

# Large Acquisition of Rights on Forest Lands: Focus on Lao PDR

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## 1. Nature of Corporate Concession Schemes

- a. Including legal principles versus actual situations.
- b. Magnitude of trends; extent of land transformations
- c. New or longer term dynamics

### Natural Forest Management:

In the original state forest management system established in Lao PDR after the revolution of 1975, a total of 9 state forest enterprises (SFE's) were allocated logging concessions over various parts of the country, each accounting for between 200,000-300,000 hectares. Each SFE was matched with a donor/support country, including the Soviet Union, Bulgaria, Czechoslovakia, Poland, Hungary, Sweden and the ADB. By the late 1980s, the SFE system in Laos was being dismantled as power over the forestry sector was consolidated by the military. The 9 SFE's became consolidated within 3 large military companies, which controlled most of the logging sector in Laos through the 1990s. These were the Mountainous Region Development Company (*Bolisat Phatthana Khet Phoudoi* – BPKP), which operated in the central provinces of the country; the Development of Agriculture and Forestry Industry Company (DAFI) in the southern provinces; and the Agriculture and Forestry Development Company (AFD) in the north. Hodgdon (2008: 7) argues that: "Though over the past five years, military companies have become less powerful than they were in the 1990s, the Army still controls all logging and forestry related activities in the border zones, often in joint operations with the Vietnamese military."<sup>1</sup> In 2002-2004, the restructuring of an insolvent BPKP, at the bequest of the World Bank as a conditionality for the Nam Theun II hydropower project loan guarantee, signaled the decline of direct military control over logging and wood enterprises, and increasing control over the forestry sector by national and provincial administrations.

Baird (2010) provides a useful description and overview of the various types of logging quotas which are currently allocated by the Government of Laos. These include national quotas for timber harvesting in national production forests, district level quotas, and limited local level/villager logging rights.<sup>2</sup> In addition, there are the so-called "special quotas", which include harvesting rights to dead wood, timber harvesting to repay international debt obligations, harvesting associated with development projects (especially to pay the construction costs of roads or government buildings), military harvesting rights, and logging quotas linked to plantation development.

The various quotas are not industrial, corporate logging concessions in the classic form.

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<sup>1</sup> It is difficult to confirm the extent to which military resource control remains in place in border areas, however. To Xuan Phuc (2009) and Baird (2010) do not emphasize the role of military units in controlling logging operations in southern Laos.

<sup>2</sup> Villager logging quotas amount to up to 5 m<sup>3</sup> per household per year, to support housing construction.

That is, distinct territorial zones of state forestland are not ‘ceded’ to private companies for extended periods of time, for the purpose of managing the forest as a concession. In Laos, it appears that most contemporary, large-scale timber harvesting is performed by Vietnamese logging sub-contactors, operating under formal Lao company leadership. For the more peripheral provinces, such as Attapeu, To Xuan Phuc (2009) notes that most of the forestry companies he encountered were joint-ventures between Vietnamese and Lao investors. He writes that “all of the companies interviewed were primarily run by Vietnamese managers, using Vietnamese labor sometimes without a labor contract or necessary legal documents, with Lao partners mainly responsible for handling administrative and regulatory procedures” (pg. 4). Baird (2010: 15) also notes that “Vietnamese logging companies are not legally allowed to have logging concessions in Laos (although Vietnamese workers can work for Lao companies)...”. There are no foreign multinational companies directly involved in logging concessions in Laos.

In terms of timber removals, the following table provides data on officially permitted forest harvesting in Laos for the 2008/2009 logging season.

**Approved national harvesting quotas 2008/09** (Source: MAF, DoF, Suford, 2009:11).

<b>Forest category</b>	<b>Quota (m<sup>3</sup>)</b>
Production Forest Area (PFA)	66,270
Development projects approved by Prime Minister’s Office	48,890
Development projects approved by Provincial Governor	17,840
Plantation development areas	17,000
<b>Total</b>	<b>150,000</b>

These official quotas have been falling in recent years, from upwards of 600,000 m<sup>3</sup> early in the decade.

Note that Forest Trend’s national mirror import data for Lao timber exports between 2003-2007 produced export averages of between 800,000 m<sup>3</sup> to 1.1 million m<sup>3</sup> per annum, which suggests that these national level quotas bear little resemblance to what is actually occurring overall in the Lao forestry sector. In reality, most of the timber harvested in Laos is derived from infrastructure conversion areas, particularly from road building and hydropower development.<sup>3</sup>

According to the Lao Forestry Law (2007) and as stipulated in the 2002 Prime Ministerial Decree 59 on Production Forest Management, and Prime Minister’s Order (PMO) No. 17, industrial-scale logging can only occur within the territorial boundaries of Lao’s 51 National Production Forest Areas (PFAs), with approved pre-harvest inventory and forest

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<sup>3</sup> The total commercial timber harvest in Laos (including processed wood for domestic and export markets, and round log exports) has been estimated at 1,360,000m<sup>3</sup> for 2008/09 (Sugimoto, 2009:22).

management plans in place.<sup>4</sup> These 51 PFAs account for approximately 3.089 million hectares of state forestland. In reality however, only a small number of the national production forests have completed inventories and sustainable management plans. These areas include 8 PFA's, covering 657,000 hectares, in 4 provinces of central-southern Laos (Khammouane, Savannakhet, Salavane, and Champassak) managed through the support of the World Bank Sustainable Forestry and Rural Development (SUFORD) project. The number of PFA's with inventories and approved management plans will increase with SUFORD's Additional Financing expansion (SUFORD-AF) to an additional 8 priority Production Forest Areas (PFAs) in five new project provinces (Xayabouly, Vientiane, Bolikhamxay, Xekong and Attapeu), between 2008-2011.<sup>5</sup> There is however some hesitation on the part of the Ministry of Agriculture and Forestry (MAF) to conduct full (and expensive) forest inventories, when the forests in question are slated for conversion for infrastructure development.

National Production Forest Demarcation is a key first step for implementing sustainable forest management in Laos. Demarcation of the forest estate is being facilitated through the Lao Forest Development Fund, which is drawn from stumpage fees on logs harvested from natural forests. First established in 2005, in 2009, the annual budget of the Forest Development Fund was about US\$ 1.5 million (Sugimoto, 2009). The stated plan by the GoL is to complete national inventories and to develop sustainable management plans for all of the national PFAs by 2013 (DoF, 2008: 6).<sup>6</sup>

#### Plantation Forestry:

Laos has been experiencing a boom in land concessions for agribusiness and plantation development since 2004. These projects more resemble 'concessions', as they involve external corporations entering into long-term use rights to territories, leased from the Lao state for commercial tree crop development. As with Cambodia, the areas formally ceded by the Lao state are far larger than the areas which have been successfully developed, with 'trees in the ground.' Laos has been more successful than Cambodia however, in terms of recruiting multinational companies to launch big investments. The key foreign direct investors currently operating in the Lao plantation sector include:

- Oji Lao Plantation (Japan): 50.000 hectares, 49 m USD
- CITYLAND Resources (Malaysia): 3.500 hectares, 11 m USD
- Daklak Rubber (Vietnam): 10.000 hectares, 30 m USD
- Viet-Lao Joint Stock Rubber (Vietnam): 10.000 hectares, 22 m USD

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<sup>4</sup> MAF, DOF, Suford (2009: 11) states however that these regulations are contradicted by other legal documents, specifically "PMO No. 30 (Section 12), which only requires a logging survey in advance of harvesting development areas and PMO No. 25 (Section 1/3), which only requires government endorsement. All three orders referred to are apparently in force."

<sup>5</sup> The annual volumes of timber produced out of the SUFORD areas represents approximately 20,000 to 30,000 m<sup>3</sup> roundwood per year. With the additional areas incorporated through Suford-AF, this will increase to about 50,000 m<sup>3</sup> per year. Approximately 3,000 to 7,000 m<sup>3</sup> per year of this SUFORD timber volume is certified by the Forest Stewardship Council, drawn from one certified PFA in Khammouane and one in Savannakhet.

<sup>6</sup> The Laos Forest Strategy 2020 (MAF, 2005: 18) document also indicates: "Almost half of these [PFAs] (~1.55 million hectares) have been subject of some kind of management planning with the largest areas in Savannakhet (7 PFAs, 327,000 ha), Khammouane (6 PFAs, 309,000 ha), Oudomxay (5 PFAs, 148,000 ha) and Xayaboury (7 PFAs, 105,000 ha)."

- Paksong Highland (Thailand): 26.000 hectares, 8 m USD
- Agarwood Lao Group (Thai/Lao): 10 m USD
- Mitr Lao Sugar Co. Ltd. (Thailand): 22.5 m USD
- Savannakhet Sugar Corp. (Thailand): 10 m USD
- Birla Lao Pulp & Plantations Co. Ltd. (India): 50,000 hectares, 350 m USD

Since July 2009, there has been a moratorium on the granting of new land concessions over 1,000 hectares in Laos.<sup>7</sup> The moratorium followed upon an initial concessions ban, issued in 2007, on concessions of over 100 hectares,<sup>8</sup> which was repealed in June 2009.<sup>9</sup> Despite the back-to-back moratoria backed by Prime Ministerial Decrees, numerous concession agreements have still been issued through this period which exceed the prescribed territorial limits, for example, the 10,000 hectare, Vietnam-backed, Hoang Anh Attapeu Agriculture Development Company rubber project in Attapeu province (see Kenney-Lazar, 2010). Exceptions built into the legal statutes allow new concessions to be issued by the central government despite the formal national “moratorium.”<sup>10</sup> These moratoria and their effects can in part be understood when placed in the context of central-provincial struggles within the Lao state over the right to sign agreements with external investors, with the both wishing to hold on to discretionary powers.

The overall magnitude of the move towards land concessions in Laos has been by all accounts concerning. However, there is no national-level data for the total areas that have been ceded to agribusiness investors by different administrative levels of the Lao state. Indications of the areas of land which have been ceded come from a number of provincial level inventories which have been conducted by the National Land Management Agency (NLMA). One full inventory has been completed for Vientiane province, with additional inventories being produced for 3 other districts, located in Luang Phrabang, Xayabouly, and Luang Nam Tha. According to the NLMA, the current objective is to finish a complete data inventory set by October 2010.

Recent legislation on land concessions include a 2009 Presidential Decree on State Land Leases and Concessions 1(No. 135/PM, 8 November), which establishes a set of general principles for the granting of leases or concessions of state lands, as well as Presidential Decree/02, November 2009, which sets plantation lease rates. In addition, a new investment law, contract law and a new environmental law are in the process of being formulated, all of which will affect the concession system in Laos (NLMA, *pers.comm.* June 4, 2010).

The national target for industrial tree plantations is 500,00 hectares by 2020. According to Sugimoto (2009: ii), the areas planned for tree plantation development by foreign investors reached 438,000 ha. by 2010, including 228,000 ha. of rubber and 151,000 ha. of industrial timber species (eucalyptus, acacia, teak). The total area of rubber in Laos (foreign investors and smallholders) reached 140,000 hectares by the end of 2008, with estimates of 250,000

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<sup>7</sup> Vientiane Times. 2009. Govt again suspends land concessions. 02 July.

<sup>8</sup> Vientiane Times. 2007. Govt suspends land concessions. 9 May.

<sup>9</sup> Vientiane Times. 2009. Govt resumes land concessions. 16 June.

<sup>10</sup> For example, concessions can still be allowed “if an urgent case arises, with an investor needing more than 1,000 hectares of land to carry out a business.” (Vientiane Times, 2009, cited in Kenney-Lazar, 2010).

hectares by 2010 (Manivong, 2009). Other estimates from the Ministry of Planning and Investment place the total area of rubber in Laos at 400,000 hectares in 2010.<sup>11</sup>

However, the inventory of concessions in Vientiane province conducted by the NLMA and GTZ (2009) showed some concerning trends. The NLMA-GTZ survey team found that 237 land lease and concession projects were active in Vientiane province, including 25,104 hectares for rubber; 20,386 ha. for jatropha, and 10,000 hectares of mixed plantations (eucalyptus, jatropha and rubber). The NLMA (the national regulator of land concessions) could only locate documentation for 148 of the 237 active concession projects; while for 89 projects, the relevant agencies at the provincial and district levels did not possess any documentation whatsoever. Only 12 concession projects had concession maps with proper coordinate points.

The results of the survey indicates first of all, a basic lack of knowledge about what is occurring where with what has become an unruly and chaotic land sector, as well as a likely sharp under-pricing of access to forest-land by external investors. A key governance issue in the plantation sector is that many of the external investors have signed deals directly with provincial or even local administrations, without the knowledge or approval of the relevant central ministries. The reverse also holds, with central actors at times approving investment deals without the prior knowledge of provincial levels of government. The official record documenting the actual state of the plantation investment regime in Laos therefore remains far from complete.

GTZ Laos (2010) has published summary data from the Luang Nam Tha concession NLMA inventory. In 2009, the survey found that there were 107 active land projects in Luang Nam Tha province, covering 25,366 hectares. Twenty-three of these projects were classified as 'concessions' (19,291 ha.) (others were classified as either 'leases' or 'contract farming' projects). 58 of the overall projects were headed by Lao investors, 45 Chinese and 1 Thai.

WWF Laos and NLMA (2008) conducted a systematic study of plantation development in Phatoumphone district, Champassak province. Their results showed that the total area of issued concessions was 10,431.8 ha. (3.83 % of the district territory). Rubber was the primary concession crop, accounting for 8,922 hectares. Thirty-two companies were active in the district, planting rubber, cashew, oil palm, eaglewood, jatropha, and fruit trees. The survey showed that 2,893 ha. had been cleared, and 1,672.6 ha. was actually planted as of 2008.

So far, these are the only systematic concession surveys that have been published for Laos, although additional data should be forthcoming from the NLMA within the year. Without systematic national level concession inventory data, it is not possible to provide accurate information on the total area of land concessions which have been granted to investors, or to provide detail on their attributes. Several groups have published broad estimates for the total area of concession deals signed on paper in Laos. GTZ (2010) estimates that 2-3 million ha. are currently covered under land concession agreements (including both active and not yet implemented projects), covering 10-15% of the total area of Lao PDR.

## **2. Nature of Concession Contracts; including AAC's, length of agreements, social/environmental aspects, benefits sharing, nature of consultation/FPIC**

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<sup>11</sup> Vientiane Times. 2010. Bokeo on home stretch to processed rubber exports. 30 June.

Business contracts have been handled very unevenly in the Lao land concession sector. As mentioned, in Vientiane province the NLMA could not locate any official documentation at all for 89 out of 237 active land concession projects in Vientiane province in 2009. The new Prime Ministerial Decree (PM/01, 2009), which establishes a range of required plantation lease rates, should help with the problem of the state undercharging investors for access to land. However, corruption and non-transparency are endemic in this sector. For example in Vientiane province a large number of concession contracts were signed even after the 2007 moratorium on land deals over 100 hectares was in effect. Provincial and district governors have been active agents in signing concession contracts in Vientiane province, even when they likely lacked the legal authority to do so.

The length of concession contracts in Laos has been established through the 2009 Presidential Decree on State Land Leases and Concessions 1(No. 135/PM, 8 November). Article 29.1 and Article 29.2 of this Decree states that the duration of land concessions shall be between 40-70 years, depending on the scale of the project, “with the possibility to extend on a case-by-case basis.”

The social and environmental impact assessments (ESIA) process is managed through the Lao Water Resources and Environment Agency (WREA). For ESIA and concession projects, Article 11 of the PM Decree No. 135 indicates that: “Anyone who wants to lease state land must create a business feasibility study and a social and environmental impact assessment certified by the concerned sectors.” It is unclear if there are, in practice, concession hectareage thresholds which would trigger an ESIA. In any case, many concession projects have proceeded to an implementation phase without any apparent submission of an ESIA document, for example, the 50,000 ha. Birla Lao Pulp & Plantations Co. Ltd. in Savannakhet; and 10,000 ha. Hoang Anh Attapeu Agriculture Development Company rubber project in Attapeu. Other large-scale concession projects, for example the 50,000 ha. Oji-Lao Plantation Forestry Ltd. (LPFL) project, technically secured their concession agreement before the 1999 creation of the precursor to the WREA— the Science Technology and Environment Agency (STEA)— and thus seem to be exempt from the requirement to conduct a full ESIA prior to implementation of their project.

Regarding corporate requirements for community consultation in the Lao concession sector, FPIC has been completely lacking. At times, even basic community consultation has been completely absent, and villagers have learned about a concession project when bulldozers have appeared on their village lands. Kenney-Lazar (2010: 22) writes:

“At *Ban Hatxane*, the *nai ban* [village leader] told us that the only consultation process to occur was that a Lao representative of the company called and met with the *nai ban* to tell him what would happen according to the signed contract. As the *nai ban* put it, “if the central government agrees, the province agrees, and the district agrees, how can a small village disagree?”

Formally, the process for securing state land for concession development which involves village land (the vast majority concession projects in Laos will be located within village spaces) need to involve community consultations and a full participatory land use planning (PLUP) process. NLMA and the MAF (2010) have recently released a new Participatory Land Use Planning Manual, and the Rights Link project (2009) has published a Legal Analysis on Communal Land and Communal Title. The revised PLUP framework opens up the potential

for communal land titling, which could cover areas zoned as village sacred land, village use forests and communal grazing lands, and communal agricultural land (but not village forest categories). These communal lands cannot be transferred or leased. However, it remains to be seen how the new PLUP manual will actually be funded, how it will be implemented in practice, and whether it will be strategically targeted towards those villagers facing imminent loss of their land to concessionaires.

### **3. Appraisal of Economic Aspects of Concessions; including capture of rents, distribution of unearned incomes, forest taxation**

There is very little data on the economic aspects of concession development in Laos. Expert opinion certainly indicates that the Government of Laos has not been capturing a fair share of the benefits from land concession development thus far. This is in part due to the chaotic and non-transparent nature of how the concessions boom has been regulated, which has often resulted in very low, even “give-away” land lease rates charged to external investors. That said, it should be remembered that it has been an explicit strategy of the GoL to turn “land into capital”— to use land resources as a strategic asset for generating revenue and for pursuing various development strategies. Thus, for example, in the case of Oji Lao Plantation Forestry, the GoL decided to take a 15 per cent joint venture share in the LPFL company, in lieu of receiving annual land rents. Similarly, in the case of Hoang Anh Attapeu Agriculture Development Company rubber project, land rents seem to have been reduced or foregone in exchange for investor funding for the building of an athletes village in Vientiane, in support of the ASEAN Games (Kenney-Lazar, 2010).<sup>12</sup> While one can certainly debate the strategic advantages of these initiatives, (without full access to contract documentation this is not possible), it should also be recalled that the absence of land lease rentals accruing to the GoL does not necessarily indicate that the land has been ‘given away for free’. The GoL may have taken a strategic joint venture interest in the company, or exchanged land lease fees for infrastructure support. The broader issue however is that the non-transparent nature of these concession contracts in Laos makes independent analysis of their economic aspects impossible. For those joint venture projects where sufficient contract information might become available, a full analysis of the economic benefits accruing to the GoL would require a sophisticated financial assessment of the overall profitability of the plantation operations in question.

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<sup>12</sup> Although the full concession contract is unavailable for independent review.

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