could also apply to land covered by tenurial rights granted by the State, such as long-term leases to companies.

## Ensure that economic benefits can be derived from customary tenure rights

In many customary areas, farmers are looking not only to secure their tenure rights, but also to maintain and expand their livelihoods and economic opportunities. Specific rights to use and manage the land productively that should be recognised include:

- the right to harvest, process and commercialise valuable products without heavy bureaucratic requirements
- the right to compensation in cases of land acquisition by the State
- the right to enter into contracts with investors (for example, for sustainable plantations or reforestation in degraded areas) and to have appropriate safeguards
- the right to enjoy benefits from the conservation of valuable areas (such as the preservation of watershed areas, biodiversity protection, REDD+ and other conservation programmes)

In general, collective land titles cannot be used as collateral because they do not include the right of alienation or transfer. The legislation could be adapted to allow farmer groups to access loans on the basis of collective land titles or to allow for customary individual land certificates to be used as collateral.



Farmers transporting their cardamom harvest to sell in Taungoo. Cardamom is an important agroforestry crop that has replaced shifting cultivation in the mountains of Northwest Karen State. (Photo: Antoine Deligne)

8 For more information about land categories in Myanmar see Leckie & Simperingham (2009) and UNHabitat (2010).

9 San Thein et al. (2018, p.3–4) and Allaverdian (2019).

10 Springate-Baginski (2019).

11 Republic of the Union of Myanmar (2012 and 2018).

### Protect the rights of minorities, displaced people and migrants

Many villages are not homogenous and include multiple groups with distinct ethnic identities that coexist within the same village. The recognition of customary rights should not take place at the expense of the legitimate rights of the following groups: ethnic minority groups within a larger ethnic group; permanent settlers; migrants and internally displaced people (IDPs) in host communities; and IDPs in relation to their area of origin. Examples of ways to protect the rights of these group include representation in the local management institution, the creation of distinct customary zones or the exclusion of some lands from customary management, and the establishment of a supra-community grievance mechanism. IDPs should also be eligible for the restitution of their original lands including the areas under customary tenure in their place of origin.<sup>12</sup>

### Establish legal recourse and independent grievance and conflict resolution mechanisms

The protection of customary rights will be effective only if a clear avenue is available for communities

to defend these rights when they are violated or in dispute. An effective grievance mechanism for community members needs to be in place to ensure that the local governing institution applies the principles of good governance – in particular, transparency, non-discrimination, equity and gender equality.

Communities have limited access to courts, so priority should be given to the creation of out-of-court conflict resolution mechanisms that are low-cost, local, legitimate, and easily accessible. These mechanisms might be established at the community level, and at the supra-community level for cases where the governing institution is a party in the dispute. Judicial recourse with access to the closest courts remains important to deal with the most complex issues. Any law that protects customary tenure must clearly state the legal validity of out-of-court decisions.

In addition, communities need to be protected from unilateral administrative decisions and from unnecessary bureaucratic requirements. Government decisions should be clearly motivated, based on transparent criteria, and the communities should have the possibility to contest these decisions in courts or through an independent mechanism.



Planting swidden rice in Shwe Taung Ngwe Taung village, a S'gaw Karen community in Bago Yoma. Labour exchange is still commonly practiced in different stages of swidden farming. (Photo: Christian Erni)

<sup>12</sup> Republic of the Union of Myanmar (2016), Article 8 (h) and Oxfam (2018).

## Conclusion

This publication proposes six options for the legal recognition of customary tenure. Each option differs in the level of complexity and tenure security as well as the degree of State control and local autonomy in land governance. These options are not mutually exclusive. Different mechanisms might be appropriate for different contexts and should be tailored to the reality on the ground for local communities.

### Take into account the aspirations of indigenous peoples for self-determination

Myanmar is home to a large number of ethnic groups and nationalities who have pre-existing rights to their land, territories and resources. Many have fought for self-determination for decades. Legislation on customary tenure should aim to respond to these aspirations for greater autonomy and ownership over natural resources.

### Align options with Myanmar's international obligations and international best practices

The enactment of any law on customary tenure must comply with relevant international legal instruments. It is important to acknowledge that claims to customary rights for indigenous peoples are supported by international law, including the UNDRIP and ILO Convention 169.<sup>13</sup>

### Ensure the FPIC of communities

Legal formalisation may transform the nature of customary systems and there is the danger that some aspects of the original system – such as its

adaptability – will be lost in the process. One key principle is to have as little State intervention as possible, but as much as is necessary to ensure tenure security, good governance and social justice for all.

Some communities may prefer to access statutory rights only and others may prefer their customary tenure system to continue outside of any formalisation process. Therefore, FPIC should be applied and communities should be able to decide whether they want to follow a specific legal process or no process at all.

### Generate broad public support and change perceptions about customary tenure

A legal process for the recognition of customary tenure will not emerge from purely technical discussions. The common perception of customary tenure as a set of backward and inefficient practices is a strong impediment to the promotion of legal reforms. The public needs to understand what customary practices are in reality – that they are not static or against development but a tool for more sustainable and equitable development.

### Moving forward in the face of political turmoil

The members of the Alliance for the Recognition of Customary Tenure in Myanmar are determined to pursue their reflections and discussions on how to achieve the recognition and protection of customary tenure in both policy and practice. It is hoped that, in the coming years, the people of Myanmar will be able to develop an inclusive discussion about the future of both the people and their lands.



Douwekuu villagers discussing their customary tenure practices in Kayah State (Photo: Elena, KMSS)

<sup>13</sup> Myanmar has not yet ratified Convention 169 (ILO, 1989)..

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Clouds over the Manipur river near Falam, Chin State (Photo: Antoine Deligne)

This Thematic Brief is a summarised version of the full length Thematic Study.

This study aims at providing guidance to civil society organisations and other reform actors in Myanmar about how to recognise and protect customary tenure in both policy and practice. Based on international experiences and concepts, the study outlines six options for recognising customary tenure with different levels of complexity. These options are not mutually exclusive, as each one may fit a specific context. International experience shows that good legal frameworks are necessary, but never sufficient to ensure that rights are fully protected. The effectiveness of these options in practice depends on a range of issues that must be kept in mind when drafting and implementing legislation, such as the need for interim measures, adapting to federalism, reforming state institutions, and so on. The proposed legal process for customary tenure recognition should provide flexibility for communities to decide if they want to follow such a process and how they want to formalise their tenure.

This study has been elaborated in collaboration with the members of the Alliance for the Recognition of Customary Tenure in Myanmar:



Promotion of Indigenous and Nature Together (POINT) is a Myanmar organisation established in 2012 for promoting the rights of indigenous peoples and increasing awareness on environmental issues. POINT is working together with indigenous communities on rights-based approaches to development and natural resource management.

For more information, please visit:  
[www.pointmyanmar.org](http://www.pointmyanmar.org)

The Mekong Region Land Governance Project (MRLG) and its alliance members work together to protect the tenure rights of smallholder farmers in the Mekong Region and has been operating in Cambodia, Laos, Myanmar and Vietnam since April 2014.

MRLG is a project of the Government of Switzerland, through the Swiss Agency for Development and Cooperation (SDC), with co-financing from the Government of Germany and the Government of Luxembourg.

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