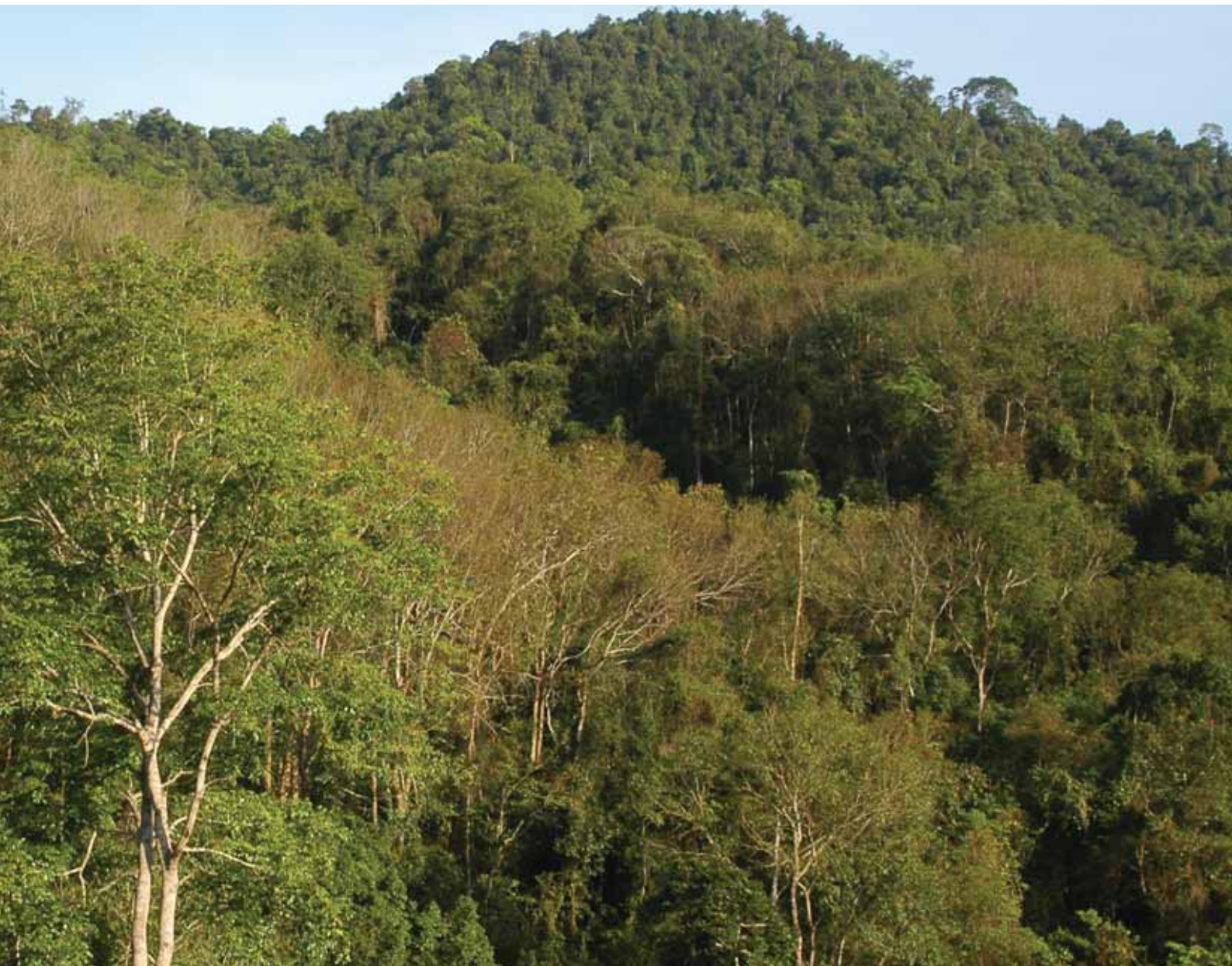




# Statutory and Customary Forest Rights and their Governance Implications

## The Case of Viet Nam

8 July 2008, Hanoi, Viet Nam





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# Statutory and Customary Forest Rights and their Governance Implications

## The Case of Viet Nam

For the IUCN Strengthening Voices for Better Choices Project

Nguyen Quang Tan, Nguyen Van Chinh

and Vu Thu Hanh

Hanoi

8 July 2008



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The views expressed in this report are those of the authors and can in no way be taken to reflect the official opinion of the European Union or IUCN. All errors and omissions are the responsibility of the authors.





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## Abbreviations

5MHRP	Five Million Hectare Reforestation Programme
AFED	Agriculture and Forest Extension Department
ARDU	Agriculture and Rural Development Unit
CITES	Convention on International Trade in Endangered Species
CPC	Commune People's Committee
CPRGS	Comprehensive Poverty Reduction and Growth Strategy
DARD	Department of Agriculture and Rural Development
DPC	District People's Committee
ETSP	Extension and Training Support Programme
FD	Forestry Department
FLEG	Forest Law Enforcement and Governance
FPD	Forest Protection Department
FPDL	Forest Protection and Development Law
FPU	Forest Protection Unit (district level FPD)
FSIV	Forest Science Institute of Viet Nam
FSSP	Forest Sector Support Partnership
GSO	Government Statistics Office
IUCN	International Union for Conservation of Nature
JBIC	Japan Bank for International Cooperation
LI	Law on Investment
LL	Land Law
MARD	Ministry of Agriculture and Rural Development
MB-PF	Management Board for Protection Forest
MB-SUF	Management Board for Special-use Forest
NGO	Non-governmental organization
NTFP	Non-timber forest product
PC	People's Committee
PAR	Public Administration Reform
PPC	Provincial People's Committee
RBC	Red Book Certificate
SFE	State Forest Enterprises
SNV	Netherlands Development Organisation
SOE	State-Owned Enterprises
SVBC	Strengthening Voices for Better Choices
TFF	Trust Fund for Forests
UNDP	United Nations Development Programme
VBARD	Viet Nam Bank for Agriculture and Rural Development
VND	Vietnamese dong
WTO	World Trade Organization



# Executive Summary

## Introduction

IUCN's Strengthening Voices for Better Choices project aims to promote the adoption of improved forest governance arrangements in Viet Nam and five other tropical forest countries in Asia, Africa and South America. These arrangements cover policy, legal, institutional and economic structures and processes enjoying the active support of government, civil society and the private sector. These three groups form the basis of the tripartite approach adopted by IUCN in its forest governance work.

This summary report is an output of a larger national study conducted by SVBC in Viet Nam (similar studies have been conducted in other SVBC project countries). The study aimed to: (i) identify policy, legal, institutional and economic obstacles to sustainable and equitable forest management at the local level; and (ii) make recommendations for future SVBC activities.

The study followed the tripartite approach in two ways. First, it was conducted by consultants from three different backgrounds, namely, statutory law, social science and resource economics. Second, it benefited from the contributions of three different stakeholder groups: state organizations, national and international NGOs, and individuals as well as private enterprises.

## Background to Viet Nam and its forest sector

Viet Nam is a tropical country situated on the Indochina peninsula in Southeast Asia. It covers an area of 33.04 million hectares (ha), administratively divided into 64 provinces and municipalities. The latest statistics show that forests cover 12.62 million ha or 38.2 per cent of its land area. Forests in Viet Nam are classified by use as production forests (36.3 per cent of the total forested area), protection forests (48.1 per cent) and special-use forests (15.6 per cent).

Forest stakeholders in Viet Nam can be broadly classified into two main groups. The first includes actors performing functions related to state management of forests:

- ... National level: The Ministry of Agriculture and Rural Development (MARD) and its subordinate departments: Forestry Department (FD), Forest Protection Department (FPD), Agriculture and Forestry Extension Department (AFPD), Department of Agro-Forestry Product Processing and Rural Industries, and Legal Department.
- ... Provincial level: Department of Agriculture and Rural Development (DARD), Sub-FD, Sub-FPD, Extension Centre.
- ... District level: Agriculture and Rural Development Unit or Economic Unit, District Forest Protection Unit.
- ... Forestry research, training and education organizations under MARD and outside the control of MARD.

The second group includes all those directly involved in forest protection and utilization:

- ... State actors: State-owned enterprises (SOEs), management boards of protection forests (MB-PFs), management boards of special-use forests (MB-SUFs).
- ... Private actors: Individuals, households and joint ventures/private enterprises.
- ... Collective actors: Collectives and communities whose members have similar forest rights and responsibilities as other actors.

The following table summarizes the key features of statutory law and customary practices in Viet Nam and their implications for different governance issues. Note that though customary laws and practices vary between ethnic groups and localities, they do share some common principles. These are drawn out in the table, which summarises the most common norms and practices found in the study.

## Extra-sectoral influences

Besides statutory and customary law (and law enforcement), a range of government policies and other influences shape forest governance in Viet Nam. These include macro-economic policies and the policies of other sectors, as well as external influences such as donor policies and programmes.

Macroeconomic policies: Government policies influencing the sustainability and equity of forest management include public administration reform, state-owned enterprise reform, agricultural land tenure reform and Viet Nam's commitments as a member of the World Trade Organization.

Donor support: Financial and technical assistance from bilateral and multilateral donors has contributed greatly to developing Viet Nam's forest sector. It is unlikely,

however, that such generosity can continue very long. When donor support declines, Viet Nam will have to look to other sources of investment and start paying for expatriate technical advice.

Power relations and corruption: Unequal power relations have negative impacts on the incentives for local people to manage forests sustainably. Furthermore, corruption in forestry makes matters worse.

Poverty and poverty alleviation programmes: In the past decade, Viet Nam has halved the number of people living in poverty thanks to significant efforts by government. Challenges still remain, however, particularly for the forestry sector which has yet to make a major contribution to poverty alleviation.

## Forest governance under statutory laws and customary practices

Governance Issues	Statutory laws	Customary practices
Categories of land tenure	Land belongs to the entire people with the state acting as the owner's representative.  Forest can be managed by state, private, and collective actors	Land tenure categories include private tenure and communal tenure. Each tenure arrangement applies to specific land types.
Use rights	Rights to exploit and enjoy the utilities of the forest granted to forest owners	Belong to community members on 'first-come, first-served' basis; granted to outsiders on ad hoc basis
Access rights	Rights to walk in the forest granted to all people except in specific cases	Equal access rights to all community members. Flexible on access rights for outsiders.
Control rights	Ultimate control rights belong to the state. Forest owners (state or non-state) have limited control rights within the given legal framework	Vested in community head or land guardian; community members share responsibilities for implementation
Transfer rights	Depending on the specific type of forest and tenure arrangements, forest owners may mortgage, lease, inherit or transfer land use titles	Only within the community in the case of land under private tenure. No transfer to outsiders except in special cases.
Tenure security	Vested in a forest land use title valid for 50 years	Provided when community members recognize and respect each other's rights to the resource
Benefit sharing	National and provincial legal framework governs benefit sharing from forest. Nevertheless, problems arise in implementing this framework.	Based on actual needs of community members
Fiscal and pricing measures to attract investment in forestry	Defined in the Forest Protection and Development Law, Land Law, Enterprise Income Tax Law and Value Added Tax Law	Not mentioned
Monitoring of law enforcement	FPD system	Customary leaders
Accountability	MARD responsible for the whole country, People's Committee responsible within its territory	Customary leaders
Sanction of violations	By law	By customary leaders

## Stakeholders, economics, law and forest governance

In principle, the legal mandates of all forest stakeholders create incentives for legal forestry activities which will provide benefits for society as a whole. Nevertheless the lack of capacity to carry out assigned responsibilities, coupled with problems in coordination and cooperation among stakeholders, still leave plenty of room for illegal activities. Furthermore, strong economic incentives for state officials to abuse their power have aggravated the problem of illegality.

Currently, land tenure (as defined by either statutory or customary laws) provides both incentives and disincentives for illegal forest activities. The disincentives for illegal activities stem mainly from the (potential) benefits that laws offer and the threat of losing valuable assigned rights. The incentives stem partly from gaps and inconsistencies between the two systems, for example the lack of recognition for traditional rules under statutory law.

In terms of benefit sharing, the mechanisms proposed by both statutory and customary law do not work as expected. In the case of the statutory mechanism, the main drawbacks are a lack of clarity and potential unfairness to local people. The problem with customary benefit-sharing arrangements is their lack of formal recognition under statutory law.

Similarly, the participation of various stakeholders in decision making regarding local forest resources has various inequities. In most cases, local elites still dominate the decision-making process and shape the distribution of forest benefits to their interests.

Other causes of illegal activities, either intentional or unintentional, include the limited knowledge of local people about existing legal requirements, the rapid and frequent changes in Viet Nam's legal framework, the absence of a clear system of monitoring law enforcement, and a lack of remuneration for the economic losses due to legal compliance.

Illegal activities that could be legitimized by formal laws and rules include clearing forest for subsistence cropping and claims of customary forest ownership by local people. These traditions are generally not recognized by statutory law.

## Recommendations to SVBC

- ... Support meaningful devolution of forest management: Despite ongoing forest devolution, the regulations governing forest use are still restrictive and the ownership of forest resources by local people remains nominal. To make forest devolution more meaningful, not only should rights to the forest be devolved but also the authority to decide on forest resource management (taking into account existing traditional governance structures). Timely support should be provided to build the capacity of local people to exercise their rights and responsibilities.
- ... Contribute to the revision of benefit-sharing policies and procedures: Ensure that existing mechanisms are clarified and understood by the affected parties. The content of benefit-sharing policies should be reviewed and practical procedures developed to allow local people to legally harvest forest products from their allocated forests and market or otherwise use them.
- ... Improve local people's access to legal information: Provide legal information in a simplified language and develop effective dissemination media including radio, visual media (poster, pictures), and printed media (simplified leaflets).
- ... Improve access by small farmers to credit: Provide information on credit and assist with loan applications to VBARD and the Social Policy Bank.
- ... Encourage the private sector to help poor people: Promote the involvement of poor villagers in forest-based commercial activities as partners in planting, maintaining or protecting forests, or as contributors of forest land.
- ... Target information at key decision makers: Improve the understanding of key actors about the practices and capabilities of ethnic groups in planning, managing and commercializing forest resources when they have the rights and authority to do so.

# 1. The forest sector in Viet Nam

## Forest cover

Viet Nam is a tropical country situated on the Indochina peninsula in Southeast Asia. It covers an area of 33.04 million hectares (ha), administratively divided into 64 provinces and municipalities.

Viet Nam's 2004 Law on Forest Protection and Development (FPDL) defines forest as an ecological system comprising populations of forest fauna and flora, forest microorganisms, forest land and other biotic factors, of which trees, bamboo or typical flora are the main components with a canopy cover of at least 10 per cent. In 2005 Viet Nam had a total forest area of 12.6 million ha (Figure 1), including 10.3 million ha of natural forest and 2.3 million ha of plantations. This is equivalent to a national forest cover of 38.2 per cent (31.1 per cent natural forest and 7.1 per cent plantations).

Forests in Viet Nam are classified by use as production forests (36.3 per cent of the total forested area), protection forests (48.1 per cent) and special-use forests (15.6 per cent). Production forests are dedicated mainly to the production of timber and non-timber products, though they also contribute to soil and water protection, the main function of protection forests. Special-use forests are dedicated to nature conservation, research, tourism and cultural and historical protection.

Of the total area of natural forest, timber forests account for 78.9 per cent, bamboo forests 7.6 per cent, mixed timber and bamboo forests 6.7 per cent, and limestone forests 6.2 per cent (Table 1). Mangrove forests account for only 0.6 per cent of natural forests.

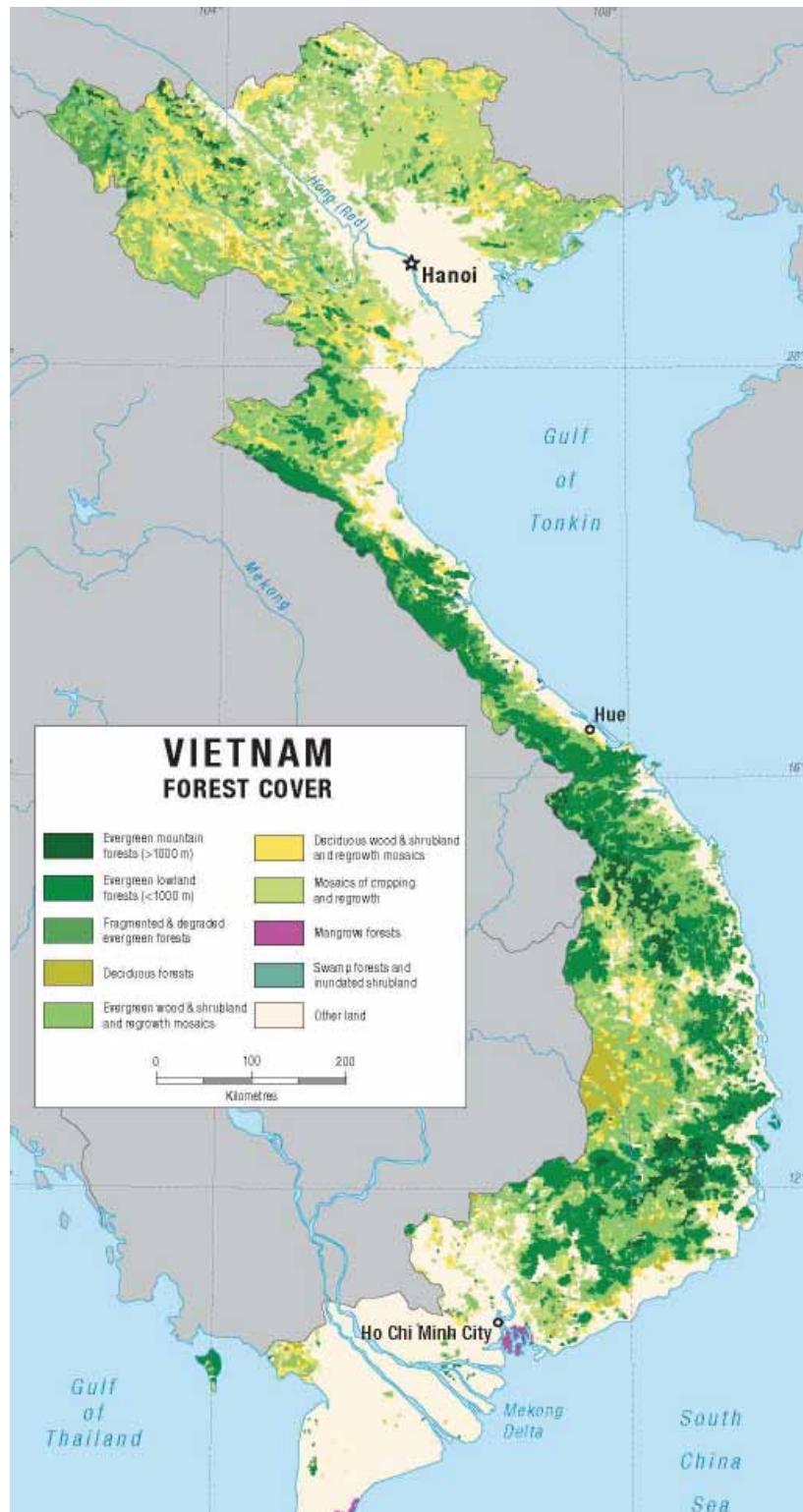


Figure 1. Forest cover map of Viet Nam.  
Source: Based on Stibig, Beuchle and Achard (2003)  
Photo: IUCN

## Forest policy and legislation

Public forest policy in Viet Nam covers forest investment, scientific research, human resource development, forest management, and forest protection and enrichment. It also includes policies supporting people in forested areas, such as forest land allocation, forest products marketing and forestry production. More than 100 legal documents in Viet Nam address forest resources protection and development.

The Constitution approved by the National Assembly in 1992 is the highest law addressing natural resources, including forests. Under the Constitution are laws related to forest resources, including the FPDL and the Land Law

(LL) of 2003. Different levels of state administration have issued various regulations and other legal documents to guide implementation of these laws.

The National Assembly is Viet Nam's highest law-making body and has the power to approve the Constitution and all laws. Beneath it is the government, which has the power to promulgate decrees and decisions to be applied throughout the country. Concerned ministries have the power to issue decisions and circulars applying to specific sectors. Locally the People's Committees at provincial (PPC) and district (DPC) level may issue legal documents governing forest resource use and management within their jurisdiction.

Table 1. Forest cover by type and category of use, 2005 (unit: ha)

	Total	Special-use forest	Protection forest	Production forest
<b>Natural forest</b>	<b>10,283,173 (81.5)</b>	<b>1,874,829 (95.7)</b>	<b>5,302,652 (85.9)</b>	<b>3,105,693 (69.2)</b>
▪ Timber forest	8,113,580 (78.9)	1,498,289 (79.9)	4,148,209 (78.2)	2,467,082 (79.4)
▪ Bamboo forest	783,667 (7.6)	83,500 (4.5)	341,889 (6.4)	358,278 (11.5)
▪ Mixed forest	684,958 (6.7)	119,118 (6.4)	314,707 (5.9)	251,133 (8.1)
▪ Mangrove forest	63,263 (0.6)	11,010 (0.6)	40,458 (0.8)	11,795 (0.4)
▪ Limestone forest	637,705 (6.2)	162,911 (8.7)	457,388 (8.6)	17,405 (0.6)
<b>Plantation forest</b>	<b>2,333,526 (18.5)</b>	<b>83,492 (4.3)</b>	<b>869,410 (14.1)</b>	<b>1,380,625 (30.8)</b>
▪ Productive forest	825,485 (35.4)	32,208 (38.6)	317,188 (36.5)	476,089 (34.5)
▪ Low productivity forest	1,209,882 (51.8)	48,133 (57.6)	468,993 (53.9)	692,757 (50.2)
▪ Bamboo forest	86,911 (3.7)	235 (0.3)	11,133 (1.3)	75,543 (5.5)
▪ Other	211,247 (9.1)	2,915 (3.5)	72,097 (8.3)	136,235 (9.9)
<b>Total forest area</b>	<b>12,616,700 (100)</b>	<b>1,958,320 (100)</b>	<b>6,172,062 (100)</b>	<b>4,486,318 (100)</b>

Note: Proportions are given in parentheses.

Source: Forest Protection Department ([www.kiendlam.org.vn](http://www.kiendlam.org.vn)).

## Forest stakeholders and their interests

Two major groups of stakeholders are involved in forestry in Viet Nam. The first group includes actors who perform functions related to state management of forests, including developing and implementing

forest policies, strategies and laws; assigning lease rights and recovering forests; and undertaking forest inventory, demarcation and research. The second group includes all those directly involved in forest protection and utilization. The two groups are discussed below.

## State management of forests

### *Forest administration system*

The Ministry of Agriculture and Rural Development (MARD) is responsible for exercising state management over forest protection and development nationwide. Under MARD, the Forestry Department (FD) is responsible for state management

of forests<sup>1</sup>, and the Forest Protection Department (FPD) for state management of forest law enforcement and monitoring<sup>2</sup>. Besides FD and FPD, the Agriculture and Forestry Extension Department (AFPD) and Department of Agroforestry Product Processing and Rural Industries of MARD deal with forest production and processing, and the Legal Department with national forest policy.

The Ministry of Natural Resources and Environment (MONRE), through its responsibility for state management of land and overall natural resources management, has an influence on forests in Viet Nam. MONRE also coordinates biodiversity protection, though most of Viet Nam's protected areas are special-use forests under the direct responsibility of PPCs with supervision from MARD. Special-use forests established to protect cultural and historical sites are managed by the Ministry of Culture and Information in coordination with MARD.<sup>3</sup>

At the provincial level, the Department of Agriculture and Rural Development (DARD) under the Provincial People's Committee (PPC) has the role of advising and assisting the PPC in implementing state management of forests.<sup>4</sup> Under

DARD, a Forestry Sub-department (Sub-FD) exists in 34 of Viet Nam's 42 forest provinces (i.e. provinces with large areas of forest). In other provinces a Forestry Section deals with forestry issues. A Sub-FD has no specific line agency at the district level and its tasks there are handled by forestry officials of the Agriculture and Rural Development Unit (ARDU).<sup>5</sup>

The Forest Protection Sub-departments (Sub-FPDs) at the provincial level have recently been placed under DARD.<sup>6</sup> To date Sub-FPDs have been established in 59 provinces. At the district level, Forest Protection Units (FPUs) come directly under provincial Sub-FPDs. Within district FPUs, one forest ranger oversees one or more communes. Besides the regular FPUs, 45 FPUs operate under special-use forest management boards.<sup>7</sup>

At the commune level, the Commune People's Committee (CPC) is responsible for forestry tasks with assistance from the district FPU. In recent years some CPCs in upland areas have established a Commune Forestry Board to oversee forestry issues within the commune.

### *Forestry training and education*

Forestry training organizations under MARD include: five forestry vocational schools; four technical forestry schools and colleges; two management schools focusing on (re-fresher) training for in-service forestry staff; the Viet Nam Forest University, which provides forestry education to graduate and post-graduate levels; and the Forest Science Institute of Viet Nam (FSIV), which offers forestry education to doctoral level. In addition there are over 20 agriculture and forestry schools and colleges directly under the provinces, and four agriculture and forestry universities under the Ministry of Education and Training.

### *Forestry research*

The main forestry research institutions under MARD are FSIV, the Forest Inventory and Planning Institute (FIPI) and the Viet Nam Forestry University (VFU). The Agro-forestry Science and Technology Institute of the Central Highlands also conducts research in forestry sciences, and the Central Forest Seed Company is involved in research in tree seed and nurseries. Staff of national parks under MARD also conduct research in forest sciences.

### *Forestry production and commercialization*

State-owned enterprises engaged in forestry production

1 Decree 86/2003/ND-CP of 18 July 2003.

2 Decree 119/2006/ND-CP of 16 October 2006.

3 Prime Minister's Decision 08/TTg of 11 January 2001.

4 MARD and Ministry of Home Affairs Inter-Ministry Circular 11/2004/TT-LT-BNN-BNV of 2 April 2004.

5 In many districts the ARDU has been merged with other production units into an Economic Unit under DPC.

6 See footnote 4.

7 These boards are responsible for directly managing, protecting and developing special-use forests.





and commercialization include the Viet Nam Forest Corporation (Vinafor), a large state trading corporation controlling 45 member enterprises, around 319 State Forest Enterprises (SFEs), the Central Forest Seed Company and its local affiliates, and a system of more than 250 wood and forest products processing enterprises under the provinces. Vinafor has its origins in forest products trading, but in recent years has started to diversify into other sectors such as construction, manufacturing and tourism. In 2003 there were also around 40 enterprises with foreign investment and 786 non-state economic enterprises active in forest products processing.

**Forest Sector Support Partnership (FSSP)**

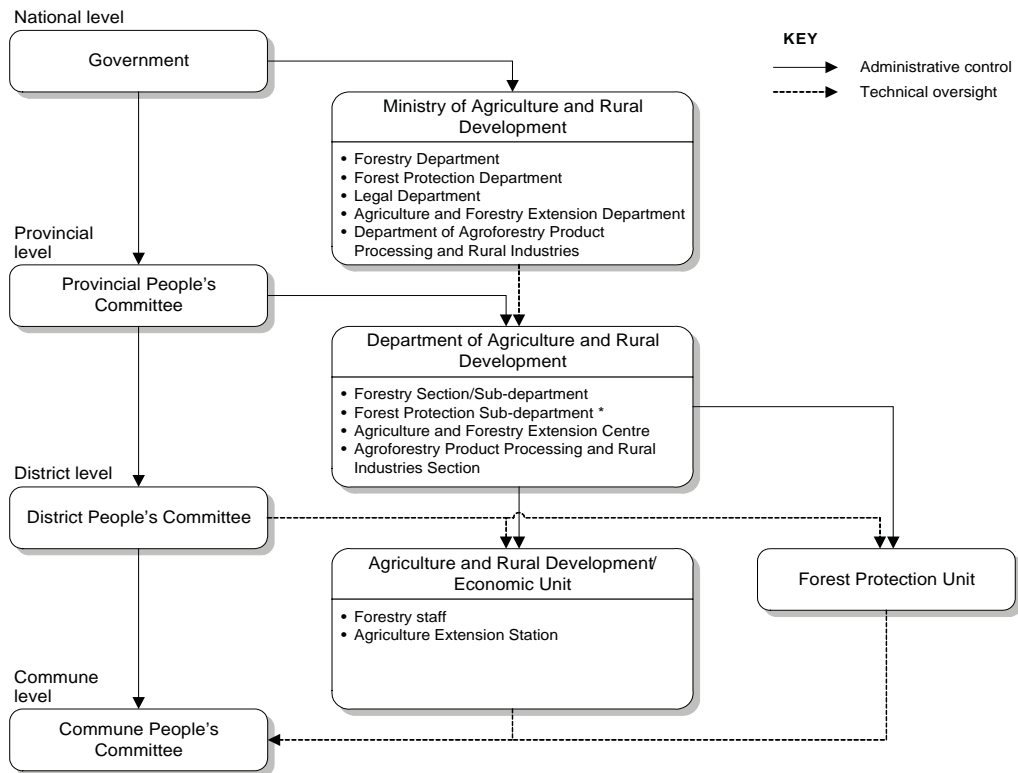
Although not a state body, the FSSP was established in 2001 to coordinate donor support for Viet Nam’s national forest sector development strategy to 2010, including the Five Million Hectare Reforestation Programme (5MHRP). Subsequently it was reoriented

to support Viet Nam’s Forestry Development Strategy 2006–2020 by promoting

information sharing, increasing policy dialogue and collaboration on important forest sector issues, and maximising effective use and mobilisation of resources. It currently has 24 international partners.

Through the Trust Fund for Forests (TFF), a grant facility created in 2004 with funding from five European bilateral donors, the FSSP channels support to initiatives that: strengthen systems of forest governance and management in a systematic and sector-wide way; and address pro-poor and sustainable approaches to forest management at policy level and piloting at implementation level. The main initiative TFF is currently supporting is the World Bank’s Forest Sector Development Project, for which it is providing up to 9.2 million euros.

Figure 2. Organizational structure of forest administration system, 2006.



\* Sub-FPDs have recently been placed under DARD, following Decree No. 119/2006/ND-CP



Non-timber forest products collection in the bufferzone forest of Xuan Son National Park, Phu Tho Province.

Photo: IUCN

### Issues facing the state forestry sector

Although the state forestry sector has been quick to adjust to emerging issues such as social forestry, devolution of forest management to local people, and integrating poverty alleviation measures into forestry activities, it still faces a number of challenges.

- ... Unclear legal framework: Many legal documents can be interpreted in different ways, largely because of their complicated language. Decision 178/2001/QĐ-TTg, for example, is meant to regulate the entitlements and obligations of forest owners, but most people find the formula for calculating benefits for specific owners too complicated to understand.
- ... Inconsistencies between different legal documents: Some provisions in different legal documents are contradictory. For example, local communities are legally recognized as owners of forest under the FPDL
- ... but not under the 2005 Civil Code.<sup>8</sup> Another example is the contradiction in the responsibilities of the PPC. According to Resolution 08-NQ/TW of 2002 on judicial reform, “[the] PPC is responsible for provincial strategy/plan development”, whereas under Article 18 of the FPDL, “[the] PPC must submit [its] strategy/plan to MARD for appraisal.”
- ... Overlapping roles and weak coordination between forest agencies: The existing separation between the FD and FPD systems at national, provincial and district levels creates delays and high costs because of inefficient coordination. Decree 119/2006/ND-CP aims to improve provincial coordination by putting

Sub-FPDs under DARD. Nevertheless coordination problems still exist at national and district levels.

### Forest protection and utilization

The actors involved in forest protection and utilization in Viet Nam can be divided into three major sub-groups: state actors, individual actors and collective actors. These correspond to the three main forest tenure types: public, private and collective. State or public tenure actors include state-owned enterprises (SOEs), management boards of

protection forests (MB-PFs), and management boards of special-use forests (MB-SUFs). Forest land and forests are allocated to state bodies for an unspecified period of time. For the special-use and protection categories, forest actors are entitled to receive a budget from the state for forest management.

Private tenure actors include all individuals, households and joint ventures or private enterprises. Under this arrangement, forest and forest land use rights are allocated for long-term (50 years) management or contracted on a short-term (annual) basis. Collective tenure actors are collectives and communities, whose members have similar forest rights and responsibilities to private sector actors.

Of the total forest area, about 9.1 million ha (72 per cent) are administered by state agencies (Table 2). Private actors manage about 2.9 million ha (23 per cent). Collectives and communities manage around 0.56 million ha (4 per cent).

Table 2. Forest area by tenure regime, 2005 (unit: ha)

	Natural forest	Plantation forest	Total
Owned by state actors	7,862,663 (76.5)	1,273,054 (54.6)	<b>9,135,717 (72.4)</b>
Owned by private actors	1,919,472 (18.7)	1,002,041 (42.9)	<b>2,921,513 (23.2)</b>
Owned by collective actors	501,038 (4.9)	58,432 (2.5)	<b>559,470 (4.4)</b>
<b>Total</b>	<b>10,283,173 (100)</b>	<b>2,333,527 (100)</b>	<b>12,616,700 (100)</b>

Note: Proportions are given in parentheses

Source: Forest Protection Department ([www.kiemlam.org.vn](http://www.kiemlam.org.vn))

<sup>8</sup> Civil Code of Viet Nam (33/2005/QH11).

In terms of natural forest, 7.9 million ha (76 per cent of the total) are publicly owned by state organizations. Private ownership is about 1.9 million ha (19 per cent) and collective ownership about 0.5 million ha (5 per cent). As for plantations, government owns 1.3 million ha (55 per cent); individuals and firms own about one million ha (43%), collectives own 58,430 ha (3 per cent). Official statistics for collective forests record only legally recognized forest rights – they exclude the area under traditional communal management (which the state does not officially recognize).

In recent years, the forest area under private and collective management has been increasing while the area under state management has been declining. This is the result of recent SFE reform and the forest land allocation programme.

## 2. Statutory law and forest governance

### Land tenure and ownership rights in forest resources

Viet Nam's Constitution mandates that land belongs to the entire people, with the state acting as their representative. The LL defines forest land as a sub-category of agricultural land. The state can transfer land use rights to different stakeholders. In the case of forests, owners may vary according to forest type and quality. Forest flora and fauna, landscapes and the environment are uniformly managed and disposed of by the state; the owners of planted production forests may be corporate, collective or individual.

#### Use rights

The FPDL defines forest use rights as "the forest owner's rights to exploit the utilities of, and enjoy yields as well as profits from, forests; and to lease forest use rights via contracts in accordance with the provisions of forest protection and development legislation and civil legislation."<sup>9</sup>

9 FPDL 2004 Article 3, Clause 6.

Rights to use forest and land belong to seven categories of forest owner:<sup>10</sup> (i) management boards for protection or special-use forests; (ii) economic organizations; (iii) domestic households and individuals; (iv) army units; (v) organizations involved in forestry-related scientific research and technological development, training or vocational training; (vi) overseas Vietnamese investing in Viet Nam; and (vii) foreign organizations and individuals investing in Viet Nam.

Communities can also be allocated use rights to forests. However, the following legal issues related to community use rights must be noted:

- The Civil Code of 2005 does not recognize the community as the subject of civil legal relationship, though legislation provides for common ownership by the community. Accordingly community members can manage, use and dispose of common property for the community's interest following agreement or custom, but not breaching law or social mores.
- The LL gives the community the same rights and responsibilities as other land users (i.e. it can exploit the utility and enjoy of the benefits of the resource), except it cannot exchange, transfer, lease or donate its land use rights. In addition, it cannot mortgage, provide guarantees or use the land under its management as a contribution to joint investment.
- According to the FPDL, the community cannot divide its forests among its members; nor can it convert, transfer, donate, lease, mortgage, or provide guarantees or contribute investment capital with the value of its assigned rights.<sup>11</sup>

The practice of land and forest allocation to village communities poses the questions of: (i) whether the community includes all households and individuals living in the village, or only a group of households and individuals; (ii) whether a village community can be allocated other forest areas beside the one satisfying the allocation conditions;<sup>12</sup> (iii) what mechanism of conflict resolution is available in case of conflicts over land and forest use between the community and other actors; and d) what mechanism is available to ensure fair sharing of benefits within the community. Such

10 FPDL 2004 Article 5.

11 FPDL 2004 Article 30.

12 FPDL 2004 Article 29. The allocation conditions include existence of the necessary technical and financial capacity, and consistency with existing forest development and protection plans.

questions reflect the inconsistency and lack of clarity in legal provisions which raise barriers to equitable and sustainable forest management in Viet Nam.

### **Access rights**

Access rights may be interpreted as rights to: (i) walk in the forest; (ii) conduct activities in the forest (such as scientific research or teaching); (iii) be assigned or leased forest use rights; and (iv) exploit forest. Vietnamese law has no specific definition of forest access rights. If access rights are interpreted as the right to walk in the forest, it is normally understood that every person has this right unless otherwise proscribed by law.

### **Control rights: rights to make decisions on how the land should be used**

According to the FPDL, the state exercises control over rights to forest land management through its authority to approve forest planning, plans, projects and schemes, land assignment, land leases, land recovery and changes in land use purpose.<sup>13</sup>

The rights to decide purpose, area and term of land and forest use belong to the state, and are exercised through the competent agencies. Forest and land users are responsible for conserving forest resources and developing forests sustainably, using forests for approved purposes within the boundaries defined in the forest allocation or lease decisions, and according to the forest management regulations. Changes in forest and land use purpose must be approved by the competent agencies.

Forest owners exercise their right to decide how forest land should be used through the right to invest for profitable use in accordance with forest land use purposes and legal provisions.

### **Transfer rights: rights to sell or mortgage the land, to reallocate use and control rights, to transmit the land Through inheritance, and so on**

Transfer rights to forest and forest land in Viet Nam are determined on the basis of the forest owner, forest category, forest tenure arrangement and level of financial responsibility for the state (e.g. levies for allocated or leased forest). More specifically, Decree 23/2006/ND-CP defines transfer rights for specific forest owners as follows:

Households and individuals have rights to transfer, change, donate, lease and inherit forest.

Domestic organizations have rights to transfer, donate and lease forest .

Overseas Vietnamese have rights to transfer, donate, re-lease and inherit forest.

... Foreign organizations and individuals have rights to transfer, donate and re-lease forest.

### **Tenure security**

By issuing (forest) land use titles, also known as Red Book Certificates or RBCs (from the colour of their cover page), the state guarantees tenure security for land users. The holder of a land use title is legally entitled to compensation from the state for any land reclaimed for public use.<sup>14</sup>

The FPDL also stipulates that forest owners will be compensated when the state reclaims part or all of their allocated forests. Compensation will take the form of allocation of other forests, assignment of land for new plantations, or compensation in kind or cash.

Security of land tenure is also provided by the 2005 Law on Investment (LI), under which the state guarantees that investment capital and the legitimate property of investors will not be nationalized or seized. This provision also applies to domestic and foreign individuals or organizations who invest in forestry in Viet Nam.

<sup>13</sup> FPDL 2004, Article 60.

<sup>14</sup> LL 2003, Article 42.

## Economic issues and instruments

### *Fiscal and pricing measures*

Fiscal and pricing measures are prescribed in forest legal instruments and laws on investment and tax. The FPDL indicates that the state is in favour of: (i) investment in protecting and developing special use forests, protection forests, national seed forests (a sub-category of production forest) and endangered, precious or rare forest fauna and flora; (ii) protecting and enriching poor-quality production forests with precious and special timber trees; (iii) developing forest products markets; and (iv) insuring planted forests and a number of forestry production activities. Tax exemptions or reductions are also applied to plantations. The value of the forest supplies the basis for calculating payments for environmental services; any levies, tax or fees; the value of rights to forest use; and compensation.

The LI lists afforestation, forest processing and environmental and ecological protection among the fields eligible for investment incentives (e.g. tax exemptions). The state also favours investment in areas with difficult socio-economic conditions. The 2003 Law on Enterprise Income Tax prescribes a preferential tax rate for income from forest protection and development. The 2000 Law on Value Added Tax specifies that: (i) products from plantation forests are not subject to value-added tax; (ii) a 5 per cent tax rate is applied to specific unprocessed products from natural forests; and (iii) a 10 per cent tax rate is applied to timber and non-timber forest products (the standard rate is 10 per cent).

### *Credit institutions*

In principle, credit for forestry development activities is available from commercial banks. In practice, most of the lending is provided to medium-scale or large-scale clients. Among credit institutions, only the Viet Nam Bank for Agriculture and Rural Development (VBARD) has a branch office in every district of the country. VBARD also offers favourable credit terms for reforestation loans. Smallholder farmers find access to bank credit cumbersome and often choose to obtain formal credit via development projects or programmes (such as the national 327 Programme), or through local organizations such as women's unions or farmers' associations.

### *Anti-corruption*

Corruption in the land and forest sector is tackled by provisions for ensuring clarity and transparency in: (i) setting up and adjusting land use plans; (ii) compensating forest owners for land recovery; (iii) certifying land use rights; and (iv) assigning subjects land to build residential houses.<sup>15</sup> In addition, the 2005 Anti-Corruption Law requires that officials and civil servants declare their assets and income, including land use rights, through an assets inventory.<sup>16</sup> Those who abuse their powers and break the law shall, depending on the nature and seriousness of their violations, be disciplined or subject to penal liability according to legal provisions.<sup>17</sup> The 1999 Penal Code lists money laundering under the crime of legalizing money or property obtained through the crime (Article 251). In Viet Nam, such activities often involve assigning forest land use rights in the name of family members. The maximum penalty for such a crime is 15 years imprisonment. Convicted offenders may also be fined, have their property confiscated, or be barred from holding certain posts or practicing certain occupations for up to five years (see Compliance and enforcement below).

### **Trade measures influencing the use of forest lands and forest resources**

To preserve forest resources, the state prohibits commercial exports of: (i) round logs and sawn timber from domestic natural timbers; and (ii) specimens of wild endangered, rare and (economically) precious forest fauna or flora (a permit from the Viet Nam CITES management agency is required for non-commercial exports).<sup>18</sup> The use of timber from natural forest to produce fine art products for export is permitted.<sup>19</sup>

The state encourages the import of timber to reduce demand for domestic timber. The lowest rate of import tax is applied to imported round logs, sawn timber and products made from imported timber.<sup>20</sup> For timber the current

import tax rate is 0–10 per cent.

<sup>15</sup> Law on Anti-Corruption 2005, Article 21.

<sup>16</sup> Law on Anti-Corruption 2005, Article 45.

<sup>17</sup> LL, Article 141; FPDL, Article 86.

<sup>18</sup> Decree 82/2006/ND-CP, Article 5.

<sup>19</sup> Decision 1124/1997/QĐ-TTg.

<sup>20</sup> Resolution 977/2005/NQ-UBTVQH.

## Access to information, public participation and benefit-sharing

### *Access to information*

The government (under FPD) prescribes and publicises information on endangered, precious and rare forest plants and animal species, and their management and protection. MARD is responsible for prescribing and publicizing information on exploiting forest plants, hunting, banned or restricted tools and methods, minimum sizes and seasons allowed for exploitation and hunting, and areas where exploitation is banned. Information on land use, forest protection and development plans must be publicized by People's Committees at all levels, land management offices and in the media 30 days after their approval.<sup>21</sup> The prescribed land prices are publicized by

the PPC at the beginning of each year.<sup>22</sup> Forest owners can also access information on forests and forest land

use and management through cadastral dossiers, books, maps and others sources. In practice, however, public access to forest and land information is limited. Existing laws do not impose any sanctions for obstructing public access to forest and land information.

### *Public participation*

Forest protection is the responsibility of the entire people. Consequently state agencies, organizations, communities, households and individuals must protect forests and strictly abide by forest protection regulations. There is, however, no specific provision for participation by local communities (as social forces) in forest and forest land management. The FPD states that "forest development planning and plans must be democratic and public".<sup>23</sup> The LL is also vague, stating "in the course of elaborating detailed land-use planning, the agencies in charge must gather comments from people".<sup>24</sup> Decision 106 of MARD<sup>25</sup> guiding community forest management prescribes detailed participation of the village community



Villagers in Van Yen Commune, Van Don District, Quang Ninh Province participate in a participatory rural appraisal exercise to plan for the locality development.

Photo: IUCN

in forest allocation, forest management planning, plan elaboration and implementation of plans, as well as their rights and responsibilities in implementation, supervising and assessing forests allocation by the state (Article 3). However, participation is limited in scope to communities in 40 communes of 10 provinces piloting the community forestry guidelines.

### **Benefit sharing**

Benefit sharing in forest protection and development follows the common principle of “ensur[ing] the harmony between the state’s and forest owners’ interests; between the economic benefits of forests and the interests of protection, environmental protection and nature conservation; between the immediate and long-term interests, ensuring that forestry practitioners can live mainly on forestry”.<sup>26</sup>

Concrete provisions for forest benefit sharing are set out in Decision 178 of the Prime Minister.<sup>27</sup>

#### Benefit sharing from forest (land) allocated or leased by the state:

Depending on the forest type (i.e. special-use forest, production forest or protection forest) households and individuals owning forest may obtain benefits from the operation of certain services, harvest of forest products (including NTFPs such as fuelwood and bamboo, and house-building materials), and state funding for management, protection and development services. Based on the source of funding, forest owners are also entitled to share (with the state) the value of timber products after tax:

- i) Special-use forests allocated to households for management, protection and development: benefits include state funding and permission to conduct scientific research and cultural, social or ecotourism activities.
- ii) Protection forests allocated to households: benefits include state funding for management and protection, permission to harvest NTFPs (including fuelwood and bamboo), permission to use no more than 20 per cent of the unforested land for agriculture or aquaculture, and selectively harvested timber

(85–95 per cent of the value after tax), provided a minimum forest cover of 60 per cent is maintained.

- iii) Production forests allocated to households: benefits include state funding for investment; permission for intercropping, cattle grazing, collection of NTFPs and timber for housing; and entitlement to a share of the value of timber products after tax. The specific share varies from 75–100 per cent depending on the source of investment funding or, in the case of natural forest, the state of the forest at the time of allocation.

#### Benefit sharing from forest contracted for restoration through regeneration or plantation

Depending on the type of forest, households or individuals contracted by the state receive funding for plantation, restoration, protection, and regeneration activities. They are also allowed to harvest NTFPs such as flowers, fruits, oil and resin, and to use part of the unforested forest land for agriculture or aquaculture. Selective logging is also allowed, and the contracting households are entitled to a share of the timber value after tax.

Since most contracted forests have not reached maturity, the provisions for sharing the value of timber products under Decision 178 have yet to be implemented. Further, when Decision 178 was issued in 2001, forest contracting to village communities had yet to start. As a result the Decision does not specify the mechanism of benefit sharing for communities.

#### Benefit sharing for plantation forests in Thua Thien Hue province

The PPC in the study province of Thua Thien Hue (see Figure 1) has exercised its right under Decision 1430/2006/QD-UBND to regulate benefit sharing for plantation forests established with investment support. This Decision applies to all plantation forest established with state support (e.g. under the 327 Programme, 5MHRP or plantation projects with local government financing), or donor support for which no benefit-sharing policy is specified. Under the Decision the state is entitled to 65 per cent of the benefits from the forest after deducting all costs of establishment, management and harvesting. Another 3 per cent is allocated to the CPC of the commune where the plantation is located. The remaining 32 per cent is distributed between the forest owner and households contracted for planting

<sup>26</sup> FPDL 2004, Article 9.

<sup>27</sup> Decision 178/2001/QD-TTg.



and tending. Many affected households, however, have expressed a preference for the benefit-sharing provisions of Decision 178.

## Compliance and enforcement

### *Jurisdiction of statutory authorities and penalties imposed*

The measures available to tackle violations of forest law include administrative sanctions, penal sanctions and civil actions. FPD has the role of protecting forests and assisting MARD and the chairmen of People's Committees at all levels in exercising state control over forests and ensuring forest law compliance. Forest owners may also organize forest protection staff,<sup>28</sup> though these have no authority to handle legal violations.

The administrative jurisdiction of FPD covers fines of between 5 and 1,500 euros (VND 100,000 to 30 million) depending on staff level (forest protection agent to Director of FPD). The Chairman of the People's Committee may also levy fines of between 25 and 1,500 euros (VND 500,000 to 30 million) depending on the level from commune to province. Supplementary sanctions may also be applied, including confiscation of forest products, vehicles or other materials used in relation to the offence, restoration of damaged forest, and compensation for damage caused.

Penal jurisdiction against forest crime lies with the court of the district where the crime is committed. Civil violations of forest law are the responsibility of the People's Court at each level. The 1999 Penal Code stipulates a maximum penalty for the crime of destroying forests of 15 years imprisonment and a fine of 500 euros (10 million VND).

Violations of forest law are frequent. In the first ten months of 2006, for example, over 32,000 cases were reported, mostly for minor violations.<sup>29</sup> The basis for determining damages, especially damage to natural forest, is not defined, which hinders determination of the severity of forest law violations.

### *Defining illegal activities*

Decree 159/2007/ND-CP of 30 October 2007 defines the following illegal activities as administrative violations in the forest sector: illegal deforestation, illegal exploitation of timber, illegal exploitation of firewood or other forest products, and illegal burning of forest for swidden cultivation beyond the prescribed area.

### *Accountability of statutory authorities*

The accountability of forest protection systems and staff is regulated by FPD and Decree 119/2006/ND-CP on the organization and operation of the forest protection system. MARD implements nationwide state control over forest protection and development, and directs and supervises the professional activities of forest rangers at all levels. The Chairman of the People's Committee at each level exercises state management over forest protection and development, and coordinates the activities of forest rangers and relevant agencies.

Specialized agencies such as the People's Security Force, the Customs Service, the Taxation Agency, the Market Management Agency and the Specialized Inspectorate coordinate with FPD in supervising, inspecting and preventing administrative violations in forest management and production.

### *Dispute resolution mechanisms in forest governance*

Some disputes may be resolved by the People's Committees, but most forest-related disputes, including those related to land legislation, come under the jurisdiction of the People's Court.

### *Standing of NGOs*

Viet Nam's legislation on forest protection and development does not mention the role of the Viet Nam Father Land Front or other NGOs in forest management and protection in general, and in the domain of protecting forest owners' rights and benefits against violations of forest law in particular.

<sup>28</sup> Decision 186/2006/QĐ-TTg.

<sup>29</sup> Forest Protection Department ([www.kieclam.org.vn](http://www.kieclam.org.vn)).

## Other issues

### *Ambiguity and changes in state forestry legislation*

The system of normative legal documents for forest management is complex and subject to frequent changes. Some provisions of FPDL are still general and lack implementing guidelines. Others, including those on forest valuation, the value of forest use rights, and the value of planted production forests, are too complex to allow widespread understanding and compliance. Confusion means that local authorities are unable to implement some state policies, especially policies on changing forest use purpose, benefit sharing with households and individuals, and regeneration and forest planting.

### *Judicial decisions related to forest governance*

Numerous legal documents prescribe customary law and village codes in forest management and protection, and by implication should guide the formulation of appropriate village rules in accordance with legislation and good habits and customs. However, there is no recorded case of a trial using customary laws during the hearing process.

### *Documented cases where application of existing law has been beneficial to local forest-dependent communities*

In 2000, with support from UNDP and the Thua Thien Hue Forest Development Department, an agreement was made for pilot management of a natural forest area by Thuy Yen Thuong village of Loc Thuy commune. The agreement covered 405 ha of forest, varying in quality from medium to rich and with an average timber volume of 76 m<sup>3</sup>/ha. The village agreed to protect the forest for a pilot period of three years, after which it would receive a forest RBC valid for 50 years.

The main responsibility of the villagers is to maintain and develop the quality and quantity of the allocated forest. In return, they are entitled to extract NTFPs and share the benefits of timber harvesting with the state. In 2004, the villagers were allowed to selectively harvest 79 m<sup>3</sup> of timber for domestic use and to cover the cost of protection. Local people also harvest firewood, rattan,

and other NTFPs from the forest. Another local source of income is fees collected from forest visitors.

## 3. Customary law and forest governance

### The customary tenure system

Customary tenure may be understood as the access, control and use of land according to long-standing principles operating outside the formal legal system. It is associated with traditional land administration institutions and customary law defining how rights are ruled, allocated and preserved. In this sense, gaps and inconsistencies exist between statutory law and policies and customary land tenure in upland areas. Literature reviews and field studies confirm that the concept and practice of customary law in forest land tenure play an important role in Viet Nam's rural communities. The conflict between current government policies and traditional conceptions of land tenure and use rights is considered to be one of the major causes of the many conflicts and disputes in Viet Nam's upland regions during the past decade. Land and forest administrators at different levels are sometimes unaware of the role and significance of customary systems for controlling land and resources, and their lack of knowledge limits the extent to which the positive features of customary norms and rules can be incorporated into formal land management practices.

### *Existing categories of land tenure*

Traditionally villages were the units that owned or had collective rights to use land and forest resources. The territory of a typical village community covered some or all of the following types of land:

- ... Residential land: where villages were established and villagers' houses and communal structures built.
- ... Forest land in use: where village members were allowed to farm.
- ... Intact forest land: primeval forest, rocky mountains or regenerating forests (fallow swiddens).

Forbidden forest land closed to use, including watershed protection forests, cemetery forests and sacred forests (where communities worshipped their gods).

The new formal land tenure regime known as “public ownership of land” includes four types of tenured land in upland areas.

Land used by state organizations, military units and economic organizations.

Land allocated to households or groups of households (or communities) for a limited term of use.

... Land under management by communities, including mainly sacred forests, cemetery forests and community-controlled forests.

... Unused land under state management.

Under this regime traditional community land ownership and use rights have been transferred to households and economic organizations. Customary land use rights have been restricted. Most of the land and forest resources previously owned by communities has been allocated to other organizations or economic entities. Conservation forests and national parks, for example, are zoned and strictly protected with little or no collection of forest products allowed.

### **Use rights**

Customary law has relatively clear regulations on the use rights of community members. These rights can be summarized as follows:

... Forest land and resources are owned by the entire community. They can be used and exploited by community members, who are treated equally in terms of the use of community land. No person may sell or transfer forest land to outsiders. When a community member leaves the village, their community land use rights expire.

... The invisible and supreme owners of forest land and resources are the gods. All land users must respect the gods who govern the land and all it contains. Those who pollute the land by breaking customary rules are penalized and required to apologize to the gods to avoid collective punishment of the entire community.

... Almost all villages have forbidden forests, including mainly watershed protection forests, sacred forests and cemetery forests. The remaining forest is accessible to community members on the principle of “first-come, first-served”. Such assertion of individual land use rights in the community is a common convention fully acknowledged by community members. This practice remains common in customary communities, particularly when forest is cleared for swidden cultivation.

... Wet rice fields, terraced fields, dry rice fields and household orchards can be exchanged, sold, mortgaged and inherited among community members.

... Forest resources other than land, including forest products and water sources, are communally owned and can be used by all community members. Outsiders may exploit these resources only with the permission of the village chief.

... Village chiefs and community land guardians are responsible for controlling, protecting and resolving all land-related conflicts, and representing their communities in ritual sacrifices to the gods whenever customary law is violated.

### **Non-monetary customary mechanisms**

Customary law in Viet Nam is built on the basis of the subsistence economy and communal use of land and forest resources. It rarely stipulates fees (monetary or non-monetary) for allowing exploitation, exchange, transfer or lending among individuals or organizations related to the use and exploitation of forest resources. Indeed, introducing monetary considerations may not be in the interests of customary law.

Incentives for complying with customary norms

Customary norms are usually based the following foundations:

- a) Conciliation among community members is the first priority in tackling violations of customary norms.
- b) The common agreement and self-awareness of all concerned parties must be respected rather than coerced.

- c) Religious beliefs have the role of monitoring and controlling individual and communal activities.

Judgement of customary law is normally flexible, and is intended mainly to raise the self-awareness of the violator and encourage better behaviour based on moral principles. The severest penalty is expulsion from the community, which dispossesses violators of the benefits and protection of the community.

## Participation and sharing information and benefits

### *Information*

The traditional social network based on neighbourhood and family plays an important role in bringing information to every community member, including those who are illiterate. Official information is disseminated through new forms of communication such as clubs, communication houses and mobile communications groups which can more easily approach the literate and young people. Young literate people tend to be better informed about forest policy and law than elders and women. Legal and policy documents related to forest land management are frequently revised, however, and the complex language used in official documents is not easy for local people to understand.

### *Participation*

The hierarchical nature of traditional societies still prevails in customary groups today, affecting decision making on land and forest resources. Village chiefs and elders play a decisive role or may influence the views of other community members. In contrast, the statutory law system and formal government regulations are primarily obligatory and compulsory. In this respect, the decisions made on the basis of customary law may be seen as more participatory.

The participation of women in decision making in ethnic communities, especially in traditionally matriarchal systems, has weakened in recent decades. This decline has been influenced by policies such as that which until recently granted land use rights solely to the husband as the household head, and the high rate of illiteracy among women in upland communities.

### *Benefit sharing*

Forest-dependent communities regard the forest as a source of livelihood supplying all of their necessities under customary governance. As mentioned above, every member has the right to use forest resources based on principle of "first-come, first-served". Since the state claimed ownership over land and forest resources, and set up organizations to manage the land, there has been a growing tendency in many communities to break customary regulations on forest resource exploitation. Customary rules prohibiting hunting and cutting of trees have become less effective. The main contributory factors include increased population pressure and the perception that forests have become public rather than communal property. Where a mechanism to share the benefits from forest preservation is applied, the share between the forest guardians (communities or groups of households) and the government (forestry units and local authorities) is poorly defined and communities receive only a minor share.

## Compliance and enforcement

### *How illegal activities are defined*

In general, the behaviour of people in customary communities is adapted to both statutory law and customary law. In forest-dependent communities, illegal activities are defined as any violation of the agreed laws relating to forest management, including both the statutory law enforced by the state and the customary law enforced by traditional authorities. Like statutory law, customary law also defines as illegal any direct violations such as cultivation of land under other guardianship, theft of rice and farm produce from cultivated fields, and unconventional forest land trading. However, customary laws may also consider as land-related some social transgressions that could provoke the anger of land gods.

### *Enforcement authority*

In customary communities, traditional leaders such as the village headman, land guardian, council of elders and family heads are responsible for enforcing customary principles and rules. Traditional leaders are not recognized by government but their power and decisions are still widely recognized by community members.

**Penalties for illegal activities**

Customary law applies basic concepts such as guilt, witness, material evidence and the accusation principle (i.e. no investigation can take place without a complaint or indictment). Penalties may include warnings, material compensation, religious rituals to redeem the crime, and lowering of personal dignity from a free citizen to family slavery or banishment from the community. Capital punishment or torture is not applied.

**Dispute resolution mechanisms**

Dispute resolution is a key function of indigenous governance systems in most of Viet Nam's upland communities. The community headman, together with the council of village elders and family heads, plays a decisive role in solving conflicts. The elders' judgments are usually considered final. The important principles of dispute resolution by customary norms are: (i) maintaining social cohesion within the community; (ii) maintaining traditional norms and practices; and (iii) showing respect to the gods.

**Accountability of customary authorities**

The customary community leader is usually nominated by the elders and heads of clans by means of election or recommendation by the council of village elders. The community leader is accountable to the council, who can ask the leader to resign and instruct the village to elect a new leader.

**Other issues**

Although forest policy makers and administrators at various levels generally recognize the existence of customary law, many view it as an obstacle rather than an aid to implementing statutory law on forest management and development.

In an effort to promote the transition from state management to community-based forest management, MARD issued Circular 56/1999/TT/BNN-KL guiding the preparation of regulations on forest protection and development at the village community level. This combines customary norms with statutory law and policies for forest management.

Although developed in consultation with villages, villagers often regard village forest protection regulations as another form of externally imposed statutory law, possibly inconsistent with customary rules. Most village communities have not received legal recognition of their customary forest land rights, and often see forest protection under village regulations as a means for "others" to gain financial benefit. In addition, village regulations are administered by a state-nominated village head rather than customary village leaders.

**There are three important areas where customary norms and statutory laws vary:**

- Rights of exclusion: under customary law the community has the right to exclude outsiders or to allow use rights at its discretion. In principle, under statutory law the rights holder can exclude access and use by others. In practice this may conflict with customary use, and enforcement may require government intervention. Outsiders may exploit the lack of government enforcement of statutory rights. This results in weakened tenure and a breakdown in traditional management systems, leading to forest degradation.
- Benefit sharing: customary law regards benefit sharing among community members as an internal matter, and the rights of withdrawal as belonging to the community. By contrast, statutory rights are regulated by state regulations, which are often vague, impractical, inflexible and non-negotiable.
- Land use: customary laws allow the community to determine the use of land within the forest land area. Under statutory regulations, users are not free to change the use purpose of land allocated to them. Clear management rules are needed to control the potential conflict between the two systems.

Improved knowledge of customary norms and better understanding of customary practices among forest administrators, policy makers and the economic institutions working in forestry would enhance the forest management and policy making process.

## Cases where following customary law has been beneficial to local forest-dependent communities

In 2004 the MacArthur Foundation supported the allocation of forest in Phong Dien Nature Reserve, Thua Thien Hue province, to local people to strengthen community capacity for natural forest management. Local people were invited to participate in the full process of forest allocation, including planning, surveying, proposing benefit-sharing policies, knowledge sharing and setting up a forest protection team. Local knowledge on forest management and customary norms and practices were included in the public discussions. Based on the common agreement arising from these discussions, the community-based forest management and benefit-sharing policies were documented and submitted to the district authorities for approval.

The community-based forest management pilot received a positive response from villagers who were able to obtain forest land rights and benefits similar to their traditional customary tenure. Forest lands were given to local people not only for forest protection but also for farming, livestock raising and other purposes on the condition that these did not hinder natural forest development. Local people involved in the project have directly benefited from the forest in terms of timber and NTFPs. Other key benefits include:

- Local villagers are recognized as the real users of forest. To some extent, their knowledge and customary norms are respected.
- Benefit sharing and rights and obligations to protect and develop the forest are regulated on the basis of common agreement and willingness.
- More employment has been created for local people through such activities as protecting and developing the forest.

- Illegal activities have been closely monitored by local communities, who have thereby reduced unauthorised logging and farming without requiring government to pay for forest protection.

### *Some shortcomings include:*

- ... Forest land was allocated to a group of households rather than the whole community. Excluded households were unable to participate in the project because of a shortage of social and human resources.
- ... Villagers have to wait several years before the forest can be exploited, but most lack immediate sources of income.
- ... The benefit-sharing mechanism is relatively general because government policies are still vague and inflexible.

## 4. Forest governance under statutory law and customary practices – a comparison

The following table summarizes the key features of statutory law and customary practice in Viet Nam. Though customary laws and practices vary between ethnic groups and localities, they do share some common principles. These are drawn out in the table, which summarises the most common norms and practices found in this review.

Table 3. Forest governance under statutory law and customary practices

Governance issues	Statutory laws	Customary practices
Categories of land tenure	Land belongs to the entire people with the state acting as the owner's representative.  Forest can be managed by state, private, and collective actors	Land tenure categories include private tenure and communal tenure. Each tenure arrangement applies to specific land types.
Use rights	Rights to exploit and enjoy the utilities of the forest granted to the forest owners	Belong to community members on 'first come first served' basis; granted to outsiders on <i>ad hoc</i> basis
Access rights	Rights to walk in the forest granted to all people except in specific cases	Equal access rights to all community members. Flexible on access rights for outsiders.
Control rights	Ultimate control rights belong to the state. Forest owners (state or non-state) have limited control rights within the given legal framework	Vested in community head or land guardian; community members share responsibilities for implementation
Transfer rights	Depending on the specific type of forest and tenure arrangements, forest owners can mortgage, lease, inherit or transfer land use titles	Only within the community in the case of land under private tenure. No transfer to outsiders except in special cases.
Tenure security	Vested in a forest land use title valid for 50 years	Provided when community members recognize and respect each other's rights to the resource
Benefit sharing	National and provincial legal framework governs benefit sharing from forest. Nevertheless, problems arise in implementing this framework.	Based on actual needs of community members
Fiscal and pricing measures to attract investment in forestry	Defined in FPD, LL, Enterprise Income Tax Law, and Value Added Tax Law	Not mentioned
Monitoring of law enforcement	FPD system	Customary leaders
Accountability	MARD responsible for the whole country, People's Committee responsible within its territory	Customary leaders
Sanction of violations	By law	By customary leaders

## 5. Wider socio-economic influences on forests and livelihoods

A range of government policies and other influences shape governance in the forestry sector. These include macro-economic policies and the policies of other sectors, as well as external influences such as donor policies and programmes. These are reviewed briefly below.

### Government policies

A Public Administration Reform (PAR) Master Programme for 2001–10 focuses on: (i) institutional reform, (ii) organizational structure reform, (iii) renovation and improvement of the quality of cadres and civil servants, and (iv) public finance reform.

In the forestry sector, reform of the SFE system will organize SFEs into either commercial business enterprises or MB-PFs, or they will be liquidated. Around 226,000 ha of forest land have been reallocated from SFEs to local authorities, which can be devolved to non-state sectors including households and communities.

Tenure reform in the agricultural sector of Viet Nam was initiated in 1981 and accelerated in 1988 with the intention of providing farmers with land as a necessary means of production for household economic development. Promulgation of the Land Law in 1993 provided tenure rights for annual and perennial crops of 20 and 50 years respectively, and extended the rights to cover:

- Inheritance of land use rights.
- Transfer, lease or exchange of land use rights.
- Pledge of land use rights as security (or collateral) to individuals or banks.
- Compensation from government in case of dispossession or seizure of land.

In 1998 the Vietnamese government implemented grassroots democracy at the commune level by creating a legal framework to promote community participation. Local people must be informed of commune plans, budgets, expenditure reviews, reviews of Commune People's Council and Committee activities, and other information. Further direction was given in 2003 to accelerate the implementation of democracy at the grassroots level.

The Fixed Cultivation and Sedentarization programme aims to stabilize over three million people engaged in shifting cultivation, stop the destruction of forest resources and so increase forest cover. Programme activities focus mainly on forestry (e.g. plantations, restoration of forests and tending of existing natural forests) and agriculture (construction of model farms, cultivation of industrial crops and introduction of high-yielding varieties) to facilitate the transition from swidden agriculture to more permanent systems of cultivation.

Viet Nam joined the World Trade Organization (WTO) in January 2007. Although membership of WTO creates opportunities for Viet Nam to boost its economy, the challenges include: increased competition for domestic producers from more open international trade; improvements required to the legal system to comply with international practices; and requirements for sustainable use of natural resources. Each of these challenges has the potential to influence forestry sector management and governance.

## Effect of donor support and the consequences of its cessation

Since the beginning of its reform process in the early 1990s, Viet Nam's forest sector has received substantial support from international donors. This has contributed to its achievements in reforestation, forest employment, forest protection and conservation, forest industry and the shift to social forestry regimes. Although support from donors remains high (18 per cent of the total investment in forestry in 2005), recent trends show that it is declining. This decline is expected to accelerate as Viet Nam joins the group of medium-income countries, and could have major consequences such as: reduced funds for forestry activities, phasing out of support for capacity building in the forestry sector, loss of technical advice from donor-supported projects, and reduced influence of donors in forest governance.

## Poverty, inequity and gender

### *Poverty and poverty alleviation*

Although Viet Nam has made substantial progress in reducing the number of people living in poverty, the national poverty rate is still high (19.5 per cent in 2004). A national Comprehensive Poverty Reduction and Growth Strategy (CPRGS) was approved by government in May 2002.<sup>30</sup> The CPRGS recognizes agriculture and rural development as crucial components in poverty reduction, given that 77 per cent of the population and 90 per cent of the poor live in rural areas, while 70 per cent of rural income is derived from agriculture. For the forestry sector,

the CPRGS aims to raise the quality of forest protection work, forestation, and reclamation of barren land and hills, while increasing national forest cover to 43 per cent by 2010. The strategy emphasizes devolution of forest and land to local people and participation of the rural poor in forestry activities.

<sup>30</sup> Document 2685/VPCP-QHQT of 21 May 2002.





Women play a greater role than men in house work in Viet Nam, especially in rural areas

Photo: IUCN

In 1998 the government launched a Programme on Socio-economic Development in Especially Disadvantaged Communes in Mountainous, Isolated and Remote Areas (also known as Programme 135). This aims to: (i) strengthen the spiritual and material life of ethnic minorities in particularly remote and under-developed communes; and (ii) create conditions to help these areas grow and reduce poverty. The programme was implemented in 1,715 communes between 1998 and 2006.

The link between forest and poverty is not clear in these national programmes. Both lack clear forest-related

objectives and guidance on the forestry measures to be taken to tackle poverty in the upland regions.

Future challenges for poverty alleviation:

The poverty reduction rate varies across regions. The two poorest regions of Viet Nam (the Northwest mountains and the Central Highlands) have a lower rate of poverty reduction than the national average. Around 25 million people (with nine million poor) live in the upland forest regions of Viet Nam. The distribution of poverty is correlated with the distribution of forest resources. Yet it is still unclear how forestry can be targeted to better contribute to poverty alleviation.

**Gender and inequity**

UNDP's Human Development Report 2006 assessed Viet Nam as having a medium level of human development with a relatively low rate of gender inequality. Nevertheless, women still play a greater role than men in family work in Viet Nam, with 71 per cent of the work done by women. Women also have lower rates of literacy (86.9 per cent in 2004 compared with 93.9 per cent for men), and fewer girls receive a general education. About 72.4 per cent of women are currently engaged in income-earning activities, whereas 78 per cent of men are economically active. The per capita income of women is 70 per cent that of men in Viet Nam.

**Stakeholders, economics, law and forest governance**

Economic incentives can play an important role in encouraging legality in the forest sector. Strong economic incentives can also lead to illegality, however.

**Legal forest mandates and (il)legal activities**

In principle, the legal framework for forestry in Viet Nam aims to promote social justice and legality. However, insufficient capacity to realize the functions assigned by law has led to the accumulation of power by certain organizations and individuals. The FPD, which is in charge of forest law enforcement and has staff at the commune and village level, is also required to undertake state forest management in most villages because of a lack of FD staff.

Weak coordination and cooperation between organizations with different mandates, particularly across sectors, tends to encourage illegality. Although FPD is in charge of apprehending violators of forest laws, without the cooperation of other sectors such as the police or army they would be unable to arrest aggressive illegal loggers who are organized and armed.

Furthermore, strong economic incentives to abuse legal authority, coupled with the poor self-discipline of some corrupt officials, impede legal forestry activities and encourage illegality. Frequently reported practices include the collection of unofficial fees for approving

legitimate harvesting and timber transport operations, or for permitting illegal logging and forestry activities. In many instances local officials, including those in the forest production (i.e. SFE) system and in state management (i.e. FD and FPD), are involved or implicated.

**Linkages between tenure, access and use rights and (il)legal activities**

Direct benefits from forest resources are an important incentive for tenure right holders, both individual and corporate, to pursue legal activities. The FPD and LL allow forest and land users who comply with statutory laws to derive long-term benefits from their allocated forest resources.

By contrast, the lack of tenure rights to natural forest has acted as a disincentive for local people to prevent illegal appropriation of forest resources.

Further, the gaps between existing statutory and customary laws pose a threat to legal forestry activities. Since statutory law does not recognize traditional rules, local people who follow customary law are in fact violating the law and this practice is considered illegal.

**Mechanisms for participation in decision making and benefit sharing**

Benefit-sharing arrangements also face problems. Legally mandated benefit-sharing mechanisms (defined by Decision 178) lack clarity and provide limited economic benefits for local people. The calculation of benefits for specific owners is complicated and benefit distribution is difficult to monitor. Field implementation of the regulation has been slow. On the other hand, traditional benefit-sharing arrangements are not recognised by statutory law and may be illegal. For example, harvesting timber for housing with community approval is a legitimate customary practice. However, statutory law requires villagers to obtain a permit for harvesting from local authorities, without which the practice is considered illegal.

It should be noted that traditional decision-making processes can be dominated by local elites and result in capture of benefits from the forest.

**Compliance and enforcement mechanisms and (ii) legal activities**

The two legal systems provide disincentives to illegal activities including:

- ... The potential loss of economic benefits gained from complying with statutory laws, including the use of forest products and the possibility of renewing land use titles to continue deriving benefits.
- ... The potential loss of non-economic benefits gained from following customary law, such as the social protection afforded by the community.

Rapid changes in statutory laws and regulations mean that few people are well informed of legal requirements, resulting in confusion at the implementation level.

The statutory legal system lacks appropriate indicators for, and mechanisms for local participation in, monitoring of legal compliance. Weak monitoring and enforcement of forest regulations tend to encourage abuse of the law.

The lack of remuneration for any economic losses caused by complying with current laws or regulations can also encourage illegality.

**Power relationships and (ii) legal activities**

Backed by statutory laws and law enforcement authority, a coalition of state agencies engaged in forest management has overridden the customary laws of traditional communities. Once local people lose confidence in customary land tenure and view forest resources as public assets, they no longer feel obliged to manage forest assets legally and sustainably. Instead, they tend to take any opportunity to appropriate the resources for their own benefit.

The absence of legal recognition for customary laws has also excluded people from active involvement in monitoring of law enforcement. Monitoring and enforcement are left to state agencies, whose (forest) officials have the incentive to abuse their power for personal gain. The upwards accountability of (local) state officials also contributes to the abuse of power. Officials in higher positions demand the help of officials at lower levels who directly control the extraction and transportation of forest resources.

**6. Synthesis and Recommendations**

The assertion of state control over forests and forest land under the Constitution and statutory law in Viet Nam has resulted in the domination of forest management by government agencies. In 2005 more than 72 per cent of the total forest area was managed by government institutions, either SFEs or management boards (for protection and special use forests). A further 23 per cent was managed by private stakeholders, either private and joint venture enterprises, individuals or households, whereas only 4 per cent was formally managed by collective actors and communities.

In upland areas ethnic communities have traditionally depended on access to forest land to maintain their livelihoods through swidden cultivation and harvesting of timber (mainly for housing) and NTFPs. Customary governance systems have evolved to manage traditional forest land. These vest full ownership of forests and forest land in the community under the control of community elders and land guardians, and provide for ownership and use rights, participation of community members, benefit sharing, dispute resolution, compliance and enforcement mechanisms.

However, statutory and customary laws conflict in several important respects:

- ... Rights of exclusion: Both governance systems provide for exclusion. Conflict occurs where traditional forest land is allocated under statutory laws to outsiders or even to community households.
- ... Benefit sharing: Customary laws control benefit sharing within the community, whereas statutory law prescribes benefit-sharing methods which are complex and often leave the community worse off than customary methods.
- ... Land use: Customary law allows the community to determine land use, whereas statutory law does not permit users to change the prescribed land use.

Many upland communities continue to depend on forests for their livelihood. The forests on which they depend, however, have often been allocated to government agencies for management under statutory law. Nevertheless communities continue to follow customary practice in their traditional forest areas,

which brings them into conflict with statutory laws. Uncertainty over land tenure has led to a breakdown in traditional governance systems, contributing to over-exploitation and degradation of forests in upland areas. The situation is made worse by in-migrants who need land for livelihood support, and may be allocated forest land under statutory law. Disputes over use of forest land by ethnic communities have created serious social disturbance in recent years.

Viet Nam's government has taken steps to restore community management of forests by making provision in the LL for community-based land use rights and in the FPDL for community use rights to forests. However, there are still legal issues relating to defining communities and conflicts with, for example, the Civil Code which does not recognize the community as a subject of a civil legal relationship. Government has also initiated a trial of community forest management in 40 communes and has made provision for the development of village regulations and benefit-sharing arrangements. There are several examples of community-based forest management achieving positive results, but a number of constraints need to be resolved. These include:

- ... Complex and frequently changing government policy and regulations which limit widespread understanding and implementation of current legislation.
- ... Limited access by villagers to information on forest management regulations.
- ... Benefit-sharing arrangements which are complex and generally put communities at a disadvantage in their share of benefits.
- ... Village forest management regulations that are seen by communities as a further imposition of government bureaucracy.
- ... Regulations on harvesting, transport and marketing of forest products that provide opportunities for corrupt practices by local forest officials.
- ... Limited knowledge of customary law among government officials, which limits their ability to develop effective community forest management policies.

A number of wider influences also impact on forest governance issues. These include the important role of donor agencies in developing forest policy, forest

governance and providing development resources. Donor resources are expected to decrease in the near future once Viet Nam achieves medium-income status. The positive correlation between poverty and forests in upland areas means that the potential role of forest management in poverty reduction should be considered in future government policies.

Based on the foregoing discussion, the following recommendations are made to SVBC:

- ... Support meaningful devolution of forest management: Despite ongoing forest devolution, the regulations governing forest use are still restrictive and the ownership of forest resources by local people remains nominal. To make forest devolution more meaningful, not only should rights to the forest be devolved but also the authority to decide on forest resource management (taking into account existing traditional governance structures). Timely support should be provided to build the capacity of local people to exercise their rights and responsibilities.
- ... Contribute to the revision of benefit-sharing policies and procedures: Support revision of existing benefit-sharing mechanisms to ensure that the contents of the policies are understood and agreed by the affected parties. The content and clarity of the policies should be reviewed and practical procedures developed to allow local people to legally harvest forest products from their allocated forest and market or otherwise use them.
- ... Improve local people's access to legal information: Provide legal information in a simplified language and develop effective dissemination media including radio, visual media (poster, pictures), and printed media (simplified leaflets). Improve access by small farmers to credit: Provide information on credit and assist with loan applications to VBARD and the Social Policy Bank.
- ... Encourage the private sector to help poor people: Involve poor villagers in forest-based commercial activities as partners in planting, maintaining or protecting forests, or as contributors of forest land.
- ... Target information at key decision makers: Improve the understanding of key actors about the practices and capabilities of ethnic groups for planning, managing and commercializing forest resources when they have the rights and authority to do so.

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Forest rangers monitor the health of trees.

Photo credit: IUCN.





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