



Report

# Tenure and social forestry in ASEAN Member States

In cooperation with



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## **Tenure and social forestry in ASEAN Member States: Status, analysis and recommendations**

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# **Tenure and social forestry in ASEAN Member States**

Status, analysis and recommendations



# Contents

Foreword.....	1
Acknowledgements.....	2
Abbreviations.....	3
Executive summary.....	4
Understanding the importance of tenure and addressing challenges.....	4
Preparing for a dynamic future.....	4
Embracing plurality and complexity.....	5
Pursuing ‘good enough tenure’.....	5
Introduction.....	6
Why is secure tenure important?.....	6
Recognition from the international community.....	6
Social forestry helps communities sustainably use, manage and benefit from forestlands.....	6
Why is this report needed?.....	8
The history and dynamics of tenure arrangements in ASEAN.....	9
Approaches to tenure arrangements.....	9
From customary tenure to statutory tenure.....	9
A new integrated approach.....	10
Secure tenure can address challenges.....	10
Elements of tenure arrangements: A framework for understanding.....	12
Tenure arrangements.....	12
Strength of tenure arrangements.....	15
Pressures and threats that test tenure arrangements.....	16
Using the Framework to understand tenure arrangements in ASEAN.....	16
Status of tenure arrangements in ASEAN.....	17
Cambodia.....	17
Indonesia.....	18
Lao PDR.....	19
Malaysia.....	20
Myanmar.....	21
Philippines.....	23
Thailand.....	24
Viet Nam.....	25
The strength of tenure arrangements in ASEAN.....	28
A strong legal framework.....	28
Planning and decision-making.....	30
Effective implementation.....	33
Pressures and threats to tenure arrangements in ASEAN.....	37
External factors.....	37
Internal factors.....	38
Behaviour of the state.....	39

Conclusions and recommendations.....	42
Importance of tenure .....	42
Prepare for a dynamic future .....	42
Embrace plurality and complexity.....	43
Pursue 'good enough tenure' .....	43
Address the challenges to understanding tenure in ASEAN .....	44
Annex.....	45
Endnotes .....	49
References .....	58

# Foreword

Close to 140 million people in Southeast Asia depend on forests for their livelihoods. Across the region, communities are improving their lives and protecting the environment by managing the forests that surround them. Some are selling sustainably harvested timber, crabs, honey and coconut-shell charcoal. Others are attracting ecotourists.

These opportunities are coming their way through social forestry. This concept and practice recognizes that people who depend on local forests are best placed to look after them. When communities are able to manage and use forest resources they can have positive social, environmental and economic impacts.

Social forestry can reduce deforestation, boost incomes and settle conflicts over land use. Moreover, it can help countries make progress towards their goals on climate change, forest protection and sustainable development.

People who depend on forests must be able to use, manage and benefit from the forests where they live. They must also be secure in the knowledge that they will be able to carry on doing so for the foreseeable future.

In other words, they must have secure tenure.

Clear and strong tenure rights allow people to visualize investments and return. They are an incentive for sustainable forest management. And they are the foundation for successful social forestry programs.

This report explores the status of tenure in ASEAN Member States. It also describes good practices for enhancing tenure, rights and benefits from social forestry. The report shows just how complex the issue of tenure is. Customary tenure rights often overlap with statutory ones. And even when people have

rights on paper, those rights are not necessarily secure. In some cases, they only last a few years. In others they are longer, but people still fear that their rights will not be respected if more powerful interests arrive.

Indeed, a recent study found that tens of millions of people in Cambodia, Indonesia, Thailand and Viet Nam felt their tenure was insecure. This was true for one-third of the Cambodians asked, and one-quarter of the Indonesians.

Even when communities have the right to manage, protect and use forests, they face other challenges that prevent them from gaining the benefits of social forestry. People need the knowledge and skills to manage forests sustainably and to set up and manage enterprises. But there are also structural problems, such as regulatory barriers, poor infrastructural links with markets and limited access to capital.

As this report shows, tenure arrangements are complex and often contentious. Government officials, civil society, donors and rural communities recognize the need to increase tenure security in ASEAN. However, they have a limited understanding of how to do it.

This report will be invaluable for state and non-state parties who work with tenure issues as part of their work on social forestry. It provides an introduction and framework to customary and statutory tenure arrangements in ASEAN to help non-specialists understand and navigate their way around tenure issues. It identifies opportunities and challenges for customary and statutory arrangements that can help ensure people have secure tenure. And it offers key conclusions and recommendations for potential ways forward, so social forestry can fulfill its promise in ASEAN Member States.

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Executive Director  
RECOFTC

# Acknowledgements

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The report draws on evidence and opinions of specialists who work at the heart of tenure and social forestry in Southeast Asia.

RECOFTC would like to thank the many individuals and organizations who made valuable contributions to the development of the report.

Independent consultant Louise Tricklebank wrote the report with guidance from RECOFTC staff.

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# Abbreviations

AMS	ASEAN Member States
ASEAN	Association of Southeast Asian Nations
ASFCC	ASEAN-Swiss Partnership on Social Forestry and Climate Change
AWG-SF	ASEAN Working Group on Social Forestry
CFI	Community forest instruction
CBFM	Community-based forest management
CIFOR	Center for International Forestry Research
DENR	Department of the Environment and Natural Resources
ENR	Environment and Natural Resource
FAO	Food and Agriculture Organization of the United Nations
FLEGT	Forest law enforcement, governance and trade
FPIC	Free, Prior and Informed Consent
GHG	greenhouse gases
IPRA	Indigenous Peoples' Rights Act
Lao PDR	Lao People's Democratic Republic
NGO	non-governmental organization
NTFPs	non-timber forest products
PFE	Permanent forest estate
RECOFTC	Regional Community Forestry Training Center for Asia and the Pacific
RRI	Rights and Resources Initiative
SDC	Swiss Agency for Development and Cooperation
SDGs	Sustainable Development Goals
SEARCA	Southeast Asian Regional Center for Graduate Study and Research in Agriculture

# Executive summary

To prosper, people who depend on forests must use, manage and benefit from those forests. They must also be secure in the knowledge that they will be able to carry on doing so for the foreseeable future.

The majority of forestlands in the Association of Southeast Asian Nations (ASEAN) region are owned by central governments. However, many local communities and Indigenous Peoples live in and around these lands. They use, manage and rely on them but have no formal rights to do so.

Prindex, the Global Property Rights Index, collects robust data on perceptions of land and property rights. A 2018 Prindex survey in Cambodia, Indonesia, Thailand and Viet Nam found that up to 62.3 million of people aged 18 and older felt insecure about their tenure rights.<sup>1</sup>

Even communities with some formal recognition of their right to use, manage and benefit from forestlands can feel insecure as those lands come under increasing pressure.

Tenure arrangements throughout the world are complex and often contentious. Government officials, civil society, donors and rural communities recognize the need to increase tenure security in ASEAN. However, they have a limited understanding of how to do it.

This report provides an entry point for state and non-state actors who face tenure issues as part of their work on social forestry. Social forestry is also known as community forestry, participatory forestry and village forestry. For consistency, this report uses the term social forestry.

The main objectives of the report are to:

- Provide an introduction and framework to customary and statutory tenure arrangements in ASEAN to help non-specialists understand and navigate their way around tenure issues
- Identify the opportunities and challenges for customary and statutory arrangements that can help ensure people have secure tenure
- Identify synergies and potential ways forward, recognizing the future pathways of social forestry through the programs of ASEAN Member States

This report includes the following key conclusions and recommendations:

## Understanding the importance of tenure and addressing challenges

Secure tenure underlies numerous environmental and development goals. Tenure insecurity has been identified as one of the most significant barriers to achieving successful social forestry.<sup>2</sup> Crucially, tenure insecurity is impeding progress on tackling the climate crisis. Therefore, strong and clear rights for local people that results in tenure security need to be prioritized throughout the region. This report provides an understanding of tenure arrangements and addresses common challenges faced by stakeholders in understanding tenure arrangements. It is a first step to unraveling the complexity and diversity of tenure arrangements across ASEAN. Further work is needed to fully break down barriers to discourse and make progress on improving tenure security to facilitate social forestry.

For example, the diversity and technical nature of terminology in tenure arrangements is a significant challenge. To tackle tenure issues effectively, there must be both a common language to discuss them and a better understanding of forest tenure itself. ASEAN has an opportunity to help Member States work towards this through further research and partnership.

## Preparing for a dynamic future

ASEAN faces unprecedented challenges from climate, biodiversity and land degradation crises. This means that social forestry needs to play a central role in the region over the next 10 years. Achieving secure tenure is a foundation for this.<sup>3</sup>

Conflict over tenure throughout Southeast Asia is escalating. Rapid economic growth in the region has reduced poverty but has also increased inequality and left marginalized communities even more vulnerable. This growth has also put more pressure on governments to expand development, which strains tenure arrangements and changes traditional community dynamics.

Flexible, adaptable and multifunctional solutions to tenure issues are needed to cope with the challenges that lie ahead. They are also needed for meeting the changing needs and desires of communities in forestlands.

## Embracing plurality and complexity

There is no single solution to achieving tenure security across the region. Each Member State takes a different approach to tenure arrangements in forestlands.

Customary and statutory tenure arrangements have different strengths and weaknesses. Governments can no longer shy away from this complexity and the difficult issues that tenure raises. Governments need to embrace plurality and complexity and focus on finding solutions that deliver positive impacts.

## Pursuing 'good enough tenure'

Communities and countries throughout ASEAN are finding ways to incorporate customary arrangements into their statutory tenure systems to complement their different strengths.

Sometimes a regulatory framework is not fully in place. It may be that community tenure systems and communities' roles in land planning are good enough for progress to occur.

'good enough tenure' takes a pragmatic, adaptive approach. It doesn't institute wholesale tenure reform. Instead, it focuses on context, institutionalizing tenure arrangements around existing tenure systems and prioritizing interventions to ensure that enough security exists for social forestry to flourish.

The fit-for-purpose approach of good enough tenure should be pursued. It can help scale up and accelerate the delivery of social forestry to meet the challenges in the region.

# Introduction

## Why is secure tenure important?

To prosper, people who depend on forests must be able to use, manage and benefit from the forests where they live. They must also be secure in the knowledge that they will be able to carry on doing so for the foreseeable future.

A 2019 study of 41 countries, published by the Rights and Resources Initiative (RRI), found that central governments own roughly 70% of forestlands with no regulations to allow local people to use them. However, large parts of these lands are used and managed by Indigenous Peoples and local communities every day.<sup>4</sup>

Many of the 2.4 billion people who rely on forests for their livelihoods<sup>5</sup> face this situation. Those in ASEAN Member States are not exempt. Many communities that depend on forestlands lack the rights to use, manage and benefit from them. This creates insecurity and results in high poverty and increased pressure on the environment.

A 2018 Prindex survey of people aged 18 and older in Cambodia, Indonesia, Thailand and Viet Nam found that up to 62.3 million felt insecure about their tenure rights (Table 1).<sup>6</sup>

If communities living in and around forestlands had secure tenure, they could attract external support and financing. Local people would feel more involved and would have a greater interest in preventing forest loss.

Secure tenure would be an incentive for local communities to manage forests sustainably and would offer more opportunities to improve their livelihoods. Ultimately, this would help ensure sustainable livelihoods, forest conservation and local self-determination.<sup>7</sup> It would also

address a host of other issues, including poverty eradication, economic development, food security, climate change mitigation and gender justice.<sup>8</sup>

## Recognition from the international community

The prevailing thought in the development community appears to be that monetization or commodification of land may be acceptable and even desirable. However, it needs further thought as to whether the outcomes for communities are beneficial in the long term.

International organizations and donors recognize the importance of secure tenure. They included it in many of their strategies. It is a key element in international agreements, including the United Nations (UN) Declaration on the Rights of Indigenous Peoples (2007).<sup>9</sup> It is also included in the Food and Agriculture Organization of the United Nations (FAO) Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2011).<sup>10</sup>

The Sustainable Development Goals (SDGs) recognize the role of secure tenure. Targets for three of the SDGs make specific reference to it:

- Goal 1. End poverty in all its forms everywhere
  - Target 1.4: By 2030, ensure that all men and women, particularly the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance

**Table 1:** Tenure security in ASEAN Member States in 2018

Country	Respondents aged 18 and older insecure about their tenure rights
Cambodia	33%
Indonesia	24%
Thailand	17%
Viet Nam	10%

Source: Prindex, 2018.

- Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture

Target 2.3: By 2030, double the agricultural productivity and incomes of small-scale food producers, in particular women, Indigenous Peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment

- Goal 5. Achieve gender equality and empower all women and girls

Target 5.a: Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws

## Social forestry helps communities sustainably use, manage and benefit from forestlands

Social forestry is also known as community forestry, participatory forestry and village forestry. For consistency, this report uses the term social forestry.

Social forestry generally defines the rights of communities to use, manage and benefit from forests and their resources. It primarily relates to forest management rights and more generally to forest tenure (rights over forests) rather than to land tenure (rights over land). This report uses 'forest tenure' as an umbrella term that may or may not include rights to the land.<sup>11</sup>

Table 2 provides an overview of how much forestland is managed by local people in six ASEAN Member States.

Communities depend on the ecosystem services and products that forests provide, including water, timber and food and non-timber products. These services and products can help build a safety net in times of hardship, contribute to longer-term subsistence needs and improve livelihoods.

People who depend on forests in ASEAN use both traditional and more recent community approaches to forest management and resource allocation. Social forestry is an approach that describes interventions to engage, empower and provide benefits to these communities.

**Table 2:** Forest land managed by local people in ASEAN 2010–2019<sup>12</sup>

	ha	ha	% of land area	Baseline 2010 ha	Situation analysis 2013 ha	Situation analysis 2016 ha	Situation analysis 2019 ha	
Cambodia	17,650,000	8,742,401	48%	113,544	183,725	296,240	362,209	4%
Indonesia	181,156,900	120,600,000	67%	33,000	143,065	642,646	3,073,676	2.5%
Myanmar	65,755,000	17,123,400	25%	41,000	42,148	113,765	289,168	1.6%
Philippines	29,817,000	15,805,825	53%	2,985,000	4,018,952	4,018,952	4,904,920	31%
Thailand	51,089,000	No data	No data	196,667	500,000	750,457	1,180,512	-
Viet Nam	33,123,078	16,240,000	49%	3,300,000	3,809,320	4,256,375	4,111,848	25%
Total community forestry area				6,669,211	8,697,210	10,078,435	13,922,333	

Source: RECOFTC, 2020.

The ASEAN Working Group on Social Forestry (AWG-SF) defines social forestry as an approach that:

- Engages communities living in and around forests in sustainable forest use and management
- Empowers communities through awareness-raising, capacity building, participatory policy development and recognition of their rights and systems of knowledge
- Provides communities with benefits and access to forest resources for their participation in sustainable forest management.<sup>13</sup>

These interventions may be made by governments in collaboration with other stakeholders, such as members of civil society.

The central role that secure tenure plays in successfully delivering social forestry in ASEAN is widely recognized. Key factors for successful social forestry include:<sup>14</sup>

- Secure tenure, or property rights
- Enabling regulatory framework
- Reasonable balance between rights and responsibilities
- Strong governance
- Viable technology to establish and manage productive forests as well as to use their products and services efficiently
- Knowledge of markets and market access for goods and services
- Supportive bureaucratic mandate and culture<sup>15</sup>

Adequately supported and resourced social forestry, through engaging and empowering local communities, often proves to be an effective vehicle for tenure reform.

## Why is this report needed?

Social forestry has become an increasingly important component of rural development and natural resource management and forest conservation programs in the region. Its environmental, social and economic value and potential are widely recognized. Prioritizing and implementing enabling factors such as tenure is crucial for its success.<sup>16</sup>

A number of factors have increased pressure on forestlands in the region. One of them is that governments try to focus on economic development and climate at the same time. This exacerbates tenure insecurity, with consequences for the success of social forestry in the region. This issue is discussed further in Chapter 2.

ASEAN Member States understand the importance of secure tenure in delivering

social forestry now and in the future. They also recognize that there is a need to understand the challenges and opportunities that different tenure arrangements pose and how they can coexist.

The Strategic Plan of Action for ASEAN Co-operation in Forestry (2016–2025) includes a requirement to review customary and statutory tenure arrangements as a component of social forestry programs.

As in many regions of the world, tenure arrangements in forestlands in ASEAN are complex and often contentious. Policymakers and practitioners in Member States recognize the need to address tenure security. However, the diversity of these arrangements across the region often creates barriers to discussion and action.

Harnessing this diversity can offer opportunities for all stakeholders to:

- Provide an introduction and framework to customary and statutory tenure arrangements in ASEAN that provides an entry point for non-specialists to understand and navigate their way around tenure issues (Chapters 1–3)
- Identify the opportunities and challenges of customary and statutory arrangements in achieving secure tenure (Chapters 4–6)
- Identify synergies and potential ways forward, recognizing the future pathways of social forestry through the programs of Member States (Chapter 4–7)

# The history and dynamics of tenure arrangements in ASEAN

## Approaches to tenure arrangements

Tenure is the system that governs various rights to land and resources. It identifies who can use which land and resources, for how long and under what conditions.<sup>17</sup> The way it is applied has a huge impact on individuals, households, communities and the natural environment.

Tenure arrangements can be divided into two broad types.

**Customary tenure** is a set of socially legitimate, informal and de facto rules and norms that govern community allocation, use, access and transfer of land and other natural resources. These norms, although based in tradition, are dynamic and flexible. They embody people's relationships with land and natural resources, which they depend on for their livelihoods, culture and well-being. They are not restricted to Indigenous Peoples and ethnic communities. Customary systems vary in scale but often encompass communal management of individual and family claims, grazing land, water resources and fisheries management.<sup>18</sup>

**Statutory tenure** is referred to as legally legitimate, formal or de jure rights. It is governed by sets of rules established and protected by the state, including registered land titles, concession contracts, laws and regulations.<sup>19</sup>

## From customary tenure to statutory tenure

Traditionally, people who depended on forests in Southeast Asia managed and used them with open access. Forests were abundant and the populations that relied on them were proportionally smaller.<sup>20</sup> This is similar to much of the rest of the world, including pre-industrialized Europe.

The colonization of Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines and Viet Nam resulted in the annexation of forests. These forests had previously been managed under various types of indigenous regimes. Although Thailand was not colonized, it followed a similar pattern of

acquisition from the central state.

Across the region, the traditional status of forest users was significantly weakened. They lost their rights to govern forests and use forest resources. In each country, the state often declared itself as the sole owner of forests and forestland. They asserted the right to regulate forest access and management in efforts to maximize timber production for the benefit of the colonizing power or the state.<sup>21</sup>

Following independence around the middle of the 20th century, little changed. Many postcolonial governments adopted the forest management approaches, laws and policies of their predecessors.<sup>22</sup>

Throughout the 1970s and 1980s, land administration models were heavily influenced by the belief that resources used in common would be poorly managed, overused and degraded as individuals acted out of self-interest. This view became popular after American biologist and philosopher Garrett Hardin published an article in 1968. It promoted the idea that private property solutions would help address pressures to overuse resources and improve forest management and forest commodification.<sup>23</sup> It is now widely discredited in favour of a more nuanced understanding.

In the 1980s and 1990s, Southeast Asian countries attempted to pursue well-defined property rights as a precondition for sustainable land management. They tried to clarify tenure, sometimes conducting tenure reform programs. Almost all countries received financial and technical assistance from international development agencies like the World Bank.<sup>24</sup>

Southeast Asian countries embraced combinations of primarily top-down legal, institutional and technical measures in order to manage their land and natural resources. This model continues today. Country efforts have often been focused disproportionately on technical components of land administration, such as land registration and recording. They have been implemented with varying levels of success.<sup>25</sup>

As a result of growing dissatisfaction with these top-down approaches, smallholder and community-based forestry emerged<sup>26</sup> across

the region from the 1970s through the 1990s.<sup>27</sup> Government agencies responsible for forestry came under scrutiny from civil society and development agencies for their ability to address increasing rates of deforestation and forestland degradation while delivering socioeconomic development. At the same time, organizations like FAO recognized that common property resource management could be a sustainable tenure option. They also acknowledged that there was a need to address the importance of forests to rural and Indigenous Peoples.<sup>28</sup>

The first social forestry programs involved communities under government management. Over time, this focus shifted to the actual devolution of rights.<sup>29</sup> Customary and statutory forms of social forestry now exist throughout Southeast Asia. Tenure lies at the heart of both of them.<sup>30</sup> Today, tenure arrangements in Southeast Asia are complex, interconnected and dynamic. Many forest communities are now governed by a mix of systems where statutory and customary laws co-exist, contradict and overlap.<sup>31</sup>

## A new integrated approach

Across the ASEAN region, tenure has been treated by government agencies as a binary choice between customary and statutory systems. Policymakers assumed that progress was defined and modernization achieved by a move away from customary towards statutory tenure arrangements based on titled private property.<sup>32</sup> However, there is now a debate between civil society and government about whether statutory tenure arrangements are necessary to ensure social forestry programs are successful.<sup>33</sup>

Customary tenure arrangements often evolved over generations to respond to local needs. In the short term, it is unrealistic to try to replace or significantly alter these customary arrangements. Many countries have limited administrative capacity and are unable to fill the gap left when they replace customary systems.<sup>34</sup>

The consequences of such actions can be severe for those who depend on the forestlands and environmental services for their livelihoods.<sup>35</sup> For example, removing local regulatory mechanisms has unleashed short-term free-for-alls where powerful outsiders have plundered the forests.<sup>36</sup> Because of this, replacing customary arrangements may be undesirable. It is possible for social forestry, based on customary arrangements, to flourish.<sup>37</sup>

Forests are vulnerable to land grabbing when there are no laws or statutes that enshrine customary tenure arrangements. The lack of tenure security undermines community efforts to manage them

and other traditional lands.<sup>38</sup> That is why there is pressure from rights-based organizations in many countries for communities to have their informal tenure recognized within formal legal frameworks.<sup>39</sup> Policymakers favour an approach that accommodates customary tenure within statutory systems.<sup>40</sup>

Across Southeast Asia today, different customary and statutory tenure arrangements coexist with varying degrees of success. Clearly, no one universal model of tenure is guaranteed to deliver successful social forestry programs.<sup>41</sup>

Global experience shows that national governments need to take account of both national<sup>42</sup> and community needs. These include the historical, economic, political and cultural circumstances of the country. This must be coupled with a detailed understanding of national government administration, policies and legal context; the political economy of development; and the diversity of existing land tenure practices. Arrangements should be tailored to be fit for purpose.<sup>43, 44</sup>

As social forestry takes an increasingly important role in forest management in the region, integrating and formalizing customary tenure in ASEAN have become urgent. Its environmental, social and economic value and potential is more apparent than ever to policymakers and practitioners in Member States. They also recognize that the full potential of social forestry has not been achieved because key enabling factors, such as secure tenure, often are not in place. Therefore, putting enabling factors in place has become a policy priority.<sup>45</sup>

Integrated and formalized customary tenure arrangements should:

- Acknowledge people's customary claims and strengthen their self-determination
- Address inequality, particularly for marginalized groups, including women
- Allow people to contribute to forest conservation, which includes maintaining biodiversity, sequestering carbon and regulating water cycles
- Lay foundations for sustainable livelihoods, including income generation, climate change adaptation and food security<sup>46</sup>
- Reduce conflict and improve tenure security through mechanisms for accountability and enforcement

## Secure tenure can address challenges

A number of global, regional and national challenges have increased pressure on forests.

Secure tenure has a role to play in tackling these and other global, regional and national challenges.

### **Deforestation and forest degradation**

Forest cover in the region has declined by 7 million hectares (3.4%) since 2013, with significant reductions in Indonesia, Cambodia, Malaysia and Myanmar. All ASEAN countries are losing primary forests at a dramatic rate.<sup>47</sup>

According to the Tenure Facility, strong community rights could prevent 27.2 million hectares of deforestation globally by 2050.<sup>48</sup>

### **Climate change**

The planet faces an unprecedented challenge as climate, biodiversity and land degradation crises push it to a tipping point. The ASEAN region is extremely vulnerable to climate change.<sup>49</sup> It has an extensive coastline, two large archipelagos and four major river deltas that are vulnerable to storms and sea level rise.

Most ASEAN economies depend heavily on climate-sensitive sectors such as agriculture and forestry. Large rural populations rely on access to land, water sources, forests, fisheries and other climate-vulnerable natural resources.<sup>50</sup> This places pressure on land resources and increases tenure insecurity.

The Intergovernmental Panel on Climate Change warns that limiting warming to 1.5°C or well below 2°C will require land-based mitigation and land use change. Most of these changes will require combinations of reforestation, afforestation, reduced deforestation and bioenergy.<sup>51</sup>

There is evidence that stronger community access and management rights result in improved forest conservation, management and reforestation. This also creates new jobs and improves livelihoods through access to affordable credit and financial resources.<sup>52,53</sup> It also lowers greenhouse gas emissions and increases carbon storage.<sup>54</sup> Research shows that clarifying and securing rights is a cost-effective solution to mitigating climate change.<sup>55</sup>

### **Conflict resolution**

Many communities in ASEAN struggle to protect their territorial claims to land and their environments. In rural areas, many are vulnerable to land grabbing for extractive industries, conservation areas and commercial agriculture.<sup>56</sup> This is fueled by globalization and a push to commodify and privatize land.

Many governments now consider tenure reform as a way to mitigate conflict over forest resources and rural land.<sup>57</sup>

### **Participatory forest governance**

Across Asia, the failure of top-down, state-controlled forest management systems is apparent. This has provided impetus to reform forest tenure to transfer statutory rights to local communities and Indigenous Peoples.

Many countries have created space for local communities to manage forests, sometimes with support from the private sector.<sup>58</sup>

### **Livelihoods development**

In 2017, approximately 47.5% of ASEAN's 642.1 million people lived in rural areas. This percentage is decreasing, resulting in a decline in the number of people living in poverty, particularly in Cambodia, Thailand and Viet Nam. There has, however, been a marked increase in income inequality throughout the region.<sup>59</sup>

Many governments now see forest tenure reform and social forestry as vehicles to improve rural livelihoods and reduce disparities between urban and rural populations.<sup>60</sup>

### **Indigenous rights movements**

There is growing recognition of problems faced by Indigenous Peoples. The Indigenous Peoples' movement has demanded customary rights over forest resources and called on governments to rethink tenure arrangements.<sup>61</sup>

The 2007 United Nations Declaration of the Rights of Indigenous Peoples states they have a collective right to the lands and resources they have traditionally owned, occupied or used.<sup>62</sup> The Declaration has spurred governments to tackle the issues through tenure reform.

# Elements of tenure arrangements: A framework for understanding

A wide range of tenure arrangements exists within and among countries. Each tenure arrangement is created and implemented in a unique context, from the national level to the individual community. A lack of clear documentation and confusing definitions and terminology make understanding tenure arrangements difficult. This complexity creates confusion and is a barrier to discourse and action.

Analysing customary and statutory tenure arrangements and their key characteristics can help clarify the challenges and opportunities that they present.

People have secure tenure when they are able to use resources on a continuous basis, free from imposition, dispute or approbation from outside sources.<sup>63</sup> It is not determined solely by whether tenure rights are statutory or customary, and it may increase or decrease over time. Some arrangements are more vulnerable to insecurity than others. Insecurity may make some types of tenure arrangement harder or even impossible to implement.

Ultimately, people's perception of tenure security is what helps them determine their land use decisions.<sup>64</sup> People will be unlikely to invest time, effort and finances in social forestry if they do not perceive their situation as secure.

In addition to tenure arrangements, tenure security is determined by the social, political and economic context within which these arrangements sit. The same arrangements within two different contexts may result in very different levels of tenure security and outcomes for the stakeholders involved.

The context can be understood by considering:

- The strength of tenure arrangement
- The pressures and threats that will test the tenure arrangements

This chapter explores elements of tenure arrangements and their context and uses the information to develop a framework, which is found in the Annex.

The framework is not intended to be a rigid analytical tool. It is a guide to simplify, aid understanding and enable analysis of tenure arrangements in a robust and consistent way. It also allows comparisons to be made.

The key characteristics of tenure arrangements are presented in three parts:

- Tenure arrangements
- Strength of tenure arrangements
- Pressures and threats

## Tenure arrangements

### Rights and responsibilities

At the core of tenure arrangements is the set of rights and responsibilities that are afforded to communities and others:

- A right is an entitlement supported by law, longstanding custom or general practice, accompanied by restrictions and responsibilities.<sup>65</sup>
- A custom or practice becomes a right when it is longstanding and when it is recognized by those within or outside a community or by the state.
- A bundle of rights is the term often used to describe the complex set of social, political, economic, legal and physical relations that are intrinsic to many complex tenure systems.<sup>66</sup>

### Bundle of rights

Eleanor Ostrom and Edella Schlager<sup>67</sup> identified five types of rights in the bundle:

- **Right of access:** the right to enter an area and enjoy non-subtractive use, such as recreation
- **Right of withdrawal:** the right to use resources and extract products
- **Right of management:** the right to regulate internal use patterns and transform the resource by making improvements
- **Right of exclusion:** the right to determine who will have access and withdrawal rights
- **Right of alienation:** the right to sell or lease management of exclusion rights<sup>68</sup>

The exact make-up of the bundle of rights afforded to forest communities varies.

RRI analysed 61 statutory community tenure regimes and the bundles of rights available to communities in 30 of the world's most forested countries. This research suggests that the rights of Indigenous Peoples and other communities have been increasingly established and recognized.

However, it also shows that most of these regimes restrict community rights by not granting one or more of the bundle of rights or by placing time limits on them.<sup>69</sup> Most frequently absent are the rights to exclude outsiders and to lease lands, also known as alienation.<sup>70</sup> Caveats are often added, such as limiting harvesting to subsistence use or denying compensation, recourse or due process if conflicts arise.

Rights come with responsibilities and duties. However, the commodification of land means that the economic benefits are often prioritized

over social benefits and rights. This leads to the dispossession of local communities.<sup>71</sup> This dynamic is particularly important to understanding tenure rights in order to make social forestry more effective and balance economic, ecological and social benefits.

Communities usually have to accept a range of responsibilities in exchange for the rights to manage their forests and share in the benefits. These are generally prescribed in the regulatory framework of laws, policies, rules and regulations. They can include preparing management plans, carrying out forest inventories and obtaining approval from government officials to harvest, transport or sell forest products.<sup>72</sup>

Each form of social forestry will have its own package of rights and responsibilities along with conditions related to the duration of the rights. Some rights are permanent, while others are granted for a limited time period.<sup>73</sup>

### Land tenure versus forest tenure

Different bundles of rights may apply to different resources: the land itself, forest resources located on the land or minerals and water under the surface.<sup>74</sup>

- Land tenure encompasses all rights to land, including the rights to possess, control, exploit and sell the land.
- Forest tenure refers to the rights relating to the forest and its resources. It includes the right to access forests and to manage and use timber and non-timber forest products. It could also include the full bundle of rights in relation to the forest.<sup>75</sup>

Land tenure and forest tenure may fall under different legislation and policies. A clear link exists between these two concepts, as rights to forest resources cannot be entirely dissociated from rights to the land on which they stand.<sup>76</sup>

A number of scenarios can be found in several countries where rights over forests and trees are tied to rights over land or forest and land rights are distinct.

For example, a community can hold the land rights of a specific plot of land while the government can still grant a private logging concession in the same forest. People who have rights to forest resources often do not have the rights to the land on which that forest is located.<sup>77</sup> Subsurface rights often remain with the government and supersede community rights to the forest, adding additional complexity.<sup>78</sup>

## **An overview of parties involved in tenure arrangements**

Once the rights and responsibilities of everyone associated with a forest are understood, it is necessary to understand to whom these rights apply. Different parties can have different rights and responsibilities over different aspects of the forest. This adds enormous complexity to the situation.

A lack of reliable information, confusion about what is meant by 'ownership' and which aspects of the 'bundle of rights' this refers to make it a challenge to understand to whom rights apply. There is no common definition of ownership. While in some cases it means complete control over land or a resource, often it refers to a more limited selection of rights.

The picture of land ownership in the ASEAN region is changing significantly. While the large majority of forests remain publicly owned, rights given to private companies, communities and individuals have increased over the past decades.<sup>80</sup> RRI recently found that between 2002 and 2017, the area of forest legally recognized for communities had grown by almost 40%.<sup>81</sup>

Even within a specific set of actors, rights may not be conferred evenly. Customary tenure systems typically encompass a range of collective or private land or resource ownership, management and use.<sup>82</sup>

Some land may be reserved for conservation or cultural use. Some may be fully communal, especially during certain periods and for specified uses, such as grazing or collecting non-forest timber products (NTFPs). Some areas are considered communal but individual households can use them for a specific period and use, such as for growing a short-term crop over one year.

Other lands are recognized for permanent use by a specific household, such as with rice paddy or tree plantations. This approaches the status of ownership but is not equivalent to the private ownership of Western-based legal systems. In some customary systems, even if land is used for permanent plantations, it cannot be sold to outsiders.<sup>83</sup>

Resource management may not always coincide with ownership. For example, if home gardens and some agricultural land are held as private

## **Main parties to whom rights apply**

### **Private**

Rights are assigned to a private party, which may be an individual, a married couple, a group of people or a corporate body such as a commercial entity or non-profit organization. For example, within a community, individual families may have exclusive rights to residential parcels, agricultural parcels and certain trees. Other members of the community can be excluded from using these resources without the consent of those who hold the rights.

### **Communal**

A right of commons may exist within a community where each member has a right to independently use the holdings of the community. For example, members of a community may have the right to graze cattle on a common pasture.

### **Open access**

Specific rights are not assigned to anyone and no one can be excluded. This typically includes marine tenure, where access to the high seas is generally open to everyone. It may include rangelands and forests, where everyone may have free access to the resources. An important difference between open access and communal systems is that under a communal system, those who are not members of the community are excluded from using the common areas.

### **State**

Property rights are assigned to some authority in the public sector. For example, forestlands may fall under the mandate of the state, at either a central or decentralized level of government.<sup>79</sup>

### **Joint rights**

This refers to a combination or shared authority over limited and highly prescribed rights for local people to access and use forest products. Forest products and related benefits from government-owned forests are shared between government and local communities to encourage communities to protect the forest.

property but land and resources surrounding the village is held in common, decision-making and management of private land may be pooled. In some cases, the management and use of common land may be allocated to individual households.<sup>84</sup>

ASEAN Member States have made efforts to enable local communities to manage and benefit from their local forests. However, the balance of power often remains with governments.

In the region, joint forest management arrangements come in many forms. Some are partnerships between the government and community. Others are through private ownership arrangements made with individuals or companies chosen by the government, such as forest concessions and land titling programs. The state often maintains a high level of control over the land and resources. This is especially true with harvesting and value-added commodities, which is where the major income opportunities lie.<sup>85, 86</sup>

According to RECOFTC, social forestry governance arrangements across the region are mainly collaborative. They range from active control by communities to passive participation in what are essentially government programs.<sup>87</sup>

### Tenure mechanisms

The various rights and responsibilities of the parties involved in tenure arrangements are governed by mechanisms, which are the ways that rights are exercised. Mechanisms are either statutory or customary or a combination of both.

Mechanisms sit within a broad continuum.<sup>88</sup> Excluding the extremes, the continuum is multidimensional. Different rights, responsibilities and parties belonging to a particular tenure arrangement might be subject to different mechanisms. The result is a complex picture, which makes it challenging to compare arrangements or generalize at a national level. The lack of transparency or clarity that often accompanies the details of the arrangement complicates the picture even further.

Confusion and ambiguities between statutory and customary social forestry arrangements are common.<sup>89</sup> Customary and statutory mechanisms are not absolutes, and they both provide challenges and benefits. Conflict between the two mechanisms is not inevitable. Social forestry can exist with or without statutory tenure rights.<sup>90</sup> Customary practices and rights may be extralegal, where they are not against the law but are not within it. In other cases, customary practices and rights might contravene statutory practices and rights, resulting in conflict among parties.

Customary rights can be formalized to varying degrees through statutory recognition within

social forestry legal frameworks, such as primary legislation. These are not equivalent to statutory rights but they can have a positive impact on community involvement in forest management by formalizing and securing these rights. This can help communities maintain and preserve the forest on their customary lands, leading to the long-term success of social forestry.<sup>91</sup>

The majority of forestlands in ASEAN Member States are owned by the state and are therefore covered by statutory tenure arrangements. These include registered land titles, concession contracts, laws and regulations. Local communities and Indigenous Peoples who live within and around the forestlands are living there either with:

- No recognition from the state, and their customary tenure arrangements are in conflict with the state
- No recognition from the state, but their customary tenure arrangements are extralegal, where they are not against the law but are not within it
- Some state recognition of their customary tenure arrangements and rights to manage the forest and its resources through statutory tenure arrangements

### Strength of tenure arrangements

A significant factor determining tenure security is the strength of the tenure arrangements. That strength depends on the legal framework and the planning and implementation of that framework, which forms both the tenure arrangements themselves and the context within which they sit.

While statutory tenure arrangements may have a strong legal basis, they might be poorly implemented. Customary tenure arrangements that have little legal standing may be well-planned and implemented with full community participation and inclusion.

The Program on Forests<sup>92</sup> is a multi-donor partnership on forests and poverty reduction led by the World Bank. It identified nine key elements for securing community-based forest tenure, which can be found in Part 2 of the Framework (Annex 1). These can be divided into legal, planning and implementation elements that help break down, identify and compare the different strengths of tenure arrangements.

### Legal

The legal framework, policies and institutions in place will vary in how strong the rights and protections are for local communities, as well as their ability to withstand different pressures on land use and change. The legal frameworks supporting statutory arrangements are not

equal. Their strength will depend on whether the full bundle of rights are recognized by the law and on the legal mechanisms used. For example, when there is a change in administration, secondary legislation or executive orders can be quickly repealed and used instead of primary legislation and the country's constitution.

### Planning

Planning and decision-making processes that are inclusive, effective and based on good information will lead to strong tenure arrangements. Legislation is little more than recognition without mechanisms in place that lead to implementation.

### Implementation

Formal, legal recognition of indigenous and community lands is an important first step. However, without effective implementation, it does not guarantee tenure security. Tenure security requires that states and other parties respect, support and enforce legal protections in a coherent manner. This ensures that commercial concessions, other land uses or external parties do not interfere with community land rights. Existing laws that establish community-based tenure require further implementation to close the gap between the lands that Indigenous Peoples and local communities hold in practice and the lands to which they have formal legal recognition.<sup>93</sup>

## Pressures and threats that test tenure arrangements

The pressures and threats that test tenure arrangements are factors that help determine tenure security. For example, some communities within forestlands may not have formal legal recognition but their tenure arrangements are 'extra-legal', and they do not suffer any adverse consequences. Other communities and Indigenous Peoples with some statutory rights can be vulnerable to land grabbing, resulting in conflicts as they struggle to protect their territorial claims and protect their environments.<sup>94</sup>

Several studies have tried to identify and categorize the range of challenges and threats to tenure security. Michael Barry in *Property Theory, Metaphors and the Continuum of Land Rights*,<sup>95</sup> says factors that might threaten tenure security may be external or internal to the community. They can also be attributed due to the behavior of the state or other powerful institutions.

## Using the Framework to understand tenure arrangements in ASEAN

The Framework (Annex 1) provides a guide to the challenges and opportunities that customary and statutory tenure arrangements present in ASEAN. It outlines where synergies exist that enable social forestry to flourish.

The next three chapters use the Framework to explore and guide the analysis of tenure arrangements throughout ASEAN. They examine each part of the Framework to guide analysis of:

- The status of tenure arrangements in each Member State. This includes: a country-level overview of customary tenure arrangements; the main parties involved in tenure arrangements in forestlands; the statutory mechanisms that have taken account of customary arrangements; the rights and responsibilities conferred; with "and areas of future focus (Chapter 4)
- The customary and statutory tenure arrangements that help achieve secure tenure; the challenges, opportunities and synergies that this presents, noting particular examples from Member States (Chapter 5)
- The challenges, opportunities and synergies of customary and statutory tenure arrangements that can help overcome the pressure and threats that test them, noting particular examples from Member States (Chapter 6)

The goals of this analysis is to help guide future development of tenure in the region to support successful social forestry.

Undertaking this analysis of tenure arrangements across ASEAN is a significant challenge. Every attempt has been made to ensure that the information presented here is accurate. However, the limitations of the information available have to be acknowledged. The quantity and quality of literature about the tenure arrangements of different Member States varies enormously. A lack of data from Malaysia presents a particular challenge, and as a result, Malaysia is largely missing from the analysis.

In addition, a lack of English translations of most legislation related to tenure resulted in a reliance on secondary literature. These interpretations were often contradictory. Efforts have been made to consult with those working on tenure issues in Member States to ensure as much accuracy as possible. Further in-depth analysis and work is needed to fully document the tenure situations in each Member State. Nevertheless, the information presented over the next few chapters should provide a useful introduction to the situation in each Member State and the complex challenges and opportunities facing tenure across ASEAN.

# Status of tenure arrangements in ASEAN

This chapter uses Part 1 of the Framework as a guide to outline:

- A country-level overview of customary tenure arrangements
- The main parties involved in tenure arrangements in forestlands
- The statutory mechanisms that have taken account of customary arrangements
- The rights and responsibilities conferred to local communities
- Areas for future focus

RECOFTC's publication *Social Forestry and Climate Change in the ASEAN Region: Situational Analysis 2020* is an overview of social forestry across the region and within each Member State. It provides useful additional information on the status of social forestry in each country.

## Cambodia

### Status

Article 15 of the Land Law (2001) stipulates that the permanent forest estate is owned by the state.<sup>96</sup>

Customary tenure arrangements extend over large parts of Cambodia. Local rules, institutions and practices have long governed access, use and management over a wide range of land, forest and fisheries resources. These arrangements include both individual and communal tenure arrangements and cover a range of land types, including forestlands.<sup>97</sup>

Cambodian law accommodates some customary arrangements in forestlands. There is a wide range of laws, sub-decrees and guidelines that govern tenure arrangements in these lands. However, customary arrangements are recognized mostly in lower-order legislation such as sub-decrees. Laws governing the allocation of land for concessions allow limited protection for customary users.<sup>98</sup>

Key statutory mechanisms that recognize customary arrangements include:

- Land Law (2001)
- Forestry Law (2002)
- Sub-decree 79, Community Forestry Management (2003)
- Ministry of Agriculture, Forestry and Fisheries Guidelines, Community Forestry (Prakas)

(2006)

- Protected Area Management Law (2008)
- Guideline, Procedure of Community Protected Area Establishment (2017)
- Guideline, Zoning for Protected Area in Cambodia (2017)
- Sub-decree 26, Rules for Granting User Rights to Plant Trees within State Forestlands (2008)
- Sub-decree 83, Issued Procedure of Registration of Land and Indigenous Communities (2009)
- Sub-decree 19, Social Land Concessions (2003)
- Sub-decree 53, Procedure Establishment Classification and Registration of Permanent Forest Estate (April 2005)
- Production Forest Strategic Plan (2018–2032)
- Environment and Natural Resources (ENR) Code (in progress)

In community forests, communities are granted rights to access, use, manage, protect and benefit from forest resources in a sustainable way. However, the lack of alienation rights means that the full bundle of rights is often not available to communities in forestlands.

In rural Cambodia at the community level, formal laws are often 'customized' or locally interpreted to fit the informal norms. These customary tenure arrangements are generally accepted in the community and by local-level government staff. They operate where there is a gap between policy and implementation.

Laws are partially implemented or neglected as a result of weak state institutions and administration. This can give rise to a kind of plurality of state law and customary norms and institutions, which can result in conflict. This flexibility reflects the traditional way that politics works in Cambodia. Long-held customs of rule and informal patron-client relationships often shape the way laws and policies are implemented.<sup>99</sup>

The Government of Cambodia has developed an Environment and Natural Resources (ENR) Code. It is meant to guide sustainable development of Cambodia by protecting the environment and conserving, managing and restoring natural and cultural resources.

The ENR Code focuses on collaborative management as a mechanism for land and natural resources management and local

livelihood development. National and sub-national authorities and local communities have clearly defined roles and responsibilities for using, managing and protecting natural resources and biodiversity.

According to the ENR Code, collaborative management applies to communities living within or adjacent to and deriving livelihood benefits from components of the Natural Protected Area System or other areas of high conservation or ecosystem service value. The ENR Code provides overarching principles for collaborative management. Detailed procedures and steps need to be developed and integrated with relevant policies and practices, especially those that relate to community-based natural resource management. A collaborative management mechanism will help ensure that communities have more opportunities to access, use, manage and protect land and natural resources.

Additional legal reforms, in the form of Forestry and Protected Area Law, provide opportunities to strengthen the legal foundations of community-based natural resource management, particularly social forestry. Furthermore, the recently finalized Production Forest Strategic Plan (2018–2032) gives social forestry a prominent role in producing timber and NTFPs.

### Areas of future focus

State laws and statutory arrangements are replacing and restricting customary arrangements in Cambodia.<sup>100</sup> This increases the urgency to secure and recognize customary arrangements.

The Land Law (2001) gives collective land ownership to indigenous communities through communal land titles and to monasteries registered in the name of the pagoda. However, non-indigenous communities, such as the Khmer and Lao, who also rely on communal forests, grazing land and fisheries and practice shifting cultivation, are not able to apply.<sup>101</sup>

Sub-decree 83 allows communities to have a maximum of 7 hectares for spirit forest and 7 hectares of burial forest. If the customary area is larger than this, they may lose a part of it. The result is that the protection given by statutory agreements may only partially protect land previously governed under customary arrangements.

Alienation is not included under the legal agreements for community forestry and community protected Areas. This limitation of the bundle of rights might prevent communities fully benefiting from forestlands.<sup>102</sup> It is also possible that if the land is alienated, communities might instead lose their whole

bundle of rights, increasing their vulnerability. Further work must be done to understand if the lack of alienation rights is in the long-term interest of communities.

All laws related to land tenure state that the government has the right to take back forestland or transfer it to other uses if it will benefit the public. None of the current legal framework provides for compensation when this happens. This significantly reduces tenure security.<sup>103</sup>

## Indonesia

### Status

Forestry Law 41 (1999) divides forests in Indonesia into state forest and private forest. Any forestlands that do not have private entitlements are state forests.<sup>104</sup>

Local communities have inhabited a large proportion of the statutory forest zone for generations. In 2009, there were 40,859 villages within and around the forest zone, approximately 40% of all villages in Indonesia.<sup>105</sup> Several case studies show that customary practices and rights in forestlands still exist and have been revived through local regulations and informal tenure arrangements.<sup>106, 107</sup> The prevalence of these practices is not clear.

Customary tenure arrangements exist mainly in forestlands in Indonesia. Although there are some regulations on customary tenure in non-forestlands, these areas have largely already been converted to private property. For example, around the Bandung area, what is called 'adat' land is actually land converted to private property. In Flores, the customary land allocation parcels are now mostly individual property as well.

Indonesian customary law varies from one region to another and between racial or ethnic groups.

There is limited recognition of customary tenure in statutory tenure arrangements. Of the approximately 9.3 million hectares of customary forest in Indonesia, fewer than 500,000 hectares had been recognized by the government by the end of 2019.<sup>108</sup>

Key statutory mechanisms that recognize customary arrangements include:

- Ministry of Home Affairs 52, Guidance for Recognition and Protection for Customary Law (2014)
- Ministry of Environment and Forestry Ministerial Decree 83 (2016)
- Forest Minister Decree 31, Administration of Community Forestry (2001)

- Regulation of the Minister of Forestry 1 (Menhut-II/2004)
- Ministerial Regulation 37 (2007)
- Ministerial Regulation 49 (2008)
- Ministerial Decree on Special Purpose Zone (1998)
- Forestry Law 41 (1999)
- Constitutional Court Ruling 35/PUU-X/2012 (2013)
- Ministerial Decree 699, Community Forest Management (1998)
- Ministry of Agrarian and Spatial Planning 18, Procedures Administration for Customary Land Rights (2019)
- Ministry of Environment and Forestry 21, Customary Forest and Forest Rights (2019)
- Ministry of Agrarian and Spatial Planning 18, Procedures Administration for Customary Land Rights (2019)

Community rights were first recognized when the Ministry of Environment and Forestry passed the Decree on Special Purpose Zone in 1998. It acknowledged the rights of customary communities that for centuries practised agroforestry systems. Further progress was made when the Forestry Law 41 (1999) came into force. It provides the basis for social forestry programs in Indonesia. Under these programs, local communities obtain forest management licenses, while land ownership remains with the state. Social forestry programs include community forest, community plantation forest and village forest.<sup>109</sup>

Joint forest management partnerships between private forestry companies and local communities offer benefits to communities for their contribution to forest development. They offer partial rights to local communities, although the exact extent and security of these rights varies greatly among projects.<sup>110</sup>

Indonesia's legal framework did not recognize communal ownership over forestland until the Constitutional Court Ruling 35/PUU-X (2012) was issued in 2013. Prior to the ruling, all traditional territories of customary communities were considered to be state owned.<sup>111</sup> This ruling declared that customary forests would no longer belong to the state and would be categorized as private forests. The significant ruling proved to be a turning point for the government because it recognized community rights over forestry. It has legitimized the longstanding claims of ownership by customary communities over their traditional territories.

While new social forestry arrangements and other tenure reform give partial rights to communities, customary tenure with full

ownership rights is not fully implemented.<sup>112</sup> The rights given to communities are usually for access, withdrawal for subsistence and commercial use and sometimes management. Exclusion, alienation and compensation rights are much less common.<sup>113</sup> In customary territories, the forest area is de facto collectively owned and managed by customary communities. They do not pay attention to the statutory definitions of state forest, private forest or area for other uses.<sup>114</sup>

### Areas of future focus

The government has made progress in gazetting forest areas. However, mapping and recognition of customary territories and boundaries are incomplete. The recognition includes identifying the people who hold those rights as well as the type of rights being held.<sup>115</sup>

The lack of exclusion, alienation and compensation rights afforded to communities have not been addressed. Customary communities should have the authoritative rights to exclude and allocate control rights to particular parties.<sup>116</sup>

## Lao PDR

### Status

Forest governance is highly centralized in Lao PDR, with the state claiming ownership of nearly all forestland.<sup>117</sup> Article 17 of the Constitution and Article 3 of the Land Law (2003) states that land and natural resources belong to the national community and are managed by the state. It has the power to devolve user rights to individuals, families, state and economic organizations.<sup>118</sup>

How much land is held under customary tenure arrangements has not been thoroughly documented.<sup>119</sup> Customary tenure exists among all ethnic groups and covers a wide range of land types and resources throughout rural Lao PDR.<sup>120</sup>

In the absence of other forms of tenure security, customary tenure continues to be the basis of livelihood and cultural security for a majority of the rural population. It is important for vulnerable sectors of the population, especially ethnic minorities, women and people who are poor and landless. They rely on access to upland areas, communal forests, grazing land and fishing areas. Customary tenure arrangements apply to land types managed collectively and held privately by individual households or families.<sup>121</sup>

There are some laws that recognize customary tenure but they are generally weak and poorly implemented.<sup>122</sup> Key statutory mechanisms that recognize customary arrangements include:

- Ministry of Agriculture and Forestry (MAF) Order 54, Customary Rights and Use of Forest Resources (1996)
- MAF Instruction 0822, Land and Forest Allocation for Management and Use (1996)
- Forestry Law (2019)
- Forestry Strategy 2020 (PM Decree No. 229 dated 9 Aug 2005)
- Forestry Law No 64 (NA/13 Jun 2019) Presidential Decree No. 255/25 Jul 2019
- Land Law (2019)
- Ministerial Direction 6036/MONRE (2014)

The government introduced the Land and Forest Allocation program in the early 1990s<sup>123</sup> as a first attempt to clarify customary land rights. As part of the program, the government began land titling to further clarify customary land claims and determine the extent of customary tenure arrangements.<sup>124</sup> To date, land titling has mainly focused on urban and peri-urban areas and has covered individual rather than collective lands. In rural areas, some people who are better off and can afford the cost of titling a single parcel use ad hoc land titling.<sup>125</sup>

Since the early 1990s, customary tenure systems have been undermined by forest and land allocation, village consolidation and market-oriented policies aimed at turning land into capital.<sup>126</sup>

MAF Order 54 on Customary Rights and Use of Forest Resources lists which customary uses of forests, forestland and forest products do not require a permit.<sup>127</sup>

Ministerial Direction 6036/MoNRE (2014) describes land that is eligible for a communal title, including village-use forests, communal tree plantation areas and spiritual forests. Articles 1.3 and 14 indicate that communal titles may be issued to one or several villages when larger areas are managed jointly.<sup>128</sup> This MONRE Direction has not been widely implemented and needs to be revisited in the light of both the Forestry Law 2019 and draft Land Law. It also needs to consider the three forest categories in Lao PDR.

The 2019 Forestry Law makes significant progress in the recognition of customary rights. It gives a wide range of rights to both individuals and organizations to use and manage forests. It indicates that local communities under village administration are considered to be juridical entities. In addition:

- Article 43 states that households and businesses can use forestland as long as they do not adversely affect forests or soil quality.
- Article 131 describes how people who have been using the land regularly for more than 25 years can be granted tenure rights if the village authority and surrounding landowners agree.

- Article 64 defines the customary utilization of forest, timber and NTFPs and, with Article 60 allows for their use in control-use zones.
- Article 126 gives individuals and organizations the right to sell timber and NTFPs they have planted and rehabilitated in areas allocated by the government. They can generate income from selling forest carbon and from ecotourism. Titled tree or NTFP plantations can be used as collateral or shares, which could benefit livelihoods. Exclusion, alienation and compensation rights are much less common.<sup>129</sup>

Land use planning is the main official process used to strengthen village tenure security. It has been important in advancing recognition for customary rights. Forest land under village management is classified as village-use forests, which since the 1990s, have been allocated as part of the Land and Forest Allocation process.

Land use plans and village forest management plans also allow customary land and resource-use rights over areas that cannot be titled, such as protection and conservation forest. Participatory land use planning provides formalization and recognition of customary tenure arrangements, which helps improve tenure security. Land use plans may not have the same legal strength as land titles. However, for some customary areas, land use planning may offer better long-term tenure security over larger parcels of village land.<sup>130</sup>

### Areas of future focus

Articles 16 and 17 of Lao PDR's Constitution and a range of legal instruments mandate the state to protect property rights, including possession, use, disposition and inheritance. However, the state claims ownership of nearly all forestland. This dichotomy highlights the tension between the constitutional rights of the country's citizens to use, transfer and inherit land, and the state's right to manage it.<sup>131</sup> This issue needs clarification and resolution.

The government also needs to establish statutory arrangements and instruments to implement the individual and collective customary rights set out in the new Forestry Law and Land Law.

## Malaysia

### Status

According to FAO's 2010 *Forest Resources Assessment*, the Malaysian government owns 98% of forests and private entities own the remaining 2%.<sup>132</sup>

The Malay customary law varies over regions and racial or ethnic groups. In Peninsular Malaysia, customary land tenure systems hold significant

influence and are still practised, especially in rural society.<sup>133</sup>

The federal Constitution assigns land and forestry matters to individual states. Each state government has autonomy over their forest resources.<sup>134</sup> The provisions of the National Forestry Policy apply in Sabah. Sarawak has its own forest policy, which delineates forestlands into equivalent classifications.<sup>135</sup>

While there is some recognition of customary arrangements, there is no recent legislation providing any protection. Key statutory mechanisms that recognize customary arrangements include:

- Sabah Land Ordinance (1930)
- Aboriginal People Act (1954)
- Land Ordinance and Land Code (1958)
- National Land Code (1963)
- Land Acquisition Act (1960)
- Land Ordinance Enactment (1975)
- National Forest Act (1984)
- Sarawak Land Code (1958, amended 2018)  
The Adat Law is a form of customary legislation based on traditional rules. It protects native Malay land from title conversion and is upheld by the National Land Code (1963) and the Land Acquisition Act (1960). In Peninsular Malaysia, native peoples' rights are protected under the Aboriginal People Act (1954). It protects Indigenous Peoples by delineating aboriginal Malay Reservation land.<sup>136</sup>

In Sabah and Sarawak, land tenure and rights are clarified in the Land Ordinance Enactment (1975). It recognizes Native Customary Rights and traditional customary *adat laws*. In Sarawak, rights and tenure are legislated in the Land Ordinance and Land Code (1958) and various amendments, which set out Native Customary Lands and Reserves.<sup>137</sup>

The Sabah Forest Department issues Occupation Permits to formalize the presence of communities in forest reserves. The price of the permit is charged per hectare and paid for annually. Although the community participates in deciding the total area covered by the permit and its duration, the final decision remains with the Forest Department.

The Sabah Forest Department's formal acknowledgement of forest communities and their traditional claims to land is a positive development. Communities in Sabah can also gain communal property rights by applying for an indigenous reserve. This differs from communal title in that the community cannot transfer these rights to other parties. Land use is restricted and a Board of Trustees must be established to manage the reserve.<sup>138</sup>

## Myanmar

### Status

Article 3 of the Constitution (2008) states that the Government of Myanmar "is the ultimate owner of all lands and all natural resources above and below the ground." It also recognizes private property rights.<sup>139</sup> Approximately 25%<sup>140</sup> of the land area in Myanmar is classified as forestland and is under the administration of the Ministry of Natural Resources and Environmental Conservation.<sup>141</sup>

There are many different types of customary tenure systems in Myanmar. They vary depending on history, geography, resource base, ethnicity, population density and factors such as the extent of market integration. Customary tenure is widespread throughout the country. It is the norm in upland areas, where shifting cultivation has historically prevailed.<sup>142</sup>

Data on the extent of land under customary tenure in Myanmar are unavailable. However, many stakeholders understand that the majority of land area is held through customary or informal tenure arrangements.<sup>143</sup> Much of the ethnic nationality areas, where about a third of the country's population lives, have working customary land use systems.<sup>144</sup> This is a significant area, which has also been affected by civil conflict in recent decades.

Although many customary systems have persisted, they have been eroded and undermined in recent decades. People have been displaced by war, militarization, military confiscation and other forms of land grabbing where customary tenure systems were practised. If these people were able to return to their land, they would have to retrieve and reinvent their customary systems.<sup>145</sup>

A significant-sized area of Myanmar are not titled. Unregistered land is considered to be at the disposal of the government. This includes land that communities claim as customary.<sup>146</sup> In 2012, the government officially relabeled them as 'virgin, fallow and vacant'. Most land labeled 'vacant' or 'virgin' is actually customary village property.<sup>147</sup>

Customary tenure covers communal plots, which are those held at the level of village or community, clan or ethnic group and individual plots, which are those claimed by individuals or households. In some cases, all land inside the village territory may be subject to individual or family claims. However, claims still cannot be alienated to outsiders.<sup>148</sup>

As of 2019, there is no statute through which to acknowledge customary systems or village land

and resources held in common. There appears to be resistance from influential parties preventing the attainment of legal status for such recognition.<sup>149</sup> Customary tenure arrangements are afforded some level of recognition from the state in policy and planning documents. The Land Use Policy, Community Forest Instruction and the Biodiversity Strategic Action Plan all acknowledge the importance of customary tenure.<sup>150</sup>

The 2016 National Land Use Policy is encouraging with respect to customary rights. Part 8 on land use rights of the ethnic nationalities' states: "Customary land use tenure systems shall be recognized in the national land law". However, the policy remains only a statement of intent until it is transformed into a national land law.<sup>151</sup>

The 2018 Agriculture Development Strategy and Investment Plan recognizes the importance of shifting cultivation. states: "The recognition, documentation and registration of customary land rights, often of a communal nature and sometimes established under shifting cultivation and agroforestry systems, is not only necessary to protect the land rights of smallholders but also for success in national reconciliation efforts."<sup>152</sup>

The key statutory mechanisms that give some recognition to customary arrangements include:

- Farmland Law (2012)
- Forest Law (2018)
- Conservation of Biodiversity and Protected Areas Law (2018)
- Community Forestry Instruction (1995, 2016, 2019)

The Community Forest Instruction (1995) allowed local communities to get some land tenure rights. However, one of the first ways communities could register land was through the provisions in the Farmland Law (2012). It provides no specific provisions for the allocation of land to individuals or communities with customary tenure systems, but farmers' organizations are identified as potential rights holders. Communities could become legally incorporated entities or associations to register land.<sup>153</sup>

The Forest Law (1992), Forest Rules (1995) and Forest Strategy (2001) all consider forestland as part of the permanent forest estate (PFE). PFEs are classified as either reserved forest, protected public forest or protected areas. Lands held under customary tenure can be found within the PFE, especially shifting cultivation land, sacred forests and community-managed forests.<sup>154</sup>

A 2013 executive order grants villages of more than 50 households with a history of living in the area the ability to be removed from the PFE, along with their permanent farmland. They can then apply for land use certificates. Although there are examples where the Forestry Department removed land from the PFE, the executive order has not been implemented to any large extent. Shifting cultivation land usually remains within the PFE. The government recommends that it be turned into agroforest, recognized by a community forestry certificate.<sup>155</sup>

The Conservation of Biodiversity and Protected Areas Law (2018) designates community protected areas as areas that are preserved and used by Indigenous Peoples and local communities for generations to conserve traditional beliefs and customs or to use resources in a sustainable manner.

The Government of Myanmar has launched a national community forestry initiative. The Community Forestry Instruction (1995) was updated in 2019 to align with the Forest Law (2018). New community forestry guidelines should be finalized in 2020. In the absence of appropriate mechanisms, community forestry is one alternative measure by which legitimate, customary land resource tenure claims could be recognized and protected.<sup>156</sup>

The Community Forest Instruction (2019), along with earlier versions (2016 and 1995) provides the most common way to recognize collective claims to forest areas under current national laws. A community forest certificate includes a lease over the land for a period of 30 years, with the possibility of extension.<sup>157</sup>

The range of rights that community forestry affords in Myanmar is broad.<sup>158</sup> All PFEs, including protected areas, can be accessed by anyone.<sup>159</sup> The Community Forest Instruction (2016) also permits community enterprises to sell timber and NTFPs, legalizing sustainable commercial use of forests. The intention is to generate income and reduce poverty.<sup>160</sup> Forest products harvested from community forests for domestic use are tax-free.<sup>161</sup>

Some management rights accompany community forestry although restrictions apply. For example, user-group members can manage the forest and carry out silviculture to improve forest resources. However, they are not able to make significant changes to land use, such as conversion to farmland or paddy fields. User groups also have the right to exclude outsiders, except the government and the Army, who don't take any responsibility for forest management or who destroy their forest. If a national government project overlaps with this area this does not apply.<sup>162</sup>

The updated Community Forestry Instruction (2019) mentions compensation rights for members of user groups, although it remains to be seen how this is implemented. Community forestry does provide inheritable tenure rights, but these cannot be sold on to others.<sup>163</sup>

### Areas of future focus

The right to alienation is a key issue in community forestry. Community members want the ability to sell or lend land to others in order to secure a loan. This is currently not allowed.<sup>164</sup>

If community forestry was given further status in the higher levels of law, tenure rights would be stronger.<sup>165</sup> The Constitution does not exclude the recognition, protection and registration of rights in customary tenure as land use rights.<sup>166</sup> Allowing recognition should be a key area of focus for Myanmar in the future.

## Philippines

### Status

Forestlands and natural resources in the Philippines are owned by the state. The controlling policy is Presidential Decree 705, as amended.<sup>167</sup> With consent from government, private individuals and entities may use forestland for traditional forestry purposes, pasture, agriculture and other pursuits under both short-term permits and long-term leases.<sup>168</sup> Certificates of ancestral domain titles (CADT) provide an exception and recognize permanent ownership of the land or domain of Indigenous Peoples. The Government of the Philippines intends to close all 'open access' areas in forestlands by 2020.<sup>169</sup> The effect of this on communities will largely depend on how it is implemented. One way to close open access areas is to award CADT to indigenous communities, reinforcing customary tenure. However, for those areas under soon-expiring community based forest management (CBFMA) agreements, which applies to many migrants, there is concern these areas may be subsumed under CADT.

Key statutory mechanisms providing some recognition of customary arrangements include:

- Community-Based Forest Management Strategy (1995)
- Executive Order 263 (1995)
- Indigenous Peoples' Rights Act (1997)
- Executive Order 318 (2004)

The 1975 Forestry Code remains the legislative basis for general forest management and use. Executive Order 263 remains the basis for recognition of CBFM.<sup>170</sup>

Executive Order 318 (2004), reinforces and strengthens CBFM as the main strategy for forest conservation and development. The rights of Indigenous Peoples to their ancestral lands and domains is recognized and respected in all forestry undertakings.

In upland areas, occupancy is legitimized through certificates of stewardship contracts (CSCs). These grant a 25-year tenure and can be renewed for a further 25 years. Grantees can receive assistance in agroforestry development and are encouraged to plant trees on at least 20% of the land they occupy.<sup>171</sup> A number of CSCs that grant tenure of forestland to individual families have expired and have been considered for renewal under CBFMA.<sup>172</sup>

A 2013 moratorium on renewals and new tenure agreements on forestland has led to more areas without a regulated tenure regime. The expiry of CSCs without renewal left many settlers on forestland with 'informal' status. Approximately 22 million citizens living in the uplands have no written land tenure arrangement. They are often considered to be illegal or landless because their CSCs have expired and have not been renewed. These people live mainly from natural resources on public forestland or on ancestral domain land.<sup>173</sup>

There are several forms of consent for communal use in the Philippines. The national integrated protected area system awards tenure rights to communities within protected areas. These are protected areas community-based resource management agreements. Under the Indigenous Peoples' Rights Act (IPRA), the National Commission on Indigenous Peoples issues permanent communal titles within ancestral lands following specific IPRA guidelines.<sup>174</sup>

CBFM agreements are communal tenure agreements issued by the Department of the Environment and Natural Resources. Organized as 'peoples' organizations', communities can enter into CBFM agreements with the government with rights to occupy, cultivate and develop the area and with exclusive use of forest resources. CBFM agreements are for 25 years, renewable for another 25 years. Communities manage over 1.6 million hectares of forestland under CBFM agreements, with 1,884 agreements officially registered.<sup>175</sup>

The government can withdraw CBFM agreements at any time by reclassifying the CBFM area for the benefit of other groups. The peoples' organization members must be compensated for "all improvements made in the CBFMA area"<sup>176</sup> Management and five-year work plans set the scope of activities community members can develop. These may include reforestation, forest protection, agroforestry,

timber harvesting, ecotourism or other income-generating activities like collecting NTFPs or making rattan furniture.

There are no legal provisions prohibiting specific activities, though priority is given to forest use that requires little or no resource extraction, like NTFPs and ecotourism. Timber extraction and harvesting is only allowed in tree plantations and private areas and not within secondary forests. This is set out in Executive Order 23, which limits the withdrawal rights of tenured communities. Communities may be granted access to community forestry provided they employ environment-friendly, ecologically sustainable and labour-intensive harvesting methods.<sup>177</sup>

Outside of CBFMA areas, rural land users are not permitted to make commercial use of the timber and non-timber forest products without government permission.<sup>178</sup>

## Thailand

### Status

The Forest Law (1941) makes all forestland state-owned.<sup>179</sup>

Indigenous groups and migrants, living mainly in the northern highlands, follow customary laws and practices governing access and use of land. Much of this land is classified as state forestland. National laws do not recognize customary land rights.<sup>180</sup>

The Land Code (1954) establishes the division between private property, which is legally protected by land titles, and state land, which includes all land “over which no one has possessory rights”. State land may be given as concessions, rented or leased by the government. Separate provisions apply to mining and forestry.

Thailand undertook a large-scale land titling program from 1984 to 2004 to clarify existing but undocumented ownership patterns and improve land administration in a comprehensive legal system. The government issued more than 11.5 million titles during this period.<sup>181</sup>

Thailand's area is 51.36 million hectares, of which 29.28 million hectares is state land (57.3%) and 22.08 million hectares is private land (42.8%). State land is classified into three main categories:

- Land under all forest-relevant laws: 21.68 million hectares (42.3%)
- Land for agricultural reform allocated to 2.9 million farmers: 5.79 million hectares (17.7%)
- Ownership certification by the Department of Land (title deed, certificate of use, certificate of reservation): 20.51 million hectares or 37,494,758 plots (40%).<sup>182</sup>

While those issued titles enjoy high tenure security, the system has not reached residents of informal urban settlements or occupants of forestland. In such cases, other types of temporary occupancy and use rights are issued, with fewer rights than for full ownership.<sup>183</sup>

Many legal provisions in Thailand recognize communities' rights to forest management. They only specify the timeframe of these rights to manage and use the forest resources. The tenure remains with the state. Despite traditional or ancestral tenure holding, the Thai state has not acknowledged customary tenure arrangements.

Key statutory mechanisms that recognize customary arrangements include:

- Forest Sector Master Plan (1993)
- Thai Constitution (2017)
- National Forest Policy (2019)
- Community Forestry Act (2019)
- National Park Act (2019)
- Wildlife Preservation and Protection Act (2019)

Section 43 of the Constitution (2017) guarantees the community's rights to manage and use forest resources and biodiversity.<sup>184</sup>

The Community Forestry Act (2019) guarantees a community's right to forest management outside protected areas so that community forests can be managed, protected and used. The Act accepts the legal right of forest communities to preserve and manage forestland. Community rights are limited to “original forest dwellers” who have lived in forest areas for at least 10 years. The Act protects 3,973 communities living inside protected areas.<sup>185</sup> According to civil society advocates, this provision excluded 20,000 communities living on the rim of protected forests.<sup>186</sup>

Section 64 of the National Park Act (2019) guarantees that communities can use and settle in national park areas for 20 years. Section 65 grants permission for communities to manage and use renewable forest resources within a 20-year project.

The Wildlife Preservation and Protection Act guarantees that communities can use and settle in wildlife sanctuary and no-hunting zones. Permission is granted for 20 years as stated in Section 121. Renewable resource use zones can be delineated as stated in Section 57.

Rights and responsibilities that apply to community forestry include forests registered in the Community Forestry Act (2019). They are restricted to establishing outside protected areas. Access to protected areas is possible for the use of renewable resources, as stated in Section 65 of the National Park Act (2019)

and Section 57 of the Wildlife Preservation and Protection Act. Access to other areas is prohibited without permission.<sup>187</sup>

Collecting forest products for subsistence use is permitted in community forests and protected areas. Use of natural timber is possible for public purposes or disaster rehabilitation but not for commercial use. Timber can be cut in the demarcated use zone. However, the timber must not come from 158 restricted species or have value for conservation in community forests. In protected areas, communities can collect forest products within the determined zone for subsistence use only. The use of natural timbers is prohibited unless they are grown in subsistence areas with the permission from the national parks chief or the wildlife sanctuary chief.<sup>188</sup>

Communities can manage their community forests by protecting, restoring and using resources as specified in the community forestry management plan. This must be approved by the provincial community forestry committee and Royal Forest Department. In protected areas, communities can protect, restore and use renewable resources in zones designated for purposes, as stated in Section 65 of the National Park Act (2019) and Section 57 of the Wildlife Preservation and Protection Act (2019) for each 20-year period.<sup>189</sup>

Communities cannot exclude outsiders, but they can enforce regulations on village members and outsiders. There are no alienation rights to sell or transfer rights, and no compensation is given if rights are revoked or extinguished.<sup>190</sup>

The government is piloting another communal land title called *Kor Tor Chor* and aimed at poor people. However, the lengthy process and difficulty coordinating government agencies has made implementation challenging.<sup>191</sup>

### Areas of future focus

Customary or ancestral land tenure is not guaranteed, and some communities are excluded from provisions. These include ethnic minorities whose settlement is more than 200–300 years prior to the promulgation of the Forest Law.<sup>192</sup> Migrant communities who are not original forest dwellers and cannot prove they have resided in the forest for more than 10 years are also excluded. These anomalies require consideration to ensure communities are not unfairly disadvantaged.

There are limitations on forest management rights in community forests and protected areas with respect to the use of products and services that benefit the local economy. This area would benefit from reform. The use of timber is restricted to planted trees only. In protected

areas, collecting wild, renewable resources must be specified in the 20-year project and requires approval from the Department of National Parks. The use of timber for commercial purposes and from naturally grown forests is still prohibited, limiting the livelihood improvement.<sup>193</sup> Alienation and compensation rights would also improve tenure security and community livelihoods in forestlands.

## Viet Nam

### Status

Article 4 of the Land Law (2013) states that land belongs to all the people, with the state acting as the owner's representative, uniformly managing land.<sup>194</sup> While ownership and management are retained by the state, the government has moved towards user rights being given to individual households.<sup>195</sup> The state owns the land, and land users, regardless of whether or not they have a formal land use certificate, are recognized as owners. The government will consider granting land use rights to local communities upon request.<sup>196</sup>

Political events severely weakened customary practices in Viet Nam. After the revolution in 1975, the traditional practice of communities managed by elders was replaced by state-appointed village heads. Customary rules have continued relevance as reference points for developing regulations on social relations, ownership rights, property disputes, marriage, inheritance, contracts and torts.<sup>197</sup>

Customary tenure systems still operate, mainly in upland forest communities,<sup>198</sup> with village elders allocating land to households each year.<sup>199</sup> In some of these areas, customary institutions play a more significant role in regulating community access to land and resources than state law.<sup>200</sup> Research conducted in Dien Bien, Thua Thien Hue and Dak Lak provinces found that 84% of villages have their own regulations to protect forests, and 60% have community forests managed under customary law.<sup>201</sup>

There is provision in legislation for communities to have land use rights and for communal land to be legally recognized. Only 2% of the total forest area, or 458,000 hectares, is allocated to communities.<sup>202, 203</sup> This indicates that there are still barriers to communal land rights. Customary laws are not explicitly recognized in Viet Nam's legal system.<sup>204</sup> Key statutory mechanisms that give some degree of recognition to customary arrangements in forestlands include:

- Land Law (1993)
- Land Law (2003)
- Law on Forest Protection and Development (2004)

- Ordinance on Grassroots Democracy (Grassroots Democracy Decree) (2006)
- Land Law (2013)
- Civil Code (2015)
- Forestry Law (2017) (came into force January 2019)

The Land Law (1993) formalized the de facto situation by introducing private land distribution.<sup>205</sup> The 2003 Land Law allows the government to issue a land use rights certificate to an individual or a household. It grants possession and use rights for up to 30 hectares of either protection forest or production forest for 50 years. The government can choose to grant certificate holders one extension of 50 years or take back the land.<sup>206</sup> The Land Law (2013) and related decrees also prioritize individual households over allocation of agricultural and forestland to communities.<sup>207</sup> The total area allocated to households is 3.3 million hectares, or 24% of the forest area.<sup>208</sup>

The Land Law (2003) gave the first formal recognition to communities as land users in Viet Nam. Although in theory communities can be allocated forestland and receive collective land use rights certificates (Article 100), there has been little uptake. The law does not explicitly mention communities as forestland users, so they do not possess formal governance powers over the land, such as deciding about land use classification. Customary rights of communities are not recognized.<sup>209</sup>

The Law on Forest Protection and Development (2004) made further progress, giving limited recognition to customary tenure. Communities can file applications to District Peoples' Committees. Article 29 allows communities "to be assigned forests they are managing or using efficiently, or which hold water sources in direct service of the communities or other common interests or forests which lie in the areas adjoining villages, communes or districts".

The 2004 law divides forests into three main types: production forest, protection forest and special use forest, also known as protected areas. Both production forests and protection forests can be assigned to 'village population communities', giving priority to the assignment of forests associated with the customs and traditions of ethnic minorities (Article 20). Communities themselves are not listed as forest owners in this law (Article 5). This results in the community being a secondary rights holder compared to state organizations.<sup>210</sup>

The Ordinance on Grassroots Democracy, known as the Grassroots Democracy Decree, was adopted by the National Assembly's Standing Committee in 2006. The core tenet of

this mandate is "people know, people discuss, people do, people supervise". It further enhances people's democratic rights and participation in the process of state governance.

The Land Law (2013) classifies forest as agricultural land. It allows the state to hand over land use rights to various land users.

- The state is responsible for adopting policies on residential land and land for community activities for ethnic minorities, in conformity with ethnic minority communities' customs, practices and cultural identities and the practical conditions of each region (Article 5.)
- The state allocates agricultural lands, which includes forestland, and grants land use title to communities for preserving cultures associated with ethnic minority groups customs (Article 131).
- The state allocates protection forestland to communities (Article 136).<sup>211</sup>

The law makes no provision for the allocation of natural production forest to households or communities. It states they should be allocated to forest management organizations (Article 135). This results in inconsistency between the Land Law (2013) and the Forestry Law (2004) as to whether natural production forest can be allocated to communities.<sup>212</sup>

The Civil Code (2015) recognizes private and multiple ownership. It provides the right for all ethnic groups to use their own language, to preserve their ethnic identity and to promote and respect good customs, practices, traditions and culture.<sup>213</sup>

The Forestry Law (2017) tackles some of the omissions of previous legislation, recognizing for the first time that communities can be forest owners (Article 2.9). It also prioritizes forest allocation to ethnic communities that have customary use of forests (Article 14.8). It defines communities as "groups living in the same village and having the same customs and traditions" (Article 2.24). Other articles that strengthen communities' rights to forestlands include:

- Recognition of religious forests and watershed protection forest of communities (Article 5)
- Allocation of religious forests to communities (Article 16.1.d)
- Allocation of protection forests to communities, including water resources protection forests; sand and wind prevention forests; wave prevention forests; and watershed protection forests of communities (Article 16.2.d)

- A principle in forest planning to “ensure the participation of agencies, organizations, households, individuals and communities; ensure transparency and gender equality” (Article 10.1.d)
- A principle in management “ensuring transparency and participation of local people; no discrimination on religion, beliefs and gender in forest allocation and lease (Article 14.7). And “respecting the space for survival, customs and practices of the local communities; giving priority to forest allocation to ethnic minorities, households, individuals and communities with customs, traditions, culture, beliefs and traditions attached to forests, with village regulations those in line with the state law” (Article 14.8).<sup>214</sup>

Land and property rights in Viet Nam focus on use rather than ownership. Management is retained by the state.<sup>215</sup>

The Law on Forest Protection and Development (2004) does not grant formal governance and management rights over land allocated to communities. Communities have no alienation rights to sell, lease, inherit, mortgage or divide forest use rights.

In practice, recognition of customary rights and practices often depends on acceptance by local authorities. For example, authorities will often ignore cultivation in production forests if it is small. Customary rights to cut timber for building houses are also widely accepted. In forests and forestland areas, many officials are sympathetic to customary tenure practices, and companies often find it difficult to enforce against local community resource use.<sup>216</sup>

The Ministry of Agriculture and Rural Development has issued guidelines for communities to develop forest protection and development conventions. Villages have been encouraged to establish them. They support customary rights and practices based on conventions. By 2010, 34,767 of these conventions had been established throughout the country.<sup>217</sup>

The Land Law (2013) also denies communities the right of alienation. Article 181 states that communities using land may not exchange, transfer, lease or donate land use rights or use their land use certificates for mortgage or as capital. Article 7 states that community representatives are responsible for the use of the allocated or recognized land of the community. This implies that some rights of access, withdrawal and management exist. Community representatives are free to undertake this under customary practices. Communities that have been allocated protection forestlands (Article

136) can be given responsibility for managing land for religious or customary practices (Article 160).<sup>218</sup>

The Forestry Law (2017) was enacted in January 2019. It addresses management, protection, development and use of forests, including forest products processing and trade. In religious forests, it allows for harvesting of dead and fallen trees, collecting NTFPs and logging timber for common use (Article 52.2.c). It also permits, in natural protection forest, harvesting NTFPs and timber as long as it does not affect the protection capacity of the forest (Articles 55.1 and 55.2).<sup>219</sup>

### Areas of future focus

Key areas for consideration in the future include:

- There is a lack of clarity in the civil code on the definition of the community as a legal entity.
- The Land Law (2013) does not recognize the tenure rights of community over religious forest. Religious forests are a type of special-use forest associated with the beliefs, customs and practices of the forest-dependent communities. The Forestry Law (2017) allows allocation of religious, watershed, wind and sand protection forests to communities.
- After the war, the government established new villages for administrative purposes. However, existing traditional villages, which were functioning as community forest user groups in the past, are not recognized as administrative units.<sup>220</sup>
- There was inconsistency between the Land Law (2013) and the previous Forestry Law (2004) on whether natural production forest could be allocated to communities. The revised Forestry Law (2017) allows natural production forests to be allocated to communities, but use rights remain mostly limited to subsistence. Models that enable communities to greater benefit from the management of natural production forests need to be developed and promoted.<sup>221</sup>

# The strength of tenure arrangements in ASEAN

As detailed in Chapter 4, ASEAN Member States have taken account of customary tenure in their statutory tenure arrangements to varying degrees. Yet statutory protection does not automatically lead to tenure security. The context within which the arrangements sit has a significant effect on how secure communities living in forestlands feel. If they do not feel secure, they are less willing to engage and invest in social forestry.

This chapter, using Part 2 of the framework as a guide, sets out the relative strength of customary and statutory tenure arrangements, with examples from Member States. The strength of tenure arrangements has a significant impact on tenure security, and depends on the legal framework as well as the planning and implementation of governance arrangements. They form both the tenure arrangements themselves and the context within which they sit.

The World Bank Program on Forests identified the nine governance elements necessary for securing community-based forest tenure (see Part 2 of the framework). This chapter examines these elements, under the broad headings of legal, planning and implementation. It identifies the opportunities and challenges of customary and statutory arrangements, where the two systems can support and complement each other and where a plural system might cause tension and conflict.

## A strong legal framework

A strong legal framework to support and guide social forestry is vital.<sup>222</sup> The legal framework of a country refers to the broad system of rules that governs and regulates decision-making, agreements and laws. It refers to rules, regulations and laws enacted by the legislative authorities of that country over time, plus the common laws and customary laws that have developed respectively through judicial or traditional practice.<sup>223</sup>

Relatively little attention has been paid to documenting the legal requirements needed to create a strong legal framework that supports social forestry.<sup>224</sup> The framework should include a robust and complete bundle of rights, with all rights holders fully recognized, especially those most often overlooked, including women

and Indigenous Peoples. This recognition should be embedded at the constitution or primary legislation level within a country's legal framework.

## Recognition of rights

Recognition of rights, practices and the rights holders is an important function of a legal framework, providing security through acknowledgement. Recognition of rights, certainty – in particular clarity on rights and duties, roles and responsibilities of stakeholders – and a mechanism for accountability all help achieve social forestry objectives.<sup>225</sup>

The level of recognition of rights varies significantly across ASEAN. Rights in Myanmar and Thailand in particular lack recognition. Myanmar does not recognize customary land. Recognition needs to be a priority for the future as land laws are drafted.<sup>226</sup> Thailand does not recognize customary community land holdings in forests. Legal reform to grant customary rights to forestland holdings and the use of forest resources should be a priority. Reform will enable communities to improve their livelihoods beyond subsistence.<sup>227</sup>

In Viet Nam, civil society organizations have successfully advocated for the recognition of communities as formal forest owners in the Forest Law (2017). They continue to engage in the revision of the Biodiversity Law (2008) and Land Law (2013). They want to improve tenure rights for local communities.<sup>228</sup> This will significantly strengthen the recognition of customary rights and practices in Viet Nam.

In Lao PDR, the new Forestry Law recognizes customary use. This recognition sits in isolation, with no clear statutory instruments to enable customary rights for individuals or for recognition of collectives and communal forestlands. Regulations to implement the recognition and protection of customary rights, especially within forestlands, should be a priority.<sup>229</sup>

The Cambodian legal framework for tenure rights over forestland is relatively clear, defining who has ownership rights on what and how it works. Forest land ownership rests with the state. Forest and protected area laws define the roles and responsibilities of key institutions responsible for management of such forestland.

Sub-decrees and guidelines under each law have defined who has authority on forestland and what requirements and steps need to be fulfilled to get management rights.<sup>230</sup>

### Type of legal instrument used

The type and combination of legal instruments used to establish a right will impact its strength. Rights that are part of the constitution are less likely to be revoked or changed, and the public will be more aware of them. Rights that are part of a lower-level legal instrument, such as a ministerial decree or a local regulation, can more easily be overturned by the state and are therefore weaker.<sup>233</sup>

High-level legislation that lacks secondary supporting legislation to enable full implementation contributes to tenure insecurity. For example, in Thailand, the 1997 Constitution and subsequent versions have included sections giving rights to persons or communities to manage, maintain and use their natural resources according to their customs and traditions. This is specified in Section 43 of the Constitution. The language is general, and the enactment and implementation of supporting national legislation has been slow or non-existent. This has left the status of many communities and individuals in legal limbo, lacking security over their forests.

Social forestry schemes can be implemented without statutory legal frameworks. Local communities and Indigenous Peoples managed forest areas long before the creation of formal social forestry in legislation.<sup>234</sup> A key strength of customary law is that each community's customs are rooted in and respond to the particular history, values and needs of that community.<sup>235</sup> Customary land tenure is as much a social system as a legal code. It obtains its enormous resilience, continuity and flexibility from that

system. Customary arrangements tend to be bottom-up processes, unlike statutory ones, which are top-down.<sup>236</sup>

Statutory legal frameworks offer distinct advantages for social forestry. Customary systems are embedded in social norms but not normally documented. This can make it difficult to contest land grabs in court.<sup>237</sup> It also underlines the value of communities documenting their customary systems. As populations grow in size and mobility in ASEAN, the importance of demonstrating the rights, practices and land, forest and resource arrangements to people outside the community grows.

Statutory arrangements offer legal certainty. They provide recognition and clarity about the rights, duties, roles and responsibilities of stakeholders. They include a pathway for accountability that even those living outside the community or in government can access. Security encourages communities to steward their forest. Statutory arrangements may also be perceived as more stable because they provide for the rules that will apply over time, often decades. However, in reality, law and policy may change more regularly.<sup>238</sup>

### Coherence across legislation

Legislation does not operate in a vacuum. It intersects with other pieces of sectoral legislation and policies and involves government agencies, such as those dealing with agriculture, land, forests, gender, justice and trade. This is an issue in Viet Nam, where laws are inconsistent with one another.<sup>239</sup> Multiple laws and decrees, prepared by different ministries, result in conflicting or overlapping mandates, which are interpreted and acted on in different ways at the local level.<sup>240</sup>

## Gender and statutory legal frameworks in ASEAN

Inequality between men's and women's land use rights is a significant issue throughout Southeast Asia. While statutory arrangements can ensure that equality is legislated, this does not always translate to equality on the ground.

Inequality in landholding in the region is a problem, and Cambodia ranks among the highest. Even though legislation gives women and men equal land rights and women often own land, they also face barriers and discrimination. This is especially true for female-headed households. Coupled with a lack of transparency in land transactions, this has led to disputes.

The situation is similar in Viet Nam, where the law provides for equal land rights, including inheritance rights. In practice, a lack of government capacity to update documentation, customs that favour men and lack of knowledge and education leads to discrimination against women.<sup>231</sup>

Thailand's formal law also promotes equality in land ownership or control. In rural areas, knowledge of the formal law is limited, and men tend to control the ownership and management of agriculture land.<sup>232</sup>

Cambodia suffers from a lack of coordination and collaboration between institutions that have jurisdiction over different aspects of land resource management. A good example are forestry and mining. The result is contradictions in how laws are interpreted. Cambodia need to strengthen cross-sectoral coordination, taking into account the recent decentralization process, whereby the district level has become the key unit for sub-national development planning and implementation.<sup>241</sup>

Coherence across legislation and collaboration between agencies in support of community rights is vital to their strength. It reduces the risk of legislation being undermined or resulting in conflict within the legal framework.<sup>242</sup> New legislation should provide an opportunity to improve coherence, though as recent experience in Lao PDR demonstrates, this does not always happen. The new Lao PDR Forest Law (2019) is not consistent with earlier legislation.<sup>243</sup>

### Quality of legislation

Research carried out by Client Earth in 2019 in Nepal, the Philippines and Tanzania on legal frameworks found that the amount of regulation is less important than its quality.<sup>244</sup> Laws need to be simple, clear in language and physically accessible.

In Viet Nam, the gap between state administrators' and communities' understanding and awareness of tenure must be bridged. State administrators are often unaware of customary arrangements or their value. For example, the worship of nature spirits is often seen as a superstitious obstacle rather than a tool to engender forest management policies.

Even when there is recognition of communities, the recognition does not always align with customary arrangements. For example, Viet Nam's Land law (2013) and Forest law (2017) refer to the village as the administration unit or system for the community. However, in customary arrangements, the unit may be household groups or family clans.<sup>245</sup>

Indonesia has made progress in recognizing the territories and defining the communities that hold the forest communities' rights. But the legislation itself has serious weaknesses. Most of the regulations contain generic definitions based on national laws. They lack understanding and acknowledgement of variations in land rights or their evolving nature. Some of these regulations use land rights derived from Dutch Colonial references. They are not usually relevant today.<sup>246</sup>

Ensuring that legislation is of high quality and avoids discrepancies is more important than having volumes of legislation. Large numbers of confusing and inaccessible laws and regulations are not likely to be applied, even if rights are conferred.

Communities also need technical support to understand the rights and obligations that are conferred by laws on social forestry. The laws should not be overly prescriptive. They should provide for accountability and transparency and allow flexibility for certain provisions to be tailored to specific community forestlands or community contexts. This requires local input. Legal frameworks on social forestry should support and facilitate communities' use of forests rather than restrict them.<sup>247</sup>

Bottom-up, flexible arrangements, embedded in communities, should be supported along with the added security, support and benefits of national recognition that inclusion in national law affords. Striking the right balance between statutory and customary mechanisms is still very much work in progress. It will vary from country to country and even community to community.

## Planning and decision-making

The strength and security of tenure arrangements for supporting social forestry depend on how plans and decisions are made. They also depend on the ability of key institutions to be accountable and open to contributions from forest stakeholders.<sup>248</sup> Good planning and decision-making are transparent, participatory and evidenced-based.

### Good information and record keeping

Good decisions require good input information. High-quality, comprehensive, accurate and easily accessible public information on tenure arrangements and social forestry is essential for good planning. A robust, transparent system that records, maintains, updates and shares this information is also required.

In Cambodia, the Community Forestry Office of the Forestry Administration, which is under the Ministry of Agriculture, Forestry and Fisheries, and the Community Protected Area Office of the Ministry of the Environment (MoE) updates Cambodian statistics on community forestry and community protected Areas annually. The data include the size of the forest, number of members and information on the community forestry management committee. The recording of community forestry tenure rights in the country still needs strengthening. It could be more timely and accessible to all stakeholders by making it an online resource.<sup>249</sup>

Viet Nam has prioritized developing a system for recording community forest data, including indigenous community conservation areas.<sup>250</sup>

Existing mechanisms to capture information under statutory tenure arrangements are often poorly implemented. They frequently miss vast amounts of knowledge about forests and resources that may exist within a forest

community. Customary systems often hold their information and history based on oral tradition. That enormous amount of information about a forest and its resources is not accessible to planners and others outside the community in an easy-to-use form. Because customary rights themselves are often not recorded, they are less secure than statutory arrangements. A customary rights holder has no legal recourse when a right is challenged.<sup>251</sup>

Many ASEAN countries lack strong administrative capacity. The Myanmar Government has started to allow customary practice by all ethnic groups. Land use policy gives customary tenure arrangements recognition, but paper records and what is known on the ground are inconsistent. The One Map program should resolve some of these discrepancies, with public consultation an important resolution tool.<sup>252</sup>

Thailand's information system for private land is completed, standardized and digitized. As in other Southeast Asian countries, land administration is more challenging on public land. That is where many poor people and Indigenous Peoples live.

Confusion often arises when different public agencies' maps use different scales. They seldom match. The Royal Forestry Department in Thailand may, for example, use 1:50,000 maps, while the Department of Land may use 1:4,000. Other agencies, such as the Agricultural Land Reform Office or the Department, of Land Development may be using other map scales altogether. This can lead to inaccuracy and confusion.

Worse, different maps may have different coordinate systems. Standard map scale is a prerequisite for resolving land conflicts. Thailand started its ONE Map project under the National Land Board in 2016. It is preparing aerial photos at 1:4,000 scale for the entire country. They will be base maps for all government agencies.<sup>253</sup>

### **Inclusive participation and governance**

Strong planning and decision-making for secure tenure requires participatory, adaptive and inclusive institutions and processes that pay special attention to including women and Indigenous Peoples.<sup>254</sup> Ideally, community-defined rules and plans for land governance would be important in these processes. Financial resources and links to advocacy and support organizations should be available to community institutions.

Attention is needed to prevent the exclusion of vulnerable groups that are more likely to be excluded from the development and operation of social forestry.<sup>255</sup> Women and poorer people generally rely on forests more than men and

wealthier people do, as a safety net and for both cash and non-cash purposes.<sup>256</sup> Even where legislation promotes equality, inequality persists throughout Southeast Asia. Cultural and social norms dominate planning and decision-making, preventing some groups, such as women, from participation and having their voices heard.

Equitable and consensual decisions that prevent conflict are more likely to occur when local communities, women and Indigenous Peoples participate meaningfully in planning and decision-making. Tenure arrangements should include specific provisions that encourage participation by all community members, especially those from vulnerable groups. Community members themselves should have the power to determine the mechanisms best for them.<sup>257</sup>

The centralized and top-down nature of statutory arrangements hinders inclusive and participatory processes. There is often institutional bias and poor understanding among decision-makers about the social norms in individual communities. This results in vulnerable community members being excluded because statutory arrangements oversimplify what is happening on the ground. In these cases, women, migrants and Indigenous Peoples may have limited opportunities to obtain land and participate in decision-making about community land matters.<sup>258</sup>

In Viet Nam, poor and marginalized people are less likely to obtain land certificates than other groups. They often lack clear information regarding the registration process, even for individual land use rights.<sup>259</sup> Transparency in decision-making and the degree of participation and consultation by stakeholders<sup>260</sup> in Viet Nam needs strengthening. This will reduce tenure insecurity. There should be more public disclosure and access to information about planning and forest-related projects.<sup>261</sup>

The bottom-up nature of customary tenure arrangements means they are highly participatory, engaging and empowering people in planning and decision-making. This is a strength. Some customary tenure systems have complex rules to protect the rights of women and migrants.<sup>262</sup> Others use traditional norms and rules that discriminate between members of the community, such as between men and women or traditional inhabitants and newcomers. Customary arrangements may be at risk of 'elite capture', biases and abuses of power that may be more difficult to reverse when norms are not codified. This should not be overlooked.<sup>263</sup>

In the Philippines, the customary land rights of Indigenous Peoples in the allocation

of community forestry areas have been a priority.<sup>264</sup> CBFM is largely a tool for land tenure security. Identifying forestland for CBFM is intended to be a joint process between the community and government. The community should lead the boundary delineation process, accounting for community customs, traditions and beliefs.

In practice, community participation is often weak, and existing maps and land use plans developed by the government are used instead. As a result, CBFM areas do not reflect areas of traditional community activities and may not be easily accessible to remote communities. The Department of the Environment and Natural Resources is resurveying areas under the CBFM program, using geographic information system mapping to define correct boundaries and coverage areas.

The degree of tenure security under CBFM is uncertain because agreements are for a limited period of 25 years, with a single possible renewal. The government can withdraw the agreement at any time by reclassifying the with CBFM area for the benefit of other groups. However, it must compensate peoples' organization members for "all improvements made in the CBFM area".<sup>265</sup>

The passing of the IPRA law has created potential for conflict with CBFM. While CBFM mostly covers forestry areas, the National Commission on Indigenous Peoples now issues CADTs, which sometimes overlap CBFM areas. Some CBFM People's Organizations are also Indigenous Peoples who have CBFM areas within their ancestral territories.

In Thailand, communities are supposed to work alongside government officials to develop community forest and protected area management plans. However, the plans are usually developed with minimal participation of marginal stakeholders' groups, forest user groups, collectors and women. Most management plans are formulated by core community members in collaboration with government officials.

A priority is to improve the capacity of government officials to facilitate participatory resource management and planning. Decision-making mechanisms have to allow for more meaningful participation by multiple stakeholders, forest users and women's groups. The capabilities of forest users groups and poor and landless people need enhancing so they can participate in forestland management decision-making at community and policy levels.<sup>266</sup>

Scarce resources, capacity and support can hamper efforts to include vulnerable groups in decision-making. This is the situation with government ministries and departments

responsible for policy development in Cambodia. The result is less than full participation by, and inclusion of, vulnerable community groups in decision-making. Sufficient resources are needed to support inclusive policy development, including participation by vulnerable groups. This is a priority for strengthening Cambodia's future tenure arrangements.<sup>267</sup>

Indonesia does not yet recognize customary rights, so the government has not invested in local community engagement and empowerment. Customary rights are threatened by interest groups that does not have the communities' interests at heart. It is crucial for Indonesia to fully recognize customary rights and provide resources to permit communities to fully participate.<sup>268</sup>

Successful, strong tenure systems recognize and use the existing and potential capacities of stakeholders to manage forest resources.<sup>269</sup> This applies to customary arrangements or to statutory arrangements that fully embrace community knowledge and ideas about managing and planning for the future of their land. Legitimizing a community-based decision-making body, either a newly established one like a forest management committee or a customary one that has existed for a long time, can lead to capturing the knowledge and engagement of communities.

Recognition, even if not statutory, may not change community-based decision-making itself but does ensure that outside parties respect customary governance.<sup>270</sup> This will help communities participate in decision-making and allow them to voice ideas about what happens to their land by reducing outside interference. Whether the community-based governance body is representative and regulates access of community members to community lands in a fair, inclusive and equitable manner will vary from case to case.<sup>271</sup> Care must be taken because increased formalization of these bodies may cement inequality, handing more power to local elites and customary leaders. They could increase their control over land and its resources, with little benefit for others in the community.<sup>272</sup>

### **Effective support and responsible government agencies**

Strong planning and decision-making processes for tenure arrangements require political will and aligned incentives. Clear and supportive mandates for responsible agencies are also needed to avoid conflicts. Sufficient capacity and financial resources are necessary for government implementation.

Customary systems tend to be much more complex, sophisticated and multifunctional than statutory systems that are administratively

regulated. They have limited numbers of categories for land use and are fairly rigid.<sup>273</sup> This can put off government and other stakeholders and requires a significant degree of alignment and cooperation between government departments and agencies.

In Cambodia, community forestry tenure rights must be approved by both the FA/MAFF and MoE. They approve the forestland to be claimed. Commune and provincial-level local authorities approve the community as a legal group and recognize the management committee as a community-based organization. In some cases, however, the forestland lies outside the administrative area of the commune authority. This kind of discrepancy causes delays and complexity and confuses the process.<sup>274</sup>

Centralized decision-making authority is an issue throughout the ASEAN region.

In Thailand, decision-making authority and approval rests with state agencies. Distributing authority to local administrations so communities can manage their own resources and creating local provisions or laws would help strengthen governance and improve tenure security.<sup>275</sup>

Transferring power to local governments brings communities and their members closer to the centre of decision-making. This enables easier access to decision-makers, information and support from the local administration. In the Philippines, the recent centralization of decision-making may have increased difficulties for communities.<sup>276</sup>

From a government standpoint, decentralization ensures that allocation procedures better reflect the specific local area and conditions, such as the type of forest being considered. Local officials are more likely to understand the forest and communities in their area, which better informs decision-makers.<sup>277</sup> This may help avoid conflict in the early stages of planning.

Plural approaches to tenure arrangements require somebody to act as a broker to balance the interests of communities and government. While civil society organizations have often filled this role, going forward there is a need to look at how others can assist. Enabling local government officials to take on this more facilitative approach will require a change in organizational culture, capacity and attitude in many local authorities.<sup>278</sup> This will also require political will, funding and capacity at the national level.

NGOs and other organizations representing community forestry groups nationally through networks, alliances, associations and federations also have an important role. They can lobby for improvements to the regulatory framework,

raise public support for community rights and increase government accountability and responsiveness. These groups can add political weight to community forestry groups with respect to government stakeholders.<sup>279</sup> Formal recognition and the acknowledgement of these groups' role in the process might strengthen tenure arrangements.

In Myanmar, although there is no legal recognition for customary practice, local NGOs are touting its effectiveness to different stakeholders. They cite community-led natural resource governance in Kamoethawy area, appear as: Dawei city in Tannintharyi Region and Hmon Taung Community Protecte Area in Chin State. This initiative has potential to influence land law formulation.<sup>280</sup>

## Effective implementation

Effective and efficient implementation of tenure arrangements is vital for secure tenure and social forestry. It builds trust and encourages communities to invest and manage their forests well. Requirements, responsibilities and procedures should be inexpensive, streamlined and tailored to local circumstances. Self-determined communities can then follow the process themselves and seek support if they choose to do so.<sup>281</sup>

### Capacity and support for implementation

When tenure arrangements are in place, the capacity of the communities that will use and implement them needs to be considered. The advantage of customary arrangements is that they have evolved with and from within the community and are therefore aligned with the community's capacity. Because statutory arrangements are imposed from outside, there is more room for misalignment.

Complicated, incomprehensible and expensive arrangements that require technical support either because they are not available in local languages or non-written forms or where literacy rates are low<sup>282</sup> may result in poor implementation. Communities or individuals may be unable to take advantage of their rights because of heavy paperwork or the inability to prepare a management plan.

Experience shows that complicated management plans can hamper social forestry implementation. In the Philippines, peoples' organizations require considerable technical support and resources when preparing management plans and five-year work plans. Currently, many CBFM agreement holders still need to complete their management plans. This is due to limited financial and technical capacity as well as inadequate human resources

and financial support from the Department of the Environment and Natural Resources. In 2016, the department responded by issuing simpler CRMF guidelines. How effective this has proven to be is not yet known.<sup>283</sup>

Communities will always need some support from the administration to practise social forestry and implement tenure arrangements, whether they are customary or statutory. Sufficient budgetary, human and technical resources must be allocated to ensure the administration can carry out its supporting role. Moreover, the allocation of resources should be sustainable so that social forestry can develop over time.<sup>284</sup>

Intentions to implement strong tenure arrangements may be good but a lack of resources, capacity and support hampers efforts. This is the situation in Cambodia and elsewhere in ASEAN. More financial and technical support is required to advance tenure arrangements for local communities, making sure this promotes customary tenure.<sup>285</sup>

In Lao PDR, a lack of funding, capable staff and equipment hinders the recognition, documentation and registration of tenure rights. In the past, forestlands, which are often in remote, difficult to access areas, have suffered. Efforts focused instead on urban and peri-urban areas, mostly for individual homesteads, land plots and agricultural land. MAF and MONRE should coordinate to design participatory land use planning that recognizes customary tenure in forestlands. Combining this with funding and trained staff who can engage with communities to register community forest tenure rights should be a priority.<sup>286</sup>

The need for support is also not just limited to communities. This is exemplified in Thailand, where officials at all levels do not clearly understand the new policies, laws and community

rights in forestland management. Those are their responsibility to implement. The new National Park Act (2019) and the Wildlife Preservation and Protection Act (2019) require government officials to collaborate with communities to develop management plans. This requires increased skills and knowledge on procedures for participatory land use planning and management.

Understanding of collaborative mechanisms, regulations, roles and mandates specified in the laws is not clear. Nonetheless, several communities have worked with government mechanisms. They started prior to the new laws and worked at the landscape level to protect their rights in resource management with complaint and conflict resolution mechanisms. Priorities for the future in Thailand include enhancing government officials' capacity to work with communities and employ participatory land use planning and management. Additionally, their knowledge and understanding of communities' rights under the new forestland policies and laws must be improved. This includes their role in collaborating with communities.<sup>287</sup>

### **Protection of tenure rights—Overlapping land use claims**

To achieve security, tenure arrangements, particularly customary and communal tenure rights, must be safeguarded. Land disputes due to overlapping claims are a common problem in ASEAN.<sup>288</sup> Many conflicts have occurred where national forest reserves of various categories overlap with areas already claimed by local communities or individuals. More incidents are being reported where concessions for mining or commercial crops have been granted or conservation areas designated for land often occupied by smallholders.<sup>289</sup>

### **Overlapping land claims across ASEAN**

- In Indonesia, prior to the 1999 logging bans, 150 mining companies had concessions overlapping with 8.7 million hectares of protected forests and 2.8 million hectares of conservation forests.<sup>290</sup>
- In Lao PDR, conflicts have arisen in areas where boundaries overlap on state land, cooperative state farmland and land occupied and used by local communities. Increasing conflicts are noted between allocation of land for agriculture and industry, between local use and foreign investment, and between forestry and community settlements.<sup>291</sup>

Legal clarity and resolution on collective tenure rights, robust mechanisms for rural policy coherence and safeguards to avoid infringements on communal tenure rights all help to ensure secure tenure. The lack of legal recognition leaves customary rights particularly vulnerable. While statutory arrangements can be vulnerable to government overturn, mechanisms for appeal may exist, and the recognition afforded by statutory rights can help in fighting displacement.

The vulnerability of customary arrangements is clear in Viet Nam, where, without explicitly stating it, the forestland allocation program gives some recognition to customary claims. In practice, recognition of customary rights often comes down to acceptance by individual authorities. For example, local authorities may ignore cultivation in production forests if the area is small. Similarly, customary rights to cut timber for house construction may be accepted. This weakness was emphasized with the implementation of the 2017 Forest Law. About 3 million hectares of forestland managed by People's Committees, administrative bodies in Viet Nam, will be allocated to other forest owners, including business organizations, individuals, households and priority communities.<sup>292</sup>

### **Accountability, conflict resolution mechanisms and enforcement**

Successful and secure tenure arrangements are set in a context of accountability. A process of conflict resolution, with mechanisms to raise complaints when rules are not respected, must be available to community members and other stakeholders.<sup>293</sup> A conflict resolution system enhances a community's perception of security.<sup>294</sup>

Effective enforcement of community forest rules requires clear delineation of the roles and responsibilities of communities, stakeholders and government authorities. That must be combined with a clear understanding of what constitutes an offence, what the sanctions are and who can impose them. Enforcement can either be the responsibility of the state or entrusted to communities themselves.<sup>295</sup> They may be based on judicial or traditional dispute resolution or a combination of the two.

Dispute resolution varies throughout the region.

In Myanmar, where customary practice does have legal recognition, communities are responsible for resolving disputes.<sup>296</sup>

In Viet Nam, local courts handle dispute resolution over land irrespective of whether it has an land use rights certificate.<sup>297</sup>

In Lao PDR, there is a lack of transparency in dispute resolution and fair compensation. Increasing access to relevant information and implementing transparent and fair negotiation and compensation would significantly enhance tenure security.<sup>298</sup>

If forest rules can be ignored without repercussion, the trust between the community and those with the power to impose sanctions will break down. Without trust in statutory agencies and clarity of their legal rights, some communities' customary arrangements may have more local legitimacy and enforceability under customary leadership.<sup>299</sup>

Effective enforcement systems require people to have technical, time management and financial skills. They also need mutual support among enforcement institutions to foster secure tenure.<sup>300</sup>

In Cambodia, both formal and informal mechanisms for settling land disputes are generally inadequate.<sup>301</sup> Insufficient government budget dedicated to advancing tenure arrangements limits timely support, particularly in the cases of conflict, on tenure arrangements for community forests and community protected areas.<sup>302</sup> Progress has been made with community forestry and community protected area tenure arrangements, but this has been with the financial support of NGOs and international donors.<sup>303</sup>

Traditional dispute resolution mechanisms have proven useful in addressing some conflicts.<sup>304</sup> Proximity to forest resources allows communities to monitor them for illegal uses more effectively than government agencies can. To do this, communities need sufficient legal backing, with the government willing and able to act when rights are infringed. It also requires coherent government policies to prevent community rights and commercial concessions from overlapping.<sup>305</sup> Caution is still required, and monitoring systems need safeguards to prevent elite capture.<sup>306</sup>

Tension frequently arises because governments do not see land and resource tenure in the same way local communities do. Many governments do not recognize the power of customary authorities to regulate and administer land and its resources.<sup>307</sup> Therefore, statutory mechanisms are also important,<sup>308</sup> even if just to provide recognition to customary mechanisms.

In the Philippines, communities, through peoples' organizations, have been granted authority to enforce community forestry rules. This includes the legal authority to apprehend illegal loggers and confiscate illegally cut

timber and tools used for cutting. To make this effective, communities require the means and tools to carry out checks, and safeguards ensure transparent and fair sanctions.

More than 100 CBFM agreements provide for informal arbitration between the parties before any adjudication in courts. The local-level barangay justice system is used to resolve

disputes between peoples' organization members. This is an alternative, community-based mediation process following the 1991 Local Government Code and is mandatory before filing any complaint in court.<sup>309</sup>

# Pressures and threats to tenure arrangements in ASEAN

Understanding the pressures and threats that test tenure arrangements is crucial. For either customary or statutory tenure to be successful arrangements for social forestry, communities and other stakeholders, including the state, must respect the arrangements. They will then be willing to invest time, energy and finances in the forest, its resources and the community.

A number of challenges and threats are testing tenure arrangements and forestland communities in Southeast Asia. They have implications for security and social forestry.

When community rights over land and forests are not recognized in law, forestlands and associated resources that communities rely on may be more vulnerable. This is particularly so in the context of growing external pressures on land.<sup>310</sup> A detailed examination of sources of tenure insecurity reveals a more nuanced picture. If there is no acute threat, a community with no formalized rights may still have a high level of tenure security.<sup>311</sup>

Tenure insecurity is not restricted to customary tenure practices. While statutory tenure may provide more security in some situations, it does not necessarily provide protection from all sources of insecurity. Examples include conflicts arising from overlapping claims or from users opposing newly granted rights.<sup>312</sup> The long-held institutions and practices of customary arrangements, with mechanisms for community participation and conflict resolution, mean that customary arrangements may be better for reducing some tenure insecurity.

Part 3 of the Framework presented in Chapter 3 categorizes and sets out the range of challenges and threats to tenure security that a community might experience. These have been adapted from those identified by Michael Barry in *Property Theory, Metaphors and the Continuum of Land Right* and Prindex, a joint initiative of the Global Land Alliance and the Overseas Development Institute.

This chapter explores these pressures and threats to tenure security. It explains the challenges, opportunities and synergies that

different tenure arrangements might show when they are tested by these circumstances. It uses particular examples from the ASEAN Member States.

## External factors

External factors are pressures and threats to tenure security that are largely outside the control of communities and other stakeholders. They may be international or national. They include what may be considered 'acts of God' and cover shocks such as natural disasters, conflict or terrorism. Long-term threats and challenges, such as climate change, migration and population growth, also fall into this category.

In Myanmar, concerns about external factors is extremely high in some ethnic areas facing conflict. As a result, communities may not be able to access their lands where legal or customary rights are held. In these communities, improving tenure security rests largely on the success of the peace process.<sup>313</sup>

In Viet Nam, many communities have little concern about external threats, such as climate change. This may be due to a lack of knowledge about the pressures and threats they face. This creates a false sense of security. Enhanced capacity and awareness in these communities is needed if they are to prepare for and successfully adapt to these challenges.<sup>314</sup>

In Lao PDR and Thailand, forestland communities have some appreciation of external threats. Many understand how climate change will affect local resources and how resources and how drought and rapid flooding impact their forest resources. Unfortunately, responses tend to be short term and superficial. Both countries should do more work on adaptation and increase community and agency capacity to develop forestlandscape management planning that takes climate change into account.<sup>315</sup> They should ensure that tenure security is not significantly impacted in the future.

In Indonesia, forest fires are a cause of concern among communities. Despite building communities' capacities, mapping disaster risk,

issuing fire alerts, increasing infrastructure and boosting funding, forest fires remain a problem. Efforts thus far have proved insufficient. The added threat of climate change calls for renewed efforts to improve coordination among relevant parties, especially at the local level. This would improve people's sense of security and provide reassurance that investment in social forestry is worthwhile.<sup>316</sup>

Neither statutory nor customary tenure arrangements are likely to provide much protection during and in the immediate aftermath of shocks, such as conflict and natural disasters. Different communities will respond to and recover from such events in different ways. The written, centrally stored records associated with statutory tenure provide some security in the aftermath of a major shock and offer some legal recourse to seek compensation and re-establish rights. The already weak state of many administrations in the region may result in a lengthy delay before rights are restored.

Customary tenure arrangements are often oral. It is difficult for those from outside the community to establish the nature and ownership of these rights. If there is a break in continuity within the community, some of the knowledge and social norms surrounding these rights may be lost.

Customary practices are often dynamic with built in decision-making and conflict resolution mechanisms. They can help communities reach agreement on how they should proceed under changed circumstances and adapt to longer-term threats like climate change.

Customary tenure arrangements may also protect individual householders from external shocks, such as the death of a household member. The community as a whole may respond and adapt to wider external events. For example, in Cambodia community forestry and communal protected area arrangements are a form of collective rights with registration at a family level. Therefore the death of the head of the household may not impact the arrangement negatively.<sup>317</sup>

## Internal factors

Local political, governance and social issues within a community, a social unit, settlement or family unit may cause instability and conflict. These internal factors may result from disagreements and conflicts within a family. For example, members in the community who hold ownership rights may take advantage for personal gain rather than serving community needs. This may result in individuals and other households being sidelined without a voice.

In Cambodia, the biggest internal threat is that community forests and community protected areas do not reflect the customary or traditional use zones, which may result in overlapping claims and conflict. The result is that some customary areas are left unprotected.<sup>318</sup>

In Viet Nam, concern about pressures and threats on a communities' tenure arrangements may be a result of insufficient awareness of potential challenges and threats, rather than high levels of actual tenure security. This may be particularly true for the migrant populations and communities occupying the land of native communities, as in the Central Highlands. Building capacity and raising awareness in communities will be important to ensure clear tenure rights and boundaries and will facilitate the development of conflict resolution mechanisms.<sup>319</sup>

In Myanmar, only customary land that is applied for under community forestry or Form 7 is legally recognized. The government often assumes that customary land with no statutory recognition is vacant and allows the private sector to propose use of this land. This further increases pressure on customary land.

In some ethnic regions, communities have dealt with the lack of statutory recognition of customary land by registering it to one person or one claim. They then hire their lands out to other members of the community in traditional ways. This puts significant power into the hands of one person, who could block the community from applying for formal recognition of their customary land through community forestry.<sup>320</sup>

Elite capture is an issue in Indonesia in the *adat* decision-making process. It is unclear how representative the *adat* system is. There are concerns that only a small number of people have their voices heard within a community. This needs to be addressed. A democratic environment should be built to ensure all levels of customary people are represented.<sup>321</sup> The *adat* system is in transition. Contesting *adat* identity is increasing. It is possible that its authority may be significantly undermined in the future.

In the Philippines, the potential for conflict in CBFM POs with mixed groups remains. For example, in those with a mix of local, lowland and indigenous members, there may be overlaps with CADT/CADC claims. There is unequal distribution of benefits within some CBFMs, where more wealthy and entrepreneurial members tend to get the lion's share of the benefits of the economic activities.

The capacity for customary and statutory tenure arrangements to deal with conflict through resolution mechanisms and how well and

fairly they are implemented is important for perceptions of tenure security.

In Lao PDR, it is rare to find effective and fair conflict resolution and compensation mechanisms that are easily accessible to local communities and parties affected by overlapping tenure claims. This should be addressed in order to bolster tenure security in communities.<sup>322</sup>

Both customary and statutory tenure arrangements exclude, rather than protect, community members, particularly those who are more vulnerable. This can result from institutional bias, local discrimination, historic feuds or recent disagreements. Statutory arrangements have a stronger legal foundation to protect people's rights. This may be particularly useful when people or groups from outside the community encroach on or seize property. Customary agreements have the advantage of being more dynamic and reactive to dealing with issues once they have been raised.

Communities themselves are also dynamic. Over the longer-term, demographic shifts may occur.

In Thailand, young people leave their communities for study or work. As a result, the remaining population is ageing, with just a few of working age. The transfer of customary knowledge of forest management between generations can be broken. An important priority will be to strengthen young leaders and increase their roles in forest resource management at the community level.<sup>323</sup>

Local population increases, combined with improved economic and educational opportunities outside the community, can test the security of tenure arrangements. The core principles of customary resource management may be challenged. As local areas integrate more into regional economies, diversification of income generation increases, as does the individualization of economic activities.

Significant social changes like an ageing village population and a more feminized workforce results in less labour investment in common resource management. This may reduce the cohesion of norms around the community customs.<sup>324</sup> This is a particular challenge in ASEAN. Pressure on customary systems may increase to privatize land and resources and to accommodate different land use practices, such as moving towards commercial cropping.<sup>325</sup> A community may move to a more individualistic, private statutory tenure model that they feel is more appropriate to their needs. The preferences within a community between customary and statutory tenure may thus change over time.

## Behaviour of the state

The way the state and other powerful institutions behave will have a significant impact on how secure communities feel. The perception of Behaviour is as important as the direct experience of the community. Knowledge of how other communities have been treated, even if they are in other parts of the country, plays a significant role in defining this perception.

## Escalating conflict over tenure in ASEAN

- In Cambodia, pressure from competing land interests by the private sector and other stakeholders generate disputes and social conflict. Of the 270 ongoing land disputes recorded across Cambodia in 2014, almost a third were related to the granting of economic land concessions. These affect almost 80,000 people. In 2015, approximately 22% of the country is under concessions or held by local elites.<sup>331</sup>
- As of 2014, the Government of Indonesia had issued commercial concessions over approximately 30% of its land area, many of them overlapping with community lands. For example, in part of West Kalimantan, oil palm concessions overlap, with 59% of community forests held under customary tenure regimes.<sup>332</sup> In 2019, two advocates for community rights were killed by plantation owners in Sumatra.<sup>333</sup>
- In Lao PDR, boundaries overlap between state land, land occupied and used by the people and cooperative state farmland. Conflicts have arisen from land titling as well as state investment projects. Increasing conflicts are noted between allocation of land for agriculture and industry, between local use and foreign investment and between forestry and community settlements.<sup>334</sup>
- In Myanmar, concessions have been granted with little regard for existing community use and customary claims. Oil palm concessions have been issued over approximately 18% of the Tanintharyi Region.<sup>335</sup>
- In Thailand, between 2001 and 2007, more than two-thirds of the 494 complaints submitted to the National Human Rights Committee were related to rights over land.<sup>336</sup>

Many of the weaknesses of statutory tenure arrangements set out in Chapter 5 result from the state failing to fulfill its obligations to plan, implement and enforce legal rights. State behaviours, such as a lack of resource allocation or missing or inaccurate land records, may contribute to communities feeling vulnerable and insecure.

The behaviour of the state and its belief that it acts in the national interest can also mean that statutory recognition of land rights is easily overridden. This increases the sense of insecurity.

In Viet Nam, revocation of use rights, such as land use rights certificates, is fairly easy and frequent. The mechanism allows the government to acquire individual land use rights for “socio-economic development for national and public benefits”.<sup>326</sup> As a result, land use title conflicts between state forest owners and local people and communities are fairly common. This is particularly true in protected areas, production forests and community forests where there is no system to record them.<sup>327</sup>

There are many instances of overlapping land use title between state owners and local people or communities. This is especially prevalent in the Central Highlands, where approximately 300,000 hectares of forestlands are affected. Local people and communities have also experienced conflict with businesses for protecting their land and forest concessions. These communities place high priority on gaining secure tenure rights over traditional forestlands. A registration system for community forests, clear boundary demarcations and a participatory conflict resolution system would improve tenure security for communities in forestlands.<sup>328</sup>

Other actions by the state and powerful institutions, such as issuing land concessions and permits for mining, are often due to a lack of recognition of the rights of Indigenous Peoples and local communities. This results in overlapping land claims and widespread conflicts. In some ASEAN Member States,

there may be functioning land markets but not necessarily ones characterized by well-defined property rights systems. Different types of land tenure may coexist. Land conflicts are often driven by attempts to superimpose property rights concepts or reassert state claims for conservation purposes, large-scale investments or infrastructure projects.<sup>329</sup>

Conflict may be fueled if governments claim ownership of contested lands and negotiate investment and development contracts. Research shows that most such contested lands are inhabited. A review of 73,000 concessions in 10 emerging frontier markets found people present in more than 93% of concession territories across all sectors and countries. These conflicts can be deadly for land defenders. Armed conflict, war and refugee flows may follow.<sup>330</sup>

The granting of concessions and lack of tenure has led to members of indigenous communities being criminalized because government considers them illegal occupants. For example, a forest may be officially owned by the state, but indigenous communities may argue that they are the rightful owners because they were there before the state existed. Sometimes they are tolerated, but often they live under threat of displacement. Because forests are considered public property, the government may grant access to mining, agricultural and forestry companies, ignoring the claims by people who have lived there for many generations.<sup>337</sup>

Many communities in ASEAN are embroiled in struggles of this nature and are vulnerable to land grabbing for extractive industries, conservation areas and commercial agriculture.<sup>338</sup> The global demand for land and natural resources for agriculture, logging and mining is growing, particularly in the face of climate change. Communities that often have weak or no rights to the lands they depend on are increasingly threatened. Conservation efforts can also pose a threat to local communities. Because customary lands often overlap with protected areas. This can lead to conflict, forced evictions and the loss of livelihoods and cultural identity.<sup>339</sup>

### **Free, prior and informed consent**

Free, prior and informed consent is a specific right that pertains to Indigenous Peoples and is recognized in the United Nations Declaration on the Rights of Indigenous Peoples. It allows them to give or withhold consent to a project that may affect them or their territories. Once they have given their consent, they can withdraw it at any stage. This right enables Indigenous Peoples to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated. This is also embedded within the universal right to self-determination.<sup>343</sup>

The 2012 Land Law in Myanmar, with its amendments, does not recognize customary systems. Most of the land labeled 'vacant' or 'virgin' by the central government is actually customary village property. This threatens customary systems and the well-being of those who depend on them by not acknowledging pre-existing rights or claims. It also violates several international norms and conventions.<sup>340</sup>

In Myanmar, a priority for the future is for the government and communities to work together, using customary and statutory dispute mechanisms in tandem. Ethnic leaders, or in some instances civil society organizations, could facilitate getting mutual agreement between landowner and current user. For conflicts involving government-initiated projects,

such as in the formation of reserved forest, the government needs to enforce the application of the free, prior and informed consent mechanism. This has begun in some ethnic regions, with local civil society organizations voicing concern about government or international NGO-initiated projects following the free, prior and informed consent process.<sup>341</sup>

Overlapping claims between concession holders and *adat* communities is a significant issue in Indonesia. There is no clear answer as to how these conflicts can be resolved. While the One Map Policy focuses on mapping, which should reduce this as an issue, improved consultation before concessions are granted and the development of conflict resolution mechanisms also need priority.<sup>342</sup>

# Conclusions and recommendations

Both customary and statutory tenure arrangements present challenges and opportunities for secure tenure and social forestry for communities living in forestlands. Each ASEAN Member State experience varies. This chapter offers key conclusions and recommendations for how tenure arrangements can help successfully deliver social forestry in each Member State and in the region as a whole.

## Importance of tenure

Communities that depend on forests need the ability to use, manage and benefit from the forests where they live in order to prosper. They also need the security to know that they will be able to carry on doing so for the foreseeable future.

Secure tenure supports sustainable forest management, conservation, poverty eradication, good health and well-being, economic development, food security, climate change mitigation, gender justice and peace building in these communities.

Secure tenure helps governments work towards SDGs 1, 2 and 5. It allows governments to work towards fulfilling their obligations to international agreements, including the United Nation's Declaration on the Rights of Indigenous Peoples and FAO's Voluntary Guidelines on the Responsible Governance of Tenure. It also forms the foundation for delivering successful social forestry, providing a basis for further international agreements, including the Bonn Challenge, the Aichi Biodiversity Targets, the New York Declaration on Forests and the United Nation's Global Forest Goals.

The important role that secure tenure plays in tackling the climate crisis also must be recognized. The land use change and forestry sector is the most significant in the region for emissions, accounting for 43% of greenhouse gas emissions from the 10 Member States. The region accounts for 52% of global emissions from land use and forestry. Forests and the communities that depend on them are central to climate change mitigation and adaptation strategies. Social forestry has the ability to play a significant role in delivering these strategies.

Efforts to scale up and accelerate progress on social forestry have been hard won. Tenure insecurity has been identified as one of the most

significant barriers to achieving successful social forestry.<sup>344</sup>

Therefore, on a number of fronts, strong and clear rights for local people that result in tenure security must be prioritized throughout the region. ASEAN has an opportunity to help Member States work towards this through further research and partnerships.

## Recommendations

- Information on forest tenure in Southeast Asia is hard to come by, and there is even less information on how successful outcomes have been achieved. The ASEAN Secretariat should promote ASEAN-level partnerships on tenure that seek to improve understanding. Sharing lessons would be a valuable step forward.
- Development agencies, with support from ASEAN Member States, should document good practices where tenure challenges have been overcome and solutions found. This will help to demonstrate that progress can be made.
- The ASEAN Civil Society Conference and ASEAN Peoples' Forum Forum has been discussing forest tenure and access rights as one of its major themes since 2011. There have been numerous discussions and key messages and statements developed on forest tenure that have been elevated at the regional level, particularly through the AWG-SF platform. The work of civil society needs to be supported and expanded to include government and donor agencies.

## Prepare for a dynamic future

The unprecedented climate, biodiversity and land degradation crises mean that social forestry needs to play a central role in the ASEAN region over the next 10 years.<sup>345</sup> Achieving secure tenure is a central foundation for this.<sup>346</sup> Identifying how this security of tenure is achieved should be a high priority for governments, civil society organizations and communities in the region.

Rapid economic growth has reduced poverty but has increased inequality and left marginalized communities even more vulnerable. This growth has also increased development pressure, compounding the strain on tenure arrangements and changing traditional dynamics found within communities. Conflict over tenure throughout Southeast Asia is escalating.

One of the strengths of customary tenure is its ability to adapt and change with the communities it is serving. This strength needs to be valued and protected for the future because communities are not static and are currently undergoing significant social change. How tenure arrangements will best serve communities in the future is difficult to predict.

Customary systems rely on social cohesion. Communities are facing new pressures, including changing market forces, the digital age, shifting demographics and the wider dominant economic development model being pursued by most governments in the region. These pressures may dilute social cohesion so much that the desire to retain customary systems could disappear from communities.<sup>347</sup>

Finding ways to modernize customary systems so they keep pace with shifting community attitudes and desires, through the use of technology for example, should be a priority. This will help ensure that the many positive aspects of customary arrangements are retained, even if the overall trend is towards individual rights.<sup>348</sup>

Flexible, adaptable and multifunctional solutions to tenure issues are necessary to cope with the challenges ahead. Climate change and responses to it will only heighten this need to find flexible, nuanced and multifunctional solutions<sup>82</sup> that can adapt to the challenges that will confront the region in the years ahead.

### Recommendations

- Increased partnership and cross sectoral work on tenure issues need to be promoted throughout ASEAN Member States.
- ASEAN is currently promoting the SEAN Multi-Sectoral Framework on Climate Change: Agriculture, Fisheries and Forestry Towards Food Security and achievement of the SDGS. All ASEAN Member States should make efforts to highlight the need to strengthen tenure and rights and demonstrate how strong tenure and rights can support the AFCC.

## Embrace plurality and complexity

As Member States take different approaches to tenure arrangements in forestlands, it is clear that there is no single solution to achieving tenure security across the region. The mechanism for customary or statutory tenure arrangements does not determine whether tenure will be secure for communities in forestlands.

As shown throughout Chapters 5 and 6, the context within which tenure arrangements sit, whether at the national, community or household levels, will determine how secure communities

feel their tenure arrangements to be. Customary and statutory tenure arrangements have different strengths and weaknesses for achieving the governance necessary for secure tenure and dealing with the pressures and threats they may face.

Customary arrangements have evolved to be extremely sophisticated, detailed and flexible<sup>349</sup> and often sit alongside statutory arrangements. Governments can no longer shy away from this complexity and the difficult issues that tenure raises. Governments need to embrace plurality and complexity and focus on finding solutions that deliver positive impacts on the ground.

### Recommendations

- Member States must create an enabling environment to support the plural tenure arrangements that exist in their country.
- ASEAN Member States should work with donors to help ensure that they work together to support and embrace this plurality.

## Pursue 'good enough tenure'

Communities and countries throughout ASEAN are finding ways for statutory tenure systems to incorporate customary arrangements that take their different strengths into account. Having identified particular areas of governance that need strengthening (Chapter 5) and vulnerabilities to particular pressures and threats (Chapter 6), it is possible to find a way to work towards 'good enough tenure' that provides enough security for social forestry to flourish while in the long term aiming for a fair and secure tenure system for all.

Good enough tenure is a term coined in a report by Tropenbos International, the Netherlands Development Finance Company, the Royal Tropical Institute and HIVOS International in 2019. It has been discussed and gained traction at many international conferences.<sup>350</sup> It argues that even if a regulatory framework is not fully in place, community tenure systems and communities' role in land planning may be good enough for progress. For example, it could be good enough for private companies to proceed with investments in that community.

Consensus is building that a fit-for-purpose approach to land administration and achieving secure tenure will often be more efficient than formal land titling programs and should be pursued.<sup>351</sup> The evidence shared in Chapters 5 and 6 of this report supports this pragmatic, adaptive approach that focuses on context. It deserves further thought and exploration.

Good enough tenure should be pursued to help scale up and accelerate the delivery of social forestry to meet the challenges the region is facing.

## Recommendations

The concept of good enough tenure is still relatively new and more work needs to be done to explore and refine it as a concept.

- Using the framework for understanding tenure arrangements set out in Chapter 3 of this report can help ASEAN Member States identify the main sources of tenure insecurity, how customary and statutory arrangements provide security and the priorities for action to create an enabling environment that allows social forestry to flourish.

## Address the challenges to understanding tenure in ASEAN

This review is a first step to understanding the complexity and diversity of tenure arrangements across ASEAN. The discrepancies add to the complexity and confusion that exists around the subject. Further work is needed to fully break down barriers to discourse and make progress on improving tenure security to facilitate social forestry.

The diversity of language and terminology surrounding tenure arrangements and its technical nature is a particular challenge. The framework in this report presents a start to find a common language to talk about tenure across Member States. However, further work needs to be undertaken by researchers, governments and academic institutions to develop common definitions and an understanding of many of the core terms that surround tenure.

Different Member States use different definitions for terms, as do many authors. It is not always clear which definitions they are using and the distinctions they are making. Therefore, there is an inherent lack of precision and accuracy surrounding discussions on tenure, particularly when comparing countries. While this is not always an issue, it can add to the confusion and complexity surrounding the topic.

As noted at the end of Chapter 3, the literature and availability of information on tenure arrangements presents its own challenges. It is clear that further in-depth analysis and work is needed to fully document the tenure situations in each Member State.

Some key points worth noting when considering this report and looking to future work on tenure include:

- There is much confusion over the term 'ownership' and what this entails, whether in the Western sense of a private land title or the leasing of a full bundle of rights.

- It is often not clear whether forest tenure includes rights to land as well and what is meant when land tenure is mentioned in terms of forest communities' rights.
- Terminology is coined that fits the extremes on the continuum of land rights. The terminology surrounding plural arrangements is not so well developed, consistent or clear. For example, when customary rights receive statutory recognition or statutory rights fully encompass customary rights, the language does not always consistently reflect this in a way easily understood by non-specialists. If it is stated that 'a communities rights have been recognized' it might be assumed that this means that statutory rights have been given to a community to reflect and replicate their customary rights. It could also mean that a community has been recognized as living in a forest with no statutory rights or recognition of their customary arrangements.
- Customary arrangements are often equated to communal arrangements, though they may include individual practices.
- Communities in forestlands are often assumed to be practising communal or customary arrangements. Not all countries have a definition of communities enshrined in legislation.
- A lack of English translation of much of the legislation related to tenure results in a reliance on secondary literature. These interpretations of the legislation sometimes contradict each other or make it hard to compare the precise provisions that need to be investigated.
- Much of the available literature looks at customary arrangements and land tenure in general rather than that specifically focused on communities in forestlands. This can result in assumptions being made about forest communities.

## Recommendations

- Academics, government agencies and civil society need to develop a common language to discuss tenure so efforts to tackle tenure issues in the region can move forward.
- Partnerships among development agencies need to work together and build on the findings of this report.
- These partnerships should strengthen and develop knowledge sharing mechanisms that provide information and successes about tenure across the region. This will aid understandings about tenure and help find solutions for complex tenure issues.

# Annex

## Framework Part 1: Tenure arrangements

Rights	Actors involved		Mechanisms	
	<ul style="list-style-type: none"> <li>■ Private</li> <li>■ Communal</li> <li>■ Open access</li> </ul>	<ul style="list-style-type: none"> <li>■ State</li> <li>■ Joint rights</li> </ul>	<ul style="list-style-type: none"> <li>■ Customary-in conflict</li> <li>■ Customary-extra-legal</li> </ul>	<ul style="list-style-type: none"> <li>■ Statutory-recognizes customary practices</li> <li>■ Statutory</li> </ul>
Right of access				
Right of withdrawal				
Right of management				
Right of exclusion				
Right of alienation				

## Framework Part 2: Strength of tenure arrangements

Security of tenure is dependent on the strength of:



### Examples

#### Legal frameworks for tenure rights

- Rights are embedded in a country's constitution or statutory law.
  - All rights and rights holders, including women recognized.
  - A robust complete bundle of rights recognized.
  - A holistic 'bundle of resources' recognized.
- Rights embedded in lower levels of the regulatory framework, e.g. through ministerial directions, rules and regulations

- Little or no local recognition of rights and no formal or legal recognition by the state

#### Legal

#### Appropriate regulations for land and resource management

- Regulations are simple and appropriate to management objectives
- Implementation of permitting processes is efficient

- Regulations, requirements and implementation of permitting process is complex, expensive and beyond communities' capacity

#### Effective support from responsible government agencies

- Processes for decision-making are participatory and adaptive
- There are high levels of political will and aligned incentives
- Mandates for responsible agencies are clear and mutually supportive
- There are high levels of capacity and financial resources for government implementation roles

Passive participation in decision, making

- No space for participation or non-participatory decision-making process
- Lack of political will and disincentives
- Overlapping responsibilities and contradictory mandates between responsible agencies
- Lack of capacity and financial resources for government implementation roles

#### Planning

#### Empowerment and inclusive indigenous and community governance

- Institutions and decision-making processes are inclusive, with particular attention to the inclusion of women
- Inclusion of community-defined rules and/or plans for land governance
- There are high levels of capacity and financial resources for tenure security roles of community institutions
- There are multilevel links to advocacy and support organizations

- No consultation or inclusion of women or other excluded groups in decision-making
- No consideration of land governance rules or plans defined by the community
- Low levels of capacity and no financial resources for tenure security roles of community institutions
- No links to advocacy and support groups

Strong ←	→ Weak
<b>Examples</b>	
<b>Implementation of legal recognition</b>	<ul style="list-style-type: none"> <li>■ Procedures are accessible and efficient</li> <li>■ Formal recognition of indigenous and community lands</li> <li>■ Procedures are inaccessible and inefficient</li> <li>■ No recognition of indigenous and community lands</li> </ul>
<b>Enforcement of tenure rights</b>	<ul style="list-style-type: none"> <li>■ High levels of capacity and mutual support among institutions responsible for enforcement</li> <li>■ Effective implementation of monitoring and enforcement systems</li> <li>■ Low levels of capacity and coordination and potential conflict between institutions responsible for enforcement</li> <li>■ No provision for monitoring and enforcement systems</li> </ul>
<b>Protection of collective tenure rights in relation to other forms of tenure and land use</b>	<ul style="list-style-type: none"> <li>■ Legal clarity and resolution on collective tenure rights</li> <li>■ Strong mechanisms for rural policy coherence</li> <li>■ Strong safeguards to avoid infringements on communal tenure rights – including free, prior and informed consent and environmental and social standards</li> <li>■ Lack or contradictory legal position on collective tenure rights</li> <li>■ Lack of rural policy coherence</li> <li>■ No safeguards to avoid infringements on communal tenure rights</li> </ul>
<b>Conflict and dispute resolution</b>	

Adapted from World Bank. 2019. *Securing Forest Tenure Rights for Rural Development: An Analytical Framework*. Program on Forests, Washington, DC: World Bank.

### Framework Part 3: Pressures and threats to tenure arrangements

Security of tenure is tested by:

		Strong concern	←————→	No concern (concern realized)
<b>External factors</b>				
e.g.	Death of a household member			
	Climate change			
	Natural disaster			
	Conflict or terrorism			
<b>Local politics in a community, a social unit, settlement or family unit</b>				
e.g.	The owner/renter may ask me to leave			
	Disagreements with family or relatives			
	Other people or groups may seize this property			
	Issues with local/customary authorities			
	Increased population pressure			
<b>The behaviour of the state and other powerful institutions</b>				
e.g.	Government may seize this property			
	Companies may seize property and prioritization of private investment			
	Lack of money or other resources			
	Missing or inaccurate land records			

Adapted from Barry, *Property Theory, Metaphors and the Continuum of Land Rights*, 2015; Prindex, 2018.

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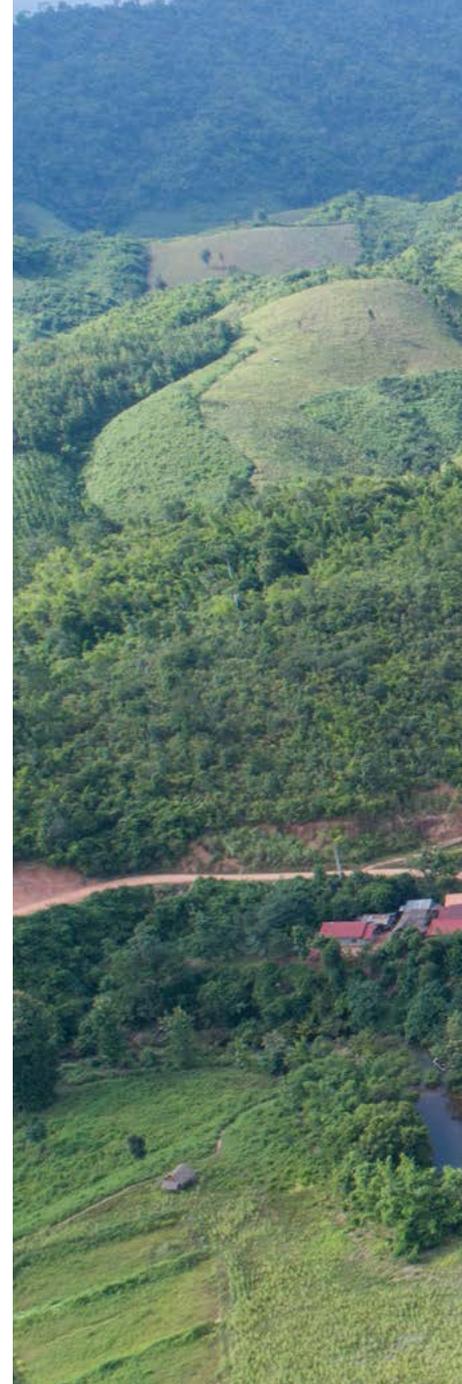
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At RECOFTC, we believe in a future where people live equitably and sustainably in and beside healthy, resilient forests. We take a long-term, landscape-based and inclusive approach to supporting local communities to secure their land and resource rights, stop deforestation, find alternative livelihoods and foster gender equity. We are the only non-profit organization of our kind in Asia and the Pacific. We have more than 30 years of experience working with people and forests, and have built trusting relationships with partners at all levels. Our influence and partnerships extend from multilateral institutions to governments, private sector and local communities. Our innovations, knowledge and initiatives enable countries to foster good forest governance, mitigate and adapt to climate change, and achieve the Sustainable Development Goals of the United Nations 2030 Agenda.



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