



Land policy and land law

Extended synopsis

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Overview

Land law has a long history in the Mekong Region, going back to the colonial era. In the post-socialist CLMV countries, there has been an acceleration and elaboration of land policy formulation and legislation around land, including related laws on investment, natural resources and other related fields. International donors have been quite heavily involved in law-drafting in some countries. Recent implementation of consultative processes around law formulation reflects the growing role of civil society organisations. Discussions around law reflect deeper tensions and debates around relationships between state and society in the countries in question.

Key trends and dynamics

Land policy and land law in the CLMV countries has moved through several key transitions from the colonial period, to wartime, to a period of inwardly-focused socialist practice, to a more outwardly oriented market-based development, and ultimately to a neo-liberal era characterised by regional cross-border investments in land for agricultural and other uses. While land policies and laws have developed in ways specific to each individual country, there are trends and processes which are common to some or all of them.

The history of socialist experiments emanating from the post-colonial period in the CLMV countries, has given rise to post-socialist dynamics in land governance across the region. In Laos, Myanmar and

Vietnam, there remain significant constitutional limits to individual – and therefore smallholder – rights in land. While in all countries there are provisions for individual land holdings, in the one-party states of Laos and Vietnam the constitution stipulates that land is ultimately owned “by the people” as a whole and managed in trust by the State (Hansen 2013). In Laos, a new national Land Use Policy has been hostage to deliberation over a Lao constitutional amendment that may redefine land as state property (Vientiane Times, 25 April 2015), but there are strong interests within the Politburo to retain its current ownership status by the Lao people as a whole. In Myanmar, all land and natural resources are constitutionally owned by the State (Article 37).

The current (post-2000) neoliberal period of increasing reliance on market forces has seen land policies and land laws geared towards “turning land into capital”. Over the last decade, land laws enacted in CLMV countries have prioritised attracting private sector investment (particularly foreign direct investment or public-private partnerships) in agriculture as well as other land-based developments such as hydropower dams, mines and urban-industrial complexes. This process works largely through State-sanctioned large-scale land concessions that channel national and transnational investments into land which are claimed by the State to promote the modernization of national agriculture towards commodities. With few legal protections available to poor farmers, ethnic minorities and women to uphold their land rights, many smallholder groups have lost their agricultural and forest lands to companies or powerful individuals, making it difficult for them to maintain their former subsistence or semi-subsistence livelihoods.

The 2001 Land Law in Cambodia and 2003 Land Law in Laos provide for the issuing of large scale land concessions to domestic and foreign investors. While there are constitutional provisions for private ownership in Cambodia through fully transferable land title, the majority of unsurveyed and untitled land remains the property of the State, facilitating the granting of concessions on that land (Dwyer 2015). In Myanmar, the 2012 Vacant, Fallow and Virgin Lands Management Law allows for State expropriation of smallholders’ land for large scale agricultural enterprises (Obendorf 2012). A number of abuses in concession-granting results from the lack of coherence of national policies and competing administrative interests between different ministries. These are also the result of blatant abuses of power combined with very limited access to justice under prevailing state-business-civil society power gradients.

Land policies and land laws of countries in the Mekong region also reflect the various efforts, particularly by international donors, to instil international legal norms of good land governance and to protect small producers from the worst aspects of the concession boom. A key policy/legislative tool for attaining ‘growth with equity’ in mainstream neoliberal development paradigm has been titling and the creation of land/credit markets. International donors have supported land titling initiatives in the region, first in Thailand from 1984 and more recently in Laos and Cambodia (although the latter two were aborted). The idea is that formal land title can help rural smallholders turn their most valuable asset, land, into a household level wealth-generating engine (de Soto 2000). However, in the case of Laos, the policy drive is to turn the country’s land asset into national wealth through expropriation (cf Barney 2009; Baird 2011).

While land titling has some instances legitimized existing land holdings, it has also served as an incentive to grab land illegitimately, thus enhancing rather than reducing insecurity of tenure for smallholders (Bugalski & Pred 2013; Oldenburg & Neef 2014; Rabe 2013). Overall, the issuance of

land titles for farming households (and communal land titles in the case of Cambodia) has been painstakingly slow, while large-scale concessions granted to private developers has accelerated rapidly. In Myanmar, it is particularly worrying that recent government efforts to formalise land holdings – as long-term, conditional leases on State lands – do not recognise rights based on customary law or actual use and may actually create greater tenure insecurity (Obendorf 2012; Land Core Group 2012; TNI 2013; Woods 2013a). Meanwhile, land and investment laws are being changed to facilitate foreign ownership of land.

In all CLMV countries, the continuing status of most of the countries' land as state property eases the process of concession granting, particularly where land has been zoned in such a way that fallow areas, grazing land, secondary forest and other supposed "wastelands" can be appropriated as vacant. This notion of wasted, unused or underutilised lands is fundamental to the ethos of granting land concessions in the Mekong Region (cf Ferguson 2014). While the rules and specific laws vary from one country to another, the categorisation of land as "underutilised" helps to make it "available" for supposedly "productive" investment in the eyes of the State. However, there is a significant literature showing that concessions do not always bring the promised investments and often act as fonts for illegal logging or land speculation from which private benefits are derived (Baird 2009; Global Witness 2015; Milne 2015; Woods 2015).

Key actors and interests

Land policy, law and land use planning in CLMV countries have been subject to many influences and tensions, reflecting the multitude of interests within bureaucracies, and between donors, governments and civil society:

Governments in the Mekong Region (namely Cambodia, Laos and Myanmar) have embraced a concession model of economic development, reorienting land and related laws and policies to encourage foreign investment (mainly from Vietnam, China and Thailand) in large scale agriculture and other land-intensive developments. One of the main motivations of governments in granting large land concessions is to reallocate land from to what is often seen as "unproductive" uses by smallholder peasants, to more "productive" large scale industrial agriculture controlled by companies. This reflects the sentiment of many in the government that forcing "unproductive" and "backward" peasants out of subsistence economies – through the enclosure of upland agriculture lands or common forests, eradication of swidden agriculture, or resettlement – will propel the rural population toward a modernised set of labour relations and bring about positive 'development' (Baird 2011). While a significant part of the literature on land grabbing refers to "the State" as complicit in land deals that dispossess citizens, states are in fact variegated and complex, with many parts of government at different levels responsible for drafting, enacting and implementing land and related laws and policies.

International donors have been quite heavily involved in law drafting and policy development in CLMV countries. The Food and Agricultural Organization of the United Nations (FAO), Swiss Development Corporation (SDC), the German International Aid Agency (GIZ/BMZ), Australian aid, USAID and others all seek to promote progressive policy reform in the land sector. This includes strengthening laws and procedures related to land concessions (often framed as minimising investor risk) and increasing legal protection for smallholder farmers, ethnic minorities and women with regard to land access and ownership. While many donor-supported land reforms promise to build

reliable legal frameworks, strengthen institutional capacity and create land-based knowledge and information systems, in practice, reforms have seldom led to desired or intended outcomes. In all four countries, neoliberal land law and institutional reforms have been embedded in prevailing social, economic and political relations (Biddulph 2011; Adler & So 2012;).

Through various land based coalitions, **civil society organisations** have been active in the process of land policy and legal reform through public consultations in each country. International NGOs (often with funding from donors) have played a prominent role in helping support and coordinate consultation processes (Oxfam 2013; Wells-Dang 2013). The Land Issues Working Group in Laos, the Land Core Group in Myanmar and the Land Alliance (Landa) in Vietnam have brought together state and non-state actors and provided comments on draft land laws and policies. The degree of inclusiveness and openness in consultation processes varies from one country to another and there are few guarantees that civil society participation will result in the incorporation of their perspectives and proposals (Polack et al. 2014).

NGOs also play an important role in land law implementation through educational campaigns, for example, around land registration procedures, farmers' rights and the law. While various laws and regulations in CLMV countries grant people freedoms and rights to peaceful assembly and to contest and appeal decisions through judicial and non-judicial arbitration, there has been limited progress in all four countries with regards to access to justice for victims of land rights violations (Adler et al. 2006). There is also a reluctance to raise thornier questions around smallholder grievances in public, particularly in Laos.

Key contestations and debates

A key point of contestation is land policy seeking to maximise large-scale foreign investment in land, on the one hand, and security of tenure for smallholders on the other. Recent land and investment laws in Myanmar, for example, have been criticised for providing certainty for investors at the expense of smallholder security (Obendorf 2012; Buchanan et al. 2013; TNI 2013; Woods 2013a; 2013b). A particular problem is that customary land-use rights are not formally recognised by the current legal regime. Most *taungya* or shifting cultivation/grazing land is not formally registered or mapped, making such areas particularly vulnerable to confiscation by private actors under the pretext of claiming "waste land" (Land Core Group 2009). There are thus continuing disparities and contradictions between rights given in law and enacted through policy, on the one hand, and customary rights and practices on the other (see, for example, Diepart 2015; Adler & So 2012).

State appropriation of land also provides challenges for land conversion in peri-urban areas. Under Vietnamese land law, State appropriation of land is only permissible where it is required for public infrastructure or social and economic development that is in the public interest – a category that is open to interpretation and challenge (Suu 2009). In Laos, the 2003 Land Law allows requisition of land for public purposes or public interest with appropriate compensation (Articles 63, 68 and 71). In practice, "public interest" can be very broadly interpreted to include economic development that is for private economic gain.

Another key issue is the oft-heard heard problem that law exists in the books but not in practice. For example, it is commonly heard that countries such as Cambodia have good land laws but they are not implemented. National land laws often reflect the priorities and interests of international donors

who ascribe to international legal norms that define the contours of “good land governance”. In practice, however, configurations of political economy in each country make institutions highly resilient to change. Official law is often superimposed on complex fields of pre-existing customary, colonial, socialist and market liberalisation laws (cf Crouch 2014; Adler & So 2013; Lund 2011; Gillespie 1998). In CLMV countries, law thus often serves as a basis for negotiation of outcomes rather than for implementation or challenge, and in increasingly economically polarised societies this often leads to unequal outcomes (Adler & So 2012; LRICI 2011). Lack of law enforcement and irregularities in the implementation of existing legislation has also led to the proliferation of land-related human rights abuses, particularly in Cambodia (Colchester et al. 2013).

Key differences and commonalities among CLMV countries

Land policies and laws are enacted on a country-by-country basis and each country has gone through reform at different times, in some cases through several iterations. A key commonality is the dynamics created by the superimposition of neoliberal projects in land onto post-conflict and/or post-socialist societies. In particular, the post-colonial experience and experiments with various guises of socialism have shaped the political economy of land in particular ways. There are also common donor influences associated with organisations such as FAO, SDC, GIZ and others seeking to promote policy reform in the land sector, either directly by having input into laws and policies or through international agreements that governments and private parties adopt, such as the *Voluntary Guidelines on the Responsible Governance of Land Tenure* (FAO 2012).

In some instances the diffusion of international legal norms has resulted in common legal concepts and categories, such as provisions for land privatisation through titling programs, or customary and community-based lands and natural resource tenure. In practice, however, these vary considerably across the CLMV countries. For example, the 2001 Land Law in Cambodia recognises communal land titles, but it sets up a number of hurdles that have made application for such land tenure recognition a drawn-out process. In Laos, communal land is being recognised on a pilot basis, and it is not tied to indigenous status (Baird 2013). In Myanmar, customary land-use rights are not formally recognised (Oberndorf 2012).

Key links and interactions across borders and across scale

Historically, there has not been a great deal of interaction among governments in the formulation of land laws and policies, though legal norms have been diffused through legal aid programs of international donors. There are signs that legal borrowing increasingly occurs within the Asian region, and there is more legal exchange or at least comparison within the region (c.f. Baird 2015; Baird 2013). For example, Myanmar is looking to Cambodia’s experience in communal land titling.

There are also various instances of governance and policy advocacy supported at a regional level, often as part of global initiatives – for example, the significant involvement of international donors and NGOs in developing and promoting the use of the *Voluntary Guidelines on the Responsible Governance of Tenure* (FAO 2012). Commodity booms and other global drivers of land grabbing suggest that governance reform also needs to extend beyond the land policy framework within individual countries and look at markets and regulatory arrangements at a distance from the site of grabbing. This is in line with what Sikor et al (2013) refer to as a shift in global land governance from “territory” to “flows”, where governance across borders is enacted through control over flows of goods produced on land, rather than direct control over land as territory.

Key reform issues and strategic openings

Land law reform remains a sensitive area of public discussion in many countries. Key reform issues and openings include:

- Legal reform to give investors' confidence: More reform oriented companies want to see land governance reforms and new sets of laws that minimise land conflicts and provide more systematic methods for acquiring land concessions. This is so that the potential for any future illegal land grabs do not pose significant risks to investors and increase their exposure to judicial claims.
- Providing a basis for secure individual ownership or use rights under titling arrangements
- Legal recognition of customary and communal land
- Consultative processes in law and policy formulation
- Matching compensation policy and practice to market prices for land
- Constitutional definitions of rights in land between "the people" as a collective, state, business entities and individuals
- At the provincial and district level, there are openings in improving practices that link land allocation, resettlement, compensation, livelihood support and other programs oriented to smallholders through awareness and concern among local government officers who have to deal with consequences of decisions made higher up. Up-scaling the isolated successes of local initiatives may provide a useful direction for longer term reform at higher levels.

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