



Land policy and land law

Extended synopsis

Natalia Scurrah and Philip Hirsch

December 2015

Overview	1
Key trends and dynamics	1
Key actors and interests.....	3
Key contestations and debates.....	4
Key differences and commonalities among CLMV countries	5
Key links and interactions across borders and across scale	5
Key reform issues and strategic openings	6
References	6

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 fronts 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.

References

- Adler, D., Chhim, K., Heang, P., Hak, S., Heng, K. Sou, K. 2006. *Towards institutional justice? A review of the work of Cambodia's Cadastral Commission in relation to land dispute resolution*. GTZ-Cambodia Land Management Project and The World Bank Justice for the Poor Program.
- Adler, D. and So, D., 2012. Towards Equity in Development when the Law is Not the Law. In, Brian Z. Tamanaha, Caroline Mary Sage & Michael J. V. Woolcock (eds.), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, Cambridge University Press.
- Baird, I., 2009. Quotas, Powers, Patronage and Illegal Rent-Seeking: The Political Economy of Logging and the Timber Trade in Southern Laos
- Baird, I.G., 2011. Turning Land into Capital, Turning People into Labour: Primitive Accumulation and the Arrival of Large-Scale Economic Land Concessions in the Lao People's Democratic Republic. *New Proposals: Journal of Marxism and Interdisciplinary Inquiry*, 5(1), pp. 10-26.
- Baird, I.G., 2013. "Indigenous Peoples" and land: Comparing communal land titling and its implications in Cambodia and Laos. *Asia Pacific Viewpoint*, 54(3), pp.269–281.
- Baird, M., 2015. International Workshop for EIA system and its Implementation in Asia held by IGES and MOE Japan in Tokyo in February 2015, <http://matthewbaird.com.au/category/eia>
- Barney, K., 2009. Laos and the making of a 'relational' resource frontier. *Geographical Journal*, 175(2), pp 146–159.

- Biddulph, R. 2011. Is the Geographies of Evasion hypothesis useful for explaining and predicting the fate of external interventions ? The case of REDD in Cambodia. Paper presented at the conference “Globalization and Development: Rethinking interventions and governance”, University of Gothenburg, November 22-23, 2011.
http://www.gcgd.gu.se/digitalAssets/1350/1350795_conf-2011-biddulph.pdf [Accessed 30.11.2015]
- Buchanan, J., Kramer, T., Woods, K., 2013. Developing Disparity: Regional Investment in Burma’s Borderlands, Transnational Institute, Burma Centre Netherlands.
- Bugalski, N. and Pred, D., 2013. Safeguarding Tenure: Lessons from Cambodia and Papua New Guinea for the World Bank Safeguards Review. Annual World Bank Conference on Land and Poverty, The World Bank - Washington DC, April 8-11, 2013.
http://consultations.worldbank.org/Data/hub/files/meetings/SafeguardingTenure_Safeguards.pdf [Accessed 30.11.15]
- Colchester, M., Chao, S., Dallinger, J., Toh, S.M., Saptaningrum, I., Ramirez, M.A., Pulhin, J., 2013. Agribusiness Large-scale Land Acquisitions and Human Rights in Southeast Asia - Updates from Indonesia, Thailand, Philippines, Malaysia, Cambodia, Timor-Leste and Burma. Forest Peoples Programme. <http://www.forestpeoples.org/sites/fpp/files/publication/2013/08/Island-studies.pdf>
- Crouch, M., 2014. The Layers of Legal Development. In Crouch, M. and Lindsey, T. (eds). *Law, Society and Transition in Myanmar*, Oxford and Portland: Hart Publishing, Ch.3.
- Diepart, J-C., 2015. The fragmentation of land tenure systems in Cambodia: peasants and the formalization of land rights, Country Profile No.6: Cambodia, Technical Committee on Land Tenure and Development, Agence Francaise Developpment.
- Dwyer, M.B., 2015. The formalization fix? Land titling, state land concessions and geographical transparency in contemporary Cambodia. *Journal of Peasant Studies*, (May), pp.1–26.
- Food and Agriculture Organization of the United Nations (FAO), 2012. *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, Rome: <http://www.fao.org/nr/tenure/voluntary-guidelines/en/> [Accessed 30.11.15]
- Ferguson, J., 2014. The scramble for the Waste Lands: Tracking colonial legacies, counterinsurgency and international investment through the lens of land laws in Burma/Myanmar, *Singapore Journal of Tropical Geography*, 35: 295–311.
- Gillespie, J. 1998. Land Law Subsystems? Urban Vietnam as a case study, *Pacific Rim Law & Policy* 7(3):555-610.
- Global Witness, 2015. The Cost of Luxury: Cambodia’s illegal trade in precious wood with China, London.
- Hansen, K., 2013. Land Law, Land Rights, and Land Reform in Vietnam: A Deeper Look into “Land Grabbing” for Public and Private Development, Independent Study Project (ISP) Collection. Paper 1722.
http://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=2753&context=isp_collection

- Land Core Group of the Food Security Working Group, 2009. The Role of Land Tenure Security for Smallholder Farmers in National Development: A policy discussion brief.
- Land Core Group of the Food Security Working Group, 2012. 13 Case Studies of Land Confiscations in Three Townships of Central Myanmar.
- Law Research and International Cooperation Institute (LRICI), 2011. Customary Law and Practice in Lao PDR, Vientiane.
http://www.undp.org/content/dam/laopdr/docs/Reports%20and%20publications/Customary_Law_Laos2011_english_master1.pdf [Accessed 27.11.15]
- Lund, C., 2011. Fragmented sovereignty: land reform and dispossession in Laos. *Journal of Peasant Studies*, 38(4), pp.885–905.
- Milne, S., 2015. Cambodia's Unofficial Regime of Extraction: Illicit Logging in the Shadow of Transnational Governance and Investment, *Critical Asian Studies*, 47(2): 200-228.
- Obendorf, R., 2012. Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgins Lands Management Law: Improving the Legal & Policy Frameworks Relating to Land Management in Myanmar, Land Core Group.
- Oldenburg, C. and Neef, A., 2014. Reversing Land Grabs or Aggravating Tenure Insecurity? Competing Perspectives on Economic Land Concessions and Land Titling in Cambodia, *Law and Development Review*, 7(1): 49-77.
- Oxfam, 2013. Aggregated outcomes of the community consultation supporting the improvement of the draft amended Land Law in Vietnam – Executive Summary. In collaborations with the Department of General Affairs, Institute of Legislative Studies,
http://oxfamblogs.org/vietnam/wp-content/uploads/2013/06/Executive-Summary-Eng.FN_.pdf [Accessed 30.11.2015]
- Polack, E., Cotula, L., Blackmore, E., Guttal, S., 2014. Agricultural Investments in Southeast Asia: Legal tools for public accountability: Report from a regional lesson-sharing workshop, IIED, Focus on the Global South, Bangkok.
- Rabe, A., 2013. Directive 01BB in Ratankiri Province: Issues and impacts of private land titling in indigenous communities. Asia Indigenous Peoples Pact.
- Sikor, T., Auld, G., Bebbington, A., Benjaminsen, T., Gentry, B., Hunsberger, C., Izac, A-M, Margulis, M., Plieninger, T., Schroeder, H., Upton, C., 2013. Global land governance: from territory to flow? *Current Opinion in Environmental Sustainability*, 5(5), pp 522–527.
- de Soto, H., 2000. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, New York: Basic Books.
- Suu, N. V., 2009. Industrialization and Urbanization in Vietnam: How Appropriation of Agricultural Land Use Rights Transformed Farmers' Livelihoods in a Peri-Urban Hanoi Village. East Asian Development Network (EADN) WORKING PAPER No. 38

Transnational Institute (TNI), 2013. Access Denied: Land Rights and Ethnic Conflict in Burma, Burma Policy Briefing, TNI and Burma Centrum Nederland, <http://www.tni.org/files/download/accesdenied-briefing11.pdf>

Vientiane Times, Draft land policy has 'no problems', lawmaker says, Vientiane Times, 25 April 2015.

Wells-Dang, A., 2013. Promoting Land Rights in Vietnam: A Multi-sector Advocacy Coalition Approach. In Annual World Bank Conference on Land and Poverty. Washington D. C.

Woods, K. 2013a. Agribusiness Investments in Myanmar: Opportunities and Challenges for Poverty Reduction

Woods, K., 2013b. Timber Trade Flows and Actors in Myanmar: The Political Economy of Myanmar's Timber Trade

Woods, K., 2015b. Commercial Agriculture Expansion in Myanmar: Links to Deforestation, Conversion Timber and Land Conflicts, Forest Trends and DFID.