



Dispute resolution and access to justice

Extended synopsis

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Overview

Increasing land pressures in the Mekong Region have generated numerous disputes. While many of these disputes are amongst neighbours, their generation is often an indirect consequence of policies and practices of more powerful actors and the displacements and competition over land generated by its commodification. Access to justice is circumscribed by limited access to legal redress and by the political limits to resistance and public complaint under authoritarian regimes. Land disputes are much more open in some parts of the Mekong Region than others, and legal redress is similarly quite uneven over the regional landscape. It is important to understand the specific contexts of dispute resolution and justice procedures in dealing with each case, and reform measures need to look well beyond land issues *per se*.

Key trends and dynamics

Cambodia, Laos, Myanmar and Vietnam have all experienced a rapid increase in land disputes over the past decade. Despite laws and regulations in Mekong Region countries granting people freedoms and rights to peaceful assembly, to protest and to contest and appeal decisions through judicial and non-judicial arbitration, there has been limited progress with regards to access to justice for victims of land rights violations. Serious rights violations continue to arise as a result of forced displacement and dispossession of lands and resources, often backed by laws and policies that favour agribusiness investors over smallholder farmers and ethnic minorities (Amnesty International 2008; Subedi 2012; ALTSEAN 2014; Baird 2011).

Documented evidence in all four countries points to a lack of procedural justice in the formal and informal dispute resolution processes available to the rural and urban poor affected by land disputes. Barriers to accessing remedy and justice for citizens impacted by land conflicts include:

- overly bureaucratic and often costly procedures for lodging complaints;
- political interference in mediating institutions, adjudicating bodies and the judiciary;
- state-sanctioned use or threat of use of violence against communities who act in defence of their land rights;
- a culture of impunity which allows human rights abuses and criminal activity to go unpunished;
- unequal power relations embedded in society that determines access to existing mechanisms (e.g. gender, ethnicity, poverty, age).

These factors pose major obstacles to peace and justice in the Mekong Region and highlight the need for legal reforms to address issues that go well beyond land *per se*.

In the absence of impartial institutions that can adequately deal with land conflicts, the poor majority resort to a variety of informal mechanisms to gain leverage in their negotiations with wealthier and more powerful parties. These include collective actions through protests and campaigns, use of media, partnering with human rights NGOs, appeals to powerful individuals and more indirect forms of resistance or “everyday politics” (Kerkvliet 2009) in contexts where direct contestation is not tolerated. While there are cases where collective action has resulted in some community “wins” (e.g. The Guardian 2011; Schoenberger 2015), these tactics pose huge risks for communities as states can respond violently and results are extremely contingent (Adler & So 2012). It is also important to note that even in ‘successful’ cases, the poorest households – particularly female headed households – who are not able to participate in sustained protests have often missed out on receiving land or a fairer compensation package for lost land (Lamb et al. 2015).

A growing trend among NGOs, particularly in Cambodia but increasingly also in Myanmar and Vietnam, is the provision of legal aid to help fight expropriation and land seizures on behalf of poor farmers and smallholders. Increased foreign investment in agribusiness and other land-based developments in Mekong Region countries have opened up opportunities for pursuing grievance mechanisms targeting a range of public and private actors at scales and jurisdictions outside of the nation state where land investments are made, including consumer markets.

Key actors and mechanisms

State mechanisms and remedies to solve land disputes include mediation, administrative bodies and the judiciary. The first point of call for parties involved in land dispute is usually village, commune, district and provincial level authorities. However, local government is often unable to solve land disputes involving land concessions granted by central government authorities, particularly those involving powerful actors. Therefore, complaints are progressively moved upwards to higher level government institutions such as the National Assembly or the Prime Minister’s Office, a process which may incur payments or require backing from powerful figures (Culas et al. 2010).

A number of inter-ministerial bodies or committees are responsible for mediating and adjudicating on land disputes. Many of these bodies have been established in conjunction with land categorisation and titling programs, such as the Cadastral Commission in Cambodia, the Systematic

Adjudication Teams of the Lao Land Titling Program and the Farmland Administrative Bodies recently introduced under the 2012 Farmland Law in Myanmar (Adler et al. 2006; Mahaphonh et al. 2007; OECD 2014). A number of studies point to how these and other government bodies – such as those responsible for allocating land to private investors – are vested with considerable powers to grant and revoke land rights and adjudicate disputes, but provide no recourse for appealing decisions. Importantly, these bodies are subject to political interference and often struggle to resolve complex cases, especially those involving parties from or with connections to the government or military (Adler et al. 2006).

Courts have played a relatively minor role in resolving land disputes in the Mekong Region. Courts in Laos and Vietnam are especially ill-equipped to deal with land cases because of their subordination to Party–state socioeconomic policy. In all four countries, systemic levels of corruption within the judiciary have severely impeded people from accessing remedies or compensation related to land rights infringements in the courts. In Vietnam, for example, around 60 per cent of housing and land disputes are passed from the courts to the National Assembly and hybrid Party organisations for a political resolution (Gillespie 2013). In March 2013, pro-bono lawyers representing families affected by the Koh Kong Sugar Industry Concessions in Southwest Cambodia filed a law suit against a UK-based sugar company in the UK Commercial Court, opening doors for potential future litigation in courts outside the region.

Civil society organisations (CSO) in the Mekong Region have adopted a range of roles and strategies to support communities affected by land dispossession. This includes documenting cases, providing legal education on laws and land rights, submitting complaints to government institutions and companies, appealing to national and international human rights organisations, and legal representation in the courts. Through their extensive regional and international networks, CSOs are exploring different arenas of law, including scrutinising international investment treaties – such as the European Union’s ‘Everything But Arms’ Initiative (EC & IDI 2013) – and leveraging opportunities provided by international developers and investors who adopt international best practice for due diligence purposes (Polack et al. 2014).

There is mounting pressure for private companies and investors to adopt international environmental and social standards and/or sign up to industry codes of conduct as a means to increase corporate legal accountability for land related human rights abuses. Communities impacted by the Koh Kong Sugar Concession in Southwest Cambodia pursued claims through various business grievance mechanisms targeting the companies that purchase sugar for distribution to European markets, Tate & Lyle and American Sugar Refinery. This included challenging Tate & Lyle’s membership of Bonsurco, a multi-stakeholder sugar industry association that accredits its members with meeting social and environmental standards; and submitting a case arguing violation of the Organization of Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (Middleton 2015). In addition, Oxfam launched a global campaign calling on the world’s largest sugar industry companies, including Coca Cola, to address land grabbing and other human rights violations in their supply chain (Oxfam 2013). While there are few incentives for domestic companies in the Mekong Region to enact environmental and social standards under weakly enforced regulatory regimes, it noteworthy that the Vietnamese Rubber Group has recently established a complaints mechanism – although to date it remains untested (Global Witness 2014).

At international level, a corporate level guidance tool has been developed by the Interlaken Group to support companies in aligning their operations with the FAO's Voluntary Guidelines on the Responsible Governance of Tenure (The Interlaken Group & RRI 2015). However, a number of civil society groups have expressed concern that efforts under way to regulate land grabs through the creation of international codes and standards on how to "responsibly" invest in farmland may not really assist communities whose lands are being targeted. They point out that corporate actions to reduce "reputational risk" are rarely synonymous with communities keeping control of their lands and that the development of "standards" can serve as a smokescreen for companies to continue business as usual (GRAIN 2015). Nevertheless, there is an argument for corporate governance mechanisms, including dispute resolution and grievance mechanisms, where effective and impartial government regulation is lacking.

International donors have financed land sector reforms that have included dispute resolution mechanisms, as well as supported judicial reform programs that have had limited success. International financial institutions have also been targeted by CSOs to leverage opportunities provided by their safeguard policies. In Cambodia, the World Bank funded Land Management Administration Program (LMAP) became the subject of a World Bank Inspection Panel investigation after communities facing eviction from Boeung Kak Lake filed a complaint arguing a breach of the Bank's Resettlement Policy Framework (Bugalski & Pred 2010). More recently, communities and their legal representatives in Ratanakiri Province impacted by rubber concessions owned by Vietnamese Hoang Anh Gia Lai Company (HAGL), have triggered the International Financial Corporation's (IFC) dispute resolution mechanism after it was discovered that IFC has investments in companies linked to HAGL (Yun 2015).

Human Rights Organisations are also important actors to whom affected communities and CSOs have turned in pursuit of greater accountability for land rights breaches by states and companies. Special Rapporteurs have been instrumental in drawing attention to land issues and the situation of human rights in Mekong Region countries. National Human Rights Commissions have also been used to file complaints against companies investing across borders. For example, a complaint filed by a Cambodian NGO with the National Human Rights Commission of Thailand against the Khon Kaen Sugar Industry Concession in Cambodia triggered an investigation of the case. Similarly, NGOs have petitioned the Malaysian Human Rights Commission for an investigation of the potential impacts of the Don Sahong Dam being built by Laos by a Malaysian-based Company (ERI 2014).

Key contestations and debates

There is a continuing climate of fear around land disputes in most Mekong countries. In some cases extra-judicial state violence is the main constraint, while in others it is the influential private actors (in collusion with State and military actors) who are behind the actual or threatened violence. In Cambodia and Myanmar, security forces have increasingly used force against evicted villagers, including arbitrary arrests and some reported deaths (Amnesty International 2008; Schwedersky 2010; Chao 2013; ALTSEAN 2014). Poor and marginalised communities fear the institutions created to protect them, such as the police, local government and the courts (CHRAC 2009). In Laos and Vietnam, families are often forced to accept compensation packages which are insufficient to begin a new life. The space to discuss human rights abuses in relation to land issues remains small as civil society organisations fear retribution for criticising government policy. There is an urgent need for government officials to publicly condemn attacks against people who assert their rights and seek

redress in the context of land rights violations. Individuals and communities must be able to act without fear of intimidation, harassment or violence, in the exercise of their right to freedom of opinion and expression, and to seek remedy and justice.

The extent to which the courts can be relied upon for impartial justice is a key issue in the four Mekong countries in question. Many people do not trust the courts and see them as inaccessible or risky to use. However, alternative dispute resolution mechanisms – such as mediation and consultation – suffer from systemic shortcomings of their own. Indeed, what much of the literature on land disputes in the Mekong demonstrates is that no one system can provide the optimal range of solutions to resolve complex land disputes. Rather, it makes sense for those seeking justice to creatively combine elements from state and non-state, formal and informal mechanisms, including maintaining pressure through protests and use of media (Gillespie and Hualing 2013).

It is widely recognised that the poor are at a critical disadvantage if they cannot access legal assistance. People whose land rights are affected by investment projects, land developments and titling programs are seldom informed about their rights under national law or relevant safeguard policies, let alone given advice on how to access legal remedies through accountability mechanisms. The little legal assistance that is provided to the disadvantaged is channelled mainly through legal NGOs, particularly in Cambodia. Such support includes awareness-raising on land laws and land rights, legal assistance and case handling, paralegal training, and engagement with local governments. However, the small number of lawyers can hardly service this sector's huge demand for legal assistance. Furthermore, the operation of these organisations is often monitored and controlled by governments. For example, NGOs in Cambodia were forbidden from entering the villages whose lands were surveyed under Order 01. Without access to independent information or advice, community members were pressured into accepting individual land titles without understanding how this would compromise their communal land title claims (Rabe 2013). In Laos and Vietnam, legal aid is mainly restricted to legal education. These programs often exhibit a tension between State views of legal education as a mechanism to enhance social compliance, and those of NGOs who see law as a tool of empowerment.

Key differences and commonalities among CLMV countries

The absence of impartial judicial and non-judicial dispute resolution mechanisms, lack of accountability for perpetrators of land rights infringements, and limited access to remedy or justice for people impacted by land grabs are factors common to all four countries. The various mechanisms used to lodge complaints and solve disputes differ among the four countries, as do the nature of land conflicts themselves. In Vietnam and Laos, for example, official complaints have often focused on the issue of adequate compensation for land expropriated by the State for urban and transport infrastructure projects and hydropower dams, while in Cambodia and Myanmar land conflicts have often involved the appropriation of villagers' land by "crony companies" and the military for agribusiness concessions.

Political conditions in the four Mekong countries place limits on resistance and public complaint, and they also determine the avenues and strategies pursued by communities and CSOs in seeking remedy and justice. Land conflicts are more open and confrontational in Cambodia and Myanmar, while in Laos they are more concealed with only passive, non-confrontational forms of resistance tolerated. In Vietnam, increasingly bold direct actions are seen with regards to land conflicts.

Experience with public interest litigation to promote accountability in large-scale land deals also differs between countries. While in Cambodia and Myanmar there is substantial experience of bringing cases to provincial and national courts, this experience is more limited in Vietnam and Laos.

Key links and interactions across borders and across scale

The case of Koh Kong Sugar Industry Concession in Cambodia highlights innovative mechanisms for seeking accountability and access to justice to redress the impacts of land grabs across borders and scales, when such mechanisms are not available at home. After exhausting all avenues at the national level, communities and public interest lawyers took their struggles to other arenas and jurisdictions, including the Thai National Human Rights Commission, the UK Courts, the European Union (targeting its 'Everything but Arms' initiative); and an international Sugar Industry accreditation scheme, Bonsurco. Also targeted have been companies in the sugar supply chain, including Coca Cola, and international banks and financiers, including ANZ and the IFC.

There are also ongoing efforts by CSOs to have land rights mainstreamed as human rights within ASEAN. However, the ASEAN Intergovernmental Human Rights Commission (AIHRC) is considered to be a toothless body without investigative powers or a complaints mechanism. To date, there is little indication that AIHRC will be able to investigate allegations of human rights violations in relation to land issues in the near future.

Key reform issues and strategic openings

- Freedom from fear of retribution in the case of complaints
- Specialised legal assistance is needed for complainants in land dispossession cases
- Equality before the law in land disputes
- Recognition of customary claims
- Sustained and open media attention to land disputes and their causes
- Support for advocates of land justice within relevant government agencies, in particular protection for "whistle-blowers" to encourage more open governance
- Provision of adequate compensation for acquired land
- When justice is not found at home, international dispute resolution forums can provide opportunities for seeking justice. International arenas of justice include, for example, complaints with foreign government agencies, transnational codes of practice of multinational corporations, and court litigation in third-party countries. However, greater enforcement power is needed requiring action by investors.
- Early and effective interventions, including community participation and consultation with government and/or developers before and during land projects, can reduce the number and intensity of disputes.
- Transparency is essential to effective dispute resolution. Critical information relating to land deals must be made publicly available in accessible form to all parties. Transparency in processes and outcome is essential for affected people's effective participation in consultation and mediation with governments and/or developers, and to understand how their rights are being affected.

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