



Food Security Working Group

Upland Land Tenure Security in Myanmar : An overview

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Acronyms and Glossary

CF	Community Forestry
CFC	Community Forestry Certificate
CFI	Community Forestry Instructions
<i>dama-ucha</i>	A kind of customary tenure in which the first one to cultivate becomes the owner (similar to "pioneering")
DAP	Department of Agricultural Planning (under MoAI)
FAO	Food and Agriculture Organization
FD	Forest Department
FSWG	Food Security Working Group
FUG	Forest User Group
GAD	General Administration Department (currently under Ministry of Planning)
HH	household
<i>le</i>	Myanmar term for an (irrigated) wet rice field
LMC	Land Management Committee
MAS	Myanmar Agricultural Service
MoAI	Ministry of Agriculture and Irrigation
NGO	Non-governmental organization
<i>Oo paing</i>	the term for recording of land holding in the village registry and SLRD field notebook
PDC	Peace and Development Council
REDD	Reducing Emissions from Deforestation and Forest Degradation (A UN Collaborative Program)
<i>saohpa</i>	Shan term for Shan chief of state; <i>sawbwa</i> in Burmese transliteration
SLORC	State Law and Order Restoration Council
SLRD	Settlement and Land Records Department (under MoAI)

SPDC	State Peace and Development Council
<i>taungya</i>	Myanmar term for 'hillfield' that refers to both a plot of sloping rotating fallow land and the rotating fallow system. (The term is also used by the Forestry Department to describe a system in which farmers grow annual crops on forest land as they tend teak or other valuable tree seedlings for the Forestry Department.)
UNODC	United Nations Office on Drugs and Crime
UNDP	United Nations Development Program
VPDC	Village Peace and Development Council
VT	Village tract
WFP	World Food Programme
<i>ya</i>	Myanmar term which refers to a rainfed (unirrigated) field for annual crops such as corn, sesame (not rice)

Executive Summary

This report provides an overview of issues related to upland smallholder land tenure. The immediate objective of the report is to promote a shared understanding of land tenure issues by national-level stakeholders, with a longer term objective of improving the land tenure, livelihood and food security of upland farm families. The report is intended for government and non-government agencies, policy makers and those impacted by policy. The report covers four main areas: status of and trends in upland tenure security; institutions that regulate upland tenure security; mechanisms available to ensure access to land; and points for further consideration which could lead to increased effectiveness and equity.

Trends in the uplands include increased population growth, resettlement and concentration of populations, fragmentation and degradation of agricultural lands, and increased loss of land to smallholder farmers or landlessness. Declining access to land for smallholder farmers results in the depletion of common forest resources, increased unemployment, outmigration for labor, and ultimately food insecurity for the people who live in these areas.

Agro-ecological systems in the uplands are diverse, complex and adaptable. Customary land tenure institutions reflect this diversity and complexity of agricultural systems. Customary tenure patterns that have developed to support the agricultural systems, are strengthened by local social structures or institutions, and are managed by communities through village leaders and conflict resolution mechanisms. Both the agricultural systems and the land tenure institutions that support them are dynamic and in transition.

The development of statutory laws related to land tenure in Myanmar is reviewed through four main historic periods: British colonial period (1824-1948); independence period (1948-1962); the socialist period (1962-1988); and the State Law and Order Restoration Council (SLORC)/State Peace and Development Council (SPDC) period (1988 to present). The summary analysis of these laws finds that although policies have changed at times over the historical periods, the creation of statutory law was in reaction to events in the lowlands, while the upland areas have been dominated by customary tenure traditions. As a result, the legal framework for upland tenure is not fully supportive of the characteristics of upland agricultural systems.

Myanmar is currently undergoing a transition to a market economy. Though all land belongs to the state, under statutory law, cultivators have the right to use and benefit from the lands they farm. The current transition to a market economy, while providing potential opportunities for upland smallholder farmers, also creates threats as increasing areas of agricultural land are allocated for large-scale commercial plantations. As land gains value in the market economy, with insufficient guarantee of tenure, inadequate mechanisms to ensure the market value of customary land when transferred to others or allocated to companies, and insufficient investment collateral to improve the land if registered, small holder farmers may be vulnerable to loss of access to land.

In addition to the dynamics of the market economy, the implementation of the policy to end shifting cultivation may have unintended negative impact on smallholders' access to land. Although the

objective of making upland systems permanent is helpful in many situations, implementation of the policy may also erode upland land tenure security, and depending on the local context, may not be the only or best approach to increasing productivity and sustainability of complex upland agricultural systems. Sustainable rotational fallow management would be encouraged if supportive land tenure and agricultural extension were in place. The existing policy framework for land use planning, and the demands of the current land classification systems, constrain comprehensive and unitary land use planning and upland tenure security.

Two mechanisms smallholder upland farmers currently use to register land are the Ministry of Agriculture managed processes on land classified as agricultural, and the Ministry of Forestry's Community Forestry Instructions on land classified as forest. Both processes have strengths and constraints in their application in the uplands. As each process is specifically for either agricultural or forestry land, these two mechanisms taken together may not provide complete or appropriate tenure support to rotational fallow systems practiced in the uplands, which may alternate between or combine agricultural and forestry use.

A revised policy framework to support upland land tenure would take into account alternating agriculture and forest land use, and the registration mechanisms would be simple and streamlined. This tenure policy framework would ideally be supported by a comprehensive land use policy that is based on current ecological parameters and long-term development objectives. Land use planning to support these policy frameworks would be participatory and include village planning as well as all relevant ministries working in close coordination.

The report makes three simple conclusions:

1. Upland smallholder tenure may be coming under threat
2. Existing tenure mechanisms are effective to an extent, and could be streamlined or improved
3. The opportunities that the market economy presents to smallholder upland farmers have not yet been fully exploited

Finally, the report offers some points to discuss and actions to consider for moving in positive directions that promote smallholder farmer access to land and engagement in the market economy:

1. Regarding Engagement of Multiple Stakeholders:
 - Engage multiple stakeholders in government, communities, private sector, and non-governmental organizations to move forward cooperatively on the points set out here, through forums for sharing information and taking action
 - Strengthen the participation and involvement of the upland farmer within local dialogue and multiple stakeholder forums
 - Recognize and honor the cultural value in ethnic societies of traditional land management practices and the social systems that support them, as well as the economic value of traditional knowledge and farmer innovations

2. Regarding Policy:

- Develop a comprehensive and unitary land use policy that is rooted in inter-ministerial cooperation and implemented through bottom-up planning
- Streamline and make equitable and accessible the current land tenure mechanisms
- Develop a new framework or tenure mechanism which supports diverse locally managed upland systems and validates customary tenure and rotational fallow as an agricultural practice
- Strengthen and extend the application of the Farmers' Rights Protection Act
- Review the impact and effectiveness of the "Wastelands Act"

3. Regarding NGO practice:

- Mainstream land tenure into uplands livelihood development projects
- Ensure that the tenure institutions and agricultural technologies promoted are equitable, supported by participatory planning, and based on farmer innovations

4. Regarding the Private Sector

- Engagement of private sector in a way that empowers smallholder farmers while meeting needs of commercial interests
- Strengthen regulation of private sector

5. Continued Learning

- Through multiple stakeholder processes and action research, gain a deep and collaborative understanding of the situation of upland farmers, their agricultural innovations and how to support any positive trends
- Implement pilot projects for continued learning

Through access to secure land tenure guarantees and investment inputs, smallholder farmers, including *taungya* farmers in the uplands, can and must be enabled to make a meaningful contribution to national goals of Myanmar: a developed nation with agriculture as the base of a robust economy.



1

Background

1.1 Scope and Purpose

Land tenure is a pressing concern of many of the upland communities with whom the Food Security Working Group (FSWG) member organizations work. In some upland areas farmers identify loss of land tenure as the most important problem they face today - and in those areas declining access to land is potentially the greatest driver of poverty. The root causes of land tenure insecurity range from demographic aspects (such as increased populations, concentration of populations and fragmentation of land holdings) to legal and institutional aspects (such as encroachment on traditional lands and a statutory framework with limited respect for and recognition of customary land use rights).

Upland areas differ from the lowlands not only in geography and topography, but also in social and cultural context, and to some extent legal frameworks. Though some land-related trends in the delta, plains, and uplands (i.e. hilly areas) are similar, the context in the uplands is different, and the solutions will thus have to be specific to the uplands context. For this reason the scope of this report is limited to the upland areas of Myanmar.

The objective of the report is to promote a shared understanding of land tenure issues in the uplands of Myanmar by stakeholders, in order to explore possibilities for improving land tenure security for smallholder upland farm families, with the ultimate result of improved prospects for livelihood and food security. The report discusses possible points for discussion and action that might help promote upland tenure security. This report may be useful for government and non-government agencies that support upland development, for policy-makers, and for those affected by policy implementation. Although it targets NGO and government agencies, the private sector could also benefit from understanding how to engage more equitably and sustainably with the people and upland environment.

If smallholder upland tenure security is threatened, as seems to be the case, it potentially presents a missed opportunity to engage smallholder farmers through their labor and productive resources in the positive achievement of national development objectives.

The report covers four main areas:

1. The status of and trends in upland tenure security in Myanmar
2. The institutions which regulate upland land tenure security (customary institutions, statutory laws, government policies) and how upland farmer land tenure security is impacted by these institutions
3. Mechanisms available to upland farmers to maintain and ensure their access to land
4. What can be done to increase effective and equitable land tenure security of upland families in Myanmar, and ultimately food security

The report was prepared by a consultant on the basis of individual interviews and group discussions with Food Security Working Group (FSWG) members and with topical experts, a desk review of reports and literature, and on the basis of an earlier report and legal analysis drafted for the FSWG in 2008. This report is based on the collective knowledge of members of the Food Security Working Group who have experience working in the uplands, and/or are uplanders themselves. There have been few if any studies specifically on customary land practices in Myanmar's uplands in contemporary times. This topic deserves further intensive study as it is so critical for helping upland farmers maintain productive sustainable agricultural systems that ensure food security.

1.2 The Uplands of Myanmar

The hills and mountains that are Myanmar's uplands range southeast from the Himalayan plateau to form an arc around the country's central plains and river delta. There is no standard Myanmar definition of 'uplands/ but when defined as areas over 1,000 feet above sea level, the uplands account for 66% of the country's townships, and are home to 42% of the national population¹. All of the nation's States, and parts of Divisions are dominated by upland areas inhabited by ethnic groups such as the Chin, Karen, Kachin, Kayah, Shan and others.

Myanmar's uplands are ethnically extremely diverse, featuring an array of ethnic groups each with their own languages and dialects, clans and sub-clans, customs and social structures. A colonial census in the early 1900s counted 135 languages and dialects², a figure still in use today to estimate the number of ethnic groups in Myanmar. The total uplands population was calculated as 21 million in the year 2000, which projecting a national average population growth rate of 2% annually, will have reached 25.6 million by end 2010.

Economically, the uplands are dominated by subsistence shifting cultivators who are not food secure. A 2005 nutrition survey³ found that 40.6% of children under five in Lashio, 61.8% in Kokang and 57.7% in Wa (upland locations in northeastern Shan State) exhibited stunted growth. A UNDP survey⁴ found nearly half of the rural population of Chin State to be in food poverty, with 22% of northern Shan and 23% of eastern Shan households similarly affected, compared to a national average of 10%. In 2010, in selected areas of Kokang, WFP found 64% of households to be food insecure, with 22% of all households severely food insecure⁵. Like Kokang, some areas of the uplands have been dominated by an economy based on the cultivation and production of opium, which has impacted household livelihoods both positively and negatively. Negative household livelihood indicators exist in the uplands despite the fact that these areas hold much of the country's natural wealth, including gem and mineral mines, valuable hardwoods, rivers with hydropower potential, and agronomic conditions that support plantation crops such as fruit and nut trees, rubber, tea and coffee.

Over the last 60 years, the uplands have been marked by armed conflict, and its regions been variously under the administrative control of a number of armed anti-state groups. Since

¹ NCEA, 2006, p 32-33.

² Steinberg, 2001, p 182.

³ WFP and National Nutrition Center, 2005.

⁴ UNDP, 2007.

⁵ WFP, 2010.

independence from Britain in 1948, many of these groups have fought for greater autonomy within a federal state, or for secession. Most former anti-state groups have now reached ceasefire agreements with the State Peace and Development Council, but active conflict continues in parts of the country, particularly in southeastern Myanmar. The history of protracted armed conflict has led to a complex institutional framework in which diverse armed groups still vie for control of people and natural resources. An FAO study⁶ found that conflict leads to loss of many kinds of livelihood assets, including damage to fields, homes and equipment, damage to community social structures and damage to human assets as people lose confidence in their ability to sustainably produce food. The FAO study emphasizes that it is the human assets that are most difficult to rehabilitate, specifically morale and ability to plan for the future.

The uplands are characterized by porous borders, as its ethnic groups spread across national boundaries over the Himalayan massif and its foothills, and many have close kin relations with those on the other side of the border lines drawn between Bangladesh, India, China and Thailand. Recent regionalization of the economy has been a strong contributing factor to the movement of people and goods across the borders.

1.3 Land Tenure: Definitions and Concepts

Simply stated, land tenure is the relationship, whether legally or customarily defined, among people (as individuals or groups) with respect to land⁷. Tenure rules define how access is granted to rights to use, control and transfer land, and with what responsibility. In short, land tenure systems determine who can use what resources for how long, and under what conditions.

Land tenure is an institution, meaning it is the rules that have been invented by societies to regulate behavior. Land tenure institutions then refer not only to the rules and regulations but also to the social systems and contracts (whether customary or pertaining to the state) that support them, and, which taken together, govern access to land.

Property rights can be categorized as⁸:

- *Use rights*: the rights to use the land - for example for grazing, growing subsistence crops, gathering minor forest products, etc.
- *Control rights*-, rights to make decisions on how the land should be used including deciding what crops should be planted, and to benefit financially from the sale of crops, etc.
- *Transfer rights*: the right to sell or mortgage the land, to convey the land to another through intra-community reallocations, to transmit the land to heirs through inheritance, and to re-allocate use and control rights.

In practice, farmers often experience tenure as a "bundle of rights,"⁹ an analogy which compares land use rights for a specific piece of land to a bundle of sticks: often separate "sticks" are held by different people and can be acquired in different ways and held for different periods or seasons—for example, a "bundle of rights" could include the right to collect leaves, bark, fruit or fuel wood from

⁶ Schelhaus, B., 1998, pp 40-42.

⁷ FAO, 2002, p 7.

⁸ FAO, 2002, p 10.

⁹ FAO, 2002, p 44.

trees in a field for one user group, while another group exercises the right to graze cattle in the field while not having access to the tree resources.

The term "customary law" is usually associated with indigenous communities, and is law administered according to local rules (usually unwritten) which bases its legitimacy on a claim to have been applied since time immemorial¹⁰. "Statutory law" was usually introduced during colonial periods¹¹ and refers to national-level laws under a state-defined legal administration. In this report the term "traditional" may be used interchangeably with "customary". Customary tenure institutions are those practiced under customary law or traditional practice.

In Myanmar's uplands, customary tenure institutions vary widely between geographic locations, ethnic affiliations and the social structures that support tenure practices. For example, land may be owned collectively by a village and redistributed annually for seasonal use rights. Or land may be owned by individual households, and land use rights may be fully transferable. Then again, some of the village land may be collectively owned and some individually owned. Different regulations may apply to grazing land, forest and fallow land, and land currently under agricultural cultivation. Tenure agreements relating to use, control, benefit and transfer of land range from collective and seasonal, to individual and inheritable (See sections 4. and 5. below for more information on customary and statutory law in Myanmar.)

Statutory law differs from customary law. In Myanmar, under statutory law as expressed by the 1974 constitution, all land is owned by the state. However, farmers may hold the right to use and control land and benefit from its products, but may not transfer or sell this use right to others except through inheritance. In other words, under this "bundle of rights" farmers have individual use and control rights which they may pass on to their children, but may not sell or rent land or use it as collateral.

Land tenure security is the certainty that a person's rights to land are recognized and protected in the face of specific challenges¹². Indicators used to measure land tenure security include¹³:

- Trends in land ownership, access and utilization by both men and women. Size of plots, equity of land distribution, number of landless and related trends
- Share of land registered individually and communally
- Cost of registration to land owners/communities and duration of registration process
- Level of protection rights of indigenous peoples, pastoralists, minorities
- Number and extent of land conflicts
- Existence and effectiveness of conflict/dispute resolution mechanisms. Existence of appeal mechanisms

Whether guaranteed by customary law, statutory law, or some accommodation between them, land tenure security is a critical foundation for food security. However, evidence suggests that land tenure security for smallholder farmers in Myanmar's uplands is eroding.

¹⁰Cotula, 2007, p 10.

¹¹FAO, 2002, p 44.

¹² FAO, 2002, p18.

¹³ European Union, 2004, p 34.





2

Trends Affecting Land Access in Uplands

Demographic trends in Myanmar's uplands include an increase in overall population and increased movement of people. Economic trends include the commercialization of agriculture and the concentration of land to large-scale holders. Combined, these trends contribute to the fragmentation of holdings, a decrease in the land available to smallholder farmers overall, and increased landlessness. The constricted access to land for smallholder farmers causes households to engage in a number of coping strategies, often with negative impacts on the household economy and prospects for sustainable regional development. The competition for land is more intense wherever foreign investment is coming in, for example near the China border in Kachin and northern Shan State.

2.1 Population Increase

Populations in the uplands are growing at roughly the national average of 2% per annum, though this varies widely between regions. In the two decades from 1980 to 2000, annual population growth rates were 3% in Kayah State, 2.1% in Shan State, 1.4% in Chin State and 1.3% in Kachin; but with a general trend of increasing rates¹⁴. The variability in rates of population increase likely corresponds to variable population densities. In practical terms, this means that in some remote areas population densities will still be low enough to sustainably support rotational fallow systems, whereas in other areas the farming systems will be undergoing change (see section 3. for more detail).

Another contributor to population growth is both temporary and permanent migration from lower Myanmar and from across national borders. Though not documented by public statistics, anecdotal evidence suggests that parts of northern Myanmar have experienced an influx of migrants from lower Myanmar due to a combination of economic pressure in the dry zone and commercialization of agriculture in the uplands. In addition, the growth in Chinese investment has brought both entrepreneurs and laborers from across the border for permanent or temporary stay, especially to those regions bordering Yunnan Province in China.

2.2 Increased Resettlement and Concentration of Populations

Resettlement, movement and concentration of populations is a particular trend in the uplands with a serious impact on land tenure. Resettlement of populations began during the decades of conflict, but continued after the cease-fires as efforts were made to consolidate villages and bring them from remote to more accessible areas for administration and provision of services. For example, some locals estimate that about 70% of the households in northern Shan State (west of the Salween) have

¹⁴NCEA, 2006, p33.

been moved at least once in the last thirty years. Many villages (especially along roads or near towns) are now consolidated, becoming heterogeneous as different ethnic and language groups are combined. Resettlement is more pronounced in areas still in active conflict or in former intense conflict zones.

Where this movement and concentration of populations occurs, traditional rotating fallow and tenure institutions become stressed and prone to breaking down. This is not only because the number of people dependent on a limited area of land has increased, but also because traditional social systems and institutions that regulate land management and provide social safety nets are weakened or destroyed. Additionally, as populations are concentrated, land holdings become fragmented and households are required to travel greater distances from the village to find cultivable land, and cultivate increasingly marginal lands vulnerable to degradation.

2.3 Land Degradation

About 10% of the total cultivated area in Myanmar is on land considered vulnerable to soil erosion and degradation, defined as land that lies at 10,000 feet above sea level or higher and with at least 10 degree slope¹⁵. Severely affected areas include Shan State, the Naga Hills of Sagaing Division and Chin State. The National Commission on Environmental Affairs considers soil erosion in the hilly regions and the dry zone to be the primary key factor contributing to degradation of agricultural land in Myanmar. As more people rely on smaller areas of land and pressure on land increases, rotational fallow systems break down, land becomes degraded and eroded, and agricultural yields decline.

2.4 Land Fragmentation and Holding Size

According to the Myanmar Agricultural Census of 2003, the number of parcels comprising the total household holdings increased by 22% on average¹⁶ from 1993 to 2003. The proportion of one parcel holdings decreased markedly from 46% of total holdings in 1993 to 19% in 2003. Furthermore, 75% of the total holdings in 2003 were composed of 2 to 3 parcels, compared to 38% in 2003. This has implications for efficiency of labor expenditure and farming practices.

Table 1: No. of HH-based Land Holdings by Size of Holding, Union of Myanmar

	Size of Land Holding	1993	%	2003	%	Growth (%)
	Union Total	2,729,258	100%	3,338,152	100%	22%
1	Under 1 Acre	187,494	7%	471,782	14%	152%
2	1 Acre and under 3	713,889	26%	766,422	23%	7%
3	3 Acres and under 5	563,175	21%	635,806	19%	13%
4	5 Acres and under 10	759,028	28%	796,439	24%	5%
5	10 Acres and under 20	413,695	15%	504,426	15%	22%
6	20 Acres and under 50	90,997	3%	157,945	5%	74%
7	50 Acres and Over	986	0%	5,332	0%	441%

Source: Report of the Myanmar Agricultural Census 2003, p 38.

¹⁵NCEA and UNEP, 2006, p 30-33.

¹⁶ Gollim, MoAI, SLRD, 2007, p34.

The number of holdings of less than one acre increased by 152% over the ten year period, from 187,494 in 1993 to 472,172 in 2003. At the same time, large-sized holdings of 50 acres or over grew by 424%, from 1,406 in 1993 to 7,369 holdings total in 2003. See Table 1.

It is interesting to note that *taungya*¹⁷ average household holding size increased from 1.8 to 2.6 acres, or by 47% (over a union total of 3% average holding size increase for all agricultural land types).

2.5 Commercialization of Agriculture

In support of the transition to the market economy, and to enhance the potential for agricultural development, a government-appointed committee began to allocate large blocks of land for commercial plantations in 1991. By 2010 a total of 1,728,269 acres had been reported as allocated to 216 companies in eleven states and divisions¹⁸. While nearly half of the total acreage allocated was in Tanintharyi (in support of oil palm plantation development), the next highest amount of acreage allotted by state/division was Kachin State at 393,292 acres (see Table 3, section 6.1). This may be an underestimate as some additional land may have been allocated informally. The rapid growth in commercial production is also expressed by the 2003 agricultural census (see Table 2) which found a 904% increase in the number of non-household based holdings over the preceding ten years.

Table 2: No. of HH and non HH-based Holdings, Union of Myanmar

Holdings	1993	2003	% change
1. Total Number of Land Holdings	2,729,820	3,343,793	22
1.1 Household Based Land Holdings	2,729,258	3,338,152	22
1.2 Non HH Based Special Land Holdings	562	5,641	904

Source: Report of the Myanmar Agricultural Census 2003, p 19.

The widespread allocation and commercialization of land, motivated by a desire for agricultural and economic growth, is based on a government calculation that 16 million acres of the national land area suitable for cropping and animal husbandry is currently not being cultivated¹⁹. However, in practical terms, in some of those areas in which land is being allocated, local villagers with customary tenure are losing access to land, with or without compensation or recourse.

2.6 Increased Landlessness and Land-Poorness

Inadequate access to land in the uplands is a worsening trend that affects food security. According to a comparison of surveys, the estimate of landless households in Myanmar ranges from 35% to 53% of the national rural population²⁰, this can generally apply to the uplands as well. A 2007 study of remote townships (mostly, but not only in the uplands) found that 44% of households were landless²¹. Of the landholding households, the average holding was 3.6 acres—with 5 acres roughly considered the minimum required to sustain a household in rural Myanmar.

¹⁷The Myanmar Agricultural Census defines *taungya* as land on at least 45 degree slope

¹⁸ DAP, 2010, p 82.

¹⁹ NCEA, 2006, p 30.

²⁰FAO, 2007, p 49.

²¹ EcoDev, 2008, p 3.

While population densities are lower and land is less scarce in remote mountainous areas, the land tends to be of poorer quality, requiring more extensive areas of land per capita to be farmed sustainably. In some upland areas, relocation and concentration of villages may enable easier access to social services but constrains access to land.

2.7 Impact on Smallholder Farmers of Loss of Land and Tenure

These trends, especially when combined with the allocation of land to agribusiness, have caused a rapid-onset of severe stress on household livelihoods in affected areas. Coping strategies for food insecurity, and for loss of access to land, though they may vary in intensity depending on the area and resources available, are generally similar across the uplands²². As households are no longer able to access enough land to sustain livelihoods, an initial coping strategy will be to gather (and deplete) common forest or other resources. Another common coping mechanism is to find work as a casual daily labor, when there is a market, usually in agriculture. Migration for labor is increasingly common, either temporary or permanent, and either within the country or across national borders. If within the country, migration is often to sites for extraction of natural resources—whether to find work in large-scale jade and gem mining operations, logging camps, or artisanal collection of gold in riverbeds, rattan or bamboo in the forests. Some of these tactics carry risk of social problems such as drug addiction and HIV infection, especially in areas with large migrant populations such as mines and logging camps. Women and children become more vulnerable to being trafficked—a growing trend in upland Myanmar, especially near the Chinese border²³. None of these are environmentally, socially or economically positive coping strategies.

Ultimately, as less land is available for shifting cultivation, productivity declines. The reduced yields lead to increased joblessness and oversupply of casual labor as well as increased environmental degradation, and ultimately increased food insecurity.

²² UNODC, 2006, pp 30-33. Although these reports detail coping strategies of farmers who are affected by opium eradication, the household coping strategies are the same for loss of land or other shocks to household food security.

²³UNIAP, 2009.





3

Agroecological Systems in the Uplands

The agro-ecological systems of Myanmar's uplands, dependent on the variable geography and topography of its hills and mountains, are diverse, complex and adaptable. Ecological diversity affects livelihood options. Different livelihoods activities and resource uses are thus adopted not only between geographic areas, but also between households within a village, and even within households as different family members are responsible for a mix of activities for their food security.

A simplified model of upland agroecosystems can be stratified by elevation. As elevations become higher and (usually in correlation) slopes steeper, changing environmental conditions determine changes in agricultural systems. In the lower-elevation plateaus and valleys where land is relatively level, agriculture may be based on flooded rice in one or two cropping seasons per year, or rainfed fields of sesame, winter wheat, beans/pulses and vegetables, with land cultivated continuously by oxen or tractor. Moving up from the valleys into sloping lands on medium elevations, rice and/or corn are cultivated in rotating fallow systems using water buffalo, a hand hoe or a dibble stick. As elevations increase and slopes become steeper the annual crops transition to more cold-tolerant grains such as millet, buckwheat and sorghum, cultivated by hand-hoe. In the medium and high elevation slopes, annual crops may also be cultivated in permanent terraces, or perennial tree species such tea, walnut, dogfruit and forest species on contour bunds or hillsides. As slopes become steeper and elevations higher, productivity decreases. Each of these 'elevation layers' are often associated with specific ethnic groups, for example Shan growing paddy in the mountain valleys, Palaung cultivating tea at middle elevations, and Chin or Kachin cultivating millet and maize at higher elevations. But both in terms of agricultural practice as well as ethnicity, this remains a simplified model, and the practical reality is a mix across elevations.

3.1 Rotational Fallow

Shifting cultivation, also known as rotational fallow, rotational forestry, rotational agroforestry, slash-and-burn or swidden²⁴, and *taungya* in Myanmar, is the staple agricultural technology in the uplands. Practiced by a majority of the 400 million people who are dependent on tropical forest across Asia²⁵, rotational fallow can be defined simply as a system with short cultivation periods followed by longer fallow periods²⁶. This system often incorporates fire to clear land of cut brush or trees (i.e. 'slash') and provide ash or nutrients to the soil. After burning the slash, the field is cultivated by hand hoe, dibble stick or water buffalo, and usually sown with a mix of grain and vegetable crops. After the weed bank has become high and the soil less productive, usually

²⁴ "Swidden" is an old English or Scandinavian term that originated several centuries ago when rotating fallow systems with fire management were widely used in Europe

²⁵ Kerkhoff, E.E. and E.Sharma, 2006, p5.

²⁶ Warner, Katherine, 1991.

somewhere between one and three years of cultivation, the field is left fallow to allow vegetation and trees to regenerate soil fertility.

Rotational fallow systems are often described or measured by the ratio of the period of cultivation to the period of fallow, i.e. the number of years cultivated compared to number of years fallowed, which is referred to as the fallow cycle. Fallow periods in the past have been up to 15 years, and still are in extremely remote and sparsely populated areas, but now a more typical cultivation:fallow cycle for Myanmar's uplands might be 2:4 or 3:6, in other words fields are cultivated for two or three years and left fallow for between four and six years. Fields are cultivated for longer periods where land use intensity is higher (i.e. less cultivable area is available per cultivator).

3.2 Forest and Rotational Fallow

Forests are the basis for upland rotational fallow, diverse livelihood activities, and food security. Rotational fallow has traditionally taken place in forest, where small areas for cropping have been cut out of forest and after fifteen years of fallow cut out of forest again. While today fallow periods in some areas are too short to allow forest re-growth, the brush and secondary re-growth still provide environmental benefits during the fallow. And in those areas with a sufficient re-growth period, fallows are managed as forest and not as fields—in other words, in a long and integral forest fallow cycle, the number of years that a plot is in forest is longer than the number of years it is in field. In these systems, forest fallows contribute to overall forest biodiversity (and food security), as each stage of regrowth presents a different mix of plant and animal resources.

Shifting cultivators may specifically manage their field for forest fallow, for example by leaving fire-resistant tree species standing in the field, to provide shade, food, or mother trees for natural regeneration. Trees may be an essential component of the cultivation period, such as systems that incorporate *Alnus nepalensis*, which by "fixing" nitrogen into the soil helps speed restoration of soil fertility, and its branches cut at the time of cultivation can be used for fuel wood while the leaves are incorporated into the soil to add fertile organic matter. Today, cultivated perennial species such as tea, walnut, mango, avocado or other fruits, fuel wood and timber species are an increasingly important component of upland agricultural systems.

Forest and forest fallows are a critical source of food, especially in times of famine or crop failure, and of items for cash or trade income. For those who know what to look for (usually local women), the forest provides a steady supply of tubers, tender leaves, bamboo shoots, flowers, fruit, nuts and bark that are consumed or used to flavor food. A variety of forest products (animal as well as plant) have traditionally been traded or sold to towns or lowland areas to help upland families access household goods not available in the forest, such as salt, oil or metal tools and implements—sometimes on the basis of upland-lowland exchange relationships between families that are passed down through generations.

Forest fallows are the most important component of shifting cultivation farming systems. .. Forest fallows are fallows in which forests are allowed to regenerate on land after it has been used to grow crops. Trees take a comparatively long time to grow, thus forest fallows last longer and comprise a much greater proportion of the cropping cycle, and corresponding larger area of land, than fallows in rotational arable systems. Forest fallows enable restoration and conservation of forest ecosystem functions, while making the land suitable for the cropping phase that follows.

-Kerkhoff and Sharma, 2006, p 15

3.3 Integral and Partial Systems

Rotational fallow systems are complex, combining annual crops and perennial crops in the field and forest, managed by farmers to fulfill their livelihood needs over time and space. The products of rotational fallow systems may be cultivated or gathered, raised or hunted and fished. The forest and fallow fields provide grazing lands for the livestock as well as fodder for cutting and carrying back to penned animals. The water buffalo is the draft animal of choice, cattle (or in the case of Chin, mython) may be raised to store surplus wealth and/or in preparation for feasts, and small livestock raised in the uplands include pigs, goats and chickens.

Important differences in shifting cultivation practices affect their sustainability and management decisions. "Integral" or "traditional" shifting cultivation is defined as the type in which indigenous communities clear and cultivate secondary forests, and leave parcels to regenerate naturally in fallows of medium to long duration²⁷. This type is contrasted with "partial" or "incipient" shifting cultivation which might be practiced by recent in-migrants to an area who do not have the local knowledge needed to sustain proper forest fallow, or who are interested in only short term economic gain through cash-cropping. "Integral" systems are also associated with cohesive social structures that are often linked to agricultural practices through ritual and/or community management institutions.

3.4 Systems under Stress

As pressures on land increase, rotational fallow systems come under stress. As fallow periods are no longer long enough to ensure soil rejuvenation, and as the surrounding forest which speeds re-growth disappears, the thin topsoil on steep slopes loses its ability to hold organic matter and water, and soils quickly erode, degrading the land and decreasing productivity of grain crops. In areas under extreme land use stress, such as Kokang or Wa where opium has been eradicated and local farmers struggle to make up for the cash (i.e. food) shortfall, farmers expand the area of land under grain cultivation and, in a downward spiral, fallow periods decline, soil erosion and land degradation increases, and yields decline, ultimately contributing to food insecurity²⁸.

However, rotational fallow systems are also adapting. Upland farmers may adopt practices that intensify their land use, for example by allowing more rapid recycling of nutrients, such as using cover crops and enrichment planting of soil-building trees into *taungya* fields, or incorporating economic forest crops into forest fallows. In this way farmers are constantly working to maximize labor and capital inputs. The technical and financial support required to mitigate food insecurity in this time of rapid transition will be most effective when supporting, enhancing and disseminating farmers' own innovations.

In recent decades upland areas of Myanmar have experienced rapid changes in the social, economic and natural resource environment, all of which have affected (for better or for worse) the options for livelihood activities and choices of farmers and policy-makers. One of the changes with greatest impact has been in land tenure institutions.

²⁷ Fujisaka et. al, 1996.

²⁸ United Nations Office on Drug and Crime (UNODC), 2006, p 31.



4

Customary Institutions²⁹

4.1 Diversity of Social Structures and Land Tenure Systems

The diverse land use and livelihoods activities in the uplands, combined with the unique social systems under which they are practiced, have led to the creation of various traditional tenure institutions, some of which are complex and highly regulated. Tenure systems may be collective, as when a village or household (or clan) group works together to prepare a large contiguous area of land for cultivation each year, or manages a collective forest. Tenure may be based on hereditary ownership by household in which each household has rights to a set of fields or forest area, and decides on their own each year which field they will cultivate. Or, the tenure system may be a combination of collective and individual. Reflective of the diversity of upland productive systems, tenure institutions apply not only to agricultural lands. A village may organize a restricted or rotational grazing system, protect its watershed forests from cutting, or regulate valuable seasonal resources such as bamboo shoots.

These regulations are internal, meaning they have been created by the community itself, usually through elder councils or passed down through generations, and supervised by the village chief or traditional leader. Customary rules and systems are managed by community mechanisms, and are not imposed by national or statutory law, although they may be altered or influenced by statutory law. As such, they often have internal conflict resolution mechanisms, whether by village heads, clan leaders, council of elders, or traditional 'conflict brokers'.

The most common form of traditional tenure (and historically supported by statutory law) is the concept of *dama-ucha*, which means that the one who cultivates wild land first (literally, "wields the machete") becomes the owner. Under this mechanism, land belongs to the one who cultivates it first, and according to traditional tenure, this ownership still holds while the field is fallow. This applies to *taungya* as well as to paddy land.

Customary tenure institutions in the uplands are often imbedded in social systems. For some upland ethnic groups, including Chin and Kachin, clan relations are the foundation of social organization. In these cases access to land is often linked to kinship ties and systems of relationship. Chin and Kachin kinship systems are strongly patrilineal, and land inheritance may be divided equally among sons, or favor either the eldest or the youngest son.

²⁹ This section is based on the collective knowledge of members of the Food Security Working Group who have experience working in the uplands, and/or are uplanders themselves. There have been few if any studies specifically on customary land practices in Myanmar's uplands in contemporary times and this topic deserves further intensive study as it is so critical for helping upland farmers maintain productive sustainable agricultural systems that ensure food security.

Patrilineal clan systems often do not recognize land rights for women. A woman enters her husband's clan upon marriage. In these systems, as the land belongs to the husband and/or his clan, when a woman becomes a widow she becomes reliant on sons or brothers-in-law for access to land. At the same time, the clan has an obligation to provide for her welfare. Although women may still continue in practical terms to access the same rights and benefits over land that they had before they became widowed, they also become vulnerable as their ability to access land, make decisions on land use, improve the land, or benefit from the land is dependent on the will of male relatives.

4.2 Examples of Traditional Land Tenure Institutions: Chin State

Among the upland peoples of Myanmar, Chin socioeconomic systems have been less disrupted by recent decades of civil conflict, population increase, land pressure, and opening to the market economy, and thus have maintained more integral systems than other areas of the country. On the westernmost border, Chin State lies in the heart of the wide mountain range that runs south from the Himalayan plateau between the Ayeyawaddy river basin and the Brahmaputra. Slopes are very steep and land not very productive. While Chin tenure systems are diverse, they can be roughly categorized as collective, individual or a combination of both.

In parts of Chin State, especially in areas with lower population density, *taungya* land is managed collectively. Each village *taungya* area is divided into *lopil*³⁰, or plots, through which cultivation is rotated, with *one lopil* cultivated each year³¹. One village may have between 4 and 6 *lopil*, or even up to 16. The size and number of *lopil* varies between villages, dependent on amount of available land, village household population and most importantly, the choice of main grain crop cultivated (which is often determined by environmental factors).

The crop choice (rice or maize) influences the cultivation period which in turn has a bearing on the number of *lopils* in the village. Rice is usually cultivated for only one year before rotating, and thus the number of *lopil* per village will be higher; while maize may be cultivated 3 to 5 years before fallowing, and the number of *lopil* per village will be fewer. For example, in Hakha Township a village may cultivate corn in 4 or 6 *lopil*, each of which is cultivated for three to five years continuously before fallowing and rotating to the next. A village in Thantlang Township might grow paddy, rotating annually through one of 12 or 16 *lopil* in the village.

Once the *lopil* has been prepared collectively through felling and burning, individual households cultivate individual sub-plots within the *lopil*. Villages may re-divide and distribute these sub-plots each time a new *lopil* is opened, using a lottery system. Or, the household sub-plot boundaries may already have been determined through inheritable ownership. Or, the *lopil* sub-plots may be allocated on the basis of a combination of "previously used/inherited" fixed land and "open access" lottery land. On average, a household in Hakha will have access to a 2-acre household plot for each cultivation period, while in Thantlang household sub-plots average 3 acres in size. Each *lopil* has a

³⁰The term *lopil* is used in Hakha, Falam and Thantlang townships but not all Chin languages and dialects.

³¹To conceptualize the *lopil* practice, think of a giant circular pie (or chapati) which represents the village's *taungya* area; slice it evenly-spaced three times across to make six pieces, or four times to make eight, and each of these slices is a *lopil*.

name. Some villages keep records of the *lopil* cultivated annually, with the year cultivated and the *lopil* name, which for some villages can date back continuously for over a hundred years:

Nevertheless, the *lopil* system is not static, but dynamic over time. As populations grow, or as some of the *lopil* land is dedicated to permanent cultivation or community forest, *lopil* may be reorganized. A *lopil* may be taken out of rotation altogether, or the area per *lopil* reduced. Or a village may re-divide the total area of *lopil*, for example making an area that was once six *lopil* into four *lopil*, to maximize the area per *lopil* and thus the number of households that can cultivate it each year.

In other parts of Chin, including in Tedim and Falam townships, *taungya* land use rights are by household and inheritable, i.e. outright individual ownership. Populations are also denser, and concentration of land into wealthier households has occurred through a combination of inheritance and collection of debt. In areas with individual and inheritable ownership, the choice of which plot to cultivate each year and how to manage it depends on the household strategy. In areas with concentration of lands into fewer households, a land rental system is well-developed in exchange for cash, a portion of the harvest, a traditional gift, or on the basis of family ties.

As for forest tenure, again the arrangements are diverse. In most villages of Hakha Township, for example, the (*non-taungya*) forest areas were owned by individuals under customary tenure. In response partly to the changing statutory laws and the socialist government orientation, in the 1960s the forest management became collective. In Falam and Tedim Townships management regimes can range from individual ownership and individual decision on fuel wood collection, to individual ownership and collective decision on fuel wood collection, to collective ownership and collective decision. These arrangements are for forest outside the *taungya/lopil* land, which is protected forest near the village and water source. Fuel wood collection in the fallow *taungya* forest is subject to another set of regulations, or to no regulations at all.

4.3 Customary Law as Statutory Law

Aspects of customary law, including traditional land tenure systems, were explicitly upheld under the British Frontier Areas Administration. The 1935 Government of Burma Act confirmed the application of a different set of laws to specific ethnic groups and/or specific geographic areas, which has not been repealed or overruled up to today. The issues for which customary rule are to be maintained are described in a series of manuals intended for use by local courts and legal officers, applicable for example to the Khamti Long (Shan of the Putao area), Hsawngsup and Singkaling Khamti Laws and Criminal Justice Order, 1926 (Shan of upper Chindwin), Shan State manual (applicable in Shan State), and a regulation for the Chin Hills, later superceded by the Special Chin State Act. An example from the Kachin Hill Tract Manual is presented here, which applies in this case to a set of ethnic groups (Kachin, Palaung and a number of others) in a specific geographic area (the 'hill tracts' of Myitkyina, Bhamo and Katha Districts). A 1960 reprint of the Kachin Hill Tract Manual states:

...customary law is extremely diverse, possibly changing from village to village...Because of this diversity, generalizations should be avoided. Also, customary rules are not static, but continually evolving as a result of diverse factors like cultural interaction, population pressures, socio-economic change and political processes.

-Cotula, 2007, p 10

In 1895 the Kachin Hill Tribes Regulation was enacted, [and] is still in force in the following areas among the races shown...[it] has also been extended to the areas known as the Triangle and the Hukawng Valley. Therefore it will be seen that there are two kinds of laws applicable in the Hill Tracts of the Myitkyina and Bhamo Districts. One set of laws applies personally to the races mentioned...and another set of laws extended by...the Government of Burma Act 1935 applies territorially.³²

Stated simply, this means that customary law is applicable to the specified ethnic groups in the designated geographic area, while statutory law applies to non-members of these groups in the same area. However, it is important to note that all laws passed since 1962 apply equally to all areas of the country³³.

This collection of acts and regulations, to which government administrative officers may still refer to today, states that village headmen "have general control, according to local custom, over the tribe, clan or villages made subject to him".³⁴ In attempting to define the parameters in which customary law takes precedence, the manual refers to the need to respect local forest use rights, while at the same time denying recognition of "any absolute rights of the Kachin over forest produce [nor]...legal objections to the constitution of forest reserves in the Kachin Hill Tracts".³⁵ References are also made to the need for village boundaries to be mapped and marked³⁶ and disputes resolved as quickly as possible, and in boundary disputes to bring contending parties together to "decide the matter with the aid of independent headmen and elders representative of all interests. A settlement in this manner is invariably the most satisfactory".³⁷

These passages illustrate the tensions already present between the growing influence of the state, which at the time the regulations were drafted was preparing to extract resources through the extension of forest reserves, while at the same time be respectful of local rights. As illustrated in the box below (see text box *Reflections on a system in transition*), township legal officers in upland areas still have to decide whether civil infractions are to be punishable under jurisdiction of customary or statutory law, and parties in dispute may choose to appeal to one jurisdiction over the other, depending on which they perceive is to their greater advantage. Nevertheless, customary law or traditional conflict resolution mechanisms take precedence for most upland farmers today, as the practical reality in terms of land and other civil disputes is arbitration by village headmen and elders, and not government officials.

³² Government of the Union of Burma, 1960. See "Foreword" (pages not numbered).

³³ Under colonial administration, Upper Burma (including Kachin) was constituted as a Scheduled District under the Notification dated 4th May 1886. Laws in force in Lower Burma were not applicable in the declared Scheduled District unless specifically extended (refer to Scheduled District Act of 1874, the Burma Laws Act of 1898 and the Government of Burma Act of 1935). For example, as mentioned in section 5 of this report, the "Extension of the Upper Burma Land and Revenue Regulation, 1889, to Hill-Tribes" extended land tax to Upper Burma (refer to Political Department Notification No. 15 dated 4th June 1935 - Kachin Hill Tract Manual). However, all laws enacted after 2 March 1962 (the day the Revolutionary Council assumed state power) to present are applicable to the whole country, for example the Disposal of Tenancies Law of 1963. In addition, it is important to note that "in the event of conflict between the former law and the later law, the later law shall prevail" (Section 3 (g) of the Interpretation of Expressions Law, 1973).

³⁴ Government of the Union of Burma, 1960, p 3.

³⁵ Government of the Union of Burma, 1960, p 140.

³⁶ Government of the Union of Burma, 1960, p 130.

³⁷ Government of the Union of Burma, 1960, p 191-192.

4.4 Systems in Transition

Traditional tenure systems, like the agricultural systems they regulate, are in transition. The major transformations occurring in much of the uplands over the last few decades spurred by population growth, protracted conflict, resettlement and migration of populations, creation of forest reserves, and the entry of the market economy, have equally transformed traditional tenure and land management systems. As expressed in the example of Chin *lopil* systems above, and the *Reflections* box below, both social and land use systems are dynamic and adapting in response to changes in the natural and social environment.

As social structures change, so too do land management systems. Since tenure institutions are fundamentally an agreement within a group on how access to land is regulated, as the social structure within which regulation mechanisms are imbedded change, so too do land tenure institutions. Moreover, customary and statutory laws influence each other.

For example, if Kachin, Hmong and Palaung are combined from separate hilltop hamlets into a village near the road, they may organize social and land management systems in the new village along ethnic lines, with physically separate quarters. Land access may depend partly on traditional clan systems as leaders share out the limited available land in the new area, and/or households migrate seasonally to cultivate fields left in their old villages. Those ethnic leaders who are fluent in Burmese or experienced negotiators may gain access to better land for themselves and/or their group in negotiation with local authorities. Tenure may depend more strongly on statutory systems than in the past, as the more affluent households begin to develop and register paddy land. Customary institutions thus cannot be understood in isolation, but within their broader local context, which could be termed a "local land regulation framework."³⁸

Whether supporting "integral" or "partial" fallow systems, land tenure institutions are in transition, and the pathways and outcome of these transitions will differ radically depending on the local context.

4.5 Customary Tenure and Statutory Practice

In integral rotating fallow systems all villagers know through a series of land marks which land is considered under customary tenure as belonging to their village, and to which land they have access for farming and/or hunting and collection of forest products. Upland farmers usually recognize several kinds of forest: the 'protection' forest surrounding the village, the forest fallows around the village in which fields are made, and the forest excluded from shifting cultivation but used for a variety of other purposes such as hunting and gathering of timber and non-timber products. According to traditional tenure systems, the entire area of forest, fields, and fallow fields, whether managed collectively or individually, is village land.

It often happens that customary and statutory tenure systems do not coincide in the uplands. First, village borders and household land holdings in the uplands are usually not clear in government records. In the uplands, village boundaries may be noted in SLRD field notebooks with landmarks and approximate distances, but are not surveyed, and not mapped. And any individual *taungya* landholdings are not formally registered or surveyed.

³⁸Cotula, Lorenzo (ed.), 2007, p 105.

More importantly, to accommodate rotating fallow systems, traditional systems recognize large areas of land as village land, only a fraction of which is cultivated in a given year and which includes fallow and grazing lands. In traditional systems when land is fallowed it either still has an individual household owner or is village collective land. Village fallow land may be used as grazing land or forest. However, government agencies consider any land that is classified as agricultural, with no registered owner, and currently fallow as 'wasteland', defined as land that is not fully utilized. Under the current push for expansion of agriculture, and through the implementation of the 1991 'wasteland act' (see section 5 below), designated 'wasteland' is available for allocation to private entrepreneurs for commercial ventures.

...several legal systems—statutory, customary and range of "in-betweens"—regulate resource rights in the same territory, resulting in overlapping rights, contradictory rules and competing authorities. The neat distinction between "customary" and "statutory" is considerably blurred, and easy dichotomies between the two must be avoided.

-Cotula, 2007, p 12

This has some potential negative outcome for access to land and household food security of smallholder farmers. In fact, the weak institutional framework for respect of customary tenure of cultivated and fallow land is one of the biggest problems facing smallholder farmers in the uplands today, with direct impact on food security.

Box A. Reflections on a System in Transition

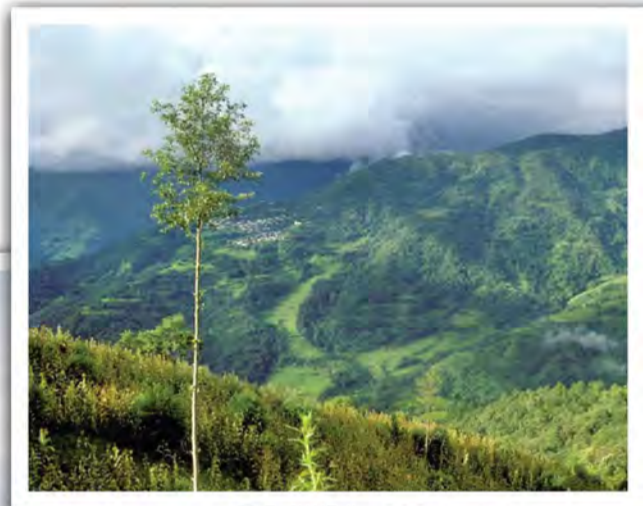
Some villages in northern Chin State are working to develop permanent plots such as paddy lands, rainfed and irrigated bench terraces for cultivation of corn and vegetables, and agroforestry plots, often on collective land. The staff of an NGO which supports this process shares some observations of implications for land tenure as follows:

The development of permanent farming systems has raised some interesting issues, first among which is land ownership. As plots that were collective rotating fallow are made permanent and individually owned, household tenure must be established. Often tenure is established through verbal agreements or declarations made between the farmer and two witnesses representing the farmer, and the village heads or elders. The declaration states the agreed boundaries using geographic features that both parties (village and farmer's representatives) can easily recall, especially in case of conflict. This witnessed verbal agreement establishes legal and binding tenure according to customary law.

The village has to agree on which land plots to allocate for permanent cultivation. When this step is not completed it can lead to conflict. And as the village decides to re-organize land to accommodate permanent plots, the area of land available for shifting cultivation becomes limited, which threatens the food security of more vulnerable households.

The transition to permanent cultivation has also created a land market (where there was none in the past), with a significant increase in the value of land, whether paddy, bench terrace, or orchard, once it is permanently cultivated. This has contributed to a higher wealth differential between village households, as those families who make permanent land plots increase their household assets and productivity, while those families who cannot afford the initial investment for conversion of land do not.

To enable vulnerable households to improve their land access, the NGO has tried to support the poorer households with food-for-work or subsidized material inputs to establish permanent plots, and introduced low-cost technical innovations to intensify and diversify production. To ensure that vulnerable households are equitably represented in village-managed land development projects, the NGO promoted collective discussion in the village of how to involve the vulnerable, and thus facilitated the extension of the permanent land areas and water sources with a priority for the vulnerable families. The registration of these lands through SLRD or FD channels has not yet been attempted, but the NGO is confident that the adoption of technologies for intensification and permanent farming is not only a step towards food security but also lays the foundation for secure land tenure in the future.





5

Statutory Law: Summary of Relevant Land and Forest Laws

Myanmar laws on upland tenure can best be understood in the context of four main historical periods: British colonial rule from 1824 to 1948; the post-colonial independence period from 1948 to 1962; the socialist period from 1962 to 1988, characterized by a unique brand of socialism administered in a country closed to outside influences; and the SLORC/SPDC period from 1988 up to today. This section provides a summary of land and forest laws relevant to the uplands, clustered into these historical periods.

5.1 British Colonial Period: Indirect Rule and Land Classification

The British colonial administration spread over the country in stages, beginning with Arakan and Tenasserim in 1824, spreading to the 'Lower Burma' delta, river plains and remaining coasts after 1852, and annexing in 1886 'Upper Burma' comprised of Mandalay and the mountainous areas to establish what eventually became—for the most part—today's national boundaries. During this period, important policies that impact upland land tenure up to today were the colonial system of frontier administration and the classification of all land within the British-delineated boundaries, including the creation of forest reserves.

The colonial system applied direct rule to areas dominated by the Burman ethnic group, and indirect rule to the non-Burman uplands. Under direct rule in the delta and plains, the indigenous village administration system was abolished and administration reorganized under colonial officers. Under indirect rule in the hilly areas, called the Frontier Administration, local village administration systems based on chiefs and the *saohpa* remained mostly intact, though under ultimate supervision of a British commissioner. The implications of this policy were that much of the uplands continued to be managed according to customary law until independence in 1948.

For reasons of taxation, the classification of lands was introduced (in Lower Burma first) in 1878 with systematic cadastral surveys and settlement of revenue rates. The land classification categories, from the perspective of agricultural tax assessors, are broadly defined as "agricultural" (taxed) and "non-agricultural land" (nominally or not taxed). The category of agricultural land includes wet rice land (*le*), dryland or *ya* including *taungya* or upland sloping fields, and orchards; while non-agricultural land includes forest, grazing land and village land or residential land. (See Table 4 in section 6.3 below for more detail on land categories in use today.)

What is significant is that the broad categories and boundaries of land classification, including forest reserve or unclassified forest, continue largely unchanged today as they were begun in the colonial era and refined after independence. Whether land is designated as agriculture or forestland, or *ya* or "wasteland," determines the allowable land use and/or the processes required to gain or validate

land tenure, and which agencies are responsible for facilitating tenure guarantees. The classification system thus has great impact in the uplands today.

In 1889, the Upper Burma Land and Revenue Regulation applied the existing Lower Burma system of taxation to the uplands, in effect establishing taxes on all cultivable lands, including paddy and *taungya*. This law is in effect up to today. In the absence of certified survey maps, the village tax roster, which lists the size and quality of holdings by household for annual tax assessment, is the key document used to determine land use rights in case of conflict in most remote upland villages.

The Forest Department was created in 1856 and marked the advent of scientific forestry, a management system designed to promote long-term commercial timber production with a strong but not exclusive focus on the production of teak³⁹. To promote this goal, a system of reserve forests was established for production of teak and other commercial species, in effect making the reserves exclusively for the use of Forest Department. Provisions for local access and village use was made through zoning of areas of forest as "local supply working circles." The Forest Acts of 1881 and 1902 established and consolidated control of the reserve forest by the Forest Department, which were extended to Upper Burma. Not only reserved forests were regulated, but also shifting cultivation in areas that were either ecologically fragile or contained significant stands of teak. In addition, 15 species of valuable hardwoods were on the reserved list⁴⁰ by 1876, meaning they could only be harvested by order or permission of the Forest Department. By 1911 forest reserves covered 15% of the total land area of 170,000 square miles administered by the British, and just over half of this reserve area was in Upper Burma⁴¹.

5.2 Independence Period: Nationalization of Land

Regarding land tenure, the fundamental achievement of the parliamentary period was the Land Nationalization Act of 1953 (revised from a 1948 version) which made the state the owner of all lands. The primary target of this act was to take land ownership out of the hands of the Chettiars, a money-lending class (of Indian ethnic origin) which had accumulated extremely large landholdings in the delta under the colonial administration. Under the Act farmers hold three guaranteed rights, including 1) Land use right, or right to control the land; 2) residual claim rights, or right to obtain residual value and 3) disposal rights, or the right to transfer the use right to others (inheritance). With this "bundle of rights" the farmers maintained individual use and control rights. In other words, though farmers could not sell or transfer land or land use rights, they were able to maintain the right to use the land and pass the use rights on through inheritance.

The Land Nationalization Act was later legislated as the Land Nationalization Rules in 1954 in a comprehensive 20-chapter legal framework with detailed mechanisms and regulations for nationalization and redistribution of land. In a bid to abolish "landlordism" or the concentration of land into the hands of non-cultivating owners—which had become a serious problem in the delta—

³⁹ Bryant, Raymond, 1997, p 7.

⁴⁰The term "reserve forest" denotes a category of a forest area, while the term "reserved" tree denotes a category of forest tree species. In either case, the forest or species is "reserved" for the unique management and harvest right of the Forest Department. It is only recently that teak has been removed from the "reserved" species list, thus now allowable for individuals and companies to plant and harvest without special authorization.

⁴¹ Bryant, Raymond, 1997, p 98.

the act set forth an ambitious program to redistribute land holdings/cultivation rights to those actually cultivating the land. Over its first five years, before petering out as impractical, the program redistributed 1.5 million acres out of about 3.4 million acres nationalized⁴².

Under the act, Land Nationalization Committees were created at village and central levels to administer the use (and redistribution) of land. Though the makeup and loose mandate of the committees has changed with changing administrations, these committees and not the courts settle land disputes and thus ultimately determine land use rights. (Due to the political partisanship of the time, elected legislators ensured that the courts were barred from settling land disputes under this act.) Another enduring legacy of the Land Nationalization Act is that it stipulates that only the President or authorities appointed to operate on the President's behalf are responsible for regulating use of agricultural lands, including and especially any changes in classification of land from agricultural to non-agricultural (under Article 39 or La Na 39). This requirement complicates any efforts today to change land use classifications from agricultural to any other land use. (See section 7.3 below).

On the forestry side, after independence the colonial strategy of 'scientific forestry' and the reserve forest management system was reaffirmed. Notable policy directions in this period included a reforestation campaign in the Dry Zone as well as renewed discouragement of shifting cultivation⁴³. As in other sectors, the forestry sector became nationalized with the result that a state-run timber enterprise was created to replace private firms in timber extraction. However, the Forest Department retained the responsibility to conserve and manage the forests, including selecting those trees that were to be extracted.

5.3 Socialist Period: State-Owned with Individual Use Rights

The Land Nationalization Act was followed ten years later by a series of laws and regulations that were intended to abolish "lingering landlordism" and again ensure that those who cultivated the land retained land use rights, as well as the equipment necessary for production. In effect, these laws—including the Farmers' Rights Protection Law of 1963, the Disposal of Tenancies Laws of 1963 and 1965, and the Abolishment of Rents in 1965—continued and strengthened the project of nationalization of land and guaranteed use right to the cultivator. These laws are reflective of the unique brand of socialism developed during this period in Myanmar, in which agricultural production—the country's strongest economic sector—was not collectivized but remained individually held. This was in contrast to other countries in the region which collectivized agriculture, and in contrast to other sectors of Myanmar's economy which were more clearly nationalized under state enterprises and institutions.

The Disposal of Tenancies Acts in 1963 and 1965 gave the sole right to "dispose of tenancy," or determine tenure rights, to Village Tract Land Committees which were intended to be composed of local farmers. It also made it illegal for non-agriculturists to occupy agricultural land. The Farmer's Rights Protection Law of 1963 decreed that no civil court could confiscate agricultural land, cattle or farming equipment from a farmer, nor prohibit a farmer from cultivating land. (Interestingly, rubber

⁴² San Them, 2008, p 32.

⁴³ Bryant, 1997, p 163.

lands were explicitly excluded from this law, as they were considered estate crops in large-scale commercial ventures.) Although they may not necessarily be implemented or practiced, these laws remain effectively on the books today. The Farmers' Rights Protection Law could be a strong mechanism to uphold upland tenure rights.

The 1974 Constitution declared the Socialist Republic of the Union of Burma, and reaffirmed and strengthened the principle that the state is the ultimate owner of land and all natural resources.

5.4 The SPDC/SLORC Period: Market Economy

After the 1988 crisis the new leadership of the country, the State Law and Order Restoration Council (SLORC) (later renamed the State Peace and Development Council or SPDC), instigated a radical new direction towards a market economy, privatization and opening the country to foreign investors.

Under the leadership of Secretary 1 of the SPDC, a 20-member Privatization Commission was formed to supervise the implementation of a privatization program, as privatization was, and is, viewed as one of the main driving forces for development of a market economy. To take advantage of international capital, in contrast to the isolationist policies of the socialist era, a Foreign Investment Law was issued in 1988 that opened the door to joint ventures between local and foreign companies.

Under the drive to open the economy and attract foreign investors, and in a radical departure from the socialist (or nationalist) tendency to individual landholdings for subsistence farming, the SLORC began to promote the large-scale commercialization of agriculture. In 1991, a Central Committee for the Management of Culturable⁴⁴ Land, Fallow Land and Wasteland was formed with the task of processing applications and granting land use rights for commercial use of land for agriculture, livestock breeding, aquaculture and related economic enterprises, to state enterprises, cooperatives, joint ventures, other organizations and private individuals⁴⁵. This Central Committee was authorized to grant to citizens the rights to cultivate or use land categorized as "culturable, fallow and waste land" up to 5000 acres at a time, for up to a total of 50,000 acres, for prescribed perennial plants, 3000 acres for orchards, or 1000 acres for seasonal crops; 2000 acres for aquaculture, and between 500 and 5000 acres for livestock breeding depending on the animal.

Under these instructions, 1,728,269 acres were reported as having been granted to national entrepreneurs for large-scale commercial farming by January 2010⁴⁶. At the same time, government statistics⁴⁷ record a significant decrease in the area of land classified as "culturable wasteland other than fallows" from 20,650,000 acres in 1991 to 14,304,000 acres in 2008, or a difference of 6,346,000 acres over the seventeen-year period—indicating extensive changes in land use. In the forestry sector, the Government began to grant timber concessions to private firms in 1989, thus "re-privatizing" the timber extraction industry. The "reserve tree species" system was brought to an end this year, and teak as well as other valuable hardwoods may now be cultivated by private interests and individuals.

⁴⁴sic, may also be translated as "cultivable"

⁴⁵ GoUM, September 1993.

⁴⁶ DAP, 2010, p 82.

⁴⁷ Central Statistical Organization (CSO), 2009, p 84.

In keeping with new Ministry of Forestry targets to expand the forest estate to 30% of the total national land area, this period also saw an expansion of the reserve forest system, from 25,062,000 acres in 1990 to 41,404,000 acres by 2008⁴⁸. Much of this new reserve forest is in the uplands, having expanded with decreased civil conflict in the mountainous areas.

A Forest Law in 1992 (taking precedence over the Forest Act of 1902) and the Forest Policy in 1995 articulated a new direction for the Ministry of Forestry. In keeping with the new opening to international agencies, conventions and standards, the language of the policy was built around concepts of sustainable development, national socio-economic development, ecological balance and environmental stability. The law and policy emphasize sustainable production, public participation and social forestry, improved environment and wildlife conservation, and international commitments. The Ministry of Forestry and the Government of the Union of Myanmar has ratified international treaties, including the Convention on Biodiversity, and is beginning to discuss participation in the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD) with UNDP and UNEP. The policy emphasis on people's participation in forestry resulted in the issuance of the Community Forestry Instructions in 1995 for the purpose of encouraging sound management of community forests with benefits accruing to village managers. In opening remarks to a workshop in 2009, a forestry official described this trend as:

*...a paradigm shift in the management systems: a shift from sustained yield management to participatory ecosystems management...(the) emergence of 1995 Community Forestry instructions (CFI) is a breakthrough in the history of Myanmar forestry.*⁴⁹

The development of agriculture as the economic base is given precedence as the first of four national economic objectives, along with the all-round development of other sectors of the economy⁵⁰. The objectives of the agricultural sector are to fulfill the needs of local consumption, increase export of surplus agricultural products for the increase of foreign exchange earnings, and assistance to rural development through agricultural development.

The agricultural policies as currently stated are⁵¹:

- To allow freedom of choice in agricultural production.
- To expand agricultural land and to safeguard the rights of the farmers.
- To encourage the participation of the private sector in the commercial production of seasonal and perennial crops, and distribution of farm machineries and other inputs.
- To encourage research and development activities for the improved quality and increased production of agricultural crops.

⁴⁸CSO, 2009, p 84.

⁴⁹ Kyaw Htun, February 2009, p 21.

⁵⁰FAO and UNDP, 2004, pp 16-17.

⁵¹ DAP, 2010, p 56.

A Land Management Committee (LMC) continues to exist at State/Division, Township and Village/Ward levels. At the division and township level the LMCs consist of the General Administration Department (GAD) officer, the Forest Department officer, and the Settlement and Land Records Department officer. The LMC structure at the village tract (VT) level includes the Chair of the Village Peace and Development Council (VPDC), the clerk of the GAD, the Myanmar Agricultural Service (MAS) village manager and an SLRD land surveyor. The agriculture and forestry line department personnel report to their respective ministries, while the V/TPDC chairs report to the General Administration Department. The Chair of the Peace and Development Council at the State/Division level is the head of the LMC, with the ultimate authority to resolve land disputes or make management decisions. Thus, the Land Committees remain bodies with important potential power to regulate agricultural (and forestry) land tenure under current land laws.

The 2008 constitution of the Union of Myanmar restates that the Union is the ultimate owner of all lands and natural resources, but that it "shall enact necessary law to supervise extraction and utilization of State-owned natural resources by economic forces" and "shall permit citizens right of private property, right of inheritance, right of private initiative and patent in accord with the law⁵²."

5.5 Summary Analysis of Statutory Law

Summary points on land tenure laws regarding Myanmar's upland include the following:

Policy reversals through historical eras

Over the last 200 years, land tenure regulations and practices in the uplands have moved through radically different operating systems. From 100+ years of British colonial practice (which supported traditional land tenure), to nationalization of land in the mid-20th century followed by thirty years of an isolationist socialist system, the uplands have begun over the last two decades to experience an abrupt opening to the market economy.

Statutory law was created for the lowlands, customary tenure remains dominant in the uplands

It is important to note that historically none of these laws were specifically intended to, nor did they particularly impact the uplands. Although they are national laws, these laws were designed to address land tenure problems in the lowland delta and plains. The national land laws have little historical relevance in the uplands, where diverse traditional tenure institutions and customary law, validated in part by special regulations for specific hill tracts and specific ethnic groups, were still in use under the British and later the socialist government, and are so to an extent up to today. That this trend endured throughout the socialist era is partly because of the lack of value of or interest in what was considered marginal land under rotating fallow systems, as well as the fact that conflict made much of the area impractical for state administration.

However, after the "Wasteland Instructions" were issued in 1991, the market economy orientation began to strongly influence land use and tenure in the uplands, on the basis of statutory law. As a result of the pressures of the market economy and other reasons, customary tenure has been weakened. The Government of the Union of Myanmar has not yet established a comprehensive legal

⁵²GoUM, 2008, p 10.

framework for upland land tenure, which takes into consideration the needs of rotational fallow agricultural practices, including the systems' extensive reliance on common grazing and forestland.

All land belongs to the state, though cultivator retains ownership-like rights

All land still belongs to the state, though the cultivator maintains three critical rights which are: the right to use land, to transfer land use rights through inheritance, and to obtain residual benefit. According to the law, the cultivator possesses land use right, but may not sell, mortgage, divide or transfer the land. According to policy, land use rights are inheritable; in practice they are transferable. In fact, in practice, in some cases land use rights continue to be rented and traded as if the land were privately owned. The 2008 constitution of the Union of Myanmar, though it affirms that all land is state-owned, also indicates a strengthened concept of private property, as well as a sense of protection of property rights, at the same time as affirming that the national economy is a market economy⁵³.

Transition from socialist institutions to market economy

A central tenet of the socialist era which is upheld today is that farmers do not hold the right to sell or transfer the lands they have use rights to. However, upland farmers are now faced with the pressures of the market economy. As land is commercially developed and allocated to private entrepreneurs, the value of land increases. Upland farmers are on the one hand disenfranchised because their customary land use rights are not being respected, and they risk losing land to agribusiness. On the other hand, farmers are unable to benefit from the increased value of land by having the right to sell or lease those lands, denying them this potential benefit of the market economy. Moreover, smallholder upland farmers lack access to credit for agricultural inputs, which makes it difficult for them to increase productivity and gain maximum benefit from the land.

⁵³GoUM, 2008. See especially chapters 1 and 8 for discussion of property and economic systems.



6

Smallholder Land Tenure and Policy Directions

Some important national policies and perspectives aim to promote national economic development and are well-intentioned, but their implementation sometimes has unintended negative effects. When poorly implemented, these policy directions can pose risks to smallholder upland land tenure, not only in the uplands, but nationally. These policy directions and perspectives include the market economy orientation as it is currently being implemented and negative perceptions of shifting cultivation. Because it constrains the application of current tenure mechanisms (see section 7 below) and comprehensive land use planning, the land classification system also may weaken smallholder land tenure security in some cases.

6.1 Market Economy and Privatization

To promote national agricultural development, the market economy orientation emphasizes large-scale commercial production, mechanization, and the allocation of land to agribusiness. Land use rights are being granted for both agriculture and forestry to investors from inside and outside Myanmar. The commercialization of natural resource extraction in the current era began in 1989 with the granting of forestry concessions to Thai companies in the eastern border areas, and continues today with large-scale agribusiness plantations in northern parts of the country, often but not always with the help of foreign investment capital. The result is an unprecedented large-scale development of commercial perennial crop plantations in the uplands. While this positive trend presents opportunities for development, it also presents constraints to smallholder land tenure, and in some areas may be a significant risk to tenure security.

According to the Department of Agricultural Planning, over 1.7 million acres have been allocated to 216 private businesses by 2010⁵⁴. (See Table 3 below.) In Kachin State, Shan State (South) and Shan State (North), altogether 32 private corporations have invested in large-scale commercial farming contracts totaling 393,292 acres, 65,772 acres, and 40,937 acres in each of the regions respectively. Most of this was allocated from what the Government classifies as "culturable wasteland." However, anecdotal evidence in some areas of the uplands indicates that land is also being allocated from what farmers consider to be customary village rotational fallow or grazing lands. This is especially the case in areas near the Chinese and Thai borders, where some lands may be allocated through informal channels.

⁵⁴ Department of Agricultural Planning (DAP), Myanmar Agriculture in Brief, 2010, p 82

Table 3: Granted Area for Large-scale Commercial Farming (31-1-2010)

State/Division	No. of companies	Granted Area (acres)
Kachin	11	393,292
Kay in	1	2,161
Sagaing	27	95,557
Tanintharyi	37	671,053
Bago (East)	9	5,859
Bago (West)	7	13,913
Magwe	38	202,492
Mandalay	16	10,300
Yakhine	14	2,602
Yangon	7	30,978
Shan (South)	12	65,772
Shan (North)	9	40,937
Ayeyarwady	28	193,353
Total	216	1,728,269

Source: DAP, Myanmar Agriculture in Brief 2010, p 82.

The widespread establishment of agribusiness plantations, especially rubber, with Chinese investment in Kachin and eastern and northern Shan State is an example of the success of the market economy. In this case, the plantation establishment is being driven not only by Myanmar government policy, but also by China's opium eradication policy, the latter which, in the interest of stopping the flow of heroin into China and stabilizing unrest on the border, provides tax incentives and subsidies to Chinese companies to establish alternative development projects in Myanmar's opium cultivation regions⁵⁵. These alternative development projects however, are large-scale agribusiness ventures that do not necessarily benefit former subsistence opium farmers.

A potential advantage of the market economy orientation for smallholder farmers is that all citizens are eligible to apply for land use rights, provided they have the investment capital to implement a development plan. Most smallholder farmers, however, do not have this capital, and lack access to sufficient and affordable credit. As it more often happens, with investors moving in, subsistence farmers lose access to their traditional lands.

Contract farming is seen as an opportunity to engage smallholder farmers in the market economy. But contract farming needs to be established under agreements that maximize benefit for the smallholder farmer and minimize risk. There are lessons to be learned from the experience in Myanmar so far and even more could be learned from other countries in the region that are struggling with the same question of how to mobilize the productive power of smallholder farmers in the market economy. The case examples presented in the Box B below illustrate two scenarios: in the first, farmers rent land use rights from the company, payable annually in harvested product. While farmers are guaranteed a market for their products and are provided with agricultural inputs on credit, this agreement is not designed for farmers to maintain access to their own land. In the second example, farmers work on their own lands while accessing inputs and a market for products. While contract farming may have different arrangements, from the perspective of the farmer an ideal contract allows them to maintain control over their land and labor, while from the company

⁵⁵ Kramer, Tom, 2009.

perspective, if the farmer owns the land then the company is able to avoid the cost of land lease or purchase while still being able to procure commercial quantities of agricultural commodities.

Box B: Example of Contracts with Farmers in Shan State

Maize production on company land

A medium-sized Yangon-based agriculture company has invested in yellow maize production in three villages in northern Shan State. The company leased 1,200 acres of "virgin land" from the government for thirty years under the 1991 "wasteland instructions." The company registered the land successfully with the SLRD in 1996 with the close cooperation of TPDC authorities. The land tax is a total of 100 kyat per acre paid in advance for the thirty-year lease, but after two years the tax may be refunded if the company develops the land according to its contract. No income tax is collected for the first five years. The company has expanded its area of cultivation annually and this year reached 900 acres cultivated after three years. The plantation must be cultivated continuously without fallow.

The company lacks labor and inputs for continuous cultivation and is working with local farmers for maize production on the 30-year lease. The company invites farmers from the surrounding villages to farm on their lease land. The company provides Thailand's CP maize seeds and Thai fertilizer, which the farmers repay in-kind after harvest. The company pays weeding labor costs. After harvest the villagers sell the maize to the company at the prevailing market price. A farmer might have use rights on between 5 and 40 acres, and 1 acre of yellow maize produces about 1 ton (approx. 1000 kg) at this site. As a land rental or land use fee, the farmer must also pay the company 30 viss (49 kg) of harvest for every acre cultivated on the company land.

Contracting for grapes on farmer lands in southern Shan State

A foreign joint venture company has a land concession for cultivating grapes for wine production. When the company needed to supplement the supply of grapes produced on the company's land, the company approached nearby villages where households have been farming grapes since the 1950s. In cooperation with the TPDC, the company provided trainings to the villagers on improving vineyard cultivation techniques and distributed improved varieties of root stock to the farmers free of charge. Up to now the company works with 35 farmers who cultivate about 50 acres of vineyards in total on the farmers' own land. The company also provides interest-free loans for farmers who wish to purchase chemical inputs, and purchases the farmers' harvest at slightly above market price. This agreement has increased grape supply for the company while improving income of local farmers from production on the farmers'

6.2 Perceptions of Shifting Cultivation

The current stated policy direction for uplands development is a modern upland reclamation project which aims to meet the following objectives:

- *Replacing slash and burn method with terrace farming, ensuring surplus food for rural people of the upland regions*
- *Enabling the people in hilly regions to live in permanent settlements*
- *Eliminating cultivation of poppy for opium by terrace farming to improve the living standard of the people in hilly regions, and*
- *Preserving and protecting the natural environment⁵⁶*

The Agricultural Mechanization Department has been given the task of implementing the land reclamation project through the development of paddy terraces in upland areas, and reports a total of 29,701 acres developed by the end of January 2010. While terracing is an excellent option for uplands development, due to cost of labor, topographic conditions and water availability, it is not

⁵⁶ DAP, 2010, p 82.

feasible for a large part of the population and their environment, and can only provide a partial solution.

The question of how to support upland rotational fallow farmers to maintain sustainable and productive systems is a question debated throughout Southeast Asia. And, throughout the region, a policy attitude to discourage shifting cultivation is the result partly of a negative perception of integral⁵⁷ shifting cultivation systems, their assumed negative impact on the forest, and their low productivity. In fact, studies have found that rotational fallow systems (aka shifting cultivation) may be the most ecologically effective approach to farming in tropical forests, and that practitioners adapt their technologies and practices to changing environmental and social situations⁵⁸. In an ideal situation, rotational fallow systems are ecologically sound if long forest fallows can be maintained and field sizes remain relatively small. As land pressure intensifies and soil degrades, shifting cultivators have traditionally moved to other more fertile areas to allow the degraded forest time to regenerate. Now that land pressure has intensified, due not only to population growth, but also to multiple pressures such as creation of forest reserves, agribusiness plantations, and resettlement of populations, shifting cultivators need assistance to work out sustainable and diverse forest farming technologies. This requires secure land tenure.

The negative perception of the practice of shifting cultivation has direct impact on land tenure. Since shifting cultivation is discouraged at top levels, civil servants in relevant government departments are reluctant to recognize the customary right of communities to the forest fallow area that they rely on. But without long-term tenure security, farmers lack the incentive to make long-term innovations on their land that will increase diversity and productivity of their agroforestry system.

A recent global shift in the knowledge of governments and scholars and their attitudes towards shifting cultivation has been led and reflected by ICIMOD, the intergovernmental International Center for Integrated Mountain Development. In response to the recognition that policy interventions to halt rotating fallow/shifting cultivation systems are not generally effective, while the systems are deteriorating as a result of limitations placed on them, government and NGO participants from five countries in the eastern Himalayan region, including Myanmar, conducted a study in the period from 2002-2004 to reexamine the impact of shifting cultivation and farmers' practical innovations and developed detailed policy recommendations for governments⁵⁹.

Based on 20 case studies conducted in the five target countries⁶⁰, the study found that farmers' innovations in shifting cultivation contribute to forest cover and biodiversity conservation, while at the same time maintaining agricultural and forest productivity. The study encourages a shift in perspective from viewing the practice of shifting cultivation as only the short period of cultivation to examining and validating the longer period of management of forest fallows as farmers protect

⁵⁷See section 3.3 for a discussion of integral versus partial systems. Integral systems are those which are based on adaptive management of the land by communities with long experience on that land (and tend to be sustainable under supportive environmental conditions), as opposed to recently introduced technologies, practiced by recent migrants, and/or under high pressure of environmental conditions (which tend to be unsustainable).

⁵⁸See for example Cairns 1999; Kerkhoff and Sharma 2006; Warner, 1991, pp 17 -18; and section 3. of this report.

⁵⁹Kerkhoff, E. no date. See also Kerkhoff, E.E. and E. Sharma, 2006.

⁶⁰Bangladesh, Bhutan, India, Myanmar and Nepal

forest areas to gain diverse benefits including restoration of soil fertility. The case examples show how farmers incorporate trees into the systems and manage agroforestry in a way that maintains and encourages biodiversity. The study report reflects this new perspective by referring to the practice as *rotational agroforestry*⁶¹ instead of shifting cultivation.

Furthermore, current problems related to shifting cultivation are often found to be as much a result of counterproductive policies as of inappropriate land-use practices. A policy dialogue workshop to discuss the findings of the ICIMOD study and make concrete policy recommendations was held in 2004, and the recommendations endorsed by participants envisage a "re-examination of the policies in place, the removal of explicit policies and instruments that discourage shifting cultivation, and the stronger implementation of existing beneficial policies."⁶²

Among the key recommendations made was that policy makers should address issues of land tenure security, research, and extension, and their impact on rotational fallow practices. Another recommendation was to strengthen the capacity of customary institutions, since management capacity and sustainability of systems are clearly linked. The report finds that to be successful, shifting cultivation practices require community-based management at a landscape level. This in turn requires strong community institutions to regulate resource use, and strong communication between community groups. These institutions must not only be locally enforced but also embody shared norms, values, beliefs and traditions. When local regulation is not available, the socio-cultural fabric on which these institutions depend become degraded and natural resource management comes under pressure⁶³.

The corollary is that land tenure policies in turn must support customary institutions rather than undermine them. One way in which broad government policies undermine customary institutions is by not recognizing the forest fallow as a productive resource managed by the rotational farmers for the benefit of not only those farmers but also "downstream" users. Another is to fail to establish legal frameworks for common property regimes or for recognition of traditional boundaries that include fallow areas. The study report concluded that dealing with common property regimes within national legal frameworks remains a challenge in all five of the countries studied⁶⁴. A key

Main impacts of adverse policy: Learning from the Asia region

Given the negative perceptions of shifting cultivation, the underlying premise of all policies is to replace the practice with permanent, settled agriculture or other settled land-based activities. Such an approach is insensitive to the tenets and strengths of shifting cultivation. The replacement of shifting cultivation by permanent agriculture or forestry activities results

1. Reduction of the total area available for shifting cultivation and subsequent shortening of the fallow phase, resulting in reduced productivity and food security,
2. Transformation of tenurial regimes from common property in which everyone gets a share, to private property, resulting in landlessness and poverty,
3. Increased dependency on external market and political forces for which communities and their institutions are little prepared or supported, increasing their vulnerability, and
4. Environmental degradation in areas where the traditional shifting cultivation practice has been distorted and acceptable alternatives have not been found.

- Kerkhoff and Sharma, 2006, p 74.

⁶¹Kerkhoff, E.E. and E. Sharma, 2006, Foreword.

⁶²Kerkhoff, E.E. and E. Sharma, 2006, Executive Summary.

⁶³ Kerkhoff, E.E. and E. Sharma, 2006, p 57.

⁶⁴Kerkhoff, E.E. and E. Sharma, 2006, p 64.

institutional support for sustainable innovations in rotational fallow systems is recognition of customary and collective land use tenure.

International conventions and funding opportunities in support of rotational fallow

By changing the focus of shifting cultivation policy away from eradicating the practice and towards encouragement of sustainable forest fallow management and farmer innovations for diverse productivity, policy makers have an opportunity to access donor mechanisms and private sector carbon trading in a way that benefits the poor. Through cooperation between government and UN agencies, Myanmar has begun to participate in the preparations for the United Nations Collaborative Program on Reducing Emissions from Deforestation and Forest Degradation (UN-REDD)⁶⁵, which has potential to become an important mechanism for providing payment or benefits to forest farmers for environmental services rendered. The REDD program acts as a broker between industries (usually in industrial nations) which are producers of carbon and are under obligation to their governments to pay, or pay voluntarily, for the storage of carbon, i.e. carbon sequestration, in existing forests. In essence, this represents a transfer of wealth from industrialized nations to those who manage and protect forests, usually in developing nations. Opportunities for payment to communities that protect forest for carbon sequestration will likely become available in the future.

One of the concerns that some REDD-watchers raise is that if not equitably implemented, the benefits accrued from carbon sequestration may not go to the poor. Rotational fallow is the dominant agricultural practice in the hill areas throughout the eastern Himalayan region, estimated to cover 10 million hectares of agriculture and forest land—and practiced by families most of whom fall into the categories of the very poor⁶⁶. Initiatives such as those of the World Agroforestry Center that "integrate rewards for environmental services into development programs to alleviate rural poverty and protect the natural environment" have already begun to demonstrate success⁶⁷.

The International Labor Organization (ILO) Indigenous and Tribal People's Convention 1989 (no.169) defends the right of indigenous peoples to maintain their distinct cultural identity—which may be closely linked with an agricultural way of life⁶⁸. Myanmar, along with most of the rest of the world's nations, voted in support of the UN Declaration on the Rights of Indigenous People at the UN General Assembly in September 2007. Although not legally binding, this document "emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations" as well as promoting their "full and effective participation in all matters that concern them and their right to remain distinct and to pursue their own visions of economic and social development".⁶⁹

By taking a constructive approach to working with shifting cultivators, Myanmar policy makers and development supporters can use programs such as these as inspiration or guides to meet the dual

⁶⁵ <http://www.un-redd.org>

⁶⁶ Kerkhoff, E.E. and E. Sharma, 2006, Foreword.

⁶⁷ See 'Rewards for. Use of and shared investment in Pro-poor Environmental Services (RUPES), World Agroforestry Center', ICRAF SEA. www.rupes.worldagroforestry.org

⁶⁸ Aryal, K.P. and E.E. Kerkhoff, 2008.

⁶⁹ UN News Centre, 13 September 2007.

goals of engaging the market economy for food security of smallholder farmers, and environmental protection in the hilly areas.

6.3 Land Use Planning and Land Classification

Sustainable development planning in Myanmar would benefit from a comprehensive framework, policy document or clear process for land use planning that involves multiple stakeholders. A unitary policy based on an updated and systematic body of laws, regulations and land use planning processes that support development objectives for agriculture, forestry, industry and biodiversity conservation would provide a foundation for sustainable development of both land management and tenure systems.

Land use planning and development requires strong coordination between relevant government departments and across different regions. Many diverse ministries have jurisdiction over land in their sector of activity, and may not necessarily coordinate when planning major land use changes, such as roads, dams, and other large infrastructures, mines and large plantations.

Moreover, planning is implemented on the basis of legal frameworks set out in the colonial era, such as the land classification categories and their delineations. Current classifications may at times not reflect current land use, nor changes in ecological productivity. The result is that, for example, some forest reserves have now been partly or converted to agricultural use, and large-scale agriculture is encroaching on land classified as forest. Development of crops for the food-processing industry, such as sugar cane and oils are implemented on the basis of national goals, but the plantation locations may not be chosen within a regional land use planning framework.

As land use is not always based on ecological parameters or current state of the environment, the cost-benefit effectiveness may not achieve its full potential. In the worst scenario, uncoordinated land management may pose a risk of land degradation, undermining sustainable development potential. At the same time, the needs of smallholder farmers may not be taken into account, posing a risk of land tenure insecurity and food insecurity.

The difficult process for changing land classification categories complicates gaining legal tenure for communities. For example, those who would like to do community forestry on land classified as agricultural may not obtain a Community Forestry Certificate unless the land classification has changed—which is in practical terms nearly impossible. (See case example on Diverse Experience in section 7 below).

The land use classifications listed in Table 4 are as used in the Statistical Yearbook issued by the Central Statistical Organization, with relative area in each classification reported annually on the basis of Settlement and Land Records Department records⁷⁰. Land classified as forest comprises approximately half of the national land area, recorded in 2008 as 41.4 million acres of Reserve Forest and 41 million of Other Woodland, compared to 30 million of Occupied Area and 14 million of Culturable Waste and Other Fallows, from a total overall national land area of 167 million acres.

⁷⁰See for example CSO 2009.

Table 4: Land Classification Definitions

1	Occupied Area	Agricultural land, whether sown or currently fallow. Categories of agricultural land include: <i>Le</i> \ rice paddy land, rainfed or irrigated <i>Ya</i> : non-rice producing dry lands, usually in plains or rolling topography, for sesame, corn, peanuts, etc <i>Uyin</i> \ refers to estate or perennial crops (fruit, nut, rubber, oil palm) <i>Kaing-kyuir</i> . alluvial lands (islands and riverbanks) cultivated in dry season <i>Dhani</i> : Nipa palm land in brackish flooded areas <i>Taungya</i> : rotational fallow fields (shifting cultivation) on sloping lands
2	Culturable Wasteland and Other Fallows	Land classified as agricultural, thus under jurisdiction of the Ministry of Agriculture and Irrigation/SLRD for registration purposes, but considered not currently used or owned
3	Reserved Forests	Now known as Permanent Forest Estate (PFE), forest land managed by the Forest Department for timber and other products, "reserved" only for government disposal
4	Other Woodland Area	Forest land which is not under reserve forest status, but still under jurisdiction of Ministry of Forestry (e.g. Community Forestry Instructions can be applied here).
5	Other	Neither agricultural nor forestry land, a broad category which includes grazing land, roads and rails, lakes and waterways, human settlement, etc.

Sources: CSO 2009, NCEA 2006, FAO 2004.

As for *taungya* land, although active shifting cultivation fields are surveyed each year and included under the "net area sown", coverage of remote upland areas in these statistics is by estimation only. And according to customary land tenure institutions, much traditional village land is in areas classified as culturable waste lands, other woodland areas and even reserve forests.





7

Registration Mechanisms For Land Tenure Security

Land classified as agricultural is managed by the Settlement and Land Records Department of the Ministry of Agriculture and Irrigation, while forest land is managed by the Forest Department of the Ministry of Forestry. Each agency follows a distinct process for registering land to smallholder farmers. In the case of agricultural lands, tenure is granted after a process which can include survey and the issuing of a certified map to culminate in renewable land use guarantees, while in the case of forestry land, the application of a process under the Community Forestry Instructions grants thirty-year tenure guarantees to Forest User Groups. It is important to note that these registration mechanisms confirm the required land use, i.e. registered agricultural land must be managed for agriculture (annual or perennial crops), and registered forest land must be managed for forest (though certain kinds of agroforestry are acceptable).

7.1 Agricultural Land Registration

Though it is the predominant form of agriculture in most of the uplands, most *taungya* lands are not formally registered. *Taungya* land has until recently had little economic value, is only farmed temporarily for annual crops, and has always been regulated under customary or traditional tenure. Paddy (wet rice) lands, which are cultivated continuously, may be registered, especially when the land is in proximity to towns or owned by those who interact with government officials, as they are more valuable and "permanent". In practice *taungya* is cultivated both on lands classified as agricultural and as forestry, though in theory it may only be registered for cropping when on land classified as agricultural.

Taungya land under SLRD jurisdiction is taxed annually on the basis of a village registry which lists all households and the households' annual acreage under agriculture⁷¹. The lands are not surveyed or mapped. SLRD keeps one field notebook for each village which is updated annually, with acreage estimated by a formula on the basis of reported amount of seed sown, as well as ideally on the basis of a ground survey. The village registry and field notebooks record data at the village level for total number of acres cultivated in the village that year, as well as at the holding level, which records number of acres and crop per household. As these lists are made for tax purposes, and the village head is responsible for collecting the household revenue for payment to SLRD, the total acreage and acreage per household is likely underreported and not accurate.

It is important to note that when *taungya* land is left fallow, it is considered to be "culturable land". For most household *taungya* land holdings the field notebook is the only legal document kept by SLRD—and it indicates only annually cropped land.

⁷¹ If under Forest Department jurisdiction then various annual fees apply to *taungya* cultivation.

The village boundaries are recorded in the SLRD field notebooks usually with landmarks and/or sketch drawings. Yet household *taungya* fields are usually not mapped, meaning they do not fall within the surveyed area. In practice, though not mapped, within village agricultural land boundaries *taungya* holdings are distributed across the landscape, often with more than one plot farmed by a household each year. Paddy fields may also be established in those areas with a water source and favorable topography.

When land is marked in the field notebook only, it is considered an "uncertified map" and cannot be used as evidence in court, as the location of the holding is not specified and is therefore "floating". It may however, along with the household registry of annual taxes paid on cropped land, be used as partial evidence by the Land Management Committee for resolving disputes. Through Form 103, a household may apply to the township SLRD for a survey of their *taungya* land, and once this is completed the township SLRD officer may issue a "certified map" at which point the land is registered under Form 105. Form 105 is a robust documentation that is difficult to contest.

Some upland farmers have begun to initiate surveys to apply for certified maps and Form 105 registration, but these are few and often require outside support. Because of the need for a survey and certified map, the application process is time-consuming and expensive. However, this process is useful in those areas where local households are under imminent threat of losing their lands to other actors.

Local farmers may choose to develop permanent farming systems without explicitly applying for land registration, as having permanent farming systems may provide a strong basis for later certification. When land is developed as terraced bunds or with trees and perennial crops on land interspersed with annual crops, this is considered as constituting use right under *dama-ucha*, (the customary "pioneering" or "homesteading" system). *Dama-ucha* has long been recognized under customary tenure, and under colonial rule was considered formalized registration if the land was cultivated and taxes paid continuously for 12 years. Although the practice was nominally abolished under the 1953 Land Nationalization Act—along with other forms of private ownership—in fact this practice is still taken into consideration in disputes or tenure allocation by the Land Management Committee.

Box C: Diverse Experience of one NGO Supporting Secure Land Tenure

Land registration in Southeast Myanmar

In this project village of about 50 households land is fertile and becoming scarce as commercial rubber plantations begin to surround the village. Some landless households were interested in establishing permanent farms using sloping agricultural land technologies, but needed land. The project staff discussed the situation with the local SLRD office and found some unregistered land left in the village land area, though it was only 6 acres. Back at the village, it was found that although the land was not registered, people were already cultivating the land. The NGO worked with the VPDC and those who were using the land to see which land users were interested in compensation in exchange for giving up claims to this land. There was also conflict with the village head, who claimed that the six acres were his, although he had no documentation. The NGO and the landless households shared the costs of compensating the land users and registering the land with SLRD.

The local SLRD officers were enthusiastic about working with the NGO and the villagers to process land tenure, so issued *oopaing* certificates to six landless households, and entered the household holdings in the village registry. Once the households had the *oopaing* registration they planted horticultural crops such as pineapple, and leguminous hedgerows for sustainable upland management. Now they are starting nurseries to turn their fields into agroforestry plots, and some are planting rubber. By having planted these crops, it will be easier obtain the Form 105 (a certified map), which provides greater tenure security in case of conflict.

The lesson for the NGO is that the process of land registration is costly and time-consuming, and project staff can only facilitate this process for targeted households in a critical situation. At the same time, non-literate and poor villagers do not necessarily have the confidence and skills to engage in this process on their own. Equity is an important issue to discuss and clarify with the villagers, in terms of who should have access to scarce land.

Community forestry registration in northern Shan State

This village cluster lives in a natural forest, which they wanted to register as a community forest. Their plan was to enrich the natural forest with high-value species such as rattan and bamboo, in addition to local timber and fuelwood species, for their eventual harvest and benefit. The NGO provided technical expertise and material inputs to the Forest User Groups (FUG) to establish nurseries and plant both valuable forest and local species.

Altogether 68 farmers intended to register a total of 610 acres as community forest. But when the project staff approached the Township Forest Department to begin the registration, they ran into problems. It turned out that the land, although it is forested, is actually classified as agricultural land managed by the SLRD. If the communities would like to apply for 30-year Community Forestry Certificates, by proper procedures they must first have the land classification changed or converted, which is very difficult to do. The project staff are now working with the Forest Department and SLRD officers, but more importantly the local authorities, to gain permission for the communities to register the land for thirty-year use rights as community forest, since this is how they would like to manage it. Negotiations are ongoing.

7.2 Community Forestry

Community forestry in the uplands has been more successful than SLRD mechanisms as a way for smallholder farmers to access land tenure guarantees, and shows potential for wider application. Under the Community Forestry Instructions, communities may apply for thirty-year use rights through a Community Forestry Certificate (CFC) on land that is classified as forest land. The certification application involves several steps that include formation of Forest User Groups, surveys and boundary demarcation by the Forest Department (FD) staff, drafting a 30-year management plan, and submission to higher offices for approval of the plan and the maps. The Community Forestry Certificates are often granted for forest that is already degraded, in anticipation that the communities will help re-establish forest cover.

The Community Forestry Instructions were released in 1995, or only 15 years ago. This was a landmark instruction, as it was the first time that households were able to obtain registered use right to forest land. Since the release of the instructions, government, bilateral development agencies, and a number of NGOs have worked to apply the instructions in all geographic zones of the country, including the uplands, delta and dry zone. A number of organizations worked together to develop and implement a Farmer Field School approach for community forestry which takes participant farmers through the steps necessary to guide their villages through the CFC process. Due to the joint efforts of communities, government agencies and development organization partners, 41458 hectares⁷² of Myanmar's land area had come under community forestry designation by 2009.

The Instructions are a positive and welcome mechanism for smallholder farmers to gain land access guarantees. A multiple stakeholder workshop, which included members of Forest User Groups (FUG), was held in February 2009 jointly sponsored by the FAO, the FSWG and UNDP to review the experiences and future of community forestry in Myanmar. The workshop found that after 15 years of experience, farmers have gained many benefits of secure tenure under the CFI. Benefits cited by FUG member participants include access to fuel wood, poles, and edible forest products; enhanced social cohesion due to collective action; increased skills and knowledge of resource conservation; establishment of tree nurseries of native and other useful species; protection of water supply for paddy fields and secure use guarantees⁷³. One of the FUGs was able to stop illegal logging in their community forests.

Yet the CF instructions have not yet been applied as widely as they could be. The primary challenges to wider application include capacity of all stakeholders—community, forest department and NGO/UN agencies—to implement the complex series of steps required for certification. Stakeholders need improved knowledge of the instructions, procedures required, and rights and responsibilities of both communities and FD staff. FD staff have insufficient resources to meet the planned targets for area under community forestry, including inadequate facilities and budget for monitoring community forests, and little experience with facilitating the participatory approaches required to make community forestry successful⁷⁴.

Creation of the forest management plan is particularly challenging as it requires long negotiation and discussion within the village and between community, forest personnel and authorities. Although villagers have traditional knowledge and experience with forest management, it is difficult to create 30-year plans that are in line with the standards required by the Forest Department. Other constraints for the communities include high transaction costs which are difficult to afford, and no guarantee of (practical) benefits from CF plots. Recommendations made by workshop participants included measures to increase capacity on all sides.

An underlying reason why farmers are not applying the CFI, is the lack of confidence in peace and stability. Farmers in war-torn upland areas may not have confidence in their ability to maintain lands or reap the benefits derived from investments in agroforestry. Another underlying challenge is trust, as local communities and forest department staff in some areas may have had past disagreement over resource use, and need to find ways to work together, building from an appreciation of

⁷² Dr. Nyi Nyi Kyaw, Presentation at REOO workshop, April 7, 2010.

⁷³ FAO, FSWG and UNDP, 2009, p 70.

⁷⁴ FAO, FSWG and UNDP, 2009, p 6.

strengths. In some areas, communities are not confident enough to approach government staff and authorities to access community forestry services.

FUG rights to the benefits of their community forestry products must be guaranteed. Furthermore, if the community forestry regulations allowed for commercial production they might be more attractive to villagers, providing incentive for forest management and the effort of going through the complex CFC process. The Community Forestry Instructions may be strengthened by being made into a law that is shaped around recommendations of the practitioners and the community forestry experience of the last 15 years.

7.3 Challenges

The Community Forestry Instructions apply primarily to land classified as forest. However, some villages only have lands classified as agriculture available for forestry use. If these villages would like to apply for community forestry on agricultural lands they must apply through the SLRD, which is very difficult. This requires conversion of land from agricultural to forestry classification. Under Article 39 (La/Na 39) the permission to use the land and especially to change land use categories can only be granted by the Land Committees, which as mentioned in section 6.5 are composed of the SLRD, FD and GAD officers, and chaired by the head of the State Peace and Development Council at the State/Division level. Because of the long chain of authorization, village-led applications for land conversion, or to apply for community forestry certification on agricultural land, are slow to be approved.

Additional difficulties in the land registration mechanisms under SLRD and FD include the general absence of land information, the scarcity of cadastral maps in remote uplands, staff capacity and insufficient technical support for mapping, for example use of GPS equipment.



8

A Framework for Upland Tenure Security

Operating in a situation of rapid-onset and chronic stresses, upland households in Myanmar need assistance of government and non-governmental agencies and the private sector for material inputs, knowledge, skills, and institutional frameworks that will help them maintain sustainable land management systems while strengthening household food security. The primary institutional support needed is land tenure guarantees. Policies that could promote secure land tenure and thus build a foundation for food security in the uplands include a framework for upland tenure, and a unitary and comprehensive land use policy and planning process.

Upland tenure guarantees could best be achieved through a holistic policy framework which recognizes that upland farmers use both forest and agricultural land, sometimes in parallel and sometimes in rotation. Ideally, this framework would not have separate registration mechanisms for agricultural and forestry land, but one mechanism for rotating fallow land. This could be in addition to existing permanent agriculture and permanent forestry designations. The mechanisms for registration and formalization of agriculture and forestry land would be simple, practical and if possible, integrate use of land for agriculture, forestry and agroforestry.

This policy framework would also formalize customary land tenure patterns, and where appropriate be based on customary institutions for land use planning and decision-making. The framework might accommodate collective tenure arrangements. The tenure guarantees should also be sufficient to enable farmers to resist encroachment, and provide clear mechanisms for recourse in case of land disputes or unauthorized encroachment on land.

In those areas of the uplands in which traditional land management practices and institutions have degraded due to movement of populations or other pressures, tenure mechanisms might still be based on locally-determined and equitable land allocation, and resource management plans that take into account diverse agricultural and forestry systems.

The parameters in policy and practice that could promote secure land tenure and thus build a foundation for food security in the uplands might have the following characteristics:

- A holistic policy framework that recognizes that upland farmers use both forest and agricultural land, sometimes in parallel and sometimes in rotation
- A legal framework that formalizes customary land tenure patterns and is based on customary institutions for decision-making
- Tenure guarantees that are equitable and benefit the entire village, not just an elite
- Mechanisms for registration and formalization of agriculture and forestry land that are simple, practical and, ideally, integrate use of land for agriculture, forestry and agroforestry
- Tenure guarantees that are sufficient to enable farmers to resist encroachment and provide mechanisms for recourse
- Access to inputs for agriculture and forestry livelihood activities and guarantees of benefits accrued from these activities

Achieving equitable and sustainable tenure guarantees in the uplands will require targeted and intensive coordination between ministries and government departments at all levels. The current land classification system clearly divides responsibility for land classified as agricultural, forestry, and other, between responsible ministries, with each agency responsible for administrative procedures on their respective administered lands. This is effective and efficient for land administration within that classification. But this system, and sometimes the land classification on which it is based, does not facilitate comprehensive and sustainable land use planning at a local or regional level.

A unitary and comprehensive land use policy would be based on the ecological parameters of the land and current land use. The policy would support long-term sustainable development objectives. Under the policy, land use planning would be participatory, incorporating both village level planning processes and State/Division level. Land use planning and the implementation of these plans would be achieved through effective coordination between all responsible ministries.





9

Conclusions

9.1 Smallholder Land Tenure

Upland smallholder land tenure is coming under threat, with negative implications for sustainable long-term development. Land tenure insecurity for smallholder upland farmers is increasing due to a number of factors. Upland populations are growing, land fragmentation is increasing, and land is degrading due to cultivation pressure. The improper implementation of some policies may at times contribute to the risk of land loss for smallholder farmers, including the large-scale allocation of land to agribusiness. The impacts of the loss of land tenure are increased poverty, migration, and increased small and large-scale extraction of natural resources.

9.2 Tenure Mechanisms

Current mechanisms for smallholder farmers to gain and maintain access to land are through the SLRD for registration of agricultural lands and through the FD for granting of thirty-year use guarantees under the CFI. These mechanisms are helpful, but their proper application is challenging and therefore the area of land thus far allocated through these mechanisms has not reached its potential.

As they are designed specifically for agricultural management on the one hand and forestry management on the other, these mechanisms provide incomplete tenure support for diverse locally-managed systems that include agriculture, forestry, agroforestry and grazing lands, sometimes in rotation. In addition, these mechanisms do not

Key factors that influence land tenure in the uplands:

- Customary tenure and statutory institutions do not always support each other
- The commercialization of agriculture presents both opportunities and constraints for upland smallholder farmers
- Current mechanisms for registration of agricultural and forestry land are positive but face constraints for application on a large scale
- Policy support for development of upland smallholder farming systems has not yet reached its full potential

yet provide a practical statutory framework for protection of customary and traditional tenure.

9.3 Opportunities for Upland Farmers

Myanmar is currently moving to a market economy orientation, which provides both opportunities and risks to smallholder upland farmers. The opportunities include fair market prices for crops and increased access to agricultural inputs. In order to maximize the opportunities under the market economy, farmers require land tenure guarantees, choice in crops cultivated, and agricultural credit. Under these conditions and guarantees, smallholder farmers will have a solid foundation to be food secure and contribute to national production goals.

Farmers in the uplands have a particular role to play as they stabilize shifting cultivation and maintain sustainable rotational fallow systems. Government agencies such as the Myanmar Agricultural Service and the Agricultural Mechanization Department, as well as NGOs, have promoted various sloping agricultural lands technologies in the uplands through demonstration plots and improvement of farmers' land. To help farmers innovate within their agricultural systems, Government and development practitioners might consider an approach to support rotational fallow systems to become as productive as they can be, which may include some fallow and fire management.

A recent review of the agriculture sector supports greater access by marginalized households to land and resources:

The country has more than 7 million acres of potentially cultivatable land, some of which could be developed for agricultural production. However, national benefits in aggregate terms would be substantially higher if access to land and water resources is improved for small/marginal, landless and ethnic minority households. With improved access to skills and technology along with capital, poor and destitute households could come out of the vicious cycle of poverty within a short period of time!⁷⁵

⁷⁵ FAO and UNDP, 2004, p 36.

10

Points For Further consideration

A set of points to discuss and actions to consider are presented here for the deliberation of all stakeholders. These points are not in priority order but are clustered according to theme or target: engagement of stakeholders, NGO practice, government policy, private sector and continued learning.

1. Regarding Engagement of Multiple Stakeholders

1a. Engage multiple stakeholders to move forward cooperatively through forums for sharing information and taking action

The solution to secure and equitable land tenure for upland smallholder farmers will require the cooperation of farmers, government agencies, NGOs and civil society organizations, the private sector, and the media. As a first step, a *national task force* could be formed consisting of representatives of selected agencies and organizations (as above) who are interested to collaboratively uncover the issues and propose solutions. The task force might have a practical terms of reference and flexibility to operate that allows it to prioritize and address the issues and recommendations raised in this report, as well as others they identify. Regional and village forums could be created to feed back to the national task force. Existing structures could be identified and mapped as part of the formation of these multiple stakeholder forums.

1b. Strengthen the participation and involvement of the upland farmer within local dialogue and multiple stakeholder forums

Mobilize or create farmer forums at the village level, with coordinating and representative bodies at township and regional (state/division) levels. Instill participatory analysis methods in these forums to enable farmers to discuss and find solutions to their tenure problems, and present their situation, complaints or proposals at the township and regional levels. These forums and lines of dialogue with local government bodies can serve as *avenues of recourse in case of conflict*, though other feedback and complaint mechanisms may also be established. They may also serve to *increase awareness of farmer rights and responsibilities* regarding land tenure, including entitlement to use customary lands in line with government policy, and responsibility to pay land tax.

1c. Recognize and honor the cultural and economic value of shifting cultivation systems

Traditional knowledge of shifting cultivation systems has both cultural and economic value. The cultural value of agricultural practices in ethnic societies is not often recognized, and could be explicitly honored. The economic value of traditional knowledge lies in the strength of farmers' own innovations. In the transition to intensified upland agricultural technologies, farmers' own innovations and practices to maintain productive farming systems under increasing land pressures

provide a primary basis for technical and tenure support—yet local technical knowledge is often not mobilized in project planning.

2. Regarding Government Policy

2a. Develop a comprehensive and unitary land use planning policy

A comprehensive and unitary land use policy would be rooted in inter-ministerial cooperation and implemented through bottom-up planning. The policy could provide a legal and conceptual framework that ensures land use which is ecologically and economically sound, as well as equitable. The approach to comprehensive land use planning might engage village bottom-up planning processes as well as horizontal processes for cooperation between ministries and government departments. The advantages and disadvantages of the current land classification system might be reviewed as part of the development of a comprehensive land use policy.

2b. Streamline and make equitable and accessible the current land tenure mechanisms

Upland farmers experience some practical constraints when applying for tenure through the SLRD and/or through the Forest Department. The time and resource costs to the farmer are high, while outcome is uncertain, which often discourages upland farmers from applying for tenure. *These processes might be made simpler, speedier, more practical and user-friendly* for respective departments as well as upland farmers. The mechanisms could also be *made equitable to empower women and poor people*, for example, explicitly identify *women head of households as land owners* as well as men.

All stakeholders could work together to review both the Community Forestry Instructions as well as the SLRD land registration processes to understand how to maximize the effectiveness (and equitability) of these mechanisms, and how to decrease the cost and increase the benefit for both smallholder farmer and government staff.

Streamlining these mechanisms, as well as applying them correctly, may require *capacity-building for government staff*, including Forest Department and SLRD line department staff, village and township leadership, as well as any supporting NGOs, as well as promote positive attitudes and participatory approaches.

2c. Develop a new framework or tenure mechanism which supports diverse locally-managed upland systems and validates customary land tenure and rotational fallow as an agricultural practice

A new framework or land tenure mechanism should be developed that enables diverse and flexible local land management practices as well as validates customary institutions. The characteristics of this mechanism would allow for land management practices to rotate between agriculture and forestry if appropriate, and land use decisions to be taken locally. (See section 8. above.) A new framework might require policy recognition of a new type of land use, such as "multiple use" or "rotating agroforestry use", and perhaps even a new classification of land.

Policy makers and development practitioners might recognize rotational fallow as a valid agricultural practice and *shift the policy orientation from "making permanent shifting cultivation" to "support*

agroforestry, rotational fallow and upland agricultural systems to be as stable and productive as possible"whether or not fallow and fire are part of the management practice

2d. Strengthen and extend the application of the Farmer's Rights Protection Act

The Farmers Rights Protection Act of 1963 (see section 5.3 above) stipulates that the farmer who cultivates land cannot be removed from that land, nor can their equipment or tools for cultivation be confiscated. Application of this law should be strengthened and applied to not only wet rice production but also *taungya* systems, including fallow land. Although it is designed to be used on land classified as agricultural, it should be extended to include fallow *taungya* land whether classified as agriculture or forest land.

2e. Review the impacts and effectiveness of the 1991 "Wastelands Instructions"

The 1991 "Wastelands Instructions" have now been in effect for nearly two decades, harnessing the private sector for development, with large amounts of land effectively allocated to commercial interests. However, the positive and negative impacts of the instructions have not yet been reviewed. The objective of the instructions is to engage the private sector in commercial agricultural production, thus increasing agricultural productivity per land unit. There are indications that in some cases land may not be productively used after allocation to commercial ventures, representing a missed opportunity for agricultural growth. In addition, the allocations may be contributing to loss of smallholder land tenure, which in fact may contribute to overall declines in agricultural productivity. It would be useful to *conduct an environmental and social impact assessment of the "wastelands instructions", to review this strategy on the basis of how it has impacted economic productivity, the environment and the smallholder farmer.* Such a review would explore to what extent the Instruction has worked to achieve national development goals, and whether and to what extent the goals have been undermined.

As this Instruction currently targets commercial-scale companies, with large holdings allocated, it does not yet fully engage the productive capacity of the smallholder farmer. It would be a positive step to *promote distribution of land to landless and land poor under the "wastelands instructions."* In addition, it might be made explicit to *remove traditional taungya fallow land and community grazing land from the classification of culturable wasteland,* thus making it unavailable for commercial exploitation.

3. Regarding NGO / UN Practice

3a. Mainstream land tenure into uplands livelihood development projects

As land tenure is one of the critical foundations for agricultural livelihoods development, all uplands projects might consider how their activities impact land tenure, and explicitly include activities to promote secure tenure. NGO/UN-facilitated strategies for land tenure must be conducted on the basis of a clear understanding of the local situation and background, risks and opportunities, and potential negative impacts especially on equitable access for women and poor people.

3b. Ensure that tenure institutions promoted are equitable and sustainable

Projects could apply clear learning and action cycles to adaptively manage land tenure approaches with the objective of ensuring equitable, locally-appropriate, and sustainable tenure guarantees. Robust use of participatory planning for land use and land tenure guarantees, based on farmer innovations, would also help mobilize and strengthen local systems of social organization.

4. Regarding the Private Sector

4a. Engagement of private sector in a way that includes and respects smallholder farmers

The private sector is now a leading force in agricultural development in Myanmar, investing capital and accumulating land. The *private sector should engage with smallholder farmers* in a way that minimizes the risk to the farmer and maximizes benefit. *Develop, document and disseminate best practices in contract farming* which maximize benefit for both farmers and industry, and explore other mechanisms which will allow effective participation of the smallholder farmer in the private sector. This would include a clear understanding of the conditions under which contract farming is beneficial, and how the government and private sector can work together to establish these conditions.

4b. Strengthen regulation of private sector

To achieve the national development goals under an efficient market economy, the private sector might be more strongly regulated. Mechanisms could be introduced to bring large-scale plantations in line with comprehensive land use planning, and encourage accountability, equity, and transparency. Clear regulations for private sector engagement in land allocation and use might benefit both farmers and the private sectors, as would guidelines on how to engage with smallholder farmers, and codes of conduct. This could be on the basis of studies as mentioned above on mutually beneficial means of engagement between the private sector, smallholder farmers, and government. The private sector could also take the initiative for self-regulation to move to international standards of accountability and equitability, adding value to products on the international market.

5. Continued Learning

5a. Gain a deep and collaborative understanding of the situation of uplands farmers, their agricultural innovations and how to support any positive trends

Technical and policy support to the development of sustainable rotational fallow and other productive upland agricultural systems should be based on a clear understanding of the systems that farmers are using, the reasons for their choices and the situations with which they are faced. Gaining this understanding of upland systems in transition, and how to support them, should be achieved through a positive working partnership between farmers, government agencies, and development organizations. *Conduct collaborative in-depth research into systems practiced and situations faced in the upland areas of Myanmar*, across different ethnic groups, agro-ecological systems, and historical conditions. To ensure meaningful and practically applicable results, *research should be collaborative and participatory*, respectful of all partners, and work from appreciative inquiry. The results of this research should be publicly validated and lead to policy considerations. This kind of research could be guided by or inform a national task force and regional forums as under recommendation 1a.

Specific topics for continued collaborative learning include:

- Traditional land use and land tenure systems across different ethnic groups and agroecological systems and how these systems are changing and adapting
- Farmer innovations for intensification of upland management
- Women and land in different cultural systems, and how women are accessing land (or not) given specific constraints
- Contract farming: how it works in upland Myanmar, different conditions and arrangements for, and which are good practices
- How communities and government might prepare for the opportunities of REDD and carbon trading through strong local tenure and land management

Case study research can explore not only traditional systems but also how interventions are working (or not) and *the impact of current development activities*. Action-oriented case studies might be conducted and documented in conjunction with pilot projects on technical and social aspects of intensified agricultural systems. (See 5b. below). Clear lessons shared on the types of tenure mechanisms that support improved upland systems would be useful for all actors.

Comparison with regional studies would be beneficial, as upland tenure issues in Myanmar have significant similarities and relevant differences to those in neighboring countries such as India, China, Vietnam, Laos and Cambodia. Much could be learned from understanding the characteristics of and advantages and disadvantages of regional approaches to land tenure and uplands development.

5b. Implement pilot projects for action learning

Pilot projects could be implemented to try different technical and tenure approaches, with analysis, reflective learning and application of lessons learned as an integral part of the project, as well as documentation and sharing as case examples. Pilot projects would discover, develop and model appropriate tenure packages and upland resource management technologies. These pilots could explore intensified shifting cultivation technologies as well as the impact and practicability of various traditional tenure systems, including collective and individual, and lead toward the validation and establishment of sustainable agroforestry communities in Myanmar's uplands.

The national agricultural development emphasis can work to strongly engage smallholder farmers, not only in the uplands but everywhere in the nation. In this way a foundation can be laid for a nation in which all citizens have equal opportunity to develop their livelihoods, and contribute to building a prosperous and disciplined democracy-flourishing nation.

Through access to secure land tenure guarantees and investment inputs, smallholder farmers, including *taungya* farmers in the uplands, can and must be enabled to make a meaningful contribution to national goals of Myanmar: a developed nation with agriculture as the base of a robust economy.

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The Food Security Working Group (FSWG), established in 2003 is a network of over 47 national and international NGOs, working on improving practices related to food security in Myanmar. The FSWG supports its members with a range of services including : technical seminars/trainings, dissemination of information, access to resources, learning and exchange forums, representation, opportunities to collaborate in evidence-based research, and advocacy.

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