

# ‘There is no vacant land’



*A primer on defending  
Myanmar’s customary  
tenure systems*

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Published by Transnational Institute  
March 2019 Yangon, Amsterdam

This primer would not have been possible without the invaluable contributions of the many participants in workshops that TNI co-organised with local organisations over the past years in Myanmar. We are very grateful to them and hope we have captured their lives and insights truthfully. Any omissions or errors are ours.

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## Summary

Across the world, the livelihoods and well-being of rural communities have, since time immemorial, been assured through their customary land and resource management systems. Myanmar is no exception, and these systems have been especially valued in ethnic upland areas. Although increasingly under pressure, these systems still widely continue more or less intact, and continue to retain social legitimacy.

Customary tenure systems involve rural communities asserting authority over their local land and resources within their village areas, allocating rights and regulating access and use according to traditional cultural norms. At the simplest these institutions are codified social norms around resource access, and as such have existed across just about every inhabited landscape in the world.

They often involve the coordination of farming activities like planting, harvesting and grazing. They are based on a strong local identification with place and ecological landscape, and have evolved dynamically over the long term, giving rise to unique cultural landscapes. They tend to be sophisticated, flexible, and practical in terms of combining common and private rights and responsibilities across diverse resources. Beyond individual villages, they can play a key role in agreeing to inter-village boundaries, and regulating across clusters of villages who gets access to what resources, when and how. They can manage disputes both within and between villages in ways which have cultural legitimacy and embody principles of social justice. Their effectiveness is reflected in how highly valued they are by the communities who rely on them, and they evolve as the social composition and economic needs of the communities evolve and change over time.

There is increasing recognition of the prevalence of these systems and the importance to rural communities who rely on them. A recent study estimated that as much as 65% of the world's land areas is managed under customary systems (RRI 2015). Across rural areas of Asia, Europe the Americas, and Africa, a wide diversity of customary land governance systems have been documented and continue to function effectively, with varying levels of state recognition. There are a wide diversity of customary systems across Myanmar, which go by a range of different local terms.

The recognition, understanding and study of common property and customary systems has been enjoying a remarkable renaissance around the world in recent decades. Academic research has demonstrated that customary systems are highly effective in enabling land and resource use that supports social well-being of ethnic communities. This is partly for economic reasons - because it can be highly efficient in delivering land and resource governance and management at relatively low cost with little conflict - and partly for social reasons - that they reflect reciprocal social relations over material resources.

However these systems are almost always misunderstood by outsiders, who without direct experience of them rarely seem to grasp the now all too unfamiliar concepts of local self-management, shared property (land and resources held in common) and social reciprocity (for instance labour exchange, and collective cropping). Negative judgements are frequently indulged in ('unequal', 'anti-women', 'feudalistic', 'outdated') with little basis in evidence, or time being taken to understand them properly.

In fact, most of the criticisms levelled against customary systems are more applicable to state-based private land systems: where land ownership tends to be unequal, where few if any women have land titles in their names, where control is remote and inaccessible and bribe-seeking common, where taxation and input costs can drive farmers into debt bondage, landlessness, even suicide, and lastly where the systems tend to be static and inflexible over time.

Misunderstanding can have serious consequences - policies commonly fail to represent these systems correctly, recognise their value, or protect their key elements. Misrepresentation has been common around the world, as customary systems have been over-ruled by colonial land administration centralisation:

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*How far these [mis]conceptions arose from ignorance or were deliberate has long been debated, every decade of persistence favouring the latter (Alden Wily, 2006a).*

In Myanmar, these systems have begun to be eroded and undermined in recent decades, and many customary villages and village clusters are now either in crisis or feeling profoundly threatened. War, militarization and land and natural resource grabbing have already displaced many villagers and communities from their customary lands. Myanmar's long-running military dictatorship ignored communities' rights and treated community land and resources as 'land at government disposal', and in 2012 the government officially re-labelled them as 'Virgin, Fallow and Vacant'. The Tatmadaw (Myanmar national army), as well as some other armed groups in the country, have summarily appropriated land and resources for themselves or their business partners, overriding village authority using menace or actual violence.

Although many customary systems have been able to persist, they are often hanging on by a thread. And as the country struggles towards democracy, economic development, and peace, new threats to customary lands and resource systems loom even larger. At the moment there is not yet even any statutory category through which to acknowledge customary systems and village land and resources held in common, and key influential actors appear to be preventing such recognition from attaining legal status.

At the same time urban-based administrators seem to be envisioning large scale 'modern' economic enterprises across Myanmar's lands, in plans and visions that seem to imply that customary village resource management systems are either an impediment to 'development' or don't even exist.

In reality, most of the land being labelled 'vacant' or 'virgin' land is actually customary village property, so implementing this law amounts to unjust appropriation of village property without acknowledgement of pre-existing rights or claims and thus violates several international norms and conventions. The third category - 'fallow' lands - at least recognises that the land is under use, but then reallocation of an already utilised resource seems all the more blatantly unjust.

Reallocating land and related natural resources without recognising and settling the pre-existing rights according to a due process is widely understood as intrinsically unjust and it particularly goes against the norms agreed to by many of the world's governments in the 2012 FAO Tenure Guidelines (FAO 2012), to which Myanmar is a signatory. Indeed, much of Part 3 of these FAO Guidelines – especially section 9 in its entirety - is devoted particularly to spelling out when and how the rights of indigenous peoples and communities with customary tenure systems must be fully recognized and protected from reallocation, eviction and any legislative or administrative initiatives that would facilitate these. Yet this is happening widely, particularly in ongoing conflict zones and promoted by powerful military and commercial interests in the Myanmar government. The inescapable conclusion must be that it is part of a hostile economic, political and military strategy, and along with other recent notorious actions of the Tatmadaw, infringes the Geneva Conventions 1949, which states:

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*... Reprisals against protected persons and their property are prohibited ( Geneva Convention IV Article 33).*

In January 2019 seven United Nations special Rapporteurs for protection of a range of human rights addressed their concerns over the VFV Amendment to the Government of Myanmar:

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*'we are concerned that this law may be used to illegally dispossess land users of their land without due process or adequate notice, undermine their human rights, and have a disproportionate impact on poor, rural and minority communities, ethnic nationalities and indigenous peoples'*

Internationally there is increasing emphasis across multilateral organisations and fora on the fundamental importance of proper protection and recognition of rights and tenure, and the adherence to basic norms of good land and resource governance (FAO 2012), as a basis for development. The UN Sustainable Development Goals, to which Myanmar is a signatory, state:

**Sustainable development goal 1** – End poverty in all its forms everywhere.

- Target 1.4 by 2030 ensure that all men and women, particularly the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, **ownership, and control over land and other forms of property, inheritance, natural resources, ...**

**Sustainable development goal 2** - End hunger, achieve food security and improved nutrition and promote sustainable agriculture.

- Target 3 –By 2030, double the agricultural productivity and incomes of small-scale food producers, in particular women, indigenous peoples, family farmers, pastoralists and fishers, including through **secure and equal access to land, other productive resources** and inputs, knowledge, financial services, markets and opportunities for value addition and non-farm employment

**Sustainable development goal 5** - Achieve gender equality and empower all women and girls.

- Target 7 – give women equal access to economy resources as well as **access to ownership and control over land** and other forms of property.

In most customary tenure systems the ownership and control referred to in the UN SDGs is already assured, and it is assured collectively.

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*Where a local system is working reasonably well and is not subject to significant outside pressures that stress the system beyond its ability to adapt and mediate conflicts, outsiders should not interfere (Freudenberger 2013).*

Despite all these norms and principles Myanmar's Government has been interfering in and undermining these systems, and therefore undermining its own international commitments as well as the achievement of these development goals. A new amendment to the VFV law 2012 passed in September 2018, making continued occupation, without official permission, of land which is not municipal, private or state (i.e. land which is *de facto* customary) a criminal offence.

Yet there still remains no provision to clarify the pre-existing and as yet unrecognised, mainly customary, community rights. Customary systems and the wellbeing of those who depend on them are now gravely threatened by this law.

Few outside of ethnic areas fully appreciate what the customary tenure systems actually are, how they work, and how centralised authorities, statutory policies and jurisdictions undermine them in practice. It is time to recognise customary resource systems in law, and acknowledge these systems as the foundation of wellbeing in many rural areas. But in order to protect ethnic well-being and ensure post-conflict recovery, it is essential that these customary tenure systems are understood. This primer seeks to clarify the issues, improve understanding of customary land tenure systems and explore what should be done.

The non-recognition of the customary tenure systems of Myanmar's ethnic groups is one of the key drivers of ethnic conflict in the country. It is related not only to respect and support of socio-economic and political systems of ethnic groups, but also closely related to the right to land for IDPs and refugees. Without addressing these issues, the prospects for national peace and development are grim.

The primer is divided into 6 sections. First, it examines the key elements of these systems and how they function. Second, it considers their prevalence and continuity around the world. Third, it considers their characteristics, importance, and relative pros and cons. Fourth, it look at the changing conditions and fifth at current policy dynamics affecting customary systems. Last, it offers some recommendations.



# 1 What are customary land tenure systems?

'Customary land', 'customary land management systems', 'customary tenures and rights', 'customary land tenure systems', 'community based property systems'. There are many terms used around the world to describe a distinctive and prevalent set of practices relating to land and natural resource control, management and use by local communities. Here we use the term **customary land tenure systems**, and a working definition of it might be:

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*the systems many villages around the world operate to express, order and regulate the possession, access, use and transfer of local land and the resources found therein. These systems involve local people controlling, managing and using their local lands and natural resources, primarily for the benefit of the local people themselves, according to and expressing their cultural traditions and knowledge systems.*

The definition involves three interrelated aspects:

**Firstly**, *the physical lands and the natural resources in a village area*. These will include a range of different sorts of land and resources, including variously:

- Settlements and residential areas,
- Home gardens,
- Village gathering places and grounds
- Sacred places (whether church, temple, monastery, sacred trees, forests, lakes, rocks etc)
- Burial grounds
- Roads and paths,
- Cultivated agricultural lands,
- Agroforestry lands including shifting cultivation areas, periodically fallowed
- Forests of various kinds (for instance village wood lots, sacred forests, watershed protection areas, timber and bamboo forests, hunting areas),

- Grazing areas, meadows and grasslands
- Water resources including rivers, streams, ponds and fisheries, irrigation and drainage systems
- Wildlife and hunting resources,
- Reserve areas of various kinds (including for future population growth)
- And so on

**Secondly**, *a community of people*, often but not only ethnic nationalities, who are relying on the resources for their wellbeing and livelihoods. ‘Community’ implies there are regular face-to-face interactions, and collective meetings. The community may comprise a range of different groups, perhaps differentiated by ethnicity or livelihood practices.

**Thirdly**, *the institutional system and regulatory mechanisms* through which those people make and implement decisions and arbitrate disputes around the control, management and use of the aforementioned resources. ‘Customary’ implies the system is embedded in social local cultural practices and traditions and draws legitimacy from this embeddedness, even though the norms themselves are often regularly updated to respond to ever-changing conditions.

Norms can range between long term inheritance or zoning issues, and shorter term day to day management issues, for instance linked to cropping.

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*“Customary land tenure is as much a social system as a legal code and from the former obtains its enormous resilience, continuity, and flexibility” (Alden-Willy 2011: 1).*

Decisions are often made by a general assembly of all villagers. Alternatively, some elements of decision-making may be delegated to elders or a leader. Thus, in contrast to externally imposed landholding regimes, the norms of customary tenure derive from and are sustained by the community itself. Communities within customary systems typically exhibit relatively high degrees of reciprocity and mutualism.

Most or all the resources within the village boundary are under the ultimate control of the village, and primarily held collectively, as common property, although they may also recognise private property rights and private inheritance within their boundaries. The systems that link local people with their local resources are highly location-specific. Although the rules which a particular local community follows are known as customary law, they are rarely binding beyond that community. These localised customary systems, together can cover large *contiguous landscapes* including numerous villages, where each village across the landscape is managing its own affairs lands and resources under its customary system, and mutually supporting neighbouring villages through councils and so on.

## 1.1 Examples from ethnic Myanmar

There are a wide diversity of customary systems across Myanmar, which go by a range of different local terms. For instance in Karen areas they talk about “*kaw*” and in Kachin ‘*lamu ga*’. A recent publication by the Ethnic Community Development Forum (ECDF 2016) provides a wealth of documented cases to explain and illustrate Myanmar’s customary land and resource management systems. In Daw Tarklare village in Kayah state, for instance:

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*‘Until 1990 the village ... was completely managed by direct governance and administrated by traditional animist chiefs, called Eelubyarseh and Khaybarseh. The Khaybarseh had until then managed the land, forest natural resource and the general development of the village. The Eelubyarseh was the main authority in organising animist ceremonies that were not related to the land. Traditionally the village chief (a different position...) sounded a traditional buffalo horn to call a meeting to gather all the villagers to collectively decide on important matters (ECDF 2016:37).*

In Dum Bung Hka village, Hpakant township, Kachin state:

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*Historically the Laphaing administered their territory through leaders called Duwa ... [who] traditionally administered the forest, hill areas and villages. In 1885, during the colonial era, the Duwa of Ka Dum territory was designated controller of the hill area. The Village committee administers the village lands according to traditional law. ... The communal lands in the area cannot be claimed by individual villagers. Those caught breaking rules can be punished with fines and have to admit their wrongdoing. In cases where the village committee cannot resolve land disputes, they have to pass these cases up to the Administrative Office Committee (ECDF 2016: 55).*

## 1.2 How do customary tenure systems work?

### 1.2.1 Decision-making by the collective authority system

The community acts as the collective authority in deciding what the norms, rules and processes are. The community may delegate authority in particular cases to specific individuals or groups of elders for instance. Decisions are made by the community, and are informed by reliance on the resource and long term local knowledge of the resource. Social cohesion is important to ensure smooth decision-making and respect for the system. This is very different from a distant administrative agency which will have its own interests which can be very different from the communities.

Customary norms and systems emerge and evolve over time according to community's needs and wishes. They may be formalised into written arrangements, but mostly tend to remain unwritten (which, like the unwritten British Constitution, can have benefits, particularly flexibility to pursue higher level principles in changing conditions), and retained by elders of the community.

### 1.2.2 Coordinating complex resource use

The systems have evolved from the adaptations of local social practices and cultures to the local agro-ecological niche that supports the communities. They tend to be particularly developed where resource based livelihoods

necessitate complex coordination, for instance over cultivation, fallowing, irrigation and grazing. Since land and natural resources tend to be multi-functional (e.g. forests can provide fuelwood, timber, grazing, hunting, medicines and wild foods) customary systems are better able to develop and adapt to the diverse uses and tenure niches for the same resource than more rigid statutory systems.

The norms in customary systems may relate to several aspects of resource management. Firstly, this includes zoning decisions over which areas are allocated for what functions, and then secondly, regarding allocation of who can use what land and in what ways, e.g. for hunting and harvesting of wild foods, for grazing and cultivation. Thirdly, there are often norms around how rights are passed on. Fourthly, there are norms over what are the prescribed practices around resource use. And fifthly, customary norms also entail the procedures for how disagreements are addressed.

Customary systems are often closely associated with ethnicity and coterminous with a single ethnic group. Yet there are also many cases, including in Myanmar, where systems have arisen in ethnically mixed villages, where people regardless of their ethnicity – or perhaps because of their differences - have over time developed ways and forged rules that enable them to coexist and share land and resources, into customary practices that get passed from one generation to the next. There are many villages in Shan for instance where different ethnic groups coexist and manage their resources in common through customary systems. Around the world pastoralists and sedentary farmers have often co-evolved customary arrangements around seasonal grazing access.

### 1.2.3 Using complex and integrated rights systems

Customary tenure systems typically encompass diverse permutations of collective or private land or resource ownership, management and use. Ownership may involve a mix of common and private, however the management of resources may not coincide with ownership. For example, house plots, home gardens and some agricultural land may be held under private property or private occupancy, whereas more extensive areas of land and resources around the village may be held in common. Yet the decision-making and management of private land may be pooled, and on the other hand the management and use of common land may often be allocated to the family household level.

There can also be diverse practices around the allocation and reallocation of the bundle of access rights to the different resources, diversity around the extent of collective labour, and different systems of inheritance and conflict management.

There may be distinctions made between primary and secondary rights – primary rights to ownership and control, and secondary rights to access and or use, perhaps for instance post harvest grazing, or hunting, gathering or fishing rights.

Holding of land in common means that it may be impossible for the land to be alienated away from the village, without consent of the village. In some villages in-migrant families may be allotted village land to use for as long as they reside in the village. This can provide strong livelihood security for the community members.

#### 1.2.4 Landscape wide

Village social structures commonly exert authority within the village boundaries, and beyond the boundary there may be the next customary village authority. In this way whole landscapes can be under a network of customary systems, and together generate unique ‘cultural landscapes’ – landscapes managed by communities for generations and which reflect sophisticated multifunctional and productive characteristics. UNESCO has begun recognising ‘cultural landscapes’ as part of the human heritage. A strong case can be made for recognising Myanmar’s customary landscapes as –

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*Combined works of nature and humankind, they express a long and intimate relationship between peoples and their natural environment (UNESCO).*

Village authorities tend to coordinate across landscapes, for example in terms of agreeing on trans-village boundaries or resolving disputes. So customary systems refer not to particular plots of land but entire landscapes.

Customary land use systems tend to be much more complex and sophisticated than administratively regulated statutory landscapes, which have limited numbers of categories for land use, and may struggle but largely fail to achieve multi-functionality. For instance, since there is no state administration for agro-forestry systems and little expertise within the state to understand and support it, the use of land for agro-forestry faces a hostile administrative environment, even though this may be the most appropriate land use from the local communities' perspective (TNI 2018).

## 2 The Prevalence of Customary land systems

Customary systems as a form of social relations are undoubtedly of great antiquity and have been widely documented around the world. Some specific customary systems may be hundreds or even thousands of years old, while others may be based on much younger practices that have become customary in nature. Either way, there is increasing recognition of the prevalence of these systems and the importance to rural communities who rely on them.

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*“Community-based property systems ... are adhered to by no less than two billion people” (Wiley 2008).*

*Communities are estimated to hold as much as 65 percent of the world’s land area through customary, community based tenure systems (RRI 2015).*

Across rural areas of Asia, Europe, the Americas, and Africa, a wide diversity of customary land governance systems have been documented and continue to function effectively, with varying levels of state recognition.

### 2.1.1 Across Asia

Numerous customary systems continue across Asia, and continue to evolve, primarily though not exclusively, in ethnic nationality areas. In **Myanmar** much of the ethnic nationality areas where about a third of the country’s population country live have working customary land use systems. This proportion would grow if we include areas from which people have been displaced by war, militarization, military confiscation or other forms of grabbing that nonetheless remain in play to the extent that the realisation of the displaced people’s right to restitution would involve ‘retrieving and reinventing’ their customary systems upon their return. In short, where there has been displacement especially in ethnic borderland areas, recognition and restitution are deeply intertwined and interconnected.



In **India** a wide diversity of systems have been documented, particularly in the North East states adjacent to Myanmar, and the recent Indian Forest Rights Act 2006 fully recognises customary lands and resources in forested landscapes. A diversity of customary land management systems exist across **Indonesia** and **Papua** too (AIPP 2015). Customary systems are an integral part of the rural landscape in many parts of the **Philippines** as well (Franco 2011).

### 2.1.2 In Europe

The 'open field' farming system, prevalent across Europe until a few centuries ago, involved customary collective management decision-making over when to plough, plant, harvest and graze. Although this has largely disappeared, common property systems still persist, protecting for instance grazing and timber extraction rights. In the **UK** these are recognised and protected under the Commons Act (2006), reflecting that customary commons remain widespread in so-called 'developed' economies. And Britain's jury system, which now forms the basis for Britain's common law system, was the original system for village common property management for instance allocating land strips within villages.

Across Europe, similarly many modern democratic structures also evolved from local customary resource self-governance systems. Customary management systems continue in rural areas across Europe today, for instance relating to grazing and water management in **Switzerland**, where alpine grazing and upland forests are managed through local government communes.

### 2.1.3 In Africa

Much of Africa's land remains under customary systems.

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*In Africa up to one quarter of the total land mass is common property (740 million hectares) if this is defined as areas over which communities still exercise de jure or de facto customary tenure (Alden Wily, 2008.)*

#### 2.1.4 North America

Complex customary systems existed across North America before the European colonists arrived and superseded them. In recent years there has been much revision, contributing towards the development of a hybrid land system. Hoekema (2010) for instance discusses cases of bottom-up 'community-controlled codification' as a hybrid form that emerged in response to the

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*'legal doctrine of recognizing rights that were never specifically given up by indigenous peoples when they ceded their lands to colonizing nations in the 18th and 19th centuries' (in Boelens et al.2010, p.235) .*

Contemporary judicial processes have required indigenous leaders to show how their communities regulate resources, this has led to

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*'an extended and soul-searching local dialogue aimed at retrieving and, if need be, reinventing what the tribe considers to be "our fundamental laws" and "the way we are"' (p.236).*

Hoekema (in Otto & Hoekema eds. 2012) describes a case like this involving Mi'kmaq First Nation group in Nova Scotia, Canada.

Such examples from around the world and from different points in history including the contemporary era help to broaden understanding of what it can mean to 'be customary' and to take stock of the fuller range of actually-existing implications when speaking of 'customary practices' and 'customary law' today. Overall it is clear that customary systems, far from gradually disappearing, remain widespread and relevant, serving vital functions for citizens around the world.

# 3 The characteristics of customary systems

Customary land systems can, by asserting control of resources against outsiders and by mediating use of local land and resources within communities, enable relatively equitable, productive and sustainable livelihood-oriented resource use for rural communities over the long term.

## 3.1 Efficiency and effectiveness in managing complexity

In pre-history, as human populations increased in relation to lands and resources they depended on, self-management of resource use, whether for hunting, gathering, grazing or cultivation, became increasingly important, and customary tenure systems emerged. As such they are believed to have facilitated the livelihoods for most of human society for much of its pre-history, and continue in many areas. More recently, statutory management systems have emerged in the highest productivity area of river basins, where states emerged. Even there, far from disappearing customary land resources and regulatory systems tend to persist for many tenure niches, for example in common grazing lands, fisheries and irrigation systems.

This is because some resources are classified as ‘common pool resources’ (or CPRs) that are costly to assert private control over (like fisheries, forests and the atmosphere) and so best suited to collective management. Whereas lowland paddy cultivation is a relatively simple cultivation challenge, and paddy land may be more suited to private management (although not irrigation systems), in upland areas livelihoods depend much more on common pool resources and so customary systems remain particularly important. Upland livelihoods involve much more complex interactions across a multi-functional landscape, for instance, long fallow agroforestry cultivation, hunting, fishing, managing irrigation systems, grazing and so on. The complexity necessitates adaptive, flexible and face-to-face resource governance arrangements.

The customary management systems that have evolved tend to be extremely sophisticated and detailed. Additionally, whereas statutory systems tend to be inflexible to changing conditions (requiring new legal provisions), and

inefficient and expensive in dispute resolution, customary systems can enable allocation and reallocation of rights adaptive responses to changes in resource condition negotiated in ways which minimise grievance and inequity.

The recognition, understanding and study of common property and customary systems has been enjoying a remarkable renaissance around the world in recent decades, and in 2009 the American economist Eleanor Ostrom won the Nobel Prize for Economics for her long-term research on the subject.

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*‘Communities ... have relied on institutions resembling neither the state nor the market to govern some resource systems with reasonable degrees of success over long periods of time’ (Ostrom 1990).*

They have demonstrated that over centuries and millennia that they are highly **effective** in enabling land and resource use that supports social well-being of ethnic communities. This is partly for economic reasons - because can be highly **efficient** in delivering land and resource governance and management at relatively low cost with little conflict – and partly for social reasons – that they reflect reciprocal social relations over material resources.

### 3.2 Robust, resilient and persistente

States come and go, but communities remain. Under problems of wars, dictatorships, corruption and bad policies customary systems **are resilient**, organising village affairs, and adapting to the changing situations. Customary systems exemplify **good governance** principles in the sense that decision-making is generally face-to-face and socially transparent, with little evidence of the sort of corruption which has plagued statutory systems across Asia and indeed the world.

Shifting cultivation customary systems demonstrate **sustainability** - for most ethnic areas where the customary systems have not been damaged by conflict we tend to see norms of resource use that ensure sustainability into

the long-term. In these areas we see far less examples of rapacious resource plunder which has characterised Myanmar's forest governance in many other areas in the last decades.

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*There is a mistaken tendency to view customary tenure systems as quaint relics of a by-gone time. In fact, there is now ample evidence that customary tenure systems are not only powerful forces in resource management, but they can be highly responsive to changes in the world around them. Adaptations take place in response to population growth, market forces (supply and demand), political changes, conflicts, and even climate change. In general, rules are relatively lax (and may even lapse) when resources are abundant and demand is low. As resources become more coveted, the rules of access, exchange, and inheritance become more intricate and/or restrictive. Rules may suddenly emerge—or be rescinded—as rights to land, forests, fallows, and water resources are renegotiated to address new economic and environmental realities (Freudenberger 2013).*

### 3.3 Culturally rooted and locally legitimated

Customary governance systems are **culturally appropriate** for the communities using them. They are not imposing external norms from an outside culture but are organically developed and also changed from within the communities and their social norms. Customary systems express the cultural norms of the community, and the high value and significance they place on their land and resources. They tend to reflect profound attachment to and reverence for the specific land and resources, which are often perceived as the domain of ancestors and/or sentient spirits.

State administrative systems on the other hand treat land merely as an inert, generic tradeable commodity without cultural context. It is this lack of attachment to the land and its condition which can contribute to degradation and destruction of the natural environment.

In customary land the enforcing authority of the citizens themselves - exemplifying often the sort of 'direct democracy' that many modern states struggle to realise. Myanmar's leaders often expound on the merits of the 'democratisation process', but in customary systems direct democracy was not generally ever lost.

### 3.4 Relatively lower levels of inequity

Social institutions express the norms of the society that produces them, and most societies inevitably involve inequalities of wealth, abilities and power. Customary tenure systems tend to be relatively **equitable** in terms of distribution of access to rights and resources. There are of course exceptions to this rule but there are no customary systems displaying the excesses of inequality and centralisation of power commonly found under statutory systems.

In terms of distribution of intra-village land-holding, customary systems are more complex, but still the extremes of land inequality found in many lowland areas, where land holders and labourers form distinct separate groups, is unusual in customary systems. At the same time there appears to be increasing privatisation of the most productive paddy lands in ethnic areas. Nevertheless, because customary systems can manage diverse uses across diverse resources, households are more able to maintain income streams, even those with less land.

But urban elites specifically criticise customary systems for wealth inequalities and gender bias, with neither empirical justification, nor comparative assessment of whether such systems are more or less unequal than statutory systems. In Myanmar's statutory laws, in practice it is almost impossible for women to hold independent or equal title to a families' private land (e.g. Form 7), and it has been reported that some parliamentarians continue to oppose the principle even after the National Land Use Policy, which supports womens right to land, was adopted in early 2016. Although not in all cases, in many customary systems that have been studied women inheriting and holding land is not uncommon, for instance across Shan State.

### 3.5 Effective dispute management

Customary systems tend to be well suited for successfully processing disputes between parties of relatively equal socioeconomic status. Diverse cultural norms are widely observed through which disputes within communities (e.g. over land use) and between communities, for example over village boundaries, are managed in ways which can develop consensus agreement and work towards reconciliation.

### 3.6 Gender and customary systems

At the UN Women's Conference in Copenhagen in 1980 it was recognised that women owned only 1 per cent of the world's resources, while constituting 50 per cent of the world's population (UN, 1980: 8). This reflects how land rights are embedded around the world within social institutions that exhibit pervasive discrimination against women. It is important therefore to assess customary systems in a relative perspective. Many researchers finding that customary institutions, although typically showing male bias in composition of their leadership, appear relatively more supportive of gendered claims to land than state systems, for instance Rao referring to systems in India:

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*.. community institutions do appear more responsive to competing discourses, having as they do a direct knowledge of the local context and relationships, responding on a case by case basis, rather than through universal policies. Further, their marginalization vis-à-vis the State and the ensuing pressures of the 'modern' legal framework, based on principles of equality (including gender equality) and justice, to prove themselves progressive, also seem to ensure that decisions made at this level are not completely adverse to women's interests (Rao 2007).*

Still, where it is most needed, change is never automatic, whether in customary or conventional land governance systems. In the case of Myanmar, various communities increasingly recognise shortcomings where they exist, and discussions are underway to assess how to address these in customary systems. It is recognised by various communities that customary rules are not static and can be adapted and improved when needed by communities.

### 3.7 Limitations, criticisms of customary systems

The main limitations of customary systems are that there are risks of 'elite capture', biases and abuse of powers, that may be more difficult to reverse where there is no codification of norms. Acheson (2006) in the context of a review of different natural resource management regimes, lists a range of problem of communities struggling to manage local resources. Internally, he cites social heterogeneity (i.e. diverse livelihood uses and or wealth levels) which can make devising and agreeing rules more difficult, and less likely to succeed. Additionally, declining dependence on local resources, for instance through increasing engagement in outside work, may mean community members are less reliant on the system. Internal social frictions and lack of a sense of community can also militate against consensus. On the other hand he cites factors outside the community which can undermine it:

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*'high on this list of factors is interference by government officials who are reluctant to give powers to locals'*

*(Acheson 2006).*



# 4 Dynamics, challenges and threats to customary tenure systems

## 4.1 What the future holds

While most current customary systems may have emerged far from the reach of the state or from markets, over time and as societies have grown and urban centres expanded, their remoteness has lessened and engagement in markets increased. Still such systems remain valued even when roads and the digital age render them less remote. What keeps them from disintegrating may be both internal cohesion and possibly external recognition.

Customary systems need not be impediments to engagement in markets, for both labour and produce, and can offer several benefits. Customary systems can protect the interests of community members when they are absent, and reciprocity means if households face hard times the community can help them and avert the need to sell off land and assets. While customary systems may not be able to issue tradeable private titles, they may not obstruct statutory systems from issuing them for some private village lands either, although using titles for collateral on borrowing can of course be a mixed blessing as it may also risk commodification and loss to outsiders of some lands.

State recognition is important, but other factors also condition whether and how customary systems will survive and thrive in the future. Would recognition serve to regenerate customary systems and enable them to thrive in the long term? Or, will such recognition simply be the 'high-water' mark for customary communities and from there they will slowly disintegrate under the pressures of ongoing 'squeeze' (ecological, economic, social and political) by the wider dominant economic development model being pursued by the government?

The conditions for customary systems are changing, especially the increased reach of state with improved infrastructure and expanded government capacity, the demand for land and resources, social changes linked to the need for cash, and increasing economic individualisation. While these factors

may seem to be threats to the future viability of customary systems, some could offer opportunities for evolving and enhancing these systems.

## 4.2 Internal change

Several factors are affecting the internal makeup of customary resource management, particularly economic individualisation and demographic change. As local areas become more incorporated into regional economies there is increasing diversification of income generation, and inevitably therefore individualisation of economic activities. This leads to pressure on the customary systems, for instance to privatise land and resources and to accommodate different land use practices, such as moving towards commercial cropping. Also in times of social change, norms around the community customs may reduce their cohesion.

Longer term demographic shifts are occurring, as populations gradually increase, and as younger members often go out for education and to seek income, leading to an ageing population in the village, and often a more feminised workforce. To an extent this is a predictable process and part of the life cycle of customary systems. Whereas there are now numerous long term studies on the so called agrarian transition in South East Asia (e.g. Rigg 2006, Rigg & Vandergeest 2012), how customary systems in particular deal with demographic changes within their own communities is not clearly researched. A major challenge is labour to manage the resources, and it is likely there is less labour investment in common resource management.

## 4.3 External challenges & relations with the states

It is useful to distinguish between the system in practice on the ground (*'de facto'*) and what is in statutory law (*'de jure'*). The relationship between the state's *'de jure'* system and the customary village *de facto* system can be critical.

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*“Of critical importance to modern customary landholders is how far national law supports the land rights it delivers and the norms operated to sustain these” (Alden-Willy 2011).*

Where states seek to assert *de jure* claims to the land and resources through a statutory system, it is a fundamental legal principle that pre-existing *de facto* practices represent legitimate rights. These therefore must be acknowledged and settled according to a due process, because failing to do so unjustly generates a 'conflict of claims'.

For example, when the British Colonial administration sought to create the Permanent Forest Estate in Burma in the late 19<sup>th</sup> Century, laws regulations and due processes were developed through which pre-existing (and largely customary) rights would be 'settled', and settlement officers were deputized in lengthy processes. Though far from perfect they expressed the basic legal principle that pre-existing customary rights ought to be recognised and respected by statutory systems.

Yet during and after the colonial era numerous 'conflicts of claims' have been created around the world, particularly through state *de jure* appropriation of village commons, like village forests and meadows.

But in recent decades, with both democratisation and growing acknowledgement of indigenous rights, customary land systems are receiving renewed international recognition, and the challenge of how best state laws can support customary systems has become a major concern.

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*In the past, most countries thought that with time and "modernization" they could simply erase customary tenure systems, replacing them with statutory systems based on titled private property. Experience now shows that this is not realistic (at least in the short term) and not desirable since customary tenure systems have attributes and strengths that respond to real needs in many countries.*

*Furthermore, as customary systems are undermined, they leave a void that statutory administrative systems are ill equipped to fill, given the limited administrative capacity in many countries.*

*For these reasons, policymakers now seek some sort of accommodation with customary tenure and are looking for guidance and experience with how these issues have been dealt with in other countries (Freudenberger 2013).*

The relationship between the village customary system and the state is fundamental for their functioning. Historically in Myanmar, as elsewhere, there has been a clear distinction between areas that have come under the jurisdiction of statutory government and areas that have not. In Myanmar this is largely reflected today in the distinction between 'states' and 'regions'. During the colonial era, a diarchic system of government was developed with powers divided between Ministerial Burma, where the ethnic Bamar-majority mostly live, and the 'Frontier Areas', where many aspects of government remained under the control of hereditary or traditional rulers among nationality peoples. At independence in 1948, a Union was created under the principles of the Panglong Agreement by which the continued autonomy of such peoples as the Chin, Kachin and Shan was guaranteed. But the commitment has never been honoured. With civil war breaking out, successive governments have sought to extend statutory jurisdiction over land through introducing three land use categories: privately-occupied agricultural land; public forest estate; and the peculiar intermediate and residual category of 'Virgin, Fallow and Vacant land' (VFV), which effectively implies all non-privately cultivated land in rural areas not under forest department jurisdiction. The VFV category, especially, has had profound consequences, and the allocation of this land to outsiders ignores the prior claim of customary authorities over the local land resource.

There clearly must be statutory recognition and validation of customary systems and a statutory accordance of customary rights in order to protect the systems from abuse and quasi-legal theft. A basic problem with addressing grabbing of customary land is that customary systems are not normally documented, but embedded in social norms. As a result it can be very difficult to contest land grabs in court. This is all the more reason for villagers to document their customary systems.

## 4.4 The changing international context

The consequences of undermining customary systems can be grave, both for the dispossessed, and also for those who depend on the ecosystem services generated by sustainable resource management. Nationalising forests, hitherto managed under customary arrangements, has been a widespread process around the world, and has widely led to disastrous consequences. Destruction of the local regulatory mechanisms can unleash a short-term free-for-all and plunder of the forests by powerful outsiders. The disastrous effects of nationalising formerly communal forests have been well documented for numerous countries including Thailand (Feeny 1988a), Niger (Thomson 1977) and Nepal (example??). Loss of forest cover in uplands is likely to cause soil erosion, river siltation, floods and dry season shortages downstream.

Numerous national governments are for various reasons, both principled and pragmatic, grappling with the dilemma of how to reconcile customary land governance and statutory jurisdiction in the context of postcolonial and post dictatorship democratic reform.

India is perhaps the closest administratively to Myanmar because until the 1930s the two countries shared much of the same British colonial structures governance and legal system. India has two major legal protections for customary land. The first is schedule 5 and 6 of the Constitution itself which specifies ethnic areas in which there are special protections for customary land management and against alienation. Furthermore, in areas not covered under schedule six -- that is, mainly areas outside of north-east India -- in 2005 the Indian Parliament passed the Forest Rights Act which enshrined the right of ethnic communities to customary land tenure outside of forest department jurisdiction. Protections in India are now relatively strong and the implementation of these acts is leading to the renewed legal empowerment of ethnic groups (Reddy et al. 2011).

Meanwhile, like Myanmar, Indonesia has undergone a political trajectory that involved enduring an abusive and rapacious military dictatorship. More than a decade after the dictatorship ended, in 2012 the Supreme Court stated that the forest department did not have jurisdiction over lands occupied by ethnic groups, and the legal basis for customary land management was reasserted. Since then, civil society organisations have been able to secure rights to extensive areas for customary governance.

In Mali, the national government was pressured to adopt legislation protecting customary systems and then also eventually to reform this law in order to recognize the distinct rights of women. Ironically, the Mali case supports the point about their flexibility and at the same time addresses the point that is often raised against “traditional” customary systems as discriminatory against women.

The “peasant reserve zones” in Colombia are a contemporary attempt to re-create/ reinvent a customary system. One of the striking things about peasant reserve zones is that they do not center on ethnic homogeneity and can be multi-ethnic in character, which is partly why there is tension with indigenous movements there. Their claim of territoriality is based on another kind of solidarity and in this way they are a ‘reinvention’ of customary.

Overall there is clearly a renewed interest in resolving the customary / statutory contradiction in legally just ways.

## 5 Current policy dynamics

Since the election of an NLD-led government in 2015, Myanmar has been undergoing a period of rapid change. New laws with far-reaching implications are being passed quickly with limited opportunities for deliberation and consultation, and there are tense negotiations over the possibility of peace and constitutional democratisation, even as Tatmadaw military offensives continue in parts of the country.

In terms of land administration there is well-justified lack of trust on the part of citizens, both in the Tatmadaw, based on a long history of and ongoing pattern of abuses and land and resource grabbing, and in the government land administration (Settlement and Land Records Department & Department of Agricultural Land Management and Statistics ), widely reported to have acted in collusion with land grabbers and prioritised bribe-seeking rather than serving citizens.

In relation to land, the policy context framed by the military constitution of 2008 as well as the 2012 Farmland and VFV laws and the 1992 forest law is being gradually extended even during active conflict is going on and a political agreement with ethnic armed groups to address ethnic grievances and aspirations – including on ethnic right to land and natural resources - has not been reached. Yet there are fundamental problems with it in relation to customary systems.

First, there is no space for recognition of customary authority structures and common property systems within the ‘one size fits all’ national laws that were developed for lowland regions, rather than the local realities of customary systems. In short, the policy context reflects the logic of the centre and not the citizens actual aspirations and practices.

Second, unsupportive of the existing systems, policy makers seek to replace them with a system that ignores the complex multi-functional land use practices on the ground, and instead fragments these landscapes into different jurisdictions and generic management arrangements, imposing artificial inflexible boundaries and undermining their sophisticated adaptive abilities.

Third, local customary authority structures that enable face-to-face, responsive and flexible problem solving are undermined and much more vulnerable to land grabbing, as power is officially vested in field offices that are under a distant central administration and which are far less accountable to the local users.

Widespread recognition of these problems across civil society and among some government officers contributed to some relatively constructive dialogue processes around the development of a new National Land Use Policy in 2014-2015. Adopted in early 2016, the NLUP document is very encouraging from the point of customary rights. There is a specific section (Part 8) entitled 'land-use rights of the ethnic nationalities' which states:

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*'customary land use tenure systems shall be recognised in the national land law'*

The NLUP remains a statement of intent until it is transformed into a new overall national land law. Clearly some groups don't want to see it translated into law as its implementation would hurt its vested interests, while at the same time any national law that is not linked to a just peace is bound to lack social and political legitimacy. Amidst widespread unresolved conflict, any attempt to extend the statutory system would amount to an act of war on the part of the central government. Therefore, in the meantime, a moratorium on any reallocation of resource rights would be an essential initial step toward full recognition and strengthening of customary systems, which in turn, would contribute to trust building toward a just peace. A joint statement by Land in Our Hands (LIOH – a national network of land rights CSOs, farmers and internally displaced people) and the Myanmar Alliance for Transparency and Accountability (MATA) on the in end of 2018 amended Vacant, Fallow & Virgin Land Management Law calls for:

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*"...enacting & implementing a national land law that fulfills the right to land and aligns with the Federal Union envisioned for Myanmar. 1.The process of making new federal land law must enable the full and meaningful participation & inclusion of local ethnic peoples from different areas. 2.The law must recognize*



*and approve customary land management and uses that are good practices currently in use in ethnic regions.<sup>3</sup>The law must fully recognize local peoples' right to participate in decisionmaking that affects their lives and that is free from centralized verdicts, in any land use judgments" (LIOH & MATA 2018).*

With the peace process slowly moving towards political dialogue, ethnic civil society and ethnic armed organisation have been preparing their policy statements on land. The Karen National Union policy is the most elaborated of these. Based on the principle that 'people are the owner of the land' the policy states:

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*For Kawthoolei, an approach is needed that prioritizes two aspects. First, it must make socially-legitimate customary occupation and use rights, as they are currently held and practiced the point of departure for both their recognition in law and for the design of institutional frameworks for mediating competing claims and administering land, forests, water, fisheries and associated natural resources. Such customary practices include upland swidden cultivation ("ku"), community forestry, and grazing. Second, such an approach must also recognize that many Karen peoples, against their will, have been alienated from their homelands and deprived of their customary occupation and use rights as a result of past and current conflict, and thus the land policy and tenure reforms must serve to redress this situation.*

Other ethnic groups are also in the process of preparing their own land policies. These are meant to be used not only as a document capturing existing customary practices on the ground in their respective areas, but also as an actual policy to be implemented on the ground by ethnic armed groups in Karen, Mon, Kayah and Kachin States, serving as a proof that it is feasible to do so. Furthermore, these policies serve as a vision of what a future national land law in Myanmar should look like and incorporate, as well as input in the political negotiations by ethnic armed groups with representatives from the government and the Tatmdaw.

## 6 Recommendations for customary tenure security

The challenge of reconciling traditional customary systems with statutory law is not unique to Myanmar: numerous countries have grappled with the same issue in recent years. Each has, in its own way, recognised the importance of protecting the customary systems, and found different ways to do so: Indonesia, India and Mali are all good examples that Myanmar can learn from.

The new land laws that came into being in Myanmar in 2012, and the amendments to it, do not recognise customary systems at all. In reality, most of the land being labelled 'vacant' or 'virgin' land by the central government is actually customary village property. Implementing this law amounts to unjust appropriation of village property without acknowledgement of pre-existing rights or claims and thus violates several international norms and conventions. Yet there still remains no provision to clarify the pre-existing and as yet unrecognised, mainly customary, community rights. Instead of supporting customary systems and the wellbeing of those who depend on them, these are now gravely threatened by this law.

The non-recognition of the customary tenure systems of Myanmar's ethnic groups is one of the key drivers of ethnic conflict in the country. It is related not only to respect and support of socio-economic and political systems of ethnic groups, but also closely related to the right to land for IDPs and refugees. Without addressing these issues, the prospects for national peace and development are grim.

Customary communities and their allies in Myanmar civil society have increasingly mobilised to articulate demands for and assert their rights to recognition and protection. In the context of the 2012 land laws, their efforts are often defensive in nature, as captured by the slogan **"There is no vacant land in ethnic Myanmar!"** In addition, villagers' efforts to map their own systems are on the rise, alongside community resource mapping efforts by others (including those with possibly competing objectives).

There are some encouraging indications from some in Myanmar's central bureaucracy that concerns are being heard: customary systems are recognised in the 2016 National Land Use Policy. This despite continuing opposition to do so from the Tatmadaw and local big business interests, who have a vested interest in defending land grabs. While this central jurisdictional endorsement is very helpful, the goal for ethnic nationality societies is decentralised self-government. Working towards that, ethnic groups are already articulating their own policy position on protecting customary lands and resources, in anticipation of peace dialogues and constitutional settlement.

Myanmar can be proud of its ethnic customary land governance traditions but will need to take significant steps to protect them against destruction. An anticipated new land law offers the opportunity of fulfilling the commitment of the National Land Use Policy to recognise customary land use tenure systems. If it does so this will be a major legal breakthrough. Yet protection of customary tenure systems should not solely rely on national laws which may be changed, but in addition requires deeper constitutional protections which will only come from federal decentralisation allowing state governments to develop the provisions most appropriate for their local areas.

There must be some redress process to restore lands stolen or occupied under previous military administrations. Customary systems need to be documented and mapped by the communities themselves in processes that can lead to their revitalisation and continuous enhancement. Challenges and issues should be identified and addressed where necessary with support.

Sequencing of reform is important and is related to choosing priorities – whose right and what purposes should be recognized and protected first, before moving on to allocating rights to others -- and then organizing clear steps to operationalize these, as there are already layers of grievances which need to be acknowledged.

In conclusion, we recommend several actions:

A moratorium on any appropriation and allocation of all customary land and resources must be introduced. Past and continuing injustices in relation to land grabbing and dispossession must be investigated systematically, proper

restitution facilitated, and punishments against the perpetrators. And no allocations should proceed or occur unless and until the provisions specified in the FAO Tenure Guidelines (especially Part 3 on legal recognition and allocation of tenure rights and Section 9 on the rights of Indigenous peoples and customary communities) are fulfilled.

This means, among others, that “where States intend to recognize or allocate tenure rights, they should first identify all existing tenure rights and right holders, whether recorded or not. Indigenous peoples and other communities with customary tenure systems, smallholders and anyone else who could be affected should be included in the consultation process, consistent with paragraphs 3B.6 and 9.9. States should provide access to justice, consistent with paragraph 4.9 if people believe their tenure rights are not recognized” (FAO Tenure Guidelines, para.7 in Section 7 Safeguards).

The rights of communities on the ground must be guaranteed, including their right to document and clarify their systems, their claims, grievances and aspirations, in order that tenure security can be better asserted, and strengthened.

Constitutional reform and federalisation process should devolve to states the powers to recognise, protect, support and help develop their customary systems, allowing local people to adapt as they wish to the new challenges and opportunities. Union level legislation is also needed to recognise customary systems: the sections on customary land in the NLUP should be included in a new national land law. At State and Region levels, local governments should proactively develop their own land and resource policies in order to prepare for and enable effective federal transfer of power to them.

Processes to reform existing land laws and make a new national land law, and to develop land and resource policies, should involve meaningful participation of local organisations. These processes should also be linked to efforts to promote peace in the country and negotiations between the government and ethnic armed organisations, some of which have their own land policies, recognising customary systems, and providing alternative views of how these could be formalised into policies and laws.

Discussions should take place among government officials, politicians, local organisations and ethnic armed organisations on administrative decentralisation measures by devolving powers to states and regions, in relation to recognition and management of customary systems. The capacities of state/region administrations must be developed to receive and discharge these new powers. Township political representatives and ethnic CSOs should be involved to support this process.

Corruption in government offices should be addressed. Reports from the field indicate routine manipulation of statutory titling processes. Even when agreeing to return of titles may 'mis-return' them (passing them not to the aggrieved rightful owners but to some other party). Individual culpability for corrupt practice and bribe seeking must be enforced with serious punishment.

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