



## STUDY

# Land Rights Matter! Anchors to Reduce Land Grabbing, Dispossession and Displacement

A Comparative Study of Land Rights Systems in Southeast Asia and the Potential of National and International Legal Frameworks and Guidelines

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# **Land Rights Matter! Anchors to Reduce Land Grabbing, Dispossession and Displacement**

A Comparative Study of Land Rights Systems in Southeast Asia and the Potential of National and International Legal Frameworks and Guidelines

## **Author**

Professor Andreas Neef

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# Preface

**“It is paradoxical but hardly surprising that the right to food has been endorsed more often and with greater unanimity and urgency than most other human rights, while at the same time being violated more comprehensively and systematically than probably any other.”**

**Richard Cohen, in *Causes of Hunger*, 1994**

Within South East Asia a huge amount of arable land is already under concessions for large-scale projects by international and national companies. Intensification of the agricultural productivity through the enhancement of external investments is one priority of national policies towards food security and economic development. Where large parts of land are seized, land conflicts are numerous. The land ownership and tenure rights, mostly traditional and customary rights of the local people are often not respected, local villagers are evicted without

fair compensation or forcefully displaced. Demonstrations against the loss of lands are often ending with violence by security forces against the people who ask for respect of their legitimate land rights. Human rights violations and direct violence against local actors are widespread, societal conflicts about land and the management of related natural resources are intensified. Especially women and the poor and marginalized parts of the societies, e.g. indigenous groups but also small-holder farmer families and informal tenants of land are suffering as their livelihood is depending on the natural resources like land, water, wood and fisheries, that they lose out to investors. Raising poverty in vast parts of the South East Asian rural population and thus increasing inequity are major challenges for sustainable development and just and peaceful societies.

Bread for the World has started to systematically work together with partner organizations from South



Rice-growing families in Palawan/Philippines – secured tenure rights are key for their livelihood

East Asia towards the Right to Food and food sovereignty. In combination with that the focus lies on land rights, natural resource management and conflict transformation. In various parts of the region our partner organizations as well as other civil society actors, farmer associations and communities face criminalization and imprisonment while they advocate for the land rights of the local population. During the last years it became clear that in-depth knowledge about the specificity of land rights systems, their contextualization into the local context of each country and specific understandings of legitimacy of land and tenure rights is key for development and conflict transformation. Information about international Human Rights mechanisms and international policy frameworks and guidelines like the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests/VGGT is important for national advocacy work and at the same time also to the international solidarity as an asset for the security of the civil society actors. But more knowledge is needed in order to provide a basis for further international networking and cooperation.

Thus the purpose of this comparative land policy study is, first, to provide a comprehensive overview of the current situation of statutory and customary land rights systems in six Southeast Asian countries, Cambodia, Indonesia, Lao PDR, Myanmar, Philippines and Vietnam and, second, to discuss the potential of national and international legal frameworks and guidelines to reduce land grabbing, dispossession and displacement in these countries. It is certainly impossible to do justice to the complexity of statutory and customary land rights systems in the six countries in all its scientific and legal background. Therefore, the author had to be somewhat selective in his analysis and focus on a number of commonalities and differences across the countries and some of their regions. Some aspects of land and resource grabbing, such as mining, could only be covered very briefly, while a discussion of issues of water grabbing and green grabbing – though of significant importance – was beyond the scope of this study. Urban land conflicts and land grab cases are also underrepresented in the study.

Land rights and legal frameworks are very dynamic, and there are a number of recent developments that have changed the legal landscape in some of the countries, making it difficult to keep track of all new laws and regulations pertaining to questions of access to and control of land resources. This is particularly true for Myan-

mar which is in a crucial phase of democratic transition and where land policies and legal frameworks have gone through particularly dramatic changes in recent years and months.

We thank Professor Andreas Neef as author of this study for his outstanding work and great experience with which he had collected the information and presented the results in this comparative study. Also many of our partner organizations in the countries as well as a broad range of other experts from Asian countries and internationally were involved and we are grateful to all of them who contributed and provided input to this study via interviews and/or e-mail. We are convinced that the comparative focus of this study is useful for our further work together with partner organizations and hope that also other readers will find it useful for their own advocacy and research work.

KLAUS SEITZ  
Head of Policy Department  
Bread for the World



# Executive Summary

Land rights systems in Southeast Asia are in constant flux; they respond to various socioeconomic and political pressures and to changes in statutory and customary law. Over the last decade, Southeast Asia has become one of the hotspots of the global land grab phenomenon, accounting for about 30 percent of transnational land grabs globally. Land grabs by domestic urban elites, the military or government actors are also common in many Southeast Asian countries. Large-scale land grabs are facilitated by a coalition of investor-friendly host governments, local political and economic elites and a variety of players from the ‘Global North’, including multinational corporations, international development banks, commercial financial institutions and bilateral donors and development agencies. Weakly recognized customary rights in combination with state ownership of large portions of the national territory (e.g. forestland in Indonesia, Myanmar, Lao PDR and Cambodia, public domain land in the Philippines) allow the respective governments to categorize the people living on these lands as ‘illegal occupants’.

The land deals are often discursively justified and legitimized by emphasizing (1) the need for investment in rural areas for job creation and poverty alleviation, (2) the urgency of addressing various major global crises, most notably those around food, water, energy, and climate, (3) the availability of vast tracts of idle or underutilized land, (4) and the need for replacing ‘inefficient’, semi-subsistence smallholder farming by capital-intensive, large-scale agriculture to achieve national food security. Yet, many studies have shown that large-scale land acquisitions and leases by domestic and foreign investors can adversely affect the enjoyment of a number of human rights, most notably the right to land and property, the right to food, the right to housing, the right to an adequate standard of living, the right to consultation and information, and the right to practice customary law and use indigenous/local knowledge for land and resource management. While land acquisition processes and land expropriation laws vary to some extent between the six countries studied, the outcomes tend to be similar: the poorest, most vulnerable and marginalized groups in rural and urban areas, particularly those without formally recognized land rights, lose their customary and legitimate rights to land and thereby their livelihood basis, while they lack alternative economic opportunities and receive limited or no compensation.

Aside from contemporary land grabbing, historic land concentration stemming from colonial times and land conflicts resulting from contradictory legal frameworks and unequal land distribution are also widespread throughout Southeast Asia. In the Philippines, Cambodia and Indonesia, for instance, vast estates were established by their Spanish, French and Dutch colonizers respectively, while the British demarcated large teak concessions in Upper Burma. More recently, several Southeast Asian governments have supported the large-scale movement of people from overpopulated regions to sparsely populated areas in remote mountain regions (e.g. in Vietnam) and in outer islands (e.g. in Indonesia and the Philippines). An exception is Lao PDR, where various ethnic groups have been moved from their customary lands in the forests to more densely populated areas along the major roads.

Historical and contemporary processes of land acquisition, dispossession and displacement have disproportionately affected the rights of indigenous people and ethnic minority groups in all six Southeast Asian countries. Governments in these countries have been reluctant to acknowledge the rights of their ‘indigenous’ populations. The governments of Lao PDR, Vietnam, Myanmar and Indonesia do not recognize indigenous status of their various “ethnic groups”, “ethnic minorities”, “ethnic nationalities” and “geographically isolated customary law communities” respectively. Only the Philippines and Cambodia acknowledge indigenous peoples’ rights to their customary lands in their national constitutions and have enacted special legal provisions for the allotment of indigenous titles on a community basis. However, indigenous land titling programs in the two countries have progressed very slowly due to insufficient funds and resources, lack of prioritization, and cumbersome procedures involving various ministries and agencies. Even where indigenous communities have obtained official recognition of their ancestral lands, they are not entirely immune against land grabs and land confiscations.

The recognition of women’s rights to agricultural land, forests and other natural resources varies significantly across and within the six countries. Women’s rights under customary law in Southeast Asia are often limited and precarious, particularly in the more patriarchal communities. Statutory law tends to be less discriminatory against women, but such laws are little known and recognized in rural communities. Corporate land grabs and land confiscations by the State tend to have





Discussions with indigenous villagers in Kratie province following a land grab by a domestic investor - the author of the study is pictured to the right

particularly negative impacts on women's rights to communal lands. Communal resources (e.g. non-timber forest products from community forests) tend to be vital for women's livelihoods, but are often in the center of land grabs and confiscation. The economic hardships resulting from dispossession and displacement can also trigger increased incidents of domestic violence, with women (and children) most at risk. Finally, women often play a particularly prominent role in resistance movements and are therefore highly vulnerable to state violence.

Civil society organizations (CSOs) in the six countries have varying degrees of freedom to exercise their advocacy work. Political rights and civil liberties are particularly weak in Lao PDR, Vietnam and Myanmar, although significant changes are under way in the latter country. Cambodia has a reputation of having a high level of corruption, and human rights activists are often harassed by the government. Indonesia and the Philippines are perceived as somewhat less corrupt and score better in terms of political freedom and civil liberties at a national level, but have been accused of 'internal colonization' and human rights abuses in its peripheral and conflict-prone regions, particularly in West Papua and Mindanao respectively. Civil society organizations throughout Southeast Asia need to carefully monitor the changing scope for legal empowerment and advocacy in their respective country or region.

There is some potential of international frameworks to control land grabs and enhance the security of customary rights in Southeast Asia. While most international investment agreements (such as Bilateral Investment Treaties) provide investors with a high degree of protection, land deals that violate general principles of international law could be challenged. The Indonesian government has recently cancelled a number of BITs that were considered unfavorable for the country and is currently reviewing other BITs in an attempt to renegotiate new terms. In Myanmar, civil society groups have expressed concerns that a planned EU-Myanmar Investment Protection Agreement may constrain the government's policy space in providing sufficiently robust social and environmental safeguards.

International human rights conventions, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the ILO Convention 169 on Indigenous and Tribal People, the Universal Declaration of Human Rights - UNDHR (which recognizes all individuals' right to food, to property and to adequate housing) or the UN Declaration of the Rights of Indigenous Peoples - UNDRIP (which holds that indigenous people shall not be forcibly removed from their lands or territories) provide a source of binding international laws for protection against illegitimate land grabs, but they continue to be

weakly enforced at the national and international level. The concept of transnational state responsibility for human rights violations, as enshrined in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) or the Maastricht Principles on Extraterritorial Obligations provide useful avenues for new thinking about transnational land grabs. The United Nations treaty bodies and special rapporteurs increasingly confirm extraterritorial state obligations to prevent companies' involvement in human rights violations abroad and hold companies accountable. Yet, governments' acceptance for Extraterritorial Human Rights Obligations (ETOs) is still relatively weak, making it easy for home states to refer to the corporate social responsibility of corporations.

Some soft law instruments, such as the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT), have broken new ground by calling for the recognition of "legitimate" tenure rights - including all forms of customary, informal and subsidiary rights, even if they are not (yet) acknowledged and protected by statutory law at the national level. Despite a number of limitations and shortcomings (most notably the lack of enforcement mechanisms and insufficient emphasis on host governments' accountability), the VGGT can be used as an important reference for civil society advocacy and provide some protection against human rights violations when used in negotiations with investors and government agencies. The on-going experience with the FAO's awareness-raising campaign about VGGT among multiple stakeholders in Myanmar's transition to democracy can provide useful guidance for other Southeast Asian countries.

The study concludes with a number of lessons learned, including the success of "naming and shaming" strategies through maintaining national and international media's and the general public's attention to land grabs; the effectiveness of national advocacy networks that include academics, reform-minded government officials and legal support organizations; and the usefulness of national registers holding information on all large-scale land transactions and land confiscations to ensure transparency and public scrutiny. Raising awareness about the VGGT and other international legal frameworks and principles, such as UNDRIP, and improving the 'legal literacy' among local communities can be useful strategies to empower the most marginalized communities and increase the pressure on national

governments and their agencies to adopt human rights standards and establish robust social and environmental safeguards when dealing with land and agricultural investments. Building transnational advocacy networks across Southeast Asian (ASEAN) countries and protecting land rights activists and social justice campaigners through assistance from international human rights lawyers has proven to be crucial in broadening the policy and advocacy space for addressing land conflicts, dispossession and forced evictions. Finally, civil society organizations need to carefully monitor the changing scope for legal empowerment and advocacy in their respective country or region and explore new windows of opportunity.

## Chapter 1

# Introduction

Southeast Asia has become one of the hotspots of the global land grab phenomenon. According to the Land Matrix, a global and independent land monitoring initiative, the region accounts for about 30 percent of transnational land grabs globally. Land-based investments are promoted by national initiatives, such as Indonesia's "Master Plan Acceleration and Expansion of Indonesia Economic Development 2011-2025" (MP3EI), or by regional initiatives, such as the Greater Mekong Subregion (GMS) economic corridors and the upcoming ASEAN Economic Community (AEC).

The International Land Coalition (2011) in its Tirana Declaration defines large-scale land grabbing as "acquisitions or concessions that are one or more of the following: (1) in violation of human rights, particularly the equal rights of women; (2) not based on free, prior and informed consent of the affected land-users; (3) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (4) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and (5) not based on effective democratic planning, independent oversight and meaningful participation." A more legalistic view defines a land grab as "the appropriation of land and homes without due process of law, or the unjust application of law, and sometimes even inappropriate, opaque and unjust laws." (Carter 2015: 100).

Land grabbing can adversely affect the enjoyment of a number of human rights: (1) the right to land and property: through the loss of farmland, collectively managed land (the 'commons') and indigenous/ancestral territories; (2) the right to food: through food insecurity and hunger; (3) the right to housing: through involuntary (forced) evictions and deprivation of access to water and sanitation; (4) the right to an adequate standard of living: loss of livelihood opportunities and means of subsistence; (5) the right to consultation and information of local communities; and (6) the right to practice customary law and indigenous/local knowledge on their land and forest resources. Aside from contemporary land grabbing, historic land concentration stemming from colonial times and land conflicts resulting from contradictory legal frameworks and unequal land distribution are also widespread throughout Southeast Asia.

While the dynamics of land grabbing and land concentration manifest themselves in ways specific to each country, there are some common trends and processes,



Large-scale timber production in Indonesia - Communities lose rainforest and their land to a paper factory for eucalyptus tree plantations

such as the implementation of neoliberal policies aimed at commodifying land, creating viable land markets, formalizing land rights through land registration and titling programs, and allocating large-scale land concessions (Hirsch and Scurrah 2015). Upland and remote areas, in particular, have been characterized by attempts of centralized states to regulate and modernize agricultural practices, 'civilize backward communities' and increase the 'legibility' and permanence of settlements and land management (Hall et al. 2011). Throughout Mainland Southeast Asia and parts of Indonesia and the Philippines, swidden cultivation (also termed 'shifting cultivation' or 'slash-and-burn farming') has, until recently, been the dominant agricultural practice in upland areas, which have historically been settled by indigenous peoples and ethnic minorities and where the potential of intensive wet-rice cultivation has been limited (Scott 2009; Hirsch and Scurrah 2015). While communities in these remote and upland regions have successfully resisted centralized state control over much of the 20th century, economic and political control has become much more pervasive in recent years. This poses enormous challenges on customary, informal and often insecure rights of access to and control over land and other natural resources.

## Chapter 2

# Scale, Actors, Mechanisms and Discourses around Land Grabbing and Land Confiscation in Southeast Asia

## 2.1 What is the scale of land grabbing and who are the actors involved?

The Land Matrix, a multi-institutional land monitoring initiative that aims at tracking transnational land acquisitions and leases globally, has identified **Indonesia**, **Cambodia** and **Lao PDR** as the countries that have been primarily targeted by the recent rush for land and other natural resources in Southeast Asia (cf. Table 1). In **Indonesia**, more than 3.6 million hectares of land have been acquired or leased by foreign investors in recent years, primarily for oil palm plantations and – to a lesser extent – fast-growing tree plantations for timber, paper and pulp production, according to this database. Outer island plantation development and expansion is triggering hundreds of land disputes each year – often accompanied by violence and/or causing dispossession – between small-holders or indigenous residents and plantation companies. In **Cambodia** and **Lao PDR** many foreign investors seek to exploit the countries' abundant natural resources, e.g. by establishing rubber, sugar and teak plantations on land previously occupied by customary rights-holders (Neef and Singer 2015).

According to the Land Matrix database, China, Malaysia and Singapore are the most prominent investor countries in Southeast Asia (Table 1). Chinese companies, in particular, have targeted **Indonesia's** and **Myanmar's** vast mineral resources. Malaysian and Singaporean corporations and state funds are investing in oil palm concessions in **Indonesia**. Vietnamese, Thai and Chinese companies have driven the dramatic expansion of rubber concessions in **Lao PDR** and **Cambodia**. Chinese corporations have also invested in the forestry sector in **Vietnam** and in the agricultural and biofuel sector in the **Philippines**, although some of the projects in both countries have already been abandoned.

Yet, it has to be noted that the Land Matrix has a number of shortcomings. It depends on independent reporting and verification on the ground, hence secretive deals in some remote places with difficult access for external observers (e.g. in conflict zones in ethnic states of **Myanmar**, in **West Papua/Indonesia** and in **Mindanao/Philippines**) may remain unrecorded. The actual size and implementation status of many deals remain unclear. Moreover, the database only covers 'large-scale' and 'transnational' land deals; large-scale land acquisitions and leases by *domestic* investors do not appear in the Land Matrix's database, unless they are joint ven-

**Table 1: Top Seven Target Countries of 'Transnational Land Acquisitions and Leases' in Southeast Asia and Top Seven Investor Countries**

Target Countries in Southeast Asia	hectares	Investor Countries targeting Southeast Asia	hectares
1. Indonesia	3,632,726	1. China (incl. Hong Kong)	1,519,995
2. Cambodia	798,207	2. Malaysia	1,380,013
3. Lao PDR	523,258	3. Singapore	718,972
4. Vietnam	351,809	4. India	402,510
5. Malaysia	294,644	5. Thailand	343,513
6. Philippines	110,150	6. Vietnam	323,449
7. Myanmar	60,702	7. South Korea	285,574

Source: Data from Land Matrix Partnership, retrieved 9 February 2016

Note: These figures do not include large-scale *domestic* land acquisitions and leases.

tures. Smaller land deals (less than 200 hectares), whether foreign or domestic, which are particularly common in the Philippines and in Lao PDR are also not covered. Massive land confiscations by central governments for industrial/special economic zones, conservation areas, hydropower dams and other large infrastructure projects also go beyond the scope of the Land Matrix, although these may also be classified as ‘land grabs’ and often involve massive amounts of foreign investments.

If domestic land grabs and land confiscations are included, the emerging picture in all six countries is much more dramatic than Table 1 suggests. In **Cambodia**, for example, the human rights advocacy group LICADHO has recorded more than 2.1 million hectares of economic land concessions (equivalent to more than 60 percent of the country's fertile agricultural land) and more than 2.3 million hectares of land covered by mining licences. International donors have supported a number of highway and railway projects that have been associated with massive relocations. Dispossession and displacement related to large-scale land acquisitions and public mega-projects have affected more than 770,000 people (almost 6 percent of the country's population), according to recent estimates of local human rights organization ADHOC (Neef and Singer 2015). In **Lao PDR** 2,642 land deals, covering a total of 1.1 million hectares of land concessions and leases (about 5 percent of the country's territory and larger than the total area under paddy rice production), were recorded in an official inventory commissioned by the Ministry of Natural Resources and Environment (MoNRE) with funding from the Swiss Agency for Development and Cooperation (SDC). While the majority of deals were held by domestic investors and were less than 5 hectares in size, 72 percent of the concession/lease area was under foreign investment. Almost one third of all concessions and leases occurred on land categorized as forest, particularly on protected forestland (Schönweger et al. 2012).

Both **Lao PDR** and **Cambodia** are aspiring to become the ‘batteries of Southeast Asia’ by planning a cascade of hydroelectric power stations along the lower Mekong basin. While energy-hungry Thailand – which was the first country in Mainland Southeast Asia to build massive multipurpose dams from the 1960s onwards – is supporting these plans and has major financial stakes in several of them, Vietnam strongly opposes its neighbors’

hydropower aspirations, as the country is anticipating major impacts on the Mekong delta's flood regime and fish supplies. Aside from large-scale displacements of already vulnerable populations in **Cambodia** and **Lao PDR**, there are projections that dam developments will trigger a massive decline of fish supplies, affecting millions of people along the Mekong and around the Tonle Sap Lake. On its part, **Vietnam** has invested massively in hydropower development in its north-western highland provinces Son La, Hoa Binh and Lai Chau and in the central region of the country, relocating hundreds of thousands of mostly ethnic minority people in the process (Neef and Singer 2015).

In the case of **Myanmar**, the limitations of the Land Matrix become probably most apparent: while the database recorded only about 60,000 hectares of large-scale land acquisitions and leases, a recent study by Woods (2015) – based on the government's own difficult-to-access data – found that large-scale land acquisitions for commercial agriculture increased from 800,000 hectares (2010) to 2.1 million hectares (mid-2013). The author states that the figures underestimated the extent of land grabbing, as they only cover agro-industrial concessions allocated by central government agencies and exclude additional concessions allocated by provincial authorities, the military and non-state entities. A recent FAO report found that as much as 5 million hectares have been approved for land concessions by the Government of Myanmar, of which only 20 percent had been developed according to the government's own statistics (Shrinivas and Hlaing 2015, cited in Hirsch and Scurrah 2015).



## 2.2 Who are the major actors involved in large-scale land transactions?

The major actors involved in large-scale land acquisitions and leases in Southeast Asia can be broadly categorized into (1) investors, (2) recipients, and (3) intermediaries.

On the **investor** side, national governments – notably in East Asian countries, but also in South Asia and the Gulf States – play a major role in driving investments in land and other natural resources in large parts of Southeast Asia. In many cases, national governments invest in land and other natural resources through Sovereign Wealth Funds (SWFs) and state-owned companies. While large transnational corporations have been among the most notorious investors in Southeast Asia for several years, small- and medium-sized biofuel companies are also quickly becoming major players in the Southeast Asian land rush, encouraged by recent mandatory biofuel policies in industrialized countries, mostly notably in the European Union and in the United States. Other types of investors include private equity and hedge funds. International environmental NGOs have also purchased vast amounts of land, dubbed as the ‘great green land grab’, i.e. the appropriation of forestland and other natural resources for conservation purposes. Evolving international carbon markets, such as the global REDD+ initiative (**R**educed **E**missions from **D**eforestation and **F**orest **D**egradation), have attracted a number of reforest-

ation companies and so-called carbon cowboys that aim at turning conservation forests and monoculture tree plantations into lucrative businesses under the guise of climate-saving investments in the green economy. Indonesia – with its particularly large forest area – has been a primary target by a new group of ‘green economy investors’ in anticipation of future trade in carbon certificates.

Among the **recipients** (i.e. targets) of large-scale transnational land acquisitions are national governments and state agencies, particularly in the least-developed countries **Cambodia**, **Lao PDR** and **Myanmar** with weak or bad governance structures and a large share of poor, vulnerable and undernourished people. Many Southeast Asian governments are actively soliciting large-scale investors to overcome the lack of investment in rural areas and to exploit allegedly ‘underutilized’ areas. Another motivation for national governments to encourage transnational land acquisitions is to make the rural landscape legally legible and fiscally taxable through a combination of territorialization, formalization and privatization. In some countries that have undergone a major decentralization process in recent years, such as **Indonesia**, regional governments at provincial or district level are increasingly targeted by investors. By contrast, local communities, who are on the recipient side of investments in Southeast Asia and have to bear their consequences in the most direct sense, are rarely involved in negotiations over the use of their land and other natural resources that they often hold under communal management.

### What is Green Grabbing?

The term “Green Grabbing” has been coined to describe processes where land and other natural resources are appropriated from their original and legitimate owners or users for ‘environmental’ reasons, such as ecosystem conservation, biodiversity offsetting, bio-carbon sequestration, biofuel production or ecotourism. Green grabbing is not a new phenomenon, as the demarcation of national parks, wildlife sanctuaries and forest reserves dates well back to colonial times. Yet, global discourses around ‘green growth’ and the

‘bioeconomy’ have become new drivers for green grabs by a variety of actors, such as environmental organizations, green activists, carbon traders, ecotourism companies and eco-certification providers. This ‘commodification of nature’ can have harmful consequences for forest-dependent, indigenous people and customary custodians of ecosystems and natural resources.

*Source: McAfee 1999; Fairhead, Leach and Scoones 2012.*



Among the **intermediaries** – i.e. those actors that play a major role in promoting, brokering or financing transnational land acquisitions – feature international development banks and aid agencies that have promoted investor-friendly policies and legislative frameworks in several Southeast Asian countries for more than 20 years. The Asian Development Bank (ADB) has provided financial, technical and legal assistance for formulating Cambodia's 2001 Land Law, which is particularly investor-friendly. The World Bank's lending arm – the International Finance Corporation – has provided direct financial support for a large number of land deals. Internationally operating commercial banks are another major group of intermediaries in transnational land acquisitions. Germany's Deutsche Bank and Australia's ANZ, for instance, have recently been condemned by human rights organizations and international media for financing Vietnamese companies involved in large-scale land grabs and violent evictions of local communities in **Cambodia** and **Lao PDR** (Global Witness 2015). In the case of green grabbing (see Box p. 14), eco-certification providers can play a major role in brokering transnational land acquisitions.

## 2.3 What are the discourses surrounding large-scale land deals?

Multi-national corporations, international development banks, bilateral donors and host governments tend to use a remarkably similar set of arguments to discursively justify and legitimize large-scale land transactions. The most common narratives are (1) the need for investment in rural areas to provide new job opportunities and alleviate rural poverty (the *development* narrative); (2) the urgency of addressing various major global crises, most notably those around food, water, energy, and climate (the *crisis* narrative), (3) the availability of unused or underutilized land that could be brought into (more) productive use (the *idle* land narrative) and (4) the superiority of capital-intensive, large-scale agriculture over semi-subsistence smallholder farming (the *efficiency* narrative) (cf. Neef 2014).

Upon close examination, these narratives stand on shaky grounds. To date, large-scale land deals in Southeast Asian have rarely generated new, permanent and secure job opportunities for local communities and mostly aggravated hardship rather than alleviated poverty among rural populations. The global food, water, energy and climate crisis is arguably a consequence of many of the factors that are driving the global land grab phenomenon. Much of the land that has been grabbed by investors and governments in Southeast Asia had been fertile and populated or served important ecosystem functions prior to the land deals and oftentimes were left idle or destroyed after its resources had been extracted by the investors. There are also major arguments put forward against the dominant discourse that only large investors can stem the investments and have the superior technological means needed for establishing agro-industrial plantations. Until recently, highly productive smallholder farms of 2-3 hectares made up about 80 percent of world rubber production. Prior to the recent wave of transnational land acquisitions, small-scale oil palm cultivation in Southeast Asia thrived alongside larger plantations and were highly productive and profitable. With the recent boom in mega-plantations in regions like Kalimantan and West Papua the proportion of smallholder-owned plantations in **Indonesia** is dwindling rapidly. However, reducing the discourse around large-scale land acquisitions and large-scale vs. small-scale farming models to questions of efficiency and productivity misses another important dimension, i.e. the cultural significance of land and the important social and safety net functions that various natural resources hold for rural people (Neef and Touch 2012). For many rural communities – and indigenous peoples in particular – 'land' is not just a physical resource to be apportioned and allocated for productive purposes, but holds important spiritual and socio-cultural meanings and values (De Schutter 2011; Neef and Touch 2012; Franco et al. 2015).

## 2.4 What are the mechanisms that facilitate large-scale land deals?

Most Southeast Asian countries have set constitutional and other regulatory limits on foreign ownership of land and other natural resources and do usually not allow foreigners to directly acquire land and assume full ownership rights. Due to these constraints, the most common mechanism by which foreign entities can undertake farmland investments is by lease agreements. With the exception of **Vietnam**, recent land developments in the agricultural sector of the countries studied have been dominated by economic land concessions, which are long-term leases granted at generally low annual per hectare rents. Yet, such land concessions are not an innovation of Southeast Asian governments. The allocation of land concessions for agro-industrial purposes, logging, mining and other extractive uses was already common in colonial times. Vast estates were established by the Dutch colonizers in today's **Indonesia** from the 17th to the 19th century and by the Spanish colonial power under the hacienda system in the **Philippines** from the 16th to the late 19th century. In **French Indochina** large-scale forest and rubber plantations were allocated to colonial concessionaires as early as 1874. The British Empire opened up teak concessions to private investors in lower **Burma** in 1829, shortly after the First Anglo-Burmese War. Following the annexation of upper Burma in 1886, the British colonizers allocated the first mining concessions in today's **Myanmar**. Land considered as vacant and idle was carved out in the eastern and north-eastern uplands from indigenous peoples' swidden cultivation systems for rubber and other plantation crops grown on British colonial estates, or for colonial forestry purposes (Scurrah et al. 2015). Hence, it can be argued that contemporary Southeast Asian government in conjunction with international and domestic investors and financiers are just reinventing an old colonial model.

Land confiscations for large-scale government projects, such as hydropower dams, roads and railways, and urban commercial zone development, can also take on the characteristics of a "land grab". All six countries have legal provisions for expropriation with 'adequate' compensation for 'public purposes' or in the 'public interest'.



Agro-industrial monoculture in a large-scale economic land concession in Koh Kong province, Cambodia - the land area cultivated by a single Chinese company could have provided livelihoods for more than 1,000 farming families

Yet, 'public interest' can be very broadly interpreted and may include projects that seek private economic gain. Special Economic Zones (SEZs), for instance, oftentimes involve the confiscation of land from smallholders to provide inexpensive sites for investors in manufacturing enterprises. In Mainland Southeast Asia, 334 special economic zones have been recorded in 2015 (Hirsch and Scurrah 2015).

While land expropriation laws may slightly vary between the six countries, the outcomes are often similar: the poorest, most vulnerable and marginalized groups, including those without formal land titles, often lose out first and lack alternative means to sustain their livelihoods, while customary rights to land are often lost permanently, with little or no compensation (Price 2015). Weak or inexistent consultation processes lead to uncompensated loss of land rights and evictions from customary land that had often been cultivated for generations. In some cases, investors exploit local governments and communities to co-opt local leaders to strengthen their negotiating position.

Large-scale land deals by commercial investors and land confiscations for the 'public interest' in the context of Southeast Asia are facilitated by state ownership to large portions of the countries' territory (e.g. forestland in Indonesia, Myanmar and Cambodia, public domain land in the Philippines), which allows the respective governments to classify people living in these lands as 'illegal occupants'. This will be further discussed in chapters 3 and 4.

## Chapter 3

# Overview of Major Land Categories and Relevant Land Policy Institutions in the Study Countries

## 3.1 Pressure on land and forest resources

Among the six countries, the **Philippines** has the highest population density, the least amount of arable land per capita and the lowest forest cover (Table 2). **Vietnam** is also densely populated and has very little arable land per capita, but has been described by international donors as a success story in terms of reversing its dramatic decline of forestland in the second half of the 20th century and increasing its forest cover through large-scale reforestation and forest allocation programmes. However, much of the forestland is production forest with limited ecosystem functions, some forestlands have barely any trees on them, and rubber plantations also tend to be counted as 'forest'. Similarly, in **Cambodia**, rubber plantations are officially recorded in the forest statistics, which explains that more than 50 percent of the country's landmass is still under 'forest'. The ecological integrity of protected

areas in Cambodia – making up more than a quarter of the country, which is by far the highest share among the six countries – has also been compromised by agro-industrial plantations, mining concessions and large tourism projects.

**Indonesia** also has a very low amount of arable land per capita, and population densities are particularly high on Java and Bali. Yet, the so-called 'outer islands' are steadily catching up because of large migration streams into the economic frontier areas. While more than 50 percent of the country is still classified as forested land, forest resources are under intense pressure from forest fires, mostly for conversion into oil palm plantations. The country accounts for about 17 percent of tropical deforestation globally. **Lao PDR** is by far the least densely populated country among the six countries, but intense pressure has come from hydropower development and relocations of forest-dependent communities in the uplands to more densely populated lowland areas.

**Table 2: Forest cover, protected areas, population density and arable land in Southeast Asia**

	Indonesia	Philippines	Vietnam	Lao PDR	Cambodia	Myanmar
Forest cover in percent 2013	51.0	25.4	46.8	46.1	55.0	46.1
Protected areas in percent 2012	14.7	10.9	6.5	16.7	26.2	7.3
Population density (people/km <sup>2</sup> ) 2014	140	332	293	29	87	82
Arable land (ha per capita) 2013	0.09	0.06	0.07	0.23	0.27	0.20

Source: World Bank database (2016)

### 3.2 Land categories and institutions in Cambodia

Under the 2001 Land Law, land in Cambodia is divided into five categories: (1) state public land, (2) state private land, (3) private land, (4) indigenous community land and (5) monastery property.

The Ministry of Land Management, Urban Planning and Construction (MLMUPC) is the government agency with primary responsibility for land management, including (a) policy and coordination of land registration and administration; (b) land use planning; (c) cadastral surveying, (d) mapping; and (e) property valuation. The Ministry is represented at the provincial level by the Department of Land Management, Urban Planning and Construction (USAID 2010a). In June 2016, a new Department of Social Land Concessions has been established, which is tasked to speed up the land allocation process to landless and land-poor rural families. Land use planning lacks technical as well as methodological

planning capacity at all administrative levels, although MLMUPC has made efforts to address these limitations (USAID 2010a). Cadastral procedures have not been uniformly undertaken in all parts of the country; several forest-rich provinces in the north-eastern and south-western parts have been excluded (Dwyer 2015). Other ministries involved in land administration include the Ministry of Agriculture, Forestry and Fisheries (MAFF) and the Ministry of Environment (MoE). MAFF is responsible for agriculture development and for overseeing the allocation of Economic Land Concessions (ELCs). The MoE is responsible for environmental protection and natural resource conservation and for assessing and mitigating potential environmental impacts related to ELCs (USAID 2010a). Over the last 10 years it has also been tasked to allocate ELCs in national parks, wildlife sanctuaries and protected forest areas, as the government has found it harder to find suitable land for foreign and domestic investors outside of protected areas (AD-HOC 2012; Neef 2016).

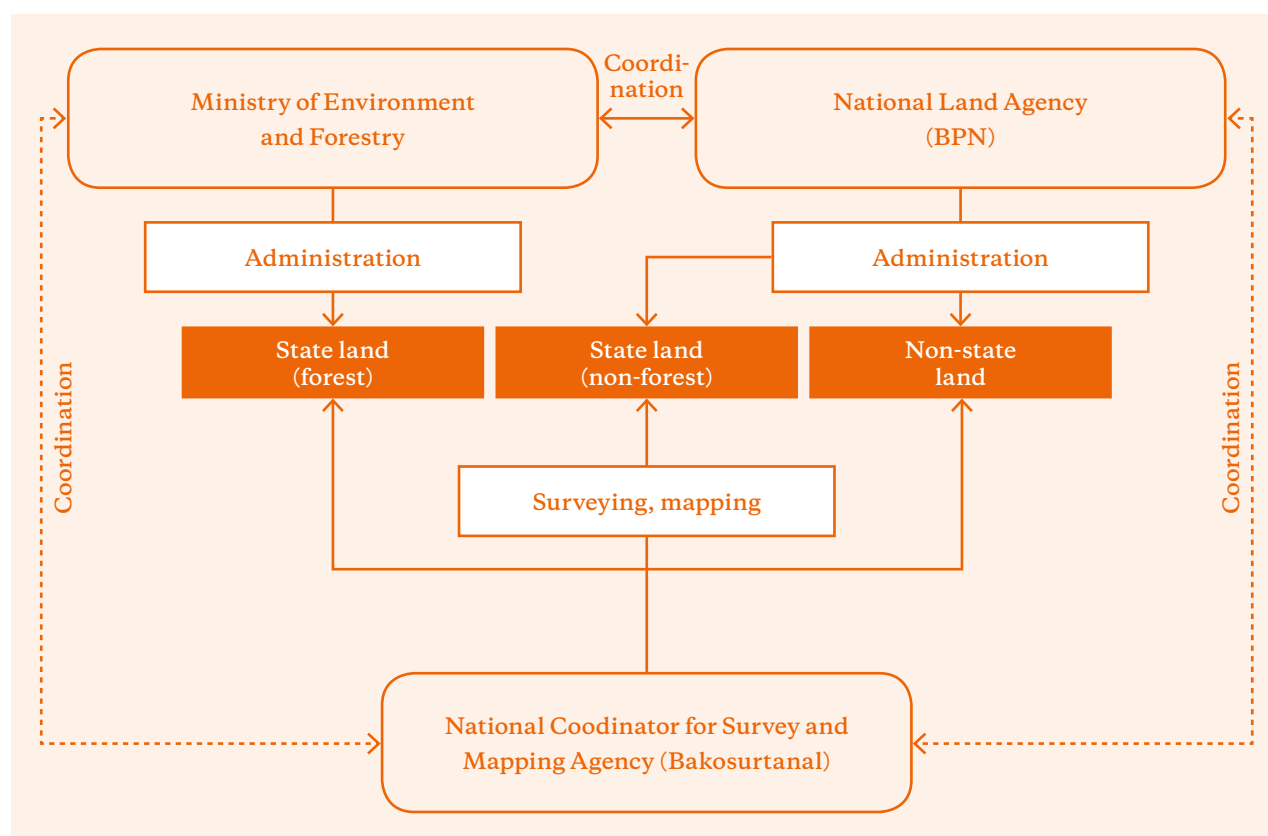


Farms in a social land concession in Kratie province – the land provided by the government and allocated through the internationally funded LASED project was of poor quality and low productivity

### 3.3 Land categories and institutions in Indonesia

Land in Indonesia is classified into three major categories: (1) state forest land, (2) state non-forest land, and (3) non-state land.

**Figure 1: Land categories and responsible institutions in Indonesia**



Source: Adapted from Susanti and Budidarsono (2014)

The responsibility for governing state forest land – estimated to comprise about 70 percent of the country’s territory – lies with the Ministry of Environment and Forestry (MoEF), formerly the Ministry of Forestry. It is important to note that Indonesia’s actual forest cover is much lower (51 percent, as per data from 2013), which means that a major share of state forest land does not have any tree cover. This discrepancy is largely the result of the MoEF’s refusal to reclassify land that has long since been allocated for other, i.e. non-forest purposes, such as oil palm plantations or mining. It is commonly presumed that this refusal is motivated by MoEF’s reluctance to

cede authority over land to other government entities (USAID 2010b).

The National Land Agency (BPN) administers all non-state land (e.g. private residential areas, individually owned agricultural land) and land categorized as non-forest state land. These two land categories together comprise about 30 percent of the country’s territory (Susanti and Budidarsono 2014).

### 3.4 Land categories and institutions in Lao PDR

Land in Lao PDR is categorized into (1) agricultural land, (2) forest (subdivided into conservation, protection, production forest), (3) water area, (4) industrial, (5) communication, (6) cultural, (7) national defense and security, and (8) construction.

The Ministry of Agriculture and Forestry (MAF) administers and manages all land classified as agricultural or forestry land, which composes much rural land in Lao PDR. MAF is in charge of managing all matters regarding crops, livestock, soil, irrigation, watershed management forests and protected areas. Much of MAF's authority has devolved to Provincial Agricultural and Forestry Offices and to District Agricultural and Forestry Offices. The Ministry of Planning and Investment (MPI) is the lead agency in processing land concession applications and issuing concession registration certificates to domestic business and foreign investors. The Ministry of Environment and Natural Resources (MoNRE) has overall responsibility for the development and implementation of REDD+ and for overseeing management of the forestry sector in Lao PDR. MoNRE was created in 2011 through a merger of the Water Resource and Environment Administration (WREA) with departments of the National Land Management Authority (NLMA) and various agencies of other ministries including the Geology Department, and the Forest Conservation and Divisions within MAF (USAID 2013a).

### 3.5 Land categories and institutions in Myanmar

Land in Myanmar is classified into at least 14 categories: (1) freehold land, (2) grant land, (3) farmland, (4) grazing land, (5) town land, (6) village land, (7) cantonment land (for military's exclusive use), (8) monastery land, (9) vacant land, (10) fallow land, (11) virgin land, (12) reserved forest land, (13) protected public forest land and (14) public forest land.

More than 20 government agencies have some form of involvement with land management. The Ministry of Agriculture and Irrigation (MoAI) implements national agricultural policies and comprises 13 departments, of which six are responsible for planning, water resources, irrigation, mechanization, settlement and land records respectively. Myanmar Agricultural Services (MAS), MoAI's largest unit, is responsible for field operations relating to extension, research, land use, seed multiplication and plant protection. The Irrigation Department, also under the MoAI, oversees all aspects of irrigation design, construction, operation and maintenance. Other major departments are the Settlement and Land Records Department (SLRD) and several State Economic Enterprises. The SLRD oversees land management, administers the land tax system and conducts national agricultural surveys following cropping periods (USAID 2013b). Following the promulgation of the 2012 Farmland Law and the Vacant, Fallow and Virgin Lands Management Law (VFV Law) the SLRD is responsible for recording and registering interests in farmland and vacant, fallow and virgin land and for issuing LUCs to farmers whose use rights have been approved by Farmland Management Body. The Farmland Management Body (FMB), which replaced the former Land Committee, is comprised of officials from MoAI and SLRD (Oberndorf 2012; USAID 2013b; Carter 2015).

### 3.6 Land categories and institutions in the Philippines

The 1987 Philippine Constitution categorizes lands of the public domain into agricultural, forest or timber, mineral lands, and national parks. Among these, only public agricultural lands can be sold, leased or otherwise alienated. The two major classifications of land are the alienable and disposable (A&D) lands and forest lands. A&D land is estimated to cover around 14.2 million hectares or 47 percent of the country's landmass. According to the constitution, A&D lands may be leased up to 1,000 hectares to private corporations – which have to be at least 60 percent Filipino-owned – and up to 500 hectares to individual citizens. Citizens can also acquire a maximum of



12 hectares through purchase, homestead or grant. Forest lands are areas in the public domain that have been classified for forest use such as public forest, permanent forest or forest reserves, timberlands (i.e. production forests), grazing lands, wildlife sanctuaries, and areas which are not yet declared A&D. Forest lands, including those with mineral deposits and national parks, belong to the State who can assign usufruct or resource utilization rights to individuals, corporations or communities under certain conditions (USAID 2011).

The Forest Management Bureau (FMB) of the Department of Environment and Natural Resources (DENR) provides further classification to the lands of the public domain and adopts the land classification of the country. Another agency under the DENR, the Mines and Geosciences Bureau (MGB), implements the mining laws and allots mining licenses and concessions – which are often in protected forested areas, adding further to the complexity and policy inconsistencies within the department. The Philippines' Land Management Bureau, also under the DENR, is responsible for administering, surveying, managing, and disposing alienable and disposable (A&D) lands and other government lands that are not placed under the jurisdiction of other government agencies (USAID 2011; Wetzlmaier 2012).

The Department of Agrarian Reform is the lead agency for the agrarian reform process and coordinates with the DENR regarding land survey and distribution of land to beneficiaries. The Land Registration Authority issues land titles and registers land transaction documents. The National Commission on Indigenous Peoples (NCIP) assists indigenous groups in securing title to their lands and approves any proposed transfer, use, management or appropriation of indigenous peoples' ancestral lands (USAID 2011; Duhaylungsod 2011).

### 3.7 Land categories and institutions in Vietnam

The Vietnamese Land Law of 2013 classifies land into three main categories: (1) agricultural land, comprising land for planting annual and perennial crops, production and protective forests and land for aquaculture; (2)

non-agricultural land, comprising residential areas, infrastructure, religious establishments, national defense and security areas, etc., and (3) unused land, comprising land for which a use purpose has not yet been determined. Public and private land tenure in Vietnam is less clearly demarcated than in many other countries (Hirsch et al. 2015).

The Ministry of Natural Resources and Environment (MoNRE) is the primary central-level administrative body for land, water and mineral resources. It is charged with the state administration of land, directing and organizing inspections of land nationwide and directing the surveying, measurement, drawing and management of cadastral maps, land use status maps and land use zoning maps nationwide. In addition, it provides regulations on cadastral files and guidelines on their formulation, revision and management and issues land use right certificates. Below the central level, provincial and district entities and commune People's Committees implement land policies with support from the provincial or district departments for Natural Resources and Environment and commune cadastral officers. Land Registration Offices – established in all provinces, but only in one third of all districts – provide land-related public services. Oftentimes, these offices lack consistent organizational and service standards as well as the capacity to meet increasing demands from land users (USAID 2013c).



Women at harvest in Vietnam

## Chapter 4

# Formal and Informal Land Rights Systems in the Study Countries

### 4.1 Statutory law and customary tenure in the Southeast Asian context



Rice-farmer in Palawan/Philippines – production techniques are often simple, but adapted to the local context and sustainably practiced

A commonality among the six study countries is that they were all under colonial rule until the 1940s to 1950s. Hence, their history of independence and nation-building is relatively recent, and colonial legacies can be found in their national constitutions and land legislations. For example, Myanmar's 1894 Land Acquisition Act – promulgated under British colonial rule of Burma – continues to be the primary legal tool governing expropriation of land for both public and business purposes in Myanmar. Most forest laws in Southeast Asia – giving sole forest ownership to the state – follow colonial tradition. The uneven distribution of land in the Philippines dates back to the hacienda system introduced by Spanish colonizers about 300 years ago and has proven extremely resistant to reform until today (section 4.4.5).

Another common feature in the six countries is that the State's recognition of customary rights to land is generally weak and is of rather low priority for government agencies and officials. Whether the countries are formal democracies (Indonesia, Philippines), have semi-authoritarian governments in democratic transition (Myanmar, Cambodia) or remain socialist, one-party states while embracing the market economy (Lao PDR, Vietnam), they all declare that the 'State' is the ultimate owner of all land. The constitutions of the Philippines and Myanmar and the 2013 Land Law of Vietnam are prominent examples:

"All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State."

*(Art. 12 of the 1987 Constitution of the Republic of the Philippines)*

"[T]he Union: (a) is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in Union; [and] (b) shall enact necessary law to supervise extraction and utilization of State-owned natural resources by economic forces."

*(Art. 37 of the 2008 Constitution of the Union of Myanmar)*

"Land belongs to the entire people with the State acting as the owner's representative and uniformly managing land. The State shall hand over land use rights to land users in accordance with this Law."

*(Art. 4 of the 2013 Land Law of the Socialist Republic of Vietnam)*

While statutory law in Southeast Asia vests control over natural resources predominantly in the State, customary rights have always existed under central authorities. In pre-colonial times, monarchs and other regional leaders claimed formal ownership over land and other resources and maintained that their decrees would prevail over customary law at community level (Ennion 2015). Locals were required to give a certain amount of produce as a form of rent or tax for using the land. While a high level of control was easy to maintain in the traditional rice growing areas, it was near impossible in the remoter places in the forests and/or uplands, where communities developed and continuously adjusted their own sets of rules. Some historians argue that the practice of swidden cultivation was developed as a specific strategy to evade and undermine governance by central authorities and avoid interaction with statutory legal systems (e.g. Scott 2009). In the early 2000s there have been estimates that swidden cultivation was being practiced, although

not exclusively, on nearly 50 percent of the land area in Southeast Asia (Ennion 2015). It has also been described as the dominant form of land use in the Southeast Asian uplands, populated by more than 100 million people. For centuries, swidden cultivation has been a rational choice of land use for traditional, close-knit forest farming communities living in isolated areas with low population density and poor soil quality. Land used for swidden cultivation was traditionally accessed through various types of communal tenure, under which exclusive usufruct and ownership rights did not rest with individuals or particular families, but with a larger community of users.

There is, however, widespread agreement that swiddening is changing rapidly throughout the Southeast Asian region. Swidden farmers have been heavily criticized by governments in all six countries for cultivating their fields non-permanently and relocating settlements following new clearances. Thus, swidden agriculture and ‘migrant’ or ‘nomadic’ practices have widely been held responsible for the destruction of the uplands’ forest resources and governments have long promoted the sedentarization of swidden farmers. Direct political drivers towards this goal have been legal restrictions or outright bans of swidden practices, particularly aggressively in **Vietnam, Lao PDR** and – more recently – **Myanmar**, often in combination with ‘opium substitution programs’. However, drivers can also be indirect, such as through the expansion of the influence of forest departments or state-forest enterprises, increased conservationism, imposing rigid land classification systems or simply by not recognizing customary land rights, as in the case of Indonesia. It is also important to note that indigenous farming communities are not necessarily engaged in swidden agriculture. Many of them, such as the Ifugao in the **Philippines**, have developed permanent farming systems on terraced hills over many generations.

While customary land rights systems in Southeast Asia are diverse, complex, localized and adaptable and have evolved differently depending on the agro-ecological niches that communities have occupied, they have a number of things in common: tenure is conceived as a “bundle of rights” that tends to be inclusive rather than exclusive and comprises a combination of individual and collective rights of control, access, withdrawal and use. Customary tenure reflects social and cultural relations: land is not just the source of food and livelihoods, but is

also seen as the foundation of a people’s indigenous culture and spirituality. It is the source of their indigenous knowledge with regards to land use, natural resource management and self-governance.

However, there is also a risk to romanticize customary law: customary institutions can often be undemocratic, class-based, elite-driven and discriminatory against certain social groups, including women. Historic and contemporary pressures on customary rights have also contributed to the slow erosion or complete breakdown of customary rules, for example when communities have been displaced, resettled or forced by their respective government to accept new settlers from other ethnic groups.

## 4.2 State instruments for governing access to land in the study countries

In this section, the major instruments used by Southeast Asian governments to grant access to land are discussed. They can be categorized into four main types: (1) land formalization for collective ownership and use, (2) individual land registration and titling, (3) land reform and redistribution, and (4) land (re)settlement (cf. Hall et al. 2011).

### 4.2.1 Formalization of collective ownership or use rights

This instrument refers to the recognition of customary – mostly collective or communal – rights by the State, including the delineation of boundaries. Typical examples from the study countries are the Community-Based Forest Management program (1995) and the Certificates for Ancestral Domain Title (CADT) program under the Indigenous Peoples Rights Act (IPRA) of 1997 in the **Philippines**, the community forestry program (mid-1990s) and the indigenous communal land titling program (2001) in **Cambodia**, and certain components of the Land and

Forest Allocation (LFA) program in **Lao PDR** (1997). These formalization programs have mostly targeted up-land people and/or indigenous groups. Common to all of them is that these types of formalized rights cannot be alienated, i.e. beneficiary communities are not allowed to sell or otherwise transfer the rights to their land.

#### 4.2.2 Registration and titling of smallholders' land

Land registration and titling programs have been initiated by a number of Southeast Asian countries. Yet the only country that has succeeded in implementing a nation-wide program is **Vietnam**. Its socialist government started to register farm households' land and allocate land use documents (so-called "Red-Book Certificates") in 1993, after a history of failed collectivization of farmland in the 1950s and 1960s and a peasant-driven de-collectivization process in the 1980s. Similarly, **Lao PDR** started its land titling program in 1997 after acknowledging the failure of collectivized farming. However, the implementation began in peri-urban areas and was only extended to rural areas and some remote, multi-ethnic sites after 2003. The program prioritized accessible areas along major roads with existing land markets. The land titling process has remained incomplete to date, despite strong support from international donors. **Cambodia's** land titling program has also been mostly donor-driven, but was limited until recently to the more densely populated provinces. Provinces in the north-eastern and south-western parts of the country - where the Cambodian government has major stakes in the exploitation of natural resources and where most of the country's indigenous populations live - were excluded from the titling process. A 'fast-track' land titling program (Order 01) was instigated by the Prime Minister in 2012 and executed by his second son, following a moratorium on economic land concession. While it covered nearly all provinces in the country, it targeted only selected areas within the provinces and bypassed existing agencies, particularly those under the Ministry of Land Management, Urban Planning and Construction (MLMUPC) that used to have the exclusive oversight of the land titling program.

**Myanmar** does not have a comprehensive land registration or titling program, although landholders with higher incomes or connections to authorities are sometimes able to apply for land use certificates (LUCs).

#### 4.2.3 Land reform and redistribution

In land reform programs land that is currently owned by large, often absentee landholders is redistributed to landless and land-poor people. The most commonly known land reform program (and probably the longest) among the six study countries is arguably the Comprehensive Agrarian Reform Program (CARP) in the **Philippines**. It was partially motivated by the desire to stop the resurgence of leftist peasant movement which had been triggered by rural inequality. Another motivation was the experience of post-war land reform in East Asia (Taiwan, Japan and South Korea) which was seen as a development model for the Philippines (Hall et al. 2011). One of its stated objectives was to rectify historical injustices and redistribute land to marginalized and deprived rural populations. Very different types of land reform were the forced collectivization campaigns in **Vietnam** and **Lao PDR**, which were largely unsuccessful and officially ended with the advent of the doi moi (renovation) reform process in Vietnam and jintanakan mai (New Economic Mechanism) in Lao PDR in the mid-1980s (Friederichsen and Neef 2010). Finally, **Cambodia's** Social Land Concession (SLC) program has been introduced as a redistributive measure, although the land allocated to SLCs has been mostly degraded, infertile land and has not been excised from large-scale concessions (Neef et al. 2013; LICADHO 2015).

#### 4.2.4 Land (re)settlement

Land (re)settlement is closely related to land redistribution, but usually involves a broader geographical outreach and claims to open up new land on the frontier rather than redistributing land that is already owned. It

supports the movement of people to areas that are considered under-utilized or unused (in general, land under the jurisdiction of the State – although competing claims may exist). In the **Philippines**, successive governments encouraged migration from the crowded islands of Luzon and the Visayas to the southern island of Mindanao throughout the second half of the 20th century (Hall et al. 2011; Noteboom and Bakker 2014). In **Indonesia**, the transmigration program has moved several million land-poor or landless farmers from the overpopulated islands of Java, Bali and Madura to the ‘outer’ less populated islands of Kalimantan, Sumatra, Sulawesi and West Papua. This program continued the Dutch colonization program of the 1920s and had similar objectives: (1) increasing agricultural output, (2) spreading populations more evenly across the archipelago and (3) consolidating the central government’s territorial control in ‘peripheral’ areas (Hall et al. 2011). In **Vietnam**, starting from the mid-1970s, many farmers from the crowded Red River Delta and Mekong Delta (the major rice-growing areas of the country) were moved to the Central Highlands and north-western provinces, inhabited predominantly by indigenous and ethnic minority groups. More recent resettlements occurred due to hydropower development that has displaced several hundred thousand people across the central and northern parts of the country (Neef and Singer 2015). Resettlements due to large infrastructure projects are also common in **Lao PDR**, **Cambodia** and **Myanmar**.



Households displaced by a coastal tourism project into a national park in Koh Kong Province, Cambodia

## 4.3 Legal recognition of the rights of marginalized and vulnerable groups

In this subsection, the particular land rights of indigenous peoples, ethnic minority groups and women are discussed. Arguably, there are other marginalized and vulnerable groups in the six countries studied (e.g. urban squatters, sea nomads), but a discussion that includes additional groups is beyond the scope of this study.

### 4.3.1 The rights of indigenous peoples and ethnic minority groups

It is important to remember that the concept of ‘indigeneity’ and ‘indigenous peoples’ emerged to a large extent out of concerns about land and resource disenfranchisement, which led to an upsurge of indigenous movements in the Americas in the late 1960s and spreading globally in the 1980s. Yet, although indigenous peoples in Southeast Asia face serious challenges in a rapidly changing environment, indigenous rights in this world region have attracted relatively little attention from the international legal community. At the same time, Southeast Asian governments have consistently abstained from participating in international human rights forums and in monitoring bodies that address indigenous people’s rights. Civil society in some Southeast Asian countries, most notably the Philippines, have played a very active role in such forums, though.

With the exception of Myanmar, the study countries are state party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted in 1974 (Table 3). Yet, none of the six countries has ratified the ILO Convention 169, which is of great significance for the rights of indigenous and tribal peoples. On the other hand, all six countries voted in favor of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.

**Table 3: Status of major international conventions related to indigenous peoples' and women's rights in the six countries studied**

	Cambodia	Indonesia	Lao PDR	Myanmar	Philippines	Vietnam
ICERD (1974) <sup>1</sup>	state party	state party	state party	not ratified	state party	state party
ILO Convention 169 <sup>2</sup>	not ratified	not ratified	not ratified	not ratified	not ratified	not ratified
UNDRIP (2007) <sup>3</sup>	signatory	signatory	signatory	signatory	signatory	signatory
CEDAW (1979) <sup>4</sup>	signatory	signatory	signatory	accessed	signatory	signatory

Source: UNCTAD Database (2016)

However, despite being signatories to UNDRIP, most Southeast Asian governments have been reluctant to fully acknowledge the rights of their 'indigenous' peoples. The governments of **Lao PDR**, **Vietnam** and **Myanmar** do not recognize indigenous status of its various "ethnic groups", "ethnic minorities" or "ethnic nationalities" respectively (Table 4). In **Lao PDR**, the various non-Lao ethnic groups have been particularly affected by the commodification of natural resources, by the declaration of special economic zones and by resettlement from abundant forest areas into multi-ethnic sites with little land available for cultivation. In **Vietnam**, ethnic minorities in the upland areas had to accommodate large numbers of Kinh (ethnic Vietnamese) migrants from the country's delta regions and have been targeted by programs aimed at eliminating traditional agricultural practices, such as swidden cultivation. Poverty rates remain much higher among ethnic minorities than within the ethnic Vietnamese population. In **Myanmar**, several 'ethnic nationalities' continue to be in a state of conflict with the central government and strive for greater political autonomy and self-determination. Enhanced control over land and other natural resources for state development projects in ethnic nationalities' territories is associated with widespread land confiscation, massive human rights violations, oppression by military forces and violent conflicts.

A section on "Land Use Rights of the Ethnic Nationalities" has been included in the National Land Use Policy document adopted in 2016, but references to customary land tenure remain vague.

Consecutive governments in **Indonesia** have argued that the concept of 'indigenous peoples' is not applicable to the country, as almost all Indonesians - with the exception of the Chinese - are indigenous and therefore entitled to the same rights. As no ethnic group can be privileged, denigrated or obtain special treatment, legal constructions of "Orang Asli" (the Indonesian term for "indigenous people") are not supported. However, the Indonesian government labels certain groups as "geographically isolated customary law communities", a term that refers to forest-dwelling communities, swidden cultivators, sea nomads and other groups that are deemed as 'lagging behind the mainstream society' (Djalins 2011). Only the **Philippines** and **Cambodia** acknowledge indigenous peoples' rights to their customary lands in their national legislations (Duhaylungsod 2011; Baird 2013; Milne 2013; Oldenburg and Neef 2014).

<sup>1</sup> International Convention on the Elimination of All Forms of Racial Discrimination (1974)

<sup>2</sup> International Labour Organization's Indigenous and Tribal Peoples Convention (1989)

<sup>3</sup> UN Declaration on the Rights of Indigenous Peoples (2007)

<sup>4</sup> Convention on the Elimination of All Forms of Discrimination against Women (1979)



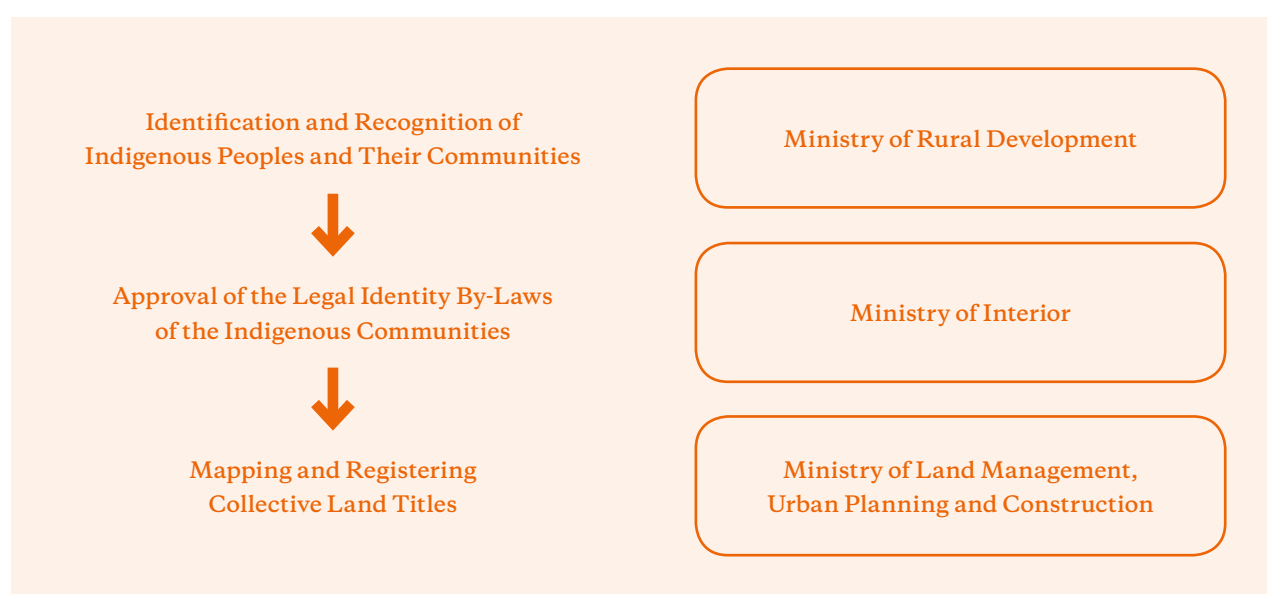
**Table 4: Indigenous and ethnic groups in the six countries studied**

Country	Number of recognized indigenous / ethnic minority groups	Indigenous / ethnic minority group population	Percentage of indigenous / ethnic minority population of country's total population
<b>Cambodia</b>	24 indigenous peoples	200,000-400,000	1-2 percent
<b>Indonesia</b>	n/a	n/a	n/a
<b>Lao PDR</b>	48 ethnic (minority) groups	~ 4.9 million	~ 70 percent
<b>Myanmar</b>	> 100 ethnic nationalities	~ 16.3 million	32 percent
<b>Philippines</b>	> 100 indigenous peoples	10.2 - 20.4 million	10-20 percent
<b>Vietnam</b>	53 ethnic minority groups	13-14 million	14 percent

Source: Compiled from various sources

In **Cambodia**, Articles 23-28 of the 2001 Land Law introduce the concept of 'indigenous community property' as a form of collective ownership, which – remarkably – also includes the rights of indigenous communities to practice 'traditional agriculture'. However, the process of acquiring indigenous communal land titles is arduous

and involves lengthy negotiations with three different ministries (Figure 2) and their respective line agencies (McLinden Nuijen et al. 2014). For this process many indigenous communities in Cambodia lack the resources and the legal expertise (Baird 2013; Milne 2013).

**Figure 2: Procedures for obtaining indigenous communal land titles and ministries involved (Example Cambodia)**

Source: Own draft, based on information by McLinden Nuijen et al. (2014)

By April 2013, 12 years after the 2001 Land Law was promulgated, less than ten communities have received communal land titles, with help from international donors. The program was largely by-passed by the fast-track individual titling that started in June 2012. Since then, no further donor funding has been allocated for this program and the community land titling process has stalled.

Article 13 of the 1987 **Philippine** Constitution calls for the State's recognition of "the rights of indigenous peoples to their ancestral domains" and Article 14 mandates the State to "recognize, respect and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions and, institutions. It shall consider these rights in the formulation of national plans and policies." Nevertheless, the contradictions with Article 12 of the Constitution – regarding 'public domain' (see p. 11) – are apparent and reveal a continued bias of the State against ancestral territories. This is also reflected in the complex and lengthy procedures involved in gaining recognition of ancestral domains under the Indigenous People's Rights Act (IPRA) of 1997. This includes (1) a petition by the local community; (2) proofs of claims through written accounts that specify customs, traditions, and other cultural markers; (3) maps from and endorsement by the National Commission on Indigenous Peoples (NCIP); and, finally, (4) the issuance and registration of a certificate of ancestral domain title (CADT).

The cases of **Cambodia** and the **Philippines** show that it is a long way from constitutionally recognizing indigenous rights to implementing policies and projects on the ground that help indigenous people to formalize their customary rights to land and other natural resources and defend them against other actors' interests and claims (see also sections 4.4.1 and 4.4.5).

### 4.3.2 Recognition of women's land rights

The recognition of women's rights to own, use or otherwise gain access to agricultural land, forests and other natural resources varies significantly across and within the six countries.

National law in **Lao PDR** states that women and men shall enjoy equal property rights. Male and female

descendants may inherit equally under the Inheritance Law, and the 2003 Land Law also makes no distinction between genders. Yet the wider society has limited knowledge of formal laws affecting women, especially in rural areas. Nevertheless, women can inherit land under a number of customary systems in Lao PDR, particularly among the majority Tai-Lao ethnic groups that have strong matrilineal and matrilocal elements. The Hmong-Mien and Mon-Khmer ethnic groups are patriarchal societies in which women do not usually have a right of inheritance and gain access to agricultural land only through their husbands or male relatives. Reportedly, land titles in urban areas have been issued mostly on an equal gender basis, but land allocation programs in rural areas have been less successful in including women's names on permanent land titles (LTD01) or temporary land use certificates (TLUCs) (USAID 2013a).

In **Cambodia**, the legal framework for gender equality in land includes the 1993 Constitution, the Law on Marriage and Family of 1989, the Land Law of 2001, and various sub-decrees (USAID 2010a). The Constitution and a number of laws guarantee equal rights for women and men, including inheritance rights. However, the ability of women to actually claim these *de jure* rights is constrained by deep-rooted social norms and attitudes about gender roles and relations. Female-headed households generally possess less land, and landlessness is also significantly more prevalent than in male-headed households. Women in male-headed households face different types of constraints with respect to land. While the law provides for joint titling, customary practices and enforcement regimes frequently undermine such rights and land titles tend to include only the name of the male head of household, although Buddhist customary law provides for joint ownership of property. In cases of divorce or the husband's death, women may lose their land rights completely, which often leads to the impoverishment of women and children. Many women in Cambodia are unaware of their land rights due to illiteracy, particularly in rural areas. They also tend to lack access to legal assistance or any other form of support for their rights. Insufficient legal knowledge and support leaves women more vulnerable to other actors pursuing claims against their land (USAID 2010a).

In **Indonesia**, the marriage law of 1974 stipulates that husband and wife jointly own all property – inclu-

ding land – that is purchased during marriage, whereas property acquired prior to marriage or obtained by donation or inheritance remains the separate property of each spouse (USAID 2010b). Actual practice, however, differs widely across the archipelago. For instance, most Javanese women can own land and are sometimes registered as land owners, while in many other regions, such as south-eastern parts of Sulawesi and on the islands of East Nusa Tenggara, women generally hold neither individual nor joint rights to land (Sulistiawati and Kristiansen 2015). Islamic law – which generally allots women half the share of inherited assets available to men with the same degree of relation to the bequeather – applies to inheritance in the case of Muslims. The Civil Code governs inheritance rights in the case of non-Muslims. However, there are regional differences: in rural Java, most families – including Muslim ones – follow Javanese tradition in dividing land equally among sons and daughters, instead of allocating half-shares to daughters in accordance with Muslim tradition, which is strictly practiced under Sharia law in Aceh province in north-western Sumatra (USAID 2010b). In West-Sumatra province the influential Mingakabau people are practicing Islam, but many still follow a matrilineal culture in which inheritance favors the female lineage and the husband has to work the land of his wife who enjoys full ownership (Huda 2008). In those cases where customary law (*adat*) allows women’s full or joint ownership to land, these rights tend to be well protected (USAID 2010b).

**Myanmar’s** constitution guarantees women and men equal rights, including rights to land and other property. However, Myanmar’s new land legislation – the Farmland Law and the Vacant Fallow and Virgin Lands Management Law of 2012 – is not supportive of equal rights for women. Rather than explicitly recognizing women’s equal rights, these laws state that land will be registered to the head of a household, which in Myanmar is understood to be the husband (USAID 2013b). In addition, these laws appear to lack a mechanism for co-ownership of property by a husband and wife, and do not explicitly provide for the equal rights of women to inherit land or be granted use rights for farmland or other types of land. Women’s land rights vary greatly by religious affiliation because Buddhist, Muslim and Hindu customary laws have the force of formal law for their respective populations in all matters of marriage and inheritance

(USAID 2013b). Customary Buddhist law, for instance, states that the majority Buddhist women have rights equal to their husbands’ regarding the ownership of property and are “co-owners” of property. Such co-owned property cannot be alienated by one spouse without consent of the other and ownership rights will go to the wife when her husband dies. Sons and daughters are entitled to inherit equal shares under customary Buddhist law. However, different rules exist among some ethnic groups in the north-eastern mountainous states, where men may inherit all of their parents’ property and women lose all jointly held property in case of divorce (USAID 2013b).

In the **Philippines**, men and women have equal property rights, as stipulated in the existing property law and family and succession law. Within marriage, the property regime is absolute community of property – unless otherwise agreed upon in the marriage settlements – with both spouses jointly administering family property. Legally, all property acquired during cohabitation without marriage is co-owned, and cannot be alienated by one partner without the consent of the other. Married women may make wills without the consent of their husband and dispose of their separate property and share of community property (USAID 2011). Widow(er)s are compulsory heirs of their deceased spouses. *De jure* equal treatment of women is also guaranteed in agrarian reform and land resettlement programs, although actual practice may be different. The Comprehensive Agrarian Reform Law guarantees women, regardless of their civil status, equal rights to own land, equal shares of farm produce, and representation in advisory and decision-making bodies. Yet, despite the formal legal recognition of women’s rights, patriarchal attitudes and deep-rooted stereotypes regarding the role of women persist, particularly in rural areas. In practice, men are still the primary property owners. Laws and policies that seem to be neutral or provide equality on paper may discriminate against women upon implementation (USAID 2011). The order of priority of agrarian beneficiaries under the Agrarian Reform Law disadvantages women, as they are mostly seasonal farm workers and thus rank only third in priority of distribution (Hall et al. 2011). Government-funded indigenous peoples’ resettlement projects award land titles to the head of the family, who is often a man. Customary laws practiced in rural areas and by various indigenous groups generally grant men greater access to



Rice harvest in Lao - women bear the brunt of work and need secured land rights

land than women. Southern Muslim tribes require the husband's consent before a woman may acquire any property, and women inherit only half the share inherited by men in a similar position, as is common practice under Islamic law (USAID 2011).

**Vietnam's** national legislation emphasizes gender equality, including with regard to land use rights. The Constitution prohibits all forms of discrimination against women and states that men and women have equal rights in the family and in all political, economic, cultural and social spheres. The Marriage and Family Law holds that all land acquired during marriage is considered a common asset, while the 2003 Law on Land requires that LURCs contain the names of both spouses if a land use right is shared property. By law a wife has the same rights and obligations as her husband in the use, possession and disposition of common property. The inclusion of women's names on LURCs is intended to protect their rights in the case of separation, divorce, or the death of a husband. However, inclusion continues to be low. In the most comprehensive study of women's access to land rights to date, groups following matrilineal succession reported 11 percent joint certification over non-residential land, and ethnic minority groups practicing patrilineal succession reported 4.2 percent (cited in USAID 2013c). Without their names on land use certificates, women are subject to customary practices, which leave them without a share of family assets acquired after marriage in the case of divorce. In the case of a

husband's death, widows often see a son's name, rather than their own, recorded on the land use certificate (USAID 2013c). Patrilocality traditions (where a newly married couple settles in the husband's home or community) and patrilineal inheritance practices among the dominant Kinh and several ethnic minority groups, such as the H'mong, as well as the low percentage of LURCs that register women's joint ownership of land, all work against women's empowerment within the rural household in Vietnam (Hirsch et al. 2015). However, there are also a number of minority groups with matrilineal and matrilocal elements, particularly the Tay/Thai groups in the northwestern provinces, where women enjoy a higher degree of land tenure security (Wirth et al. 2004).

In conclusion, it can be stated that women's rights under customary, informal law in Southeast Asia are often limited and precarious, particularly in the more patriarchal and patrilocal communities. Statutory law tends to be less discriminatory against women, but such laws have little traction in rural communities. Corporate land grabs and land confiscations by the State often affect women's usufruct rights on communal lands, because the 'commons' are particularly targeted by land grabbing and confiscation. The resources of these 'commons' (e.g. non-timber forest products) are often vital for women's livelihoods. The economic destitution resulting from dispossession and displacement can also lead to increased domestic violence, with women (and children) mostly at risk. Finally, women have often been at the forefront of resistance movements, particularly in Cambodia, and are therefore particularly vulnerable to state violence.

## 4.4 Particularities in the land rights systems of the study countries and typical land conflicts

### 4.4.1 Cambodia

Land is the most valuable resource for the citizens of Cambodia. Approximately 23 percent of the land is arable

and about 80 percent of the population live in rural areas, mostly depending on agriculture as the main source of their livelihood. Agriculture employs 60 percent of the total labor force and land is the necessary foundation to ensure the livelihoods for its population, which holds especially true for forest-dependent communities and indigenous communities (Oldenburg and Neef 2014).

As a post-conflict country, Cambodia has a particular land legislation history. During the Khmer Rouge Regime from 1975 to 1979, private land ownership was abolished, and all cadastral documents were destroyed (Oldenburg and Neef 2014). During the ten-year long occupation by Vietnamese forces and several years of unrest that followed, rural areas in Cambodia were marked by large and unregulated movements of people and land possession by occupation of forestland and otherwise vacant land. While around 180,000 people had been internally displaced, more than 350,000 had fled to Thailand. Following the Paris Peace Accord of 1991 and the end of major civil conflicts, a policy of forest concessions was introduced that had enormous social and ecological impacts. From 1993 to 2002 more than 30 forestry concession zones were created, covering about 6.5 million hectares and about 70 percent of forestland (Oldenburg and Neef 2014). The system caused widespread deforestation and forest degradation and was criticized by international donors and development banks, which eventually resulted in a moratorium on forest concession in 2002 (Neef and Touch 2012; Oldenburg and Neef 2014).

Systematic land registration has only been taken up again in the 21st century with major assistance from international donors. The new Land Law of 2001 introduced new property rights categories, such as state public land (mostly forested areas) and state private land (land that can be converted into various forms of concessions) (Oldenburg and Neef 2014). The law rendered possession of state public property as ‘precarious and illegal’, which affected hundreds of thousands of rural people living on unregistered state public land. To date, there is still no clear demarcation between state public and state private land and there is no verifiable and enforceable procedure for assessing or contesting state claims to land in Cambodia (Oldenburg and Neef 2014). The Cambodian Land Law of 2001 explicitly recognizes communal land rights of indigenous communities, but truly participatory land use planning processes and delineation of indigenous

community land has only been implemented in a handful of cases with international support, while most indigenous communities remain at acute risk of dispossession and displacement by corporate interests in the form of large-scale land grabbing (Subedi 2012).

Most state private land has been allocated by the government to domestic and foreign investors in the form of Economic Land Concessions (ELCs) without any public scrutiny. While the law provides a number of social and environmental safeguards, the legal requirements for granting ELCs have often not been complied with by both state authorities and concessionaires. For instance, ELCs have been granted on state public land and the reclassification to state private land occurred only after the granting process (Oldenburg and Neef 2014). In several cases, the rule of a maximum size of ELCs (10,000 hectares) has been bent by granting land which borders each plot as concessions that are de facto controlled by the same individual or company. In several instances, community forest land – assigned by the Forest Administration – has often been overridden by land concessions (Neef and Touch 2012; Oldenburg and Neef 2014). Environmental and social impact assessments have either not been conducted at all or were of poor quality. Legally required consultations with affected villagers have not been conducted. ELCs have been granted in protected forest areas – core and conservation zones as defined by the law – after the reclassification to sustainable use zones according to the law on Protected Areas 2008, which allows economic activities in these areas according to its Art. 11 III (Oldenburg and Neef 2014). In the year 2011 alone, 251,000 hectares of Economic Land Concessions were granted by the Ministry of Environment in protected forest areas. Large-scale tourism development projects, such as the US\$3.6 billion tourism complex in a national park in Koh Kong province built by the Chinese Tianjin Union Development Group, have also triggered the forced displacement of hundreds of families (Neef and Singer 2015; Neef and Touch 2016).

Internationally operating financial institutions, U.S. and European multinational corporations, and both state-owned and private companies in neighboring Asian countries are involved in either financing or operating economic land concessions in Cambodia. In the south-western Koh Kong province, Cambodian-Thai joint ventures export sugar to one of the world’s largest

processors and sellers of cane sugar from a huge concession that displaced hundreds of farming families (EC and IDI 2013; Borrás et al. 2016). These sugar exports are facilitated by the Generalized System of Preferences (GSP) trading scheme of the European Union, the so-called “Everything but Arms” policy, which has benefited Cambodia’s trade with EU countries since 2001. In the resource-rich north-eastern provinces along the border with Vietnam, two large Vietnamese corporations that have been implicated in the eviction of indigenous people for logging and rubber concessions were bankrolled by the International Finance Corporation (the private lending arm of the World Bank) and Deutsche Bank (the largest German commercial bank), according to investigations by a London-based NGO (Global Witness 2013).

As a result of the rampant allocation of ELCs, 20–30 percent of Cambodia’s land resources have been progressively concentrated into the hands of only 1 percent of the population, mostly at the expense of the weakest and most marginalized groups in rural areas (Oldenburg and Neef 2014). With the equivalent of more than 60 percent of agricultural land not available for local farmers over the next 70 years (the average lease period of concessions), the food security for the upcoming generations of Cambodians is put at risk. The widespread dispossession of local farmers contributes to an increase of rural poverty and a social transformation of former land possessors into a landless and land-poor semi-proletariat that depends on selling their labor force (Oldenburg and Neef 2014).

Relief for the landless and land-poor has been promised through another new element of the 2001 Land Law, the so-called Social Land Concessions (SLCs), which have been introduced by the government in 2003 as an instrument of ‘distributive justice’. After initial failures, the Land Allocation for Social and Economic Development (LASED) project was instigated in July 2008 under technical, administrative and financial support from the World Bank and German Development Assistance (GIZ). The duration of the project was originally planned for 5 years, but was later extended to March 2015. Overall project costs were US\$ 12.7 million and the plan was to provide 10,000 hectares of land to a total of 3,000 households, i.e. so-called “Target Land Recipients (TLRs)”, in three provinces. The project was plagued with a number of problems, such as (1) insuffi-

ent quantity and quality of land to be distributed, (2) lack of settling-in support, (3) missing health and educational infrastructure, and (4) overly long process (up to 6 years) from land identification to land distribution, which led to an influx of opportunistic settlers and small-scale ‘land grabs’. The Cambodian human rights NGO LICADHO found in a 2015 study that many families had already given up their plots, with some of the eight sites more than half abandoned. Nevertheless, the project has been branded as an overall success by the World Bank and German Development Assistance, asserting that the original project objectives in terms of number of recipients, allocated land and increase of household income had been exceeded. A LASED Fact Sheet published by GIZ in 2014 claims that a “cost-efficient replicable model guaranteeing significant positive impact on rural livelihoods is now available for nationwide dissemination and up-scaling”. A 2016 evaluation report commissioned by GIZ was somewhat more self-critical (Richter 2016). Yet, what is left out of most accounts is the fact that landlessness in rural Cambodia is primarily a result of the Cambodian government’s very own land policies and that over the painfully long duration of the LASED project the government had no difficulties in finding hundreds of thousands of hectares of suitable land for foreign and domestic investors.

At the time of writing this position paper, the World Bank is planning a second phase of the LASED project, spending US\$ 25 million on improving conditions in the existing eight sites, in five other sites which had been set up with assistance from Japan and adding an entirely new site, which – according to media reports – is already being farmed by indigenous families some of whom may need to be resettled. The World Bank’s new commitment follows a five-year freeze on development funding to Cambodia after its investigation of the notorious case of the Boeung Kak lake area in Phnom Penh, where the WB-sponsored land titling project deliberately excluded thousands of residents from receiving land deeds, thereby facilitating forceful evictions to give way to a large commercial urban development project. The GIZ has recently pulled out of the land administration sector after more than 15 years of engagement with the Ministry of Land Management, Urban Planning and Construction (MLMUPC) – citing slow progress with nation-wide land reforms as one of the reasons –, but may get involved in



LASED's second phase, if the World Bank approves it (Neef 2016). The Cambodian government seems to be keen to go ahead with the allocation of social land concessions. A new minister was appointed to the MLMUPC in a cabinet reshuffle in April 2016. The former governor Phnom Penh previously headed the Ministry of Rural Development and has a reputation of a strongman who gets things done (Neef 2016). A new Department of Social Land Concessions was set up under the MLMUPC shortly after his appointment.

In contrast to the slow process of SLC allocation, the ad-hoc land titling initiative under Order 01 – which started in 2012 following a moratorium on the granting of new Economic Land Concessions (ELCs) and a ‘comprehensive review’ of existing ones – was fast-paced. Recognizing the potential for widespread social unrest among the rural population, the Prime Minister sent more than 5,000 student volunteers to rural areas in order to measure and excise agricultural plots from selected ELCs and return them to farming families. Between July 2012 and December 2014 about 610,000 land titles were issued and a total of 1.2 million hectares of land were reclassified, of which 32 percent were located in ELCs, 23 percent in forest concessions and 55 percent on other state land and forest land (Scurrah and Hirsch 2015). Order 01 has become synonymous with the Prime Minister's ‘leopard skin’ policy, under which individually owned agricultural plots – like the dots in a leopard skin – are located in a wide expanse of land concessions or, less frequently, of state public or communally managed land (Milne 2013; Neef 2016). Implementation of the Order 01 was highly controversial: many recipients stated in a 2015 survey by the NGO Forum on Cambodia that some of their plots were not surveyed at all or that they did not receive titles for all the land that had been measured (Grimsditch and Schoenberger 2015). While in some districts disputed areas were targeted by the survey, in other districts such areas were excluded from the survey. Conflicts involving powerful actors – military officials or concessionaires – were rarely resolved. Most contentious was the practice in indigenous communities, where potential beneficiaries from individual land titling were told to leave the community and give up their rights to all traditional lands, which created tensions and divisions among community members (Grimsditch and Schoenberger 2015).

## 4.4.2 Indonesia

In Indonesia, nation building and economic modernization have paid little respect to customary land ownership and local agricultural systems. After the fall of the Suharto regime in 1998 and profound decentralization reforms in 2001, land issues have increasingly become a core part of local political debates, especially triggered by potential or realized foreign and domestic investments that have profound impacts on livelihoods of rural people (Kristiansen and Sulistiawati 2016). A large, but unquantified share of the archipelago's landmass is unregistered land, often with disputed claims. The national government, through the Ministry of Environment and Forestry, legally claims ownership rights over more than two-thirds of the land currently or previously under forests (Susanti and Budidarsono 2014; Kristiansen and Sulistiawati 2015). Forest dwelling communities have almost no tenure security and have limited means to defend themselves against land grabs, as their land falls under the jurisdiction of the Ministry of Environment and Forestry. Between 2004 and 2009, the Forestry Ministry allocated 1.2 million hectares of forests for mining activities and announced plans to allocate a further 2.2 million hectares of forests between 2010 and 2020. Customary and communal land ownership mostly lacks formal legal recognition (Kristiansen and Sulistiawati 2016). Development of sound policies and laws that are acceptable to citizens and civil society groups and can also be implemented by the bureaucracies at provincial and regency level is a daunting task.

Customary land rights and their relationship to statutory law in Indonesia are especially complicated. Article 5 of the Basic Agrarian Law (BAL) of 1960 – which is most important legislation governing land rights in Indonesia – states that Indonesia's agrarian law is based on *adat* law, or Indonesian customary law, as long as it does not conflict with national interests or other regulations set out in the BAL. However, *adat* is essentially a communal approach to regulating land rights, including land rights exercised by individual land managers (e.g. farmers, foragers, pastoralists, artisanal miners) with the consent of the community (USAID 2010b). *Adat* varies widely across Indonesia, sometimes with marked differences between villages in the same regency. The private land rights set forth in the BAL are an ‘alien’ categoriza-

tion of land rights that can hardly be considered customary (USAID 2010b). Moreover, the BAL does not deal with many of the more collective land tenure types and it fails to recognize customary systems that regulate access to land. Communal (*ulayat*) rights can only be registered if there is proof that ‘custom’ is still a valid source of the rural legal system in the local community and that communal land usage is maintained. It is therefore probably more accurate to think of the BAL as ultimately directed at the individualization of land tenure in Indonesia (USAID 2010b). In many places, *adat* forms of tenure are either gradually disappearing or are being forcefully replaced by full private ownership over a relatively short time period (Sulistiawati and Kristiansen 2016). However, the formalization and registration of such individual land rights proceeds at an extremely slow pace, and the local units of the National Land Agency often have no access to agricultural land ownership held by individuals within their jurisdiction. Only about 5 percent of Indonesia’s land area is formally registered for private ownership or use rights (Kristiansen and Sulistiawati 2015). In areas where no systematic land titling has ta-

ken place, it is extremely difficult and costly for individual citizens to register their land rights, which may take between 6 and 12 months. Registration costs amount on average to about 10 percent of the value of the property, which makes the process unaffordable for the rural poor.

Competition over access to land has been a source of conflict across Indonesia for decades, especially on the more densely populated islands. Conflict over control of agricultural and forestland often relates to land that the government seized from individuals and communities during the New Order regime (1965–1998) and allocated to large corporations to establish plantations (USAID 2010b). Allocation of state forestland and unregistered customary land to concessionaires has continued and even intensified under the *Reformasi* period (after 1998) (Anderson 2012; Susanti and Budidarsono 2014; Gellert 2015). Processes have become more complex with the decentralization process, as provincial and district governments obtained new decision-making powers and have since used them to broker lucrative land deals with investors. The new land acquisition law of 2012 has been criticized for making it even easier and quicker for govern-



A manganese mining operation on Flores Island, Indonesia, has polluted the freshwater sources of adjacent communities – villagers claim that the company is operating on protected forestland

ment entities to acquire land in the public interest, i.e. the ‘interests of the nation, the state and the people as a whole’ (Bakker and Reerink 2015, p. 84). The law no longer distinguishes between compulsory land expropriation and voluntary land release, but provides for “negotiations with landholders”, but only for a limited period of time after which confiscations and resettlement can be ordered. The authority for acquiring land has been transferred from elected regional heads to appointed officials of the National Land Agency (NLA), which is likely to compromise accountability. Government institutions that may adopt the land acquisition procedures can include state-owned companies, many of which are involved in mining and plantation operations with up to 49 percent held by private corporations (Bakker and Reerink 2015).

More than 10 million hectares have been licensed for oil palm estates in Indonesia of which two thirds are attributed to the conversion of forest and peat-lands (i.e. mostly by burning the original vegetation). The Asian NGO Coalition cites a study by the Consortium for Agrarian Reform (KPA) that found that an area of more than 900,000 hectares of plantations (mostly oil palm and industrial timber) was subject to agrarian conflicts in 2014, often involving the armed forces. Indonesia’s palm oil output increased three-fold between 2003 and 2013, making the country the world’s largest oil palm producer and exporter. Of the roughly 9 million hectares that are under full production, about 50 percent are believed to be controlled by large-scale concessionaires, with close to 10 percent held by state-owned plantation operators and the remaining 40 percent owned by smallholders (Casson et al. 2013), many of whom are part of an emerging rural middle class. The palm oil sector – which provides jobs for about 4 million Indonesians – is promoted by the government as a driver of the national economy and a means to alleviate rural poverty (Obidzinski et al. 2014; Sustanti and Budidarsono 2014). Despite the imposition in 2011 of a so-called ‘forest moratorium’ with financial support from the Norwegian government (renewed in 2013 and 2015), extensive forest fires have become a near-annual environmental and health hazards, even affecting diplomatic relations between Indonesia and its neighbors Singapore and Malaysia. The outrage among Singaporean and Malaysian government officials appears hypocritical, given that state-managed govern-

ment funds, private banks and palm oil companies in these two countries have major stakes in the Indonesian palm oil business. According to a study of the Rainforest Action Network, commercial loans and underwriting recorded for the top 50 tropical ‘forest-risk’ companies in Indonesia between 2010 and 2014 amounted to a total of US\$ 33.5 billion, of which 20 percent stemmed from Malaysia and 7 percent from Singapore; German financial institutions accounted for 2 percent or nearly US\$700 million (Kawakami 2016).

While international attention focused on Indonesia’s efforts to deal with fires on Sumatra and Kalimantan – currently the major palm oil producing islands –, forested areas in West Papua burned on an unprecedented scale in 2015, reportedly destroying more than 350,000 hectares within several months. As oil palm expansion reaches its natural limit in other parts of Indonesia, West Papua is seen by the national government as the new frontier of oil palm expansion (Obidzinski et al. 2014). While the ceiling limit for large oil palm estates is 100,000 hectares in other parts of Indonesia, the government allows the allocation of up to 200,000 hectares to corporations in West Papua. A total of more than 2 million hectares have reportedly been appropriated for oil palm plantations. The provincial government of Papua simplified the application process for concession licenses in 2007, and in 2008/2009 alone granted permits covering a combined area of more than 250,000 hectares. In 2009 government authorities in Jakarta and Papua unveiled plans to establish the 1.6-million hectare Merauke Integrated Food and Energy Estate (MIFEE) as a public-private partnership to grow rice, corn, soybean and oil palm on an agro-industrial scale. The Indonesian Government’s “Master Plan Acceleration and Expansion of Indonesia Economic Development 2011-2025” (MP3EI) states that “MIFEE is an activity of large-scale cultivation of crops by adopting the concept of agriculture as an industrial system based on science and technology, capital, modern organization and management.” More than 40 plantation companies had been granted permits for this project, which has faced strong opposition by Papuan advocacy groups and international human rights networks due to its alleged violation of customary land rights and the FPIC principles, concerns about displacement of indigenous Papuans by outside workers and the destruction of vital ecosystems. In 2015, Indonesia’s new

president announced plans to revitalize the stalled project, setting the goal of cultivating 1.2 million hectares within three years, with a possible expansion to up to 4.6 million hectares in a later stage. The government's rhetoric of national economic development, creation of jobs, provision of food security and poverty alleviation needs to be carefully scrutinized; a recent study on the impact of oil palm plantations in Papua suggests that the sector exacerbates land conflicts and has limited spin-off effects on other economic sectors and that the generated jobs go to skilled migrant workers (primarily from Java) rather than to the local poor, leading to uneven income distribution and deepening social conflicts between indigenous Papuans and non-Papuan migrants (Obidzinski et al. 2014).

Aside from agro-industrial concessions, mining operations have also ignored indigenous Papuan's land rights. One of the world's largest gold and copper mines, co-owned by US-mining giant Freeport McMoRan and British-Australian multinational mining corporation Rio Tinto, has been a major driver of land conflict and environmental destruction in West Papua, while being one of the most important sources of royalties and corporate tax revenue for the Indonesian state coffers (Ahmed 2015). The Norwegian Government Pension Fund has recently excluded both companies from its investment portfolio – not because of their serious human right violations, but the severe environmental damages that their operations have caused in West Papua and other places. In another 'outer island' of Indonesia, Flores Island in East Nusa Tenggara, conflicts related to controversial mining operations are also common, albeit at a more localized scale. In one case, villagers of Robek community in Manggarai District, have fought for decades against the operator of a manganese mine. The community claims that the mine operates illegally in a protected forest area and has contaminated their soil and freshwater resources. The villagers had been particularly angered by the fact that an elderly man had to serve three years in prison for collecting firewood in the forest area, while it was being destroyed by the mining company. They have been supported in their cause by the local government which repealed the mining permit. However, the mining company referred to the permit given by the central government in Jakarta and won the case via administrative court procedures in the Supreme Court.

### 4.4.3 Lao PDR

Lao PDR has historically been a country of abundant land resources relative to its small population. The vast majority of the population has lived in rural areas where they have practiced agriculture on a subsistence basis on small family holdings with relatively equitable land distribution. However, in recent years Laos has experienced particularly rapid change from a country which was promoted by its one-party government as land-rich and capital-poor, and hence in need of foreign investment, to one with growing land pressures (Hirsch and Scurrah 2015). These pressures stem primarily from agro-industrial plantations (mostly rubber and – more recently – banana) and a high number of hydroelectric, mining and infrastructure projects. Additional pressure comes from the government's policy to relocate forest-dwelling people, particularly ethnic minority groups, to lowland areas, where access to roads, education and health systems is easier to provide (Baird and Shoemaker 2007; Friedrichsen and Neef 2010). Together these pressures have created increasing land scarcity and considerable land insecurity among rural people.

The allocation of land for individual farm households is under the responsibility of two different agencies, the District Agricultural and Forestry Office (DAFO) and District Land Office (DLO). Permanent land titles (LTD 01) are allocated by the DLO for permanent types of land uses, such as housing land, home gardens, paddy rice land and tree plantations (Neef 2008). Rubber plantations need to be established for at least three years before a permanent land title can be granted. No permanent land titles are issued for permanent land use on the basis of annual (non-rice) crops, such as maize (Friedrichsen and Neef 2010). In rural areas, the state distributed temporary land-use certificates (TLUCs) for agricultural and forest land (USAID 2013a). TLUCs are allocated by DAFO, mostly in the context of the Land and Forest Allocation (LFA) process and on upland fields, for a period of three years (Friedrichsen and Neef 2010). The use rights evidenced by a TLUC can be bequeathed and inherited but cannot be sold, leased or used as collateral. By 2006, over 330,000 households (about half of all rural households in Lao PDR) had been issued TLUCs (USAID 2013a). The allocation of TLUCs has been one of the most controversial issues around land legislation





Akha women harvesting pulses in a newly established rubber plantation in northern Laos - many women lost their traditional livelihoods through the rubber boom

in Lao PDR. TLUCs entail a number of conditionalities, such as permanent use of the land, prohibition of sale, and acceptable land use practices depending on the slope angle (Neef 2008). For the case of non-compliance, several stages of fines are foreseen. In accordance with the national policy to eradicate swidden cultivation, only up to three plots can be allocated under the TLUCs system. As TLUCs are closely linked with the tax system, villagers would even declare less than three plots or try to avoid the declaration of their upland fields at all. In reality, farm households may use up to 20 upland plots, with an estimated average of 4-6 plots, particularly if they do not have their own paddy rice fields (Friederichsen and Neef 2010). Neither at the district nor at the village level there is a comprehensive system of storing the TLUCs; many documents get lost or become unreadable due to inappropriate storage (Neef 2008). Although in theory the rights evidenced by a TLUC can be converted to permanent land use rights over time, the law provides no clear mechanism for this conversion to take place (USAID 2013a). More recently, budget constraints have slowed implementation and follow-up activities. Thus many TLUCs are expired, and, in practice, the land-use

rights evidenced by TLUCs are informally exchanged or transferred (Friederichsen and Neef 2010; USAID 2013a). In sum, TLUCs do not provide a high level of tenure security; instead they tend to make upland farmers' tenure rights even more precarious.

Under customary or informal rules in rural areas, local communities traditionally controlled common property, including upland areas, grazing land, village-use forests and sacred forests. All community members were entitled to use communal land. These tenure systems have evolved over a long period and vary from village to village. In relocation sites or so-called 'focal sites', in particular, customary tenure systems have come under increasing pressure in recent years, as different ethnic groups have often been combined into single administrative entities. The resulting multiple sets of customary law have in many cases resulted in a breakdown of traditional, customary authority.

No formal registration process is in place for communal land rights, although they are still an important element of the cultural, political, social and economic fabric of rural communities. In January 2013, the GOL issued the first community land titles for agricultural

and forestry land to five villages that had been relocated as part of preparations for construction of the Nam Theun 2 hydropower dam and reservoir (USAID 2013a).

Foreign investments involving land and other natural resources have become ubiquitous in Lao PDR. Patterns of investment tend to vary geographically; in southern Laos, the largest land concessions are managed by Vietnamese investors who converted them mostly into rubber plantations (Kenney-Lazar 2012; Schönweger et al. 2012). For the Lao government, rubber has played a central role in eliminating swidden cultivation and opium poppy production, in supporting fixed settlements and introducing permanent agricultural practices (Neef 2008). Most concessions have been granted on land classified as ‘fallow’, but which in reality have been forested, have been used for collection of non-timber forest products (NTFPs) by women or have been part of fallow cycles important to farmers grazing livestock in nearby villages (Friederichsen and Neef 2010). Provincial and district authorities have played a crucial role in identifying land “available” for concessions. Provincial governments can approve the lease of land not exceeding 100 hectares, while larger concessions up to 10,000 hectares are signed off at the central government level prior to identification of specific areas of land to be allocated (Hirsch and Scurrah 2015).

Two large Vietnamese companies, the private corporation Hoang Anh Gia Lai (HAGL) and the state-owned Viet Nam Rubber Group (VRG), have invested massively in rubber cultivation in southern Laos (Global Witness 2015). Alongside financial assistance from China, Japan and Vietnam, HAGL supported the Laotian government to build the facilities for the 2009 Southeast Asian Games and – in return – received large land concessions (Hirsch and Scurrah 2015). The London-based NGO Global Witness asserts that up to 300,000 cubic meters of timber were included in the deal, with a value four times that of the assistance given. The company works partly through subsidiaries and is estimated to have about 26,500 hectares under rubber in southern Laos (Global Witness 2015). VRG reportedly owns more than 38,000 hectares of rubber in Laos. Global Witness asserts that VRG has worked closely with provincial officials and military personnel to clear land that encroached on villagers’ farmland.

In northern Laos, Chinese investors dominate the commercialization of land, mainly for rubber and, more recently, bananas. While there are some plantations, these tend to be on a smaller scale than those in southern Laos. Many Chinese investors have preferred to engage in contractual arrangements with Laotian farmers rather than establishing large-scale rubber plantations themselves. In such contract farming arrangements farmers continue to work their land and contribute their own labor, while the Chinese companies provide seedlings and knowledge and promise a secure market. In other cases, Chinese entrepreneurs lease land from existing farmers, in deals often brokered by local authorities. Investors can use a variety of tools to lease land, including land titles, land-tax declarations and – in some instances – even village-head certificates of land ownership. The diversity of instruments in combination with a weak land-registration system has led to widespread confusion and manipulations resulting in conflicts over boundaries and vulnerability of land occupants to dispossession by land speculators and investors. Crop markets and prices are also not always as secure as farmers were led to believe during the negotiation process with foreign companies (mostly from China, but also from Thailand and Vietnam). Several cases are reported where Laotian farmers were encouraged to grow certain cash crops (banana, rubber, black ginger, corn) with a guaranteed market and a good price, but were later left with substantial debts when borders were closed for certain commodities or when companies did not honor their part of the contract. Banana farming has also been associated with a significant health risk due to the use of high doses of pesticides.

Small-holder rubber expansion along with the provision of permanent land documents in northern Laos has led to a rapidly evolving land market with the prospect of land concentration in the hands of wealthier farmers and more powerful ethnic groups (Friederichsen and Neef 2010). Hmong villagers in Bokeo province, for example, have bought upland plots in neighboring villages to plant rubber and have also acquired lowland paddy fields from Khmu communities, the group that has the longest history of settlement in Lao PDR (Neef 2008). The Khmu are among the most marginalized and economically deprived ethnic groups in Lao PDR and land sales are often done out of financial distress.



#### 4.4.4 Myanmar

The Union of Myanmar has more than 30 land-related laws, many of which have their roots from colonial times, when it was part of 19th-century British Imperial India, according to the Land Core Group (LCG 2009). The post-independence government sought not only to claim back land previously under foreign ownership, but also to reduce or abolish landlordism through the 1953 Land Nationalization Act (Hirsch and Scurrah 2015). Private land rights were replaced by a system in which the State formally owned the country's land and could impose rules on its own discretion. With few exceptions, agricultural land was subject to state reclamation and redistribution schemes, which empowered government entities and gave them the legal means to confiscate land and other natural resources, even under the most dubious pretexts (Hirsch and Scurrah).

The marginalization of ethnic groups in the borderlands ignited armed conflicts with the post-independence government and eventually resulted in the 1962 military coup. Since then, Myanmar has experienced several decades of civil war and unrest. As a result, hundreds of thousands of people have been internally displaced and many have fled to neighboring countries, particularly Thailand. About 70 percent of the country's population depend on the agricultural sector for their livelihoods. Ethnic states - many of which continue to be in more or less violent conflict with the central government - make up more than 50 percent of the total land area of the country. Customary farming practices, such as *swidden* cultivation, have been practiced in these areas for many generations and the relationship of most 'ethnic nationalities' with their land is deeply rooted in spiritual, cultural and social norms and practices. Meanwhile, land has been regarded by the government, the military and other powerful actors predominantly for their economic value, and land grabs have become pervasive throughout the country, but particularly in resource-rich ethnic states.

Recently introduced legal frameworks - particularly the Farmland Law and the Vacant, Fallow, and Virgin Law (VFV), both promulgated in 2012 - provide the regulatory basis for further land grabs and make existing ones lawful (Transnational Institute 2013; Woods 2015). The Farmland Law only recognizes property rights on

officially registered land with valid land use certificates (LUCs) which is unattainable for most smallholder farmers, as the registration process is either extremely slow or inexistent (Oberndorf 2012). Even if a farmer has access to land registration procedures the burden of proof concerning the pre-existence of the right to use the land is on her or him and she or he also has to demonstrate 'proper' use. The VFV regards all untitled lands - including forestlands and land that is actually being used - as 'wasted assets' and gives the government the right to redefine them as 'vacant, fallow or virgin' and subsequently reallocate those lands to foreign or domestic investors (Carter 2015b). Investors can lease a maximum of 20,234 hectares for plantation crops and up to 4,047 hectares for seasonal crops. Rental fees for lands devoted to perennial crops, such as rubber or *jatropha* (a biofuel crop), are extremely low and range from US\$ 3-6 per hectare and year. Land confiscation may affect *swidden* land, communally managed pastures, village forests and fishponds, which are crucial for rural people's food security and livelihoods and are neither formally registered nor mapped. In the southern provinces such customary lands have been mostly reallocated to large oil-palm concessions and - to a lesser extent - to rubber concessions. The Tanintharyi region has become a particular hotspot; more than 750,000 hectares of concessions were allocated to nearly 50 mostly Burmese companies, of which around 20 percent were planted with oil palms in 2013 (Woods 2015).

Land grabs for rubber and *jatropha* plantations are more common in the mountainous regions of northern and north-eastern Myanmar. In the mountainous areas of Kachin and Shan States large tracts of land have been expropriated and converted to rubber under a Chinese-backed 'opium-substitution program'. In contrast to northern Lao PDR, where Chinese investment has primarily banked on contract-farming arrangements (see previous section), rubber development in these states is following a large-scale plantation model. The Indian government has reportedly encouraged investments in Myanmar to control border tensions and to mitigate the inflow of illegal immigrants into India. Other reasons for dispossession and displacement of customary landholders in the upper regions of Myanmar are hydro-power development projects, logging concessions and large-scale mining projects (Hirsch and Scurrah 2015). Kachin State has some

of the world's most valuable high-quality jade deposits and the jade industry is operated almost completely by associates of the former military junta and small ethnic militias who had formerly obtained mining contracts as rewards for giving up their armed resistance.

Mining and hydroelectric power sectors make up a large share of the more than US\$ 4 billion of foreign direct investment in Myanmar in 2013-2014. One of the most notorious joint-venture mining projects is the Monywa copper mine, located in west-central Myanmar and jointly operated by Wanbao Mining, a Chinese company and subsidiary of a Chinese state-owned arms firm, and the Union of Myanmar Economic Holdings Company (UMEHL), the largest state-owned enterprise controlled by the military. Since mid-2012, a planned extension of the mine, the Letpadaung Tuang copper mining project, has been the target of long-standing protests by farmers, monks and other villagers of adjacent communities, due to the massive land grabs and environmental damages associated with the project and insufficient compensation provided by the mining companies (Zerrouk and Neef

2014). In November 2012, protesters were dispersed in a violent attack by police using white-phosphorous bombs, resulting in major injuries and severe burns to many of the protesters in the camp, particularly monks. A parliamentary inquiry commission on the Letpadaung project was formed immediately after this incident, headed by Daw Aung San Suu Kyi, the leader of the National League for Democracy (NLD). While the 10-page report of the Commission found that Wanbao Mining had not compensated the local villagers properly for their loss of farmland and houses and called for more transparency in the project's land appropriation process, it did not recommend that the project's expansion be stopped, despite its acknowledgement of the lack of environmental and social impact assessments and the failure of creating jobs for local residents. The report explicitly referred to the government's stated policy of attracting foreign investment and expressed concerns that a closure of the mine would damage Myanmar's international relations. The Commission did not call for criminal charges against the policemen involved in the violent dispersal



Restitution and return to rightful owners is important. Rehabilitation of destroyed forest areas can bring new perspectives for the local communities like in the Community Forest Project in Myitkyina/Myanmar

of protests, but rather recommended that the government seek international assistance for police riot control training. While the report was welcomed by Wanbao Mining, UMEHL and the Chinese government, it sparked anger among the affected villagers and human rights advocates. Allegedly, most of the recommendations of the Commission have been ignored by the companies, and in December 2014 a woman was killed and several other people injured when police opened fire on protesters who continue to resist the expansion of the mine. In February 2016, Wanbao Mining announced that it will begin copper production in May 2016, a month after the new NLD-led government was instated.

The Chinese government has also announced that it will resume talks with the newly installed government about continuing the work on the controversial Myitso-ne Hydropower Dam project in Upper Myanmar, which had been expected to submerge 47 villages and was suspended by the outgoing government in 2011. Prior to the project's suspension, several communities had already been relocated, and villagers who returned home to reclaim their land in 2012 were forcibly evicted by the military. Land confiscation and displacement is also widespread in newly created Special Economic Zones – including hotel zones – which have been actively promoted by the government since 2011, for urbanization projects, expansion of military units, construction of state-owned factories, and large infrastructure projects. Hence, government-led land confiscations in Myanmar are not just for large-scale land deals with foreign investors, engaged in the production of food, feed and fuel for export, but are common in a wide range of domestic sectors and for multiple purposes.

The NLD's central committee for farmers' affairs issued a letter in December 2015 which instructed their offices in all regions and states to make lists of land confiscations. However, given the alleged military involvement in many of the disputes, it remains uncertain whether the NLD can live up to the expectations of settling these issues in a timely manner. First anecdotal evidence after the new semi-civilian government assumed power in April 2016 suggests that some land is being returned to their rightful owners, but often this restitution appears to be only partial or selective, leaving those villagers that were not able to claim their land back or only parts of it even more frustrated.

### 4.4.5 Philippines

Extremely unequal access to land and other natural resources is a pervasive issue in the Philippines that affects both rural and urban sectors. It has fuelled a number of socio-political movements and the ongoing insurgency in the Mindanao region and some other areas. While *de jure* all natural resources are the property of the State (following the concept of 'public domain' under the Regalian doctrine), in practice many are under a *de facto* open access regime or in the hands of a small group of large landowners (USAID 2011). Among Southeast Asian countries, the Philippines have probably the longest history of private land ownership, dating back to the colonial regimes of the Spanish and Americans. In pre-colonial times, land was communally owned, but the Spanish colonizers introduced the *encomienda* and *hacienda* systems which allocated land to Spanish landlords and religious orders. These systems were the starting point of a massive concentration of land ownership to a few influential individuals and families (known as the 'landed elite' in the Philippines). They also created a mass of landless farmers under various tenancy relations (e.g. sharecropping, where the tenant has to give a sizeable portion of her or his harvest to the landowners) and seasonal farm workers with precarious livelihoods and constant threat of food insecurity. Landlessness has remained a persistent social problem and source of rural unrest starting with the 1896 Philippine Revolution to the present. The Americans introduced the Torrens system of land registration that was the basis for titles of private land, which discriminated further against the rural poor and the indigenous population. The new tenure regime ignored communal land control, reduced the maximum amount of land available for non-Christians and led to discrepancies in the understanding of land 'possession', i.e. private titled ownership versus communal stewardship of customary land. Indigenous peoples' land was declared to be under the public domain, available for commercial development, by the Land Registration Act of 1902 and the Public Lands Act of 1905 (Duhaylungsod 2013).

Agrarian reform was envisioned by successive Philippine governments as a measure to correct historical injustices and century-old distributional inequities. Various land reform laws failed to address the root causes of landlessness because of the resistance of landlord fami-

lies holding political and economic power in the country. The Comprehensive Agrarian Reform Program (CARP) introduced by President Corazon Aquino in 1988 has been the most far-reaching land reform program to date (Hall et al. 2011). It was enacted after intense lobbying by peasant movements and land reform advocates. Initially, the program sought to redistribute about 10 million hectares of land, a target that was later reduced to around 7.8 million hectares. Intended beneficiaries were landless, including tenants and regular or seasonal farmworkers, and land-poor farmers owning no more than 3 hectares of agricultural land. Tools for redistribution included voluntary sales with a compensation premium, compulsory acquisition and distribution of stocks held in land-based enterprises. The program met fierce resistance by landlords, who challenged its legitimacy and tried to exploit various loopholes to prevent land redistribution and, in some cases, even to allow a reconcentration of distributed land, e.g. by lease-back or 'joint-venture' arrangements (Hall et al. 2011). The slow pace of CARP has also allowed many landlords to remove tenants from their land in order to avoid having their land subjected to agrarian reform. The initial plan was to complete the land redistribution under CARP by 1998, but the completion of the program was later extended to 2008, as it failed to achieve its targets. The deadline was extended by another five years in 2009 under the new acronym CARPER or "Comprehensive Agrarian Reform Program Extension with Reforms", which expired in June 2014. According to the main implementing agency, the Department of Agrarian Reform (DAR), 6.9 million hectares of land (equivalent to 88 percent of the total land subject to redistribution) have been acquired and distributed by 31 December 2013. Under the administration of outgoing President Benigno Aquino III (May 2010 - June 2016) a total of about 750,000 hectares have been distributed. About 900,000 hectares remain to be distributed by 2016, but it is unclear whether and when this will happen, as the Philippine Congress rejected the President's proposal to extend the program by another two years.

In a self-assessment, the DAR acknowledges numerous problems of the agrarian reform program, such as erroneous technical descriptions regarding the land boundaries in some of the land titles, the destruction of titles, disputes about who should or should not be qualified as beneficiaries, and petitions of landowners that

their lands be exempted from agrarian reform coverage, with some cases going up to the Supreme Court (Hall et al. 2011). The most high-profile case is Hacienda Luisita, a 6,000-ha sugar estate owned by the Aquino family, which was ordered to be distributed by resolution of the Presidential Agrarian Reform Council (later upheld by the Supreme Court), but refused to comply which ignited protests by farm workers that were violently dispersed by police. External assessments elicit a number of other shortcomings of the agrarian reform program, particularly with regard to the many potential beneficiaries that have in fact been left out from the distribution process. First, the tenant farmers and landless workers that were threatened and harassed by thugs deployed by landlords to instill fear of asserting their rights and/or that chose to retain the 'protection' of their landlords in the absence of alternative social networks; second, those that could not take possession of distributed land because of legal challenges by the landlords; and, third, those whose claims were rejected by the DAR. A serious limitation of the program is that it excludes beneficiaries from the land market and from using their land as collateral for obtaining credit, because of government-imposed restrictions on the sale, transfer or leasing of land from program beneficiaries to other parties. This prevents beneficiaries from extending their farmland and from making other land-based investments. The lack of agricultural support services also compromised smallholders' ability to farm their newly allotted plots successfully. Another point of criticism is that a high share of the distributed land has been claimed from the public domain rather than from wealthy landlords. From July 2010 to December 2013, 45 percent of the agrarian reform land was public land distributed by the Department of Environment and Natural Resources (DENR), supporting the argument by some critics that if land is not removed from private landowners it cannot be considered as 'genuine reform land'.

Apart from its involvement in the agrarian reform program, the Department of Environment and Natural Resources (DENR) also operates the Community-Based Forest Management (CBFM) Programme, which was formally adopted in the mid-1990s as the national strategy to achieve sustainable forestry. As of 2008, CBFM covered about 5.97 million hectares, i.e. 38 percent of the country's classified forestland at the time, and involved



more than 690,000 rural households. Under this program, upland communities can obtain a lease of up to 25 years on a certain area of forestland that allows them to occupy and use it in a sustainable way. The land remains state property (under the status of ‘public domain’) and the government reserves the right to withdraw the land if it is not properly managed or for reasons of ‘national interest’. One of the positive aspects of the program has probably been less its material value – much of the allocated land is degraded forest and of limited use –, but rather its symbolic value in recognizing environmental stewardship of upland people instead of seeing them as forest destroyers.

The Certificate of Ancestral Domain Title (CADT) program went a step further in its recognition of communal land rights on formerly public domain land. Indigenous peoples’ land rights were first recognized through the 1987 Constitution in which the State guarantees the

protection of the rights of “indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being.” The Indigenous Peoples Rights Act (IPRA) of 1997 recognizes the rights of indigenous peoples to their cultural integrity and self-governance and certifies customary property rights to ancestral domains and lands. The Act requires a council of elders to formally represent the community in all dealings with government entities, which – in some instances – has opened the door for elite capture. In some communities, leadership is no longer exercised by elders, but was transferred to members with a formal education, which raises problems of ‘traditional’ representation. The requirement also discriminates against women who tend to be excluded from leadership roles in indigenous communities, although there are cases where women are represented in the council of leaders.



Agrarian structures in a remote area of Mindanao, Philippines – intensification reduces biodiversity

The process of obtaining a CADT or CALT is expensive and time-consuming, due to the large amount of evidence that needs to be provided by the claimants. According to the Philippine Task Force for Indigenous Peoples Rights (TFIP), the process takes 2-3 years on average, but in some cases, registration processes have been going on for more than 10 years and still remain incomplete. As of December 2008, only 96 CADTs covering 2.7 million hectares had been issued of which only 19 were registered with the Registry of Deeds, corresponding to less than 0.6 million hectares (Cariño 2012). In other words, after 11 years of the promulgation of IPRA, less than 8 percent of the estimated 7.5 million hectares of ancestral domains were registered. Reportedly, about 175 CADTs were approved by 2014, with many cases pending. Unfortunately, more recent data is not available, as the website of the National Commission on Indigenous People (NCIP) has not provided any updates.

The issuance of a Certificate of Ancestral Domain/Land Title (CADT/CALT) under IPRA supposedly provides land tenure security to an indigenous community and all its members. Yet, despite this progressive legal framework, indigenous peoples continue to be marginalized and have been evicted from their ancestral lands by the government for infrastructure projects and by private farming interests and natural resource concession holders. Ancestral domain claims often overlap with land in the 'public domain', such as protected areas and government reservations, as well as concessions given for mining, logging, plantations and energy projects, which are governed by other existing and often conflicting laws. While the Act requires Free Prior and Informed Consent (FPIC) of indigenous peoples prior to any government grant of license or concessions covering lands within ancestral domains, FPIC requirements are oftentimes ignored with impunity or manipulated in a fraudulent manner. A recent field-based investigation of 34 FPIC cases in three different geographical regions (Luzon, Visayas, Mindanao) – commissioned by the National Commission on Indigenous People (NCIP) and supported by the German development agency GIZ – found that no more than 50 percent of the studied cases attained the status of full and faithful compliance with the FPIC guidelines and procedures (GIZ and NPIC 2015). A substantial number of cases reported incidents of violations during the actual conduct of the FPIC (38.2 percent), as well

as during the conduct of the signing of the Memorandum of Agreement (MOA) and post-FPIC activities (29.4 percent), which are the phases where the more substantial aspects of the FPIC are deliberated and ultimately settled. The widespread negative perception about FPIC appeared to be related to the non-implementation of agreed upon or promised benefits (GIZ and NPIC 2015).

Another major problem with the implementation of FPIC in the Philippines is that those indigenous communities that have not (yet) secured CADTs are automatically excluded from the FPIC provisions. This omission is conveniently used by the government and investors to disregard indigenous opposition to development plans. Cases are reported where one indigenous group entered into an agreement with a mining company in exchange for security and non-technical jobs in the mine, but it turned out that the mining area was located in the ancestral land of another group under a different tribal leader. Since the mining company had already obtained the consent of the other leader, FPIC was considered valid from a government perspective and the project could go ahead. Pre-existing rights to land and natural resources also prevail over competing indigenous claims or rights; therefore many logging and mining leases continue to exist even on recognized indigenous domains (Xanthaki 2003).

The southern island of Mindanao has been designated as the 'agribusiness hub' of the Philippines since the Arroyo administration (Noteboom and Bakker 2014). Joint ventures between foreign and domestic investors have been encouraged by successive pro-business governments and can be registered as a domestic corporation. As long as at least 60 percent of a project's stocks are owned by Philippine citizens, land investments of up to 1,000 hectares are possible, although many loopholes exist (Noteboom and Bakker 2014). For example, investors may enjoy 100 percent control – albeit not formal 'ownership' – if the land is characterized as "idle, unproductive or marginal". There are generally no limits on the size of areas to be leased (Montemayor 2013). Private landowners in the southern Philippines tend to lease their lands to banana and pineapple plantations for a rental fee of US\$ 400 per hectare per year. These fees are usually paid in lump sum every five years and leasing contracts typically range from 25-50 years (Montemayor 2013). Large-scale concessions are not an entirely new phenomenon, as foreign-operated banana and pineapple



plantations with well-known brand names have operated since the early 1900s. Many of the lands in Mindanao currently being targeted by foreign investors are agrarian reform areas. The island has also been a major target of large mining companies and historically logging concessions played a major role for the national economy. More recently, the government has made attempts to broker large-scale land deals with wealthy investors from the Gulf States (Noteboom and Bakker 2014).

Ironically, the government legitimizes these deals by arguing that such projects can help promote peace in this violence-ravaged region. Muslim separatists are engaged in armed rebellion in Mindanao, where six of the country's 10 poorest provinces are located. Following the creation of the Autonomous Region in Muslim Mindanao, conflict and instability persist and have even intensified in some areas. The region is plagued by localized clan rivalries over land and other natural resources and political dominance. Smallholder farmers have often been pressured into involuntarily leasing their land to Malaysian oil palm investors. Small landholders trying to resist the land deals have reportedly been harassed by goons hired by local agents of agribusiness investor.

Rural-to-urban migration and lack of access to land and housing by the poor has led to the swelling of squatter colonies or informal settlements in public and privately owned lands in urban and peri-urban areas. Ironically, many of these 'illegal' squatters have moved to the cities because they have been dispossessed, displaced or otherwise disempowered by aggressive rural development projects in the region of origin. Yet their informal settlements in the cities are also under constant threat of demolition and removal, ostensibly to protect large urban centers from the risks of flooding and other perceived threats, but often with the underlying agenda to build commercial centers, high-rise condominiums and luxury real estate enclaves. Following the devastation of Typhoon Haiyan (Yolanda) in Tacloban, restrictions on residential use of coastal lands deemed unfit for human habitation were followed rapidly by a rush of commercial investors attracted by the prospects of land conveniently laid open by government-imposed no-dwelling zones, where they could simply disregard the customary rights of former landowners (Chanco 2015).

## 4.4.6 Vietnam

For many decades, Vietnam has been characterized by smallholder farming with relatively little private concentration of land; however, there is a new trend of growing inequality in access to land (Hirsch et al. 2015). The Vietnamese Constitution vests all land – including forests, rivers and lakes, water sources and underground natural resources – in the population as a whole. It also provides that the state is to systematically manage all land and allocate it to organizations and individuals, and that those to whom land has been allocated are entitled to transfer their right of use to others (USAID 2013c). While Vietnam's legal system does not recognize customary laws, in areas where the state does not have the capacity to administer state law, customary rules are often an important source of regulation for ownership rights and property disputes. In ethnic minority communities, customary rules are often the first choice for dispute settlements (USAID 2013c). The 2003 Law on Land includes provisions for some kind of communal land tenure, stating that "land allocated by the State to a community of citizens shall be used to preserve the national identity through the habits and customs of ethnic minority people". However, this provision has rarely been translated into practice on the ground. One of the major reasons is the ambiguous legal status of 'local communities'. In the current legal system, the formal status of 'community' has not been clearly defined, and the 2005 Civil Law does not recognize a community as a legal entity.

Vietnam's Land Law of 1993 and its successor, the 2003 Law on Land, stipulate that all land – including agricultural and forestland – is the 'property of the entire Vietnamese people and is uniformly managed by the state'. In line with the notion of positioning the State as the exclusive 'land manager', the Land Laws provided the legal basis for the allocation of land use rights to households and state or private organizations for specified periods of between 20 and 50 years (for annual crops and perennial/tree crops, respectively) thus allowing recipients of Land Use Rights Certificates (LURCs) – commonly known as 'red book certificates' – to exchange, lease, inherit and mortgage land use rights (Wirth et al. 2004; Friederichsen and Neef 2010). These transferable rights provided the basis for the development of a land market and also opened access to land for domestic and

foreign investors. Legislators made provisions for an extension of the 20-year allocation of annual cropland, but only if “the land user has strictly obeyed the legislation relating to land during the period of occupancy” (Art. 20 of 1993 Land Law). Yet, emphasizing the State’s discretionary power as ‘sole land manager’ Art. 27 stipulated that “in necessary circumstances the government may appropriate land to be used for the purposes of defense, security, national interest and public interest”. Such projects in the ‘national interest’ include large infrastructure projects, such as hydropower dams, which have displaced hundreds of thousands of mostly ethnic minority people in the north-western and central provinces of the country (Neef and Singer 2015).

Land allocation following the 1993 law created numerous tensions between customary land tenure arrangements and the new formal rules. Particularly among ethnic minorities in the country’s mountainous regions, there was a considerable friction between the new land legislation assuming fixed field boundaries and the traditionally fluid nature of customary land rights on hill slopes, where boundaries tend to shift from year to year according to the labor availability within a farm household (Wirth et al. 2004). In other cases, government offices issued contradicting land titles and the maps accompanying those land titles were highly imprecise. In a case in northern Bac Kan province, land allocation resulted in the concentration of paddy land in the hands of the pre-cooperative owners belonging to one particular ethnic group (Tay), whereas 20 percent of the district’s population (mostly from the Hmong and Dao ethnic group) were left without access to paddy land (Friederichsen and Neef 2010).

Particularly contentious has been the allocation of forestland under the new laws. Vietnamese state-owned forest enterprises have dominated the forest sector for a long time and much of the land under their control continues to overlap with traditional community forests, particular in ethnic minority areas. Where forestland has been allocated, it was done mostly at the farm household level and often in rather inequitable ways, with most forestland going to local elites. Female-headed households were mostly excluded because forest management was regarded as a ‘male job’. Theoretically, farmers have the right to use allocated forestland, but in practice the state can overrule these rights. In earlier forest protection and reforestation programs (Decision 327 “Re-greening

the Barren Hills Program” and Decision 661 “Five-Million Hectare Forest Program”), the State often obliged farmers to plant certain types of trees, regardless of the farmers’ own preferences. In areas where farmers had practiced swidden cultivation, the allocation of forestland has even weakened farmers’ rights when they preferred to continue with their traditional slash-and-burn farming practices for food security reasons rather than implement forest protection measures or engage in reforestation practices. In some areas in the Northwest and the Central Highlands, farmers were also forced into rubber cultivation. In many places, rubber has emerged as a large-scale plantation crop, with average plantation sizes of over 500 hectares, according to a recent study (Hirsch et al. 2015). Rubber production occurs in different models: while state companies and private corporations seem to dominate in the Central Highlands and are reportedly involved in local land grabs, collaboration between state-owned companies and smallholders appears to be more common in the north-western mountains.

The new Land Law of 2013 has maintained the allocation term for land used for perennial crops, such as rubber or other tree plantations at 50 years, but extended the period of allocation of land use certificates for annual crops to 50 years. This extended allocation period means that farmers have a higher degree of security and control over land. On the other hand, it has led to rapid social differentiation in more commercialized areas as poorer families have often made distress sales (Hirsch et al. 2015). Some NGOs have argued that the new Land Law is more supportive of state-owned organizations, private companies and foreign business interests than of small-scale farmers and communities.

Unlike the other five countries examined in this report, Vietnam has seen limited development of large-scale private plantation agriculture in recent years. The loss of land by smallholders has occurred in different parts of the country in different ways and by a range of processes closely linked to the country’s rapid development toward a more industrialized, urbanized market economy (Hirsch et al. 2015). In many peri-urban areas around the major centers, such as Hanoi, Ho Chi Minh City, Danang and Haiphong, smallholders had to give way to the development of industrial zones, often at the expense of the most fertile land (Hoan Le 2015). Rapid coastal development, including for tourism, has displaced significant

numbers of smallholders from their land. In the mountainous regions, dispossession and displacement of ethnic minorities have taken a number of forms, from migration of lowlanders from overpopulated delta areas to hydro-electric power projects to the allocation of land to agro-industrial state farms. Most large land and forest enterprises in Vietnam's uplands are operated by state-owned entities (Hirsch et al. 2015). However, many of these now resemble private corporations, as the State has reduced its subsidies for these enterprises. A number of them have started to engage in transnational land grabs in neighboring Lao PDR and Cambodia, displacing hundreds of families from their customary lands (see section 4.4.3).

Under the 2013 Land Law, land acquired for public purposes such as national defense or public infrastructure can be acquired by compulsory purchase. In principle, land required by domestic private investors for commercial purposes is to be acquired by voluntary conversion, through negotiation between the investor and the rightful landholders (Hirsch et al. 2015). In practice, however, a number of cases of domestic private investment for commercial purposes involved compulsory acquisition (Hoan Le 2015). Public authorities play an important part in negotiating and sometimes coercing agreements, even when they are officially labelled as "voluntary" arrangements. The distinction between public interest and private benefit is thus somewhat unclear, particularly as state officials are often understood to be serving the interests of investors in their dealings with landholders (Hirsch et al. 2015). Land dispossession is a major source of disputes and grievances in Vietnam, lar-

gely as a result of state acquisition of land for domestic investors. In the decade following the 2003 Land Law, about 70 percent of 1.6 million complaints, petitions and denunciations officially recorded were related to land issues (Hirsch et al. 2015). Many of these cases involved the dispossession of poor farmers near urban centers for the purpose of converting agricultural land into residences, infrastructure or industrial developments (Hoan Le 2015).

There is relatively little foreign direct investment in agricultural or forest land in Vietnam (several concessions with Hong Kong-based corporations have been abandoned), but indirectly foreign investment is behind some types of land dispossession, particularly through the development of industrial estates and the tourism sector (Hirsch et al. 2015).

## 4.5 In comparison: Main national tenure problems and sources of conflict in the six countries

Table 5 summarizes the main national tenure problems in the six countries studied. Incoherent statutory legal frameworks, poorly developed land governance institutions, endemic corruption, weak recognition of customary land rights and selective enforcement of laws have resulted in an increasingly inequitable distribution of land and other natural resources in all six countries.



Large-scale land concessions given to investors often cause violence against local population and land tenants – Forced displacement from customary land in Oddar Meanchey Province, Cambodia

**Table 5: Comparison of national tenure problems and associated land conflicts**

<b>Cambodia</b>	<ul style="list-style-type: none"> <li>• Formal land titling program not applied country-wide; primarily permanent fields in non-contested areas get titled</li> <li>• Rampant allocation of economic land concessions without regard for customary rights and without environmental and social impact assessments</li> <li>• Selective enforcement of legal framework in support of business and gov't elite interests and at the expense of the rural and urban poor</li> <li>• Communal indigenous titling and allocation of social land concessions for land-poor and landless farmers is slow and lacks coordination and cohesion</li> </ul>
<b>Indonesia</b>	<ul style="list-style-type: none"> <li>• Ambiguous or contradictory laws on rights to agricultural and forest land; failure to recognize customary forest rights of communities</li> <li>• Limits on customary land rights in favor of business interests and large-scale investors' rights</li> <li>• Absence of rules and procedures for registering community forests</li> <li>• Insufficient capacity at national, provincial and local level to register land and certify rights of customary owners</li> <li>• Inaccurate maps and unclear boundaries between communities</li> <li>• Conflicting claims between communities, between government agencies and communities, between migrants and autochthonous (indigenous) population, and between communities and investors</li> </ul>
<b>Lao PDR</b>	<ul style="list-style-type: none"> <li>• Weak recognition of customary rights</li> <li>• Unclear legal aspects related to tenure and land registration/land titling procedures</li> <li>• Land governance institutions at national, provincial and local level are poorly developed</li> <li>• Formal land laws limit local ownership and use rights</li> <li>• No explicit laws for indigenous rights in relation to land tenure</li> <li>• Non-transparent allocation of land concessions and leases for domestic and foreign investors; infringing on collectively managed and protected lands</li> </ul>
<b>Myanmar</b>	<ul style="list-style-type: none"> <li>• Land considered as virgin, vacant, fallow or otherwise under-utilized subject to appropriation by state authorities</li> <li>• Outdated cadastral system and slow, complex and non-transparent land titling process</li> <li>• Poor land information system, overlapping land classifications and inaccurate land use maps</li> <li>• Lack of recognition of customary rights and weak protection of registered land rights</li> <li>• Active promotion of large-scale land allocations without adequate safeguards</li> </ul>
<b>Philippines</b>	<ul style="list-style-type: none"> <li>• Land concentration and land control by influential urban elites</li> <li>• Outdated land administration laws and inefficient land administration and adjudication infrastructure</li> <li>• Constitutional recognition of indigenous peoples' territorial rights, but overlaps with public domain and conflicts with corporate interests, e.g. mining</li> <li>• Success of agrarian reform program limited by landlords' resistance and bureaucratic red tape</li> </ul>
<b>Vietnam</b>	<ul style="list-style-type: none"> <li>• No formal recognition of customary rights and 'community'; gap between national and customary law</li> <li>• Unclear legal aspects related to tenure and land registration/land titling procedures, particularly in remote mountainous regions</li> <li>• Land governance institutions at provincial and local level are poorly developed</li> <li>• No explicit laws for indigenous (ethnic minority) rights in relation to land</li> <li>• Inequitable allocation of land, particularly household-'owned' forest land</li> <li>• Community rights of ethnic minority groups over traditional forests for management are not clearly defined in the law</li> </ul>

## Chapter 5

# Potential for Controlling Land grabs and Safeguarding Customary Land Rights through National and International Legal Frameworks

## 5.1 Potential for advocacy and legal support at the national level

This subsection examines the political climate for human rights advocacy and legal support for customary, indigenous, community and individual land rights are discussed.

### 5.1.1 The political space for advocacy work of CSOs

The political space for civil society organizations varies significantly between the six countries. Civil society is particularly weak in **Lao PDR** and **Myanmar**, two countries that have only recently become more integrated into the international community and in which corruption is widespread among government officials and

political and civil freedoms remain limited (although this may be about to change in the case of Myanmar). Vietnam also does not score well in terms of political rights and civil liberties as expressed in its rating by Freedom House, an independent watchdog organization (Table 6).

**Indonesia** and the **Philippines** are perceived as somewhat less corrupt by their own people than the other four countries (according to Transparency International), and they score relatively well in terms of political freedom and civil liberties. However, remarkably, they are both considered as “extreme risk” in terms of their human rights index, as calculated by Maplecroft, which puts them in the same category as **Myanmar**. In the **Philippines**, 31 human rights activists were murdered in 2015, according to Front Line Defenders (only Colombia fared worse globally). Both **Indonesia** and the **Philippines** have been accused of ‘internal colonization’ and massive human rights abuses in its restive regions West Papua and Mindanao respectively.

**Table 6: Corruption perceptions, political and civil freedom, and respect for human rights in the six countries studied**

	Indonesia	Philippines	Vietnam	Lao PDR	Cambodia	Myanmar
2015 Corruption Perceptions Index - rank <sup>1</sup>	88	95	112	139	147	150
2015 Freedom Rating <sup>2</sup>	3.0	3.0	6.0	6.5	5.5	6.0
2014 Human Rights Index	extreme risk	extreme risk	high risk	high risk	high risk	extreme risk

Sources: Transparency International (2016), Freedom House (2016), Maplecroft (2015)

1) out of a total of 168 countries

2) on a scale from 1 (most free) to 7 (least free)

### 5.1.2 Using political and judicial space for advocacy in Cambodia

The Cambodian Constitution in its articles 35, 41 and 42 guarantees the right and freedom of all Khmer citizens to “participate actively in the political, economic, social and cultural life of the nation”, “express their personal opinions, the freedom of press, of publication and of assembly”, “create associations and political parties” and “participate in mass organizations meant for mutual assistance, protection of national realizations and social order.” Yet, in July 2015, the National Assembly and the Senate passed the Law on Associations and NGOs (LANGO), which requires the 5,000 domestic and international NGOs that work in Cambodia to register with the government and report their activities and finances or risk fines, criminal prosecution and shut-downs. The law also allows government authorities to ‘de-register’ NGOs if they are not “politically neutral” and deny registrations on vague grounds that the groups have ‘endangered the country’s security and stability’ or ‘jeopardized national security or Cambodian culture’. The Cambodian government claims that the law was necessary to weed out illegitimate NGOs and ensure they do not receive financing from terrorists, but there is widespread fear among civil society that LANGO will be used to harass NGOs and stifle advocacy work. External observers see this move as another attempt of the government to restrict the democratic space in Cambodia by using various legislative, judicial and extra-legal means. Despite widespread harassment by the government, a number of civil society organizations are involved in public-private negotiations and in legal actions against large foreign investors and concessionaires. A combination of local resistance, domestic and international advocacy work and mediated negotiations has incited some investors to offer compensation to displaced populations or to withdraw their involvement in bankrolling illegitimate land deals or buying products from concessions that had ignored human rights.

The legal system of Cambodia has long been criticized of being partial and corrupt, and there is little evidence that this might change in the near future. In principle, the Cambodian Constitution protects the independence and impartiality of the country’s courts and postulates a regime of rule of law (Oldenburg and Neef

2014). The execution and protection of the law rests with the State’s executive and judiciary branches according to the principles of separation of powers. Yet, many local communities face challenges when exercising their rights in court proceedings. Human rights organizations, such as ADHOC and LICADHO as well as the network of CSO the NGO Forum Cambodia, have documented many cases of violations and misinterpretations of the land law by legal institutions at the expense of local farmers and urban poor. These groups also often do not have the financial means to access the court system, as they cannot pay the necessary fees, while investors are often backed by multinational companies. Courts are also less likely to process complaints or lawsuits involving concessionaires (Oldenburg and Neef 2014). On contrast, local villagers are subject to court proceedings if they exercise their rights on land claimed by concessionaires. Consequently, villagers tend not to access the formal legal system and rather seek recourse to extrajudicial procedures. The major threat for the independence of the jurisdiction stems from the predominantly exercised control by the executive and its associated investors and rich and powerful businessmen over the courts (Oldenburg and Neef 2014).

Despite these severe limitations, there are several entry points for advocacy groups to support the protection of rural and urban people’s right to land. First, the 2012 moratorium on new economic land concessions, the review of existing ELCs and the campaign for surveying land and issuing land titles to people living on state land have shown that the government reacts to increasing pressure from international and bilateral donors, rural resistance movements and civil society groups. Second, the Cambodian Land Law has a number of progressive elements, particularly the provisions for communal indigenous land titling and there should be sustained efforts from civil society to urge the government and its donors to resume the communal titling process in indigenous communities. Third, mapping economic land concessions, tracking individual land grab cases and uncovering the international financial linkages of corporate investors by such organizations as ADHOC, LICADHO and Global Witness has been particularly effective in getting global attention. Fourth, CSOs could identify ways of collaborating with the FAO’s crowd-sourcing approach ‘Open Tenure’. This software-based approach supports the collection of tenure-related details by communities



themselves and has been piloted in Oddar Meanchey Community Forest in the context of the implementation of the Voluntary Guidelines for Responsible Governance of Tenure (VGGT) in Cambodia (Hall and Scoones 2016).

### 5.1.3 Expanding the scope for land rights advocacy in Indonesia

In recent decades, Indonesia's civil society organizations have provided an essential counterweight to the urban elitist bureaucracy in matters of public policy development (USAID 2010b). The strong civil society mobilization for traditional rights started in 1998 and the growing number and financial strength of cultural and environmental NGOs, often with global support. With respect to agrarian issues, legal aid, forest management and natural resource governance, active CSOs include the JATAM-Mining Advocacy Network, KSPPM and the Consortium for Agrarian Reform (KPA). The KPA is leading national advocacy efforts to develop a so-called "Land Bill" which seeks to redress unequal land distribution and provide alternative solutions for conflicts around plantations, forests and mining.

To be more effective in their advocacy work, CSOs would greatly benefit from further training in the legal aspects of regulating and administering land relations which would help them to understand the ways in which government officials and investors take advantage of gaps and ambiguities in Indonesia's complex land legislation framework (USAID 2010b). Regional and local governments - which have been given widespread authority to govern their territories under an increasingly decentralized system - are also often unaware of the legal mechanisms that could be used to formalize and document customary ownership of lands and to settle land conflicts through traditional mediation rather than through court procedures. Indonesia adopts a civil law system, which relies heavily on judicial independence and reluctantly applies precedence. The general public's perception is that Indonesian law enforcement is often not well aligned with local customs and rules and judges are seen as incompetent or simply corrupt. Many locals remain unaware or cynical with the judicial system in place.

A major breakthrough towards a wider acknowledgement and protection of customary rights in Indonesia was the Constitutional Court ruling in May 2013 which invalidated provisions of the 1999 Forestry Law under which the Indonesian government through the Ministry of Forestry had assumed ownership over forest land that traditional communities had occupied for generations. The Constitutional Court ruled that the state was constitutionally required to recognize and respect the customary (*adat*) rights of traditional forest communities. The decision stipulated that it was unlawful for the government to grant concessions without approval from these communities. The court ruling was a major victory for the Alliance of Indigenous People of the Archipelago (AMAN) which had brought this case to the Constitutional Court. The ruling affects millions of hectares of forestland across the archipelago and hundreds of thousands of forest-dwelling communities that had been dispossessed of their traditional lands. Advocacy groups can assist these communities in reclaiming their customary lands, although this is expected to a long and uphill struggle.

Another entry point for advocacy groups may be the "One Map" initiative, launched in 2013 by the Indonesian government to harmonize existing mapping approaches and settle competing claims across the archipelago. Participatory, community-based mapping of customary land - referred to as 'counter-mapping' or 'local counter-territorialization' has been initiated in West Kalimantan and West Papua by the grassroots organization Network for Participatory Mapping (JKPP) and the Alliance of Indigenous Peoples of the Archipelago (AMAN) over many years. Following the Constitutional Court ruling of 2013, the chances may be higher that the government incorporates spatial data produced by legitimate *adat* communities into their geospatial information systems, which would be an important step towards legal recognition.

### **5.1.4 Emerging political and advocacy space in Lao PDR**

Civil society in Lao PDR is very weak in comparison with most other ASEAN countries. The authoritarian and undemocratic rule of the Lao government, the absence of opposition parties, the repression of any form of open resistance, and the limited role of civil society in the country's political arena have been persistent obstacles for open advocacy work. Until 2012, no national NGOs were permitted and only foreign, mostly non-political NGOs were allowed to operate in the country (Hirsch and Scurrah 2015). Since 2012, non-profit associations (NPAs) have been allowed, but they can only operate as service providers and are not allowed to engage in any advocacy work. The media in Lao PDR also remain tightly controlled by the government. As a consequence, there are few open spaces for policy advocacy over land issues beyond the grouping of foreign NGOs that work with the Land Issues Working Group (Hirsch and Scurrah 2015). The one-party state and the reluctance to challenge authority through various forms of resistance means that international governance principles associated with land and natural resource initiatives such as FPIC are difficult to implement or monitor. Civil society activities remain mostly confined to the low-key use of social media.

However, there seems to be an increasing realization on the part of the government that rural people have not benefitted from the indiscriminate expansion of land concessions and leases and that grievances and land conflicts in rural areas are on the rise. This probably explains why the Prime Minister of Lao PDR issued a notification in June 2012 that land concessions for industrial tree plantations (eucalyptus, rubber) and for mining be suspended and ordered a review of the government's concession policy (Schönweger et al. 2012). Possible measures that could be supported by local NGOs under the current political and civil space may include capacity-building in land conflict resolution, legal literacy training, providing access to legal resources and supporting meaningful local participation in community-based mapping and land use planning processes (USAID 2010b).

### **5.1.5 Uncertainties for human rights advocates in Myanmar's democratic transition**

Since the start of Myanmar's transition to a fragile democracy with semi-authoritarian elements, there has been a dramatic increase in civil society advocacy for more secure land rights for communities and ethnic farm households. Through the Land Core Group, NGOs and grassroots organizations have been able to engage with the Myanmar government on policy issues related to land rights and foreign investment (Hirsch and Scurrah 2015). State-civil society relations were strengthened through the drafting process of a National Land Use Policy (NLUP) which has yet to be adopted. Engagement in the NLUP consultation process may be an experience that will inform future advocacy work. CSOs also play an increasingly important role in land law implementation through educational campaigns, for example, around land registration procedures, but also on farmers' rights and the law (Hirsch and Scurrah 2015). New laws allow demonstrations under the condition that they are peaceful and registered with authorities in advance. Many local communities have used their new liberties to publicly express their grievances and make demands for more transparent processes for the allocation of land concessions and provision of adequate compensation in case of land loss. However, these new civil and political freedoms can be fragile and short-lived, as demonstrated by the violent dispersal of a three-month occupation of Monywa copper mine in November 2012 (see section 4.4.4). However, there is hope among CSOs that there are more opportunities to resist new land grabs and reverse past land deals in the country's democratic transition process. The new semi-civilian government under President Htin Kyaw has set up a "Central Review Committee on Confiscated Farmlands and Other Lands", chaired by one of the country's vice-presidents. He has urged officials to set up task forces to deal with the return of seized land and with the economic impact land grabbing has had on farmers.

Prior to the instalment of the new semi-civilian government, Myanmar's current legal climate was characterized by distrust and the legal system was held in low esteem, as a result of political oppression, corrupti-

on, absence of rule of law or selective law enforcement. Even government officials acknowledge that many laws are in conflict with the 2008 constitution – which enshrines respect for human rights and the rule of law, separation of powers and property rights – but the lack of legal capacity and qualified lawyers limits the scope for action (Carter 2015). Yet, the 2008 constitution itself contains a number of highly problematic provisions, such as officials’ immunity for past human rights violations and the military’s veto power over ratification of any amendment to the constitution. In this difficult and sensitive political climate, the approach taken by the legal empowerment network Namati in Myanmar could be a useful model. Namati’s Community Land Protection Program is currently working on hundreds of cases of farmers who suffered land grabbing by the military and other powerful figures under the country’s decades-long military regime (Namati 2015). The approach of Namati is to provide training to so-called ‘community paralegals’ who can then give advice on land laws to a much larger group of people than could be assisted by lawyers alone (in a similar way as primary health workers are connected to doctors).

### **5.1.6 Advocating for peasant and indigenous peoples’ rights in the Philippines**

Since the 1986 People Power Revolution that ended the Marcos dictatorship civil society in the Philippines has been the most vibrant among the six countries studied. CSOs have operated in a political system that is characterized by traditional patron-client relationship in an oligarchic system that is controlled by a small group of powerful – and land-rich – urban elites. Civil society actors have used a variety of strategies to pursue their causes which include (1) advocating for constitutional reforms to address power abuses by the ruling elite, (2) constituency-building and social development work, (3) research and training programs and (4) conflict-reduction efforts, including peace-building efforts with communist insurgents, peasant movements and indigenous peoples. An important strategy has been to forge ties with transna-

tional social movements and international CSOs to create a global environment that is favorable to their cause. Among the challenges that civil society in the Philippines has faced are (1) continued elite domination of Philippine politics which hampers CSO advocacies, (2) co-optation of CSO leaders by the political elite, (3) the influence of the military and the political instability in the country, particularly in the southern and poorest provinces (Tadem 2015), and (4) divisions among the various civil society groups regarding the ‘right’ pathway for political change which compromises the effectiveness of their activities.

Among the advocacy groups and networks trying to defend customary and indigenous land rights, the Philippine Task Force for Indigenous Peoples Rights (TFIP), a national network of 12 non-government organizations, has probably the widest geographical outreach in the country. TFIP is involved in participatory action research, information dissemination, networking, capacity building, campaigns and policy advocacy. It is currently engaged in a campaign to stop the extra-judicial killing of indigenous peoples, to abolish the Philippine Mining Act of 1995 and to stop the construction of large dams in indigenous communities. Another large advocacy group, The Central Visayas Farmers Development Center (FARDEC) was founded in 1989 by leaders of provincial farmers’ federations and peasant advocates from the Church, academia and civil society as a support network for local farmers’ groups defending their land rights and fighting for genuine agrarian reform. Through mobilization of communities, capacity building, research and advocacy work FARDEC supports farmers in defending and advancing their right to till and presses for ‘genuine’ agrarian reform.

### **5.1.7 Expanding political and advocacy space for land right protection in Vietnam**

In contrast with the Philippines, Indonesia and even Cambodia, civil society in Vietnam is still in a very early formative stage. The issue of land rights remains one of the more dangerous subjects to examine critically



Collecting fingerprints as signatures on a petition against a land grab – indigenous communities have been particularly vulnerable to dispossession in Cambodia

(Hirsch and Scurrah 2015), particularly when land confiscations involve powerful government actors. Recently, advocacy coalitions have taken advantage of new civil society spaces to collaborate closely with progressive government officials, academia and other actors to lobby for forestland use rights and other issues related to land and natural resources and to resource-dependent livelihoods (Hirsch and Scurrah 2015). Formally, Article 67 of the 1980 Constitution guarantees the Vietnamese citizens' rights to freedom of speech, the press, assembly, and association, and the freedom to demonstrate. Such rights are, nevertheless, subject to a caveat stating "no one may misuse democratic freedoms to violate the interests of the state and the people." Vietnamese NGOs have therefore opted for a more 'quiet' approach to lobbying for local communities' land rights.

Media coverage of issues previously deemed too sensitive to broadcast in public has increased significantly in recent years. In 2012, the case of a farmer who resisted the eviction from his farmland by a team of police and the army to make way for a new airport made national headlines and unleashed an unprecedented response from the Vietnamese public which sympathized with his cause. The defense of the farmer by the media and the Vietnamese people prompted the Prime Minister to

publicly question the actions of the local authorities and order an investigation into the incident (Toan Le 2015).

Vietnamese peasants have often directed their anger against government officials – sometimes in violent protests – in the face of land confiscations and involuntary displacement. The Vietnamese government is increasingly aware that tensions between the state and the people will further rise when it arbitrarily uses its discretionary power to confiscate land from small farmers. This will make it more difficult for the socialist regime to retain the notion of "people's land ownership" in its political rhetoric.

## 5.2 Potential of international frameworks to control land grabs and secure customary rights

This subsection examines which international legal frameworks could be useful in regulating or controlling land grabs and securing the customary rights of indigenous communities and other marginalized groups in Southeast Asia.

## 5.2.1 International Investment Agreements

Foreign investments in agrarian land are mostly regulated through international investment agreements and associated contracts and treaties. International investment agreements are treaties between countries that are intended to provide special protection under international law for investors from one state investing in another state. Most land deals are governed by Bilateral Investment Treaties (BITs). Table 7 shows the number of BITs signed by the six countries. Vietnam, the Philippines and Indonesia have been particularly active in signing such investment agreements. Lao PDR and Cambodia have also more than 10 BITs in force, with Myanmar trailing behind, but expected to conclude a number of new BITs in the near future.

Foreign investors enjoy an incredibly high degree of protection under Bilateral Investment Treaties (BITs) and provide them with a number of privileges. Major investor rights under the umbrella of BITs include:

- National treatment – fair and equitable (at least same rights as domestic investors and any third State investor)
- Full protection and security (often provided by police or military forces)
- Inclusion of stabilization clauses in contracts (e.g. to protect investors from new social and environmental standards introduced by host states)

- No expropriation without compensation
- Often non-interference guaranteed by the host state
- Access to state-investor international arbitration (Investor State Dispute Settlement – ISDS) in the event of ‘injury’

While in theory human rights obligations can be included in the BITs, most of the existing ones in the case of the six countries studied are ‘human-rights blind’ (Dhanarajan 2015). However, land deals that violate general principles of international law could be challenged. Under Article 53 of the Vienna Convention on the Law of Treaties, any treaty that conflicts with a peremptory norm (jus cogens) is void (Dhanarajan 2015). Peremptory norms that are recognized and are potentially relevant to land grabs include prohibitions of aggression and the right to self-determination. Some legal scholars have argued that permanent sovereignty over natural resources (e.g. acquisition of water sources), pollution of an exponential scale (may be applied to some mining activities) and the destruction of the rights of indigenous people could also classify as ‘peremptory norms’ under international law. Yet, in reality, it may be difficult for human rights advocacy groups to hold states or corporations accountable by referring to peremptory norms, as Southeast Asian states – hungry for foreign investments – generally reserve the right to interpret the concept of these norms for themselves.

**Indonesia** has recently experienced the repercussions from signing BITs that contain the ISDS clause,

**Table 7: Corruption perceptions, political and civil freedom, and respect for human rights in the six countries studied**

	Indonesia	Philippines	Vietnam	Lao PDR	Cambodia	Myanmar
No. of BITs in force	34	31	45	18	11	5
No. of BITs signed, but not in force	17	6	15	6	12	5
No. of BITs terminated	18	-	1	1	1	-

Source: UNCTAD 2016

which enables investors to sue the host country, if it feels it has been treated unfairly. The government is facing a billion-dollar lawsuit from UK-listed Churchill Mining under the terms of one such treaty, after issuing a new mining law. Several other international companies have also threatened litigation. An American mining company – with a Dutch subsidiary – used the Indonesia-Netherlands investment treaty to get exemptions from certain legal requirements. As a consequence of these ongoing claims and litigations, the Indonesian government has terminated 18 of its BITs (including the one concluded with the Netherlands, its former colonial power, and the one with economic powerhouse China) and has started to review other BITs in an attempt to renegotiate new terms that do not allow companies to use ISDS as a threat or bargaining tool.

**Myanmar**, which has opened the doors widely for foreign direct investments and is currently negotiating an EU-Myanmar Investment Protection Agreement (IPA) alongside a number of other international investment agreements, may be able to draw important lessons from the case of Indonesia. The current draft also contains a so-called ‘umbrella clause’ which would allow companies to sue the Myanmar government if any government authority has breached a written commitment, regardless of the reasons. There are concerns that such a clause would greatly limit the Myanmar government’s regulatory power and increase the risks of negative social and environmental impacts of the IPA. The Myanmar Centre for Responsible Business has suggested that the government of Myanmar should prioritize reforms and implementation of Myanmar law, particularly the land law, before finalizing an EU-Myanmar IPA that may negatively affect the government’s policy space in providing social and environmental safeguards.

## 5.2.2 International Human Rights Law: The rights to food, water, adequate housing and self-determination

### Right to food

The right to food is enshrined in the **Universal Declaration of Human Rights** (1948). Art. 25 stipulates that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, [...]”. The **International Covenant on Economic, Social and Cultural Rights** explicitly recognizes “the fundamental right of everyone to be free from hunger” (Art. 11(2)) and places an obligation upon state parties to take measures, either in their individual effort or through international cooperation, to address all forms of food insecurity. States are obliged to ensure that everyone under their jurisdiction has access to minimum essential food that is sufficient, accessible, nutritionally adequate and safe to ensure their freedom from hunger. The then **UN Special Rapporteur on the Right to Food** defined the right to adequate food as “having regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of people to which the consumer belongs, and which ensures a physical and mental, individual and collective fulfilling and dignified life free of fear” (de Schutter 2012). The special rapporteur argued that states that negotiate land acquisition agreements without ensuring that this would not result in food insecurity are violating the right to food. It needs to be emphasized that the right to food is not simply a right to be fed, but primarily the right to feed oneself in dignity. In sum, the right to food is a legal concept recognized under binding international law that provides entitlements to individuals and places legal obligations on States to overcome hunger and malnutrition domestically and internationally and to realize food security for all. The Indonesian government makes reference to the right to food as a basic human right in its 2012 Food Law (see also next subsection).



## Food sovereignty

Closely related to the ‘right to food’, but also to the ‘right of self-determination’ discussed later is the concept of food sovereignty (see definition in the box below). It was developed by the international farmers’ movement “La Via Campesina” and refers to the right of communities, peoples and states to independently determine their own food, agriculture, livestock and fishery systems and policies. The concept of food sovereignty aims to ensure the survival and well-being of smallholder farmers and other small food producers (pastoralists, fisher folks, foragers), who have been largely neglected or excluded from broader processes of agricultural and rural development over the past decades (Beuchelt and Virchow 2012). La Via Campesina and other proponents of the concept have argued that smallholder farmers should play a more prominent role in food and agricultural policy debates, including food trade, which requires that local communities have better access to and control over productive resources and more socio-political influence. The concept of food sovereignty raises the fundamental question which type of agri-food system is desirable and what types of rural development should be pursued to guarantee food security for communities as well as

national and global populations (Beuchelt and Virchow 2012).

The concept of food sovereignty has been adopted by a few countries, mostly in Latin America (Venezuela, Bolivia and Ecuador), but also by two West African countries (Mali, Senegal) and Nepal, and found entry into their constitutions and legislative frameworks. In Southeast Asia, **Indonesia** has become the first country that has mentioned the term “food sovereignty” in relevant legislation, namely the 2012 Food Law. However, its definition differs markedly from the one provided by the NGO/CSO Forum for Food Sovereignty the box below. In Article 1, the government states that “Food Sovereignty is the right of the state and nation to independently establish a food policy that guarantees the right to food for the people and grant the right for the society to establish a food system that is in accordance with the local potential resources.” None of the articles in the 2012 Food Law stipulates that local communities, individual family farms or other small food producers have the right to determine their own food and agriculture system. Hence, ensuring national and local food security, safeguarding the right to food for all members of society and determining the country’s agri-food system is seen as an exclusive mandate of the State. While the law mentions briefly the

### Definition of ‘food sovereignty’

“Food sovereignty is the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems. It puts those who produce, distribute and consume food at the heart of food systems and policies rather than the demands of markets and corporations. It defends the interests and inclusion of the next generation. It offers a strategy to resist and dismantle the current corporate trade and food regime, and directions for food, farming, pastoral and fisheries systems determined by local producers. Food sovereignty prioritises local and national economies and markets and empowers peasant and family farmer-driven agriculture, artisanal - fishing, pastoralist-led grazing, and food production,

distribution and consumption based on environmental, social and economic sustainability. Food sovereignty promotes transparent trade that guarantees just income to all peoples and the rights of consumers to control their food and nutrition. It ensures that the rights to use and manage our lands, territories, waters, seeds, livestock and biodiversity are in the hands of those of us who produce food. Food sovereignty implies new social relations free of oppression and inequality between men and women, peoples, racial groups, social classes and generations”.

(NGO/CSO Forum for Food Sovereignty 2007: 1; cited in ISC 2007)

utilization of “local resources, institution and culture”, the “obligation to achieve availability, affordability and fulfilment of food consumption that is sufficient, safe, excellent and nutritionally balanced both on the national and local levels to individuals equally in the entire territory of the Republic of Indonesia” is explicitly placed on the State. The Indonesian government can then justify and legitimize large-scale agri-business operations in such regions as West Papua by its obligation to provide affordable food for the whole population. The example from **Indonesia** shows how a concept that was originally meant to protect small food producers is at risk of being misappropriated, manipulated and re-interpreted by policy-makers.

In the international context, other concepts closely related to food sovereignty are “land sovereignty” (Borras and Franco 2012) and “livelihood sovereignty” (Dam Trong Tuan 2016). These concepts may be better suited as discursive elements in the debate about land rights, as their connection to issues of land is more obvious and the potential to redefine them in order to suit the interests of the State may be more limited.

## Right to water and adequate housing

The **UN Committee on Economic, Social and Cultural Rights** in November 2002 declared that “the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.” However, it was not until 28 July 2010 that the **United Nations General Assembly** through Resolution 64/292 explicitly recognized the human right to water and sanitation. In the context of land grabbing, violations of this fundamental human right may stem from (1) diversion of freshwater supplies to agro-industrial plantations or other water-intensive economic processes at the expense of drinking and irrigation water provision for other stakeholders, such as small-scale farmers or pastoralists, (2) contamination of freshwater sources through agrochemicals, mining operations and other industrial activities and (3) evictions of communities from areas with adequate water supply.

Article 11 of the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** encapsulates the right to adequate housing. Article 25(1) of the **Uni-**

**versal Declaration of Human Rights (UDHR)** also guarantees this right, which prohibits forced evictions. The practice of forced evictions – a common feature in many land grabs across Southeast Asia – also violates various other rights, including a number of civil and political rights, the right to security of the person and the right to non-interference with privacy, family and home.

## Right to property and self-determination

Under international law, the right to property has not been strongly determined and has therefore remained controversial among international human rights lawyers. Neither the **International Covenant on Civil and Political Rights (ICCPR)** nor the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** refer explicitly to the right to property. However, Article 17 of the **Universal Declaration of Human Rights (UDHR)** provides that “No one shall be arbitrarily deprived of his property”, which can be interpreted as international – and legally binding – recognition of land grabbing as a violation of this basic human right. However, the problem in most Southeast Asian countries is that many customary landholders are denied the right to ‘property’ of land (ab initio denial) by their own State. Either they are entitled only to permanent and transferable land use rights (as in the case of **Vietnam** and **Lao PDR**) or they are regarded as illegal occupants on State land (as in the case of **Cambodia** and **Myanmar** and – to some extent – in **Indonesia** and the **Philippines**). Therefore, governments ordering the eviction of these people from places that they have occupied ‘illegally’ or without permanent ‘ownership’ status may argue that they do not ‘arbitrarily deprive them of their property’.

In relation to the rights of indigenous peoples, however, international law is much more explicit. Art. 10 of the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) stipulates that “[i]ndigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return”. The UNDRIP was adopted by the UN General Assembly following protracted negotiations over many years. The 46

articles deal in a comprehensive way with the identity, the position and the rights of indigenous peoples. They address their rights to self-determination, life and integrity, cultural identity and heritage, as well as the rights to their lands and resources. In several parts, the UNDRIP explicitly uses the term “self-determination”, which is an important concept for indigenous peoples in Southeast Asia. Yet, unfortunately, the document does not contain a definition of indigenous peoples, which has made it easier for the governments of Vietnam, Myanmar, Lao PDR and Indonesia to question the declaration’s applicability in their own countries. Nevertheless, in many respects the UNDRIP is a far-reaching and ambitious document relating to the right to development and self-determination of indigenous peoples. In various provisions, the UNDRIP refers to the economic rights of indigenous peoples and their entitlement to their ancestral lands. For example, Art. 26 provides that “[i]ndigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” and imposes an obligation upon States to “give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

Art. 28 has particular relevance for the case of **Cam-bodia** and the **Philippines**, where indigenous peoples are protected by the constitution and necessary by-laws, but often remain ignored or overruled by other interests, particularly in the context of corporate land grabbing and land confiscation by the State: “Indigenous peoples have the right to redress, by means that can include restitution or, when that is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.” Human rights advocates should hold their governments accountable by referring to this article in particular.

### 5.2.3 Codes of Conduct

The UN Guiding Principles on Business and Human Rights, agreed upon by the UN Human Rights Council (HRC) in 2011, the so-called ‘UN’s Protect, Respect, Remedy Framework’. It has three pillars, namely the state’s duty to *protect* against human rights abuses, the corporate responsibility to *respect* the human rights of all peoples, and the contractual parties’ obligation to ensure access to effective *remedy* when protection fails (Subedi 2015). By contrast, according to Ruggie’s Guiding Principles on Business and Human Rights there are strong policy reasons but no obligation for states to regulate activities of companies domiciled in their countries abroad. However this interpretation has been overtaken by the evolving nature of international human rights law. The obligation of a State to control the conduct of businesses outside its territory has been explicitly affirmed by various United Nations human rights treaty bodies.

The Principles of Responsible Agricultural Investment (PRAI) that have been proposed by the World Bank are not much more than a checklist of some of the major problems that can arise from large-scale land acquisitions (Brüntrup et al. 2014). There has been widespread criticism that the PRAI have been developed in a non-inclusive process. Advocacy groups and grassroots movements have dismissed them as legitimizing large-scale land acquisitions and unable to slow down the land rush.

The fundamental problem with codes of conduct for multinational corporations and domestic investors is that they are voluntary and there is no binding force. The corporate veil protects the parent companies of multinational corporations from regulation and enforcement of norms in home and host states. Codes of conduct also do not sufficiently acknowledge the importance of responsibility and accountability on the part of the state entities that are involved in land deals and the human rights abuses that may result from them (Dhanarajan 2015).

### 5.2.4 The FAO's Voluntary Guidelines for Responsible Governance of Tenure of Land, Forestry and Fisheries

The “Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security” (VGGT) were officially endorsed by the 125 member countries of the Committee on World Food Security (CFS) on 11 May 2012 after a three-year consultative process facilitated by the Food and Agricultural Organization of the United Nations (FAO) that included many civil society organizations (CSOs) from the Global South. The declared aim of the VGGT is to achieve “food security for all and support the progressive realization of the right to adequate food in the context of national food security” and to promote “responsible governance of tenure of land, fisheries and forests, with respect to all forms of tenure: public, private, communal, indigenous, customary, and informal”. These overall objectives are grounded in fundamental human rights frameworks as enshrined in several international conventions.

One of the most remarkable characteristics of the VGGT is that they call for the recognition and protection of “legitimate” tenure rights, which includes all forms of customary, informal and subsidiary (such as gathering forest products by women) rights, even if they are not (yet) acknowledged and protected by statutory law (Guffens and Kroff 2012; FAO 2015; Hall and Scoones 2016). This recognition is even extended to publicly owned lands, pastures, fishery grounds and forests that are communally used and managed, generally referred to as “the commons” in academic and policy circles. The VGGT also call for redistributive reforms in order to provide a wider and fairer access to resources, equally for both men and women. Some NGOs have criticized that the concept of redistributive reform as defined by the VGGT includes market-based mechanisms, such as the “willing seller – willing buyer” model, which has not been very successful in the case of the Philippines for instance (Guffens and Kroff 2012).

One of the major limitations of the VGGT is the fact that they do not cover water and mineral rights (Brün-

trup et al. 2014). This is particularly problematic in those Southeast Asian countries and regions that have valuable mineral deposits targeted by central governments, domestic investors and multinational corporations, such as upper Myanmar, northeastern Cambodia, West Papua, Kalimantan, Sulawesi and Flores in Indonesia and Mindanao, Northern and Central Luzon, Mindoro and Palawan in the Philippines. Only the preface of the VGGT briefly mentions that States may take these guidelines into account in the responsible governance of other natural resources that are inextricably related to land, fisheries and forests, such as water and mineral resources. Another shortcoming is that the principle of Free, Prior and Informed Consent (FPIC) – which is explicitly addressed in relation to indigenous peoples in the VGGT with reference to the UNDRIP – could not be extended



Indigenous Khmu woman fetching freshwater in Bokeo Province, Lao PDR – water rights have not been included in the FAO's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests

to non-indigenous social groups (Paoloni and Onorati 2014). While civil society organizations (CSOs) fought for its extension to all groups whose livelihoods depend on land, fisheries and forests, the final document of the VGGT only refers to general consultation and participation standards for non-indigenous communities. This poses challenges for human rights groups that advocate for FPIC among non-indigenous communities (for example, in the context of urban and peri-urban land grabs in all six countries), but also for ‘indigenous peoples’ that are not officially recognized as such by their governments, most notably in Myanmar, Vietnam, Lao PDR and – to some extent – Indonesia.

Another controversial issue is that the VGGT can be interpreted in different ways by different actors. Governments, investors and bilateral or international agencies can make references to certain elements in the text in order to create an agenda focusing on national economic growth, land markets promotion and public benefits of commercial interests (Paoloni and Onorati 2014). The most recent technical guide provided by FAO (2015) to support the implementation of the VGGT – titled “Safeguarding Land Tenure Rights in the Context of Agricultural Investment” – underscores this problem. In its second chapter “Creating an enabling environment” the document presents various ‘business models’ that are presumably more “inclusive and do not threaten tenure rights”, such as “contract farming” and “joint ventures”, but also include “tenant farming/sharecropping” (FAO 2015) which in some parts of the Philippines have been found to be very repressive and exploitative. The danger with these alternative ‘investment models’ is that they can easily become ‘land grabs in disguise’.

A final – and probably the most controversial – issue is that the VGGT do not reject the large-scale transfer of tenure rights, although the text contains several safeguards to limit the scale of such transfers and minimize their potentially negative impacts. This is done, for instance, by calling on States to “expropriate only where rights to land, fisheries or forests are required for public purpose”, by urging States to provide adequate compensation and restitution in case of loss, and by reminding commercial investors to respect human rights and legitimate tenure rights. Yet, a proposal by CSOs to impose a ban on land grabbing was not accepted in the final version of the document (Paoloni and Onorati 2014).

However, the safeguards contained in several sections of the final and official document can be tactically used to organize resistance to illegitimate and unethical land grabs at local and national levels.

In conclusion, the VGGT are an international ‘soft law’ instrument that appeals to investors’ business ethics and corporate social responsibility and calls for host and home countries’ oversight over transnational land transfers. In the process that led to the final document, it was not possible to convince the States to accept the establishment of a strong international mechanism to monitor the policies and actions of governments, international organizations and multinationals that affect the tenure security of local populations (Paoloni and Onorati 2014). Skeptics will argue that if investors and investment-friendly host governments have refused to respect mandatory international and domestic law until now, it is highly unlikely that they will adhere to this new set of voluntary principles. However, despite the various limitations and shortcomings of the VGGT, many of its principles can be used by civil society actors and affected communities as references in their national and local struggles against land grabbing and inequitable land distribution.

The effectiveness of the further implementation of the VGGT will strongly depend on increased and sustained public scrutiny (through civil society movements, academics, global social networks and media platforms) and legal empowerment of advocacy NGOs and affected local populations. The recent agreement between the outgoing government of Myanmar and FAO to pilot the implementation of the VGGT will be a useful ‘test case’ of how robust they can be in a country that has had very limited interaction with international agreements, where the legal framework is particularly complex and inconsistent, and where land grabbing has become pervasive in almost every economic sector (Hall and Scoones 2016). Following the government’s request, FAO organized a three-day multi-stakeholder workshop in the country’s capital Naypyidaw in October 2015. The event was attended by more than 100 participants from government entities, NGOs, farmers’ organizations, academia and the private sector. The objectives were to raise awareness on the VGGT, foster dialogue among participants, and improve coordination around the governance of tenure. To ensure ownership of the process by national stakeholders

from the outset, FAO engaged a national support team, including a civil society network – the Land Core Group, to facilitate the workshop. A so-called “Participatory Capacity Assessment” approach has been used to identify the capacity needs from the participants’ own perspectives. It is still too early to comment on the success of this initiative, but there is some hope that the new semi-civilian government under its president Htin Kyaw may use elements of the VGGT to scrutinize past land confiscations which are currently being reported to the governing National League for Democracy’s offices in each region and state of the country.

## 5.2.5 Transnational State Responsibility and Extraterritorial State Obligations

The VGGT discussed in the preceding subsection made reference to the States’ existing obligations under national and international law and called on them to ensure that they honor their voluntary commitments under applicable regional and international instruments. This has been interpreted by some legal scholars as recognition of extraterritorial obligations (ETO) under human rights law as defined in the “Maastricht Principles” and in the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).

For decades, the traditional view among international human rights lawyers has been that human rights only apply on the territory of states which have ratified human rights treaties. Yet, more recently, there is an increasing awareness about a lack of accountability mechanisms to address the negative consequences of extraterritorial activities, such as land grabbing by multinational corporations, on human rights. This gap is addressed by Extraterritorial Human Rights Obligations (ETOs) which can be defined as “obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory.” The underlying rationale is that (1) States cannot do abroad what they are prohibited from doing at home and (2) states must promote

*universal* respect for, and observance of human rights (UN Charter). International human rights lawyers have therefore placed more emphasis on developing frameworks that foster transnational state responsibility, i.e. by making investor states liable for unethical or illegitimate land grabs by their private and state-owned corporations or sovereign wealth funds (Coomans 2016).

However, at present, there are still challenges in implementing ETOs. From the perspective of most States, ETOs do not exist because they have not been explicitly agreed upon internationally. The UN Guiding Principles on Business and Human Rights support the idea that States have the duty to take steps to prevent human rights abuses “by business enterprises that are owned or controlled by the state”. Hence, this principle would apply, for instance, for a Vietnamese or Chinese state-owned enterprise whose plantations threaten to evict local customary rights-holders in Cambodia or Lao PDR. Yet, the Guiding Principles also maintain that “[a]t present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction.” At the same time, the Guiding Principles also clearly suggest that States are not “prohibited from doing so, provided there is a recognized jurisdictional basis” (Dhanarajan 2015).

In conclusion, the acceptance for ETOs is currently still relatively weak, making it easy for home states to refer to the corporate social responsibility of corporations. Most states also do not want to limit the operational freedom of their corporations abroad and are either unable or unwilling to regulate the conduct of corporations.



## Chapter 6

# Concluding Remarks and Lessons Learned

Based on the existing body of knowledge, this study has shown that in all six countries there is a strong tendency of governments to ‘rule by law’ rather than to establish the ‘rule of law’. In other words, governments use existing land laws to support their own economic agendas, which are mostly focused on attracting foreign (and domestic) investments in agro-industrial and forestry plantations, mining concessions, infrastructure development, special economic zones and tourism developments. To this end, national legal frameworks are selectively enforced, with strong emphasis on the investor-friendly elements of the land legislation and on land (re)classifications that allow governments to confiscate occupied land as ‘idle land’, ‘under-utilized land’, ‘state land’, or land required for ‘development’ in the public or national interest. Environmental and social safeguards are weak or remain unenforced, and legitimate occupants are often dispossessed and displaced, with little or no compensation. Large-scale land grabs are facilitated by a coalition of investor-friendly host governments, local political and economic elites and a variety of players from the ‘Global North’, including multinational corporations, international development banks, commercial financial institutions and bilateral donors and development agencies. International investment agreements and treaties provide strong protection for foreign investors, and the hope for a self-regulation by adhering to voluntary human rights standards under companies’ corporate social responsibility initiatives has not (yet) materialized.

The following lessons learned may be useful for civil society organizations involved in supporting legitimate local communities (indigenous and non-indigenous) in their struggle to defend and secure their customary lands:

- National registers based on geographic information systems of all large-scale land transactions and land confiscations serve to ensure transparency and public scrutiny, particularly when they are run by independent organizations (cf. LICADHO’s work in Cambodia);
  - Adopting and promoting the VGGT and other international legal frameworks and principles, such as UN-DRIP, are useful strategies to enhance awareness and increase the pressure on national governments and their agencies when dealing with land and agricultural investments;
  - Improving ‘legal literacy’ among local communities, including providing robust legal information about the rights of indigenous peoples and the rights of women, is a crucial means for empowering the most marginalized groups;
  - Building transnational advocacy networks across Southeast Asian (ASEAN) countries and protecting land rights activists and social justice campaigners through assistance from international human rights lawyers has proven essential tools to broaden the policy and advocacy space when dealing with land conflicts and forced evictions.
- Not all the above strategies have been applied to the same extent in each of the six countries, as the legal, social and political space differs significantly from one country to the other and oftentimes even from region to region within the same country. Civil society organizations need to carefully monitor the changing scope for legal empowerment and advocacy in their respective country or region.
- “Naming and shaming” strategies through maintaining national and international media’s and the general public’s attention to land grabs have been successful in some instances, as foreign investors tend to be weary of their public reputation;
  - National advocacy networks that include academics, reform-minded government officials and legal support organizations are more effective in pushing for reform of national legal frameworks that discriminate against legitimate customary land rights than isolated advocacy activities;

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## Appendix 1

# Key Land Legislation in the Study Countries

## A1.1 Cambodia's Land Legislation

### **1996 Law on Environmental Protection and Natural Resource Management**

Aimed at preventing, reducing and controlling pollution and suppress acts that cause environmental harm

### **2001 Land Law**

Extends private ownership rights to residential and agricultural land; establishes a framework for systematic land titling; recognizes the right of indigenous communities to collective ownership of land; grants extensive rights to the government to reclassify state public land into state private land; provides the legal basis for granting economic and social land concessions

### **2002 Forestry Law**

Establishes a legal framework for harvesting, use, development and conservation of Cambodia's forests; provides the legal basis for community forestry

### **2005 Sub-Decree on Economic Land Concessions (ELCs)**

Outlines the criteria under which an Economic Land Concession (ELC) can be allocated: (1) land needs to be classified and registered as state private land; (2) a land use plan has been adopted; (3) an environmental and social impact assessment has been conducted; (4) land has solutions for resettlement and does not involve the forced resettlement of rightful landholders; and (5) public consultations have been held with territorial authorities and residents of the locality.

### **2008 Protected Areas Law**

Recognizes the right of forest dependent and indigenous peoples to reside within and sustainably use natural resources of protected areas in core zones, conservation zones, sustainable use zones and community zones

### **2010 Law on Expropriation**

Outlines the principles, mechanisms and procedures of expropriation; defines fair and just compensation for any construction, rehabilitation, and public infrastructure expansion project for the public and national interests and development of Cambodia

### **Directive 01 (Order 01) - 2012**

Introduced a country-wide fast-track land titling programme by sending student volunteers to rural areas with the task of measuring and allocating state land to individual land users, by-passed the regular procedures for land titling

## A1.2 Indonesia's Land Legislation

### **Basic Agrarian Law (BAL) No. 5/1960**

Recognizes customary law (*hukum adat*) as the source of agrarian law; assigns ownership rights exclusively to Indonesian citizens and Indonesian legal entities; allows foreign individuals and legal entities to acquire secondary rights, such as lease or use of land with certain limitations

### **Law on Foreign Investment No. 11/1970**

Stipulates that foreign investors should not be treated differently from Indonesian investors in their rights to manage land for commercial uses and rights to use land and usufruct rights, although they cannot acquire primary land ownership rights (see BAL).

### **1999 Forestry Law**

Provides the legal basis for state ownership of the country's forestland (including non-forested, 'political' forests); effectively overrides customary rights of local communities and indigenous peoples on such lands, particularly forest-dependent groups, foragers and swidden cultivators; stipulates that anyone who lives in a forest area and uses its products can be charged with a criminal offence.

### **Law on Land Acquisition for Development in the Public Interest (2012)**

Simplifies the land confiscation process by state authorities; abolishes the distinction between compulsory land expropriation and voluntary land release; instead it provides for "negotiations with landholders"; authority for acquiring land transferred from elected regional heads to appointed officials of the National Land Agency (NLA).

**Food Law of 2012**

Provides a platform for the Government of Indonesia (GOI) to institutionalize self-sufficiency in food production and “food sovereignty” as overarching food security policies; intended to provide a legal basis to regulate the following activities: (1) food planning; (2) food availability; (3) food affordability; (4) nutrition and consumption; (5) food safety; (6) food labelling and advertising; (10) food institution; (11) public participation; and (12) enforcement.

**Constitutional Court Decision 35/PUU-X/2012**

Invalidates provisions of the 1999 Forestry Law under which the Indonesian central government had assumed ownership over forest land that traditional communities had occupied and used for generations; emphasizes that the state is constitutionally required to recognise and respect the customary (*adat*) rights of traditional forest communities

**Village Law of 2014 (Law No. 6 on Village Affairs)**

Gives greater autonomy to villages and intends to address budget imbalances between different administrative levels, unequal control over natural resources and uneven infrastructure development.

## A1.3 Lao PDR’s Land Legislation

**1990 Law on Property**

Establishes and defines five forms of property: (1) state property, (2) collective property, (3) individual property, (4) private property (belonging to a private economic unit other than an individual or collective) and (5) personal property (items for personal use); establishes that ownership of all land, underground resources, water, forests and wild animals is vested in the state, which may grant rights of possession, use, transfer and inheritance to other entities.

**1996 Land and Forest Allocation Programme**

Designed for remote upland and forested areas; aimed at formalizing rural land occupation by fixing village boundaries and by zoning village territories into fixed categories, such as conservation forest, protection forest,

use forest, agricultural land and settlement area; intended to improve the ‘legibility’ of village land use.

**2003 Land Law**

Lays out categories of land and the scope of land use rights; stipulates that “all land is owned by the national community, and the state must safeguard long-term rights to land by ensuring protection, use, usufruct, transfer and inheritance rights”; establishes the basic organization of land management authorities and a framework for land registration; provides that land titles shall constitute evidence of permanent land use rights and establishes a system of temporary land use certificates (TLUCs) for agricultural and forest land; allows Lao citizens to lease land from the state for up to 30 years; allows the state to lease out land or grant land concessions to non-citizens; prohibits land speculation; guarantees compensation if the state withdraws legitimate land use rights due to public interest.

**2004 Law on Development and Protection of Women and the 2005 Law on Heritage and Basis of Inheritance**

These two laws govern matters related to marital property rights and inheritance. They provide the basis for equal rights of men and women to property.

**2007 Forestry Law**

Defines and delineates three forest management categories, i.e. conservation, protection and production forest; yet, these categories do not indicate current land cover, but are only administrative categories determining management and land use regulations.

**2009 Law on Investment Promotion**

Defines the principles, regulations and measures for promotion, protection and management of investments and lays out rules for granting land leases and concessions to investors; leases are defined as activities that are less resource-intensive and incur only rental fees on the part of the lessee, whereas concessions are assumed to involve activities that use resources more intensively, therefore imposing royalties, taxes and other fees on the concessionaire.

## A1.4 Myanmar's Land Legislation

### **The Land Acquisition Act (1894)**

Continues to be the major legal justification used by the Myanmar government to confiscate land; has provisions for appropriate processes of land acquisition including compensation procedures, but in reality these have mostly been disregarded.

### **2008 Constitution**

Identifies the state as the ultimate owner of the land in Myanmar; gives the government the right to acquire land from its citizens against their will.

### **2012 Farmland Law**

Stipulates that use rights on farmland need to be registered, which gives the owner a land use certificate (LUC) representing tenured title; creates a situation where anyone without an LUC no longer possesses legal rights to use land and can be evicted; creates the Farmland Administration Body (FAB), chaired by the Minister of Agriculture and Irrigation, which has sole power to allocate land use rights; does not subject the FAB to the reach of the judicial system, which means that decisions made by FAB are final and cannot be appealed in a court.

### **2012 Vacant, Fallow, and Virgin Lands Management Law (VFV Law)**

Reclassifies 'unoccupied' land as 'vacant, fallow and abandoned' and makes it available as farmland; declares 'reserved forests, grazing ground and fishery pond land' and 'uncultivated' land as 'virgin land' and makes it available for farming and other uses, such as mining; allows the Central Committee to allocate such 'vacant, fallow or virgin' land for use in large-scale agriculture, livestock and poultry farming, mining and other purposes permitted by the government; permits the allocation of up to 50,000 acres (about 20,234 hectares) to foreign investors in the form of 30-year leases.

### **2012 Foreign Investment Law**

Allowed foreign investors to ease private land with an initial investment term of 30 years, twice extendible for periods of 15 years; offers tax breaks to foreign investors; enabled them to establish businesses without the need for local partners; prohibited activities that were prejudicial

to (1) the cultures and customs of the ethnic nationalities, (2) public health, (3) natural resources, the environment and biodiversity and (4) agriculture that could be carried out by national citizens.

### **2015 Myanmar Investment Law**

Combines the 2012 Foreign Investment Law and the 2013 Myanmar Citizens Investment Law; alters the mandate of the Myanmar Investment Commission (MIC); adds some nominal human rights protections to future foreign investment projects.

### **2016 Condominium Law**

Permits foreigners to own up to 40 percent of a condominium building.

## A1.5 Philippines' Land Legislation

### **1987 Constitution of the Republic of the Philippines (Art. XII)**

States that "[a]ll lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated."

### **1988 Comprehensive Agrarian Reform Programme (CARP)**

Sought to redistribute more than 10 million hectares of land (more than 80 percent of the country's farmland) to redress distributional injustices resulting from colonial times, later reduced to a target of 8 million hectares; specified the means for redistribution, including voluntary offers to sell (with a compensation premium), compulsory acquisition and distribution of stocks in land-based enterprises; met with strong resistance by landlords from elite families; CARP expired on 30 June 2014 when the Philippines Congress did not approve President Aquino's proposal to extend it for two more years.

### **1993 Investors' Lease Act**

Allows foreign investors to lease private lands for up to 75 years; sets a maximum of 40 percent foreign equity in

land investments for the exploration, development and utilization of natural resources, and the culture, production, milling, processing and trading of agricultural products (with the exception of rice and corn)

#### **1995 Community-Based Forest Management Programme**

Formally adopted as the national strategy to achieve sustainable forestry; upland groups can receive a lease certificate over 25 years (renewable) allowing them to occupy and use a certain area of forestland; such leased land remains the property of the state, which reserves the right to cancel it for reasons of national interest at any time; the lease carries with it a wide range of obligations with respect to the management of land and forests.

#### **1995 Mining Act**

Allows 100 percent foreign ownership of lands of up to 25,000 hectares through the Financial and Technical Assistance Agreement (FTAA); has allowed widespread land grabbing in Mindanao and in Nueva Vizcaya in Northern Luzon

#### **1997 Indigenous Peoples' Right Act (IPRA)**

Recognizes ancestral domain as the "private but communal property of indigenous peoples", thus not part of the public domain; registers ancestral domain through Certificates of Ancestral Domain Title (CADT); stipulates that ancestral domains "belong to all future generations", and no part of the CADT may be sold or otherwise alienated; assigns responsibility to the group for enforcing the boundaries of the domain, for maintaining the ecological balance within their territory and for restoring denuded areas through reforestation and other development initiatives.

## **A1.6 Vietnam's Land Legislation**

#### **1980 Constitution of the Socialist Republic of Vietnam**

Stipulated that 'land is owned by the entire people' to reassure the Vietnamese citizens of their entitlement to 'collective ownership' of land; formally abolished private land ownership and vested land effectively in the State.

#### **1993 Land Law**

Granted land users the right to exchange, transfer, inherit, lease and mortgage land; stipulated that agricultural land for cultivating annual crops is to be allocated to land users for only 20 years and that land with perennial/tree crops and forestland can be allocated for a duration of 50 years; recognized that land has a price and that this price is used to calculate compensation for land appropriated by the State; provided that the government may appropriate land to be used for the purpose of defence, security, national interest and public interest, without further defining these terms

#### **Decree 01/CP dated 1/1/1995**

Allowed State Forest Enterprises and Management Boards of Protection Forest to contract out the protection and management of forest land to individual households for annual fees.

#### **2003 Land Law**

Accelerated the formation of a formal land market by extending use rights; recognizes communities, religious establishments, overseas Vietnamese and foreign organizations and individuals investing in Vietnam as new land users.

#### **2004 Law on Forest Protection and Development**

Provides that local communities can receive forest land for management, but implementation has not moved beyond the pilot level.

#### **2010 Decision 99 ND-CP "On the Policy for Payment for Forest Environmental Services"**

Introduces mandatory Payment for Environmental Services (PES) schemes and requires 'beneficiaries/buyers' of ecosystem services to pay fees either directly to 'providers/sellers' or indirectly into a Forest Protection and Development Fund to be set up at the provincial level

#### **2013 Land Law**

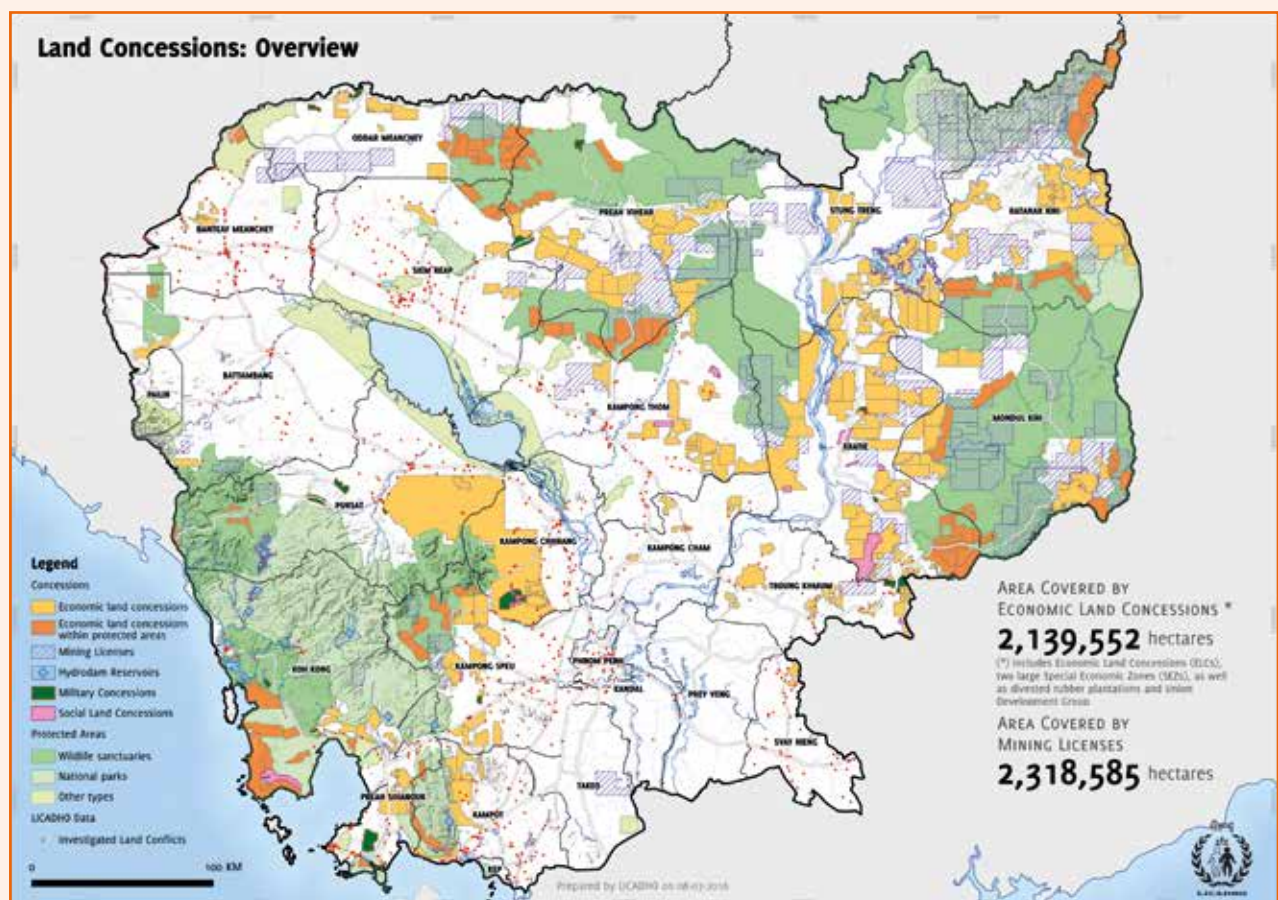
Continues the policy of the 1993 Land Law and the 2003 which declared that "all land belongs to the state, and land is allocated by the state to individuals and organizations for stable long-term use", extends the duration of allocated land use certificates from 20 to 50 years for annual crops and maintains the duration of 50 years for perennial crops and trees.

## Appendix 2

# Maps with Information on Land Concessions and Economic Zones

Figure A2.1

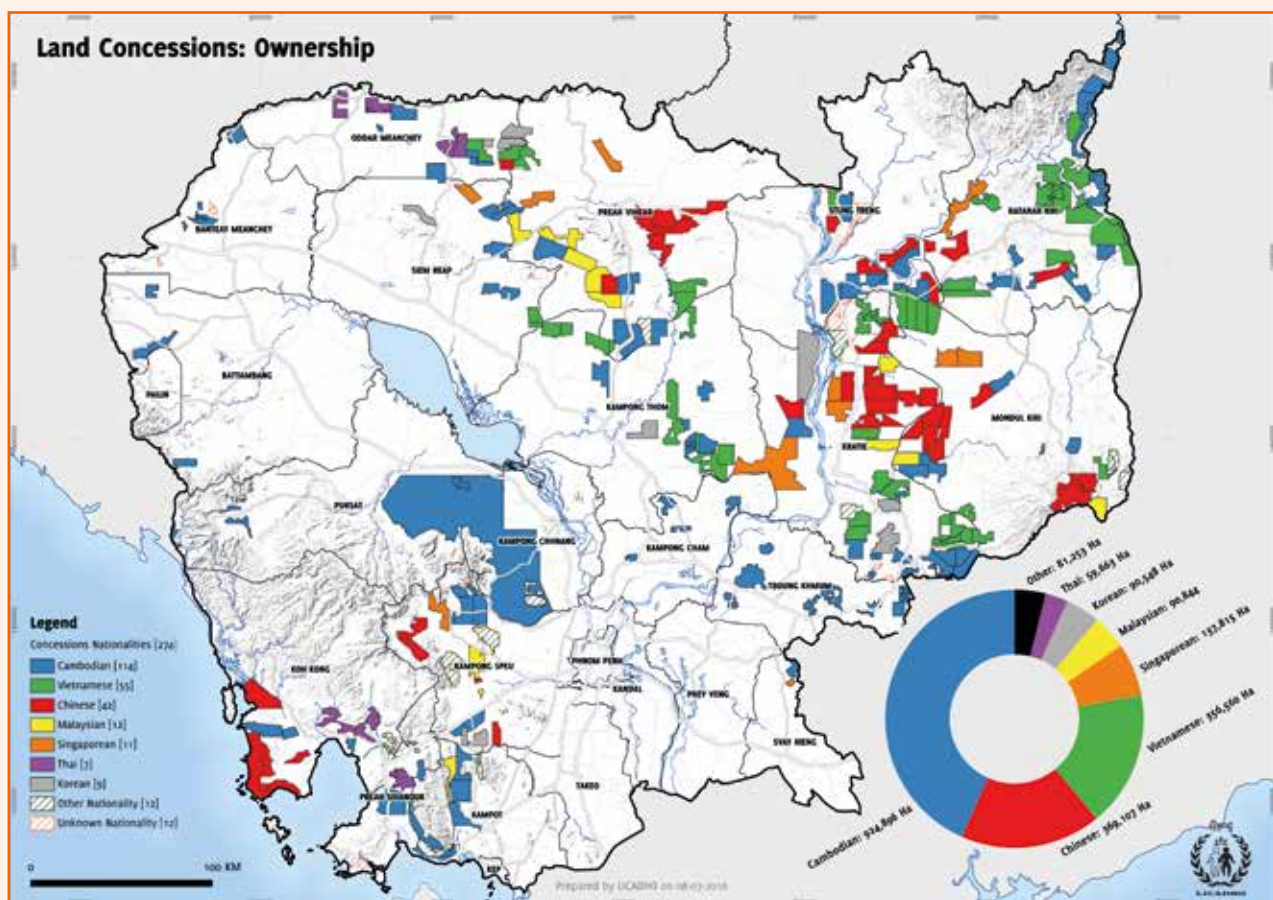
Map of Land Concessions in Cambodia



Source: LICADHO 2016



**Figure A2.2**  
**Economic Land Concessions in Cambodia**  
**by Investors' Country of Origin**



Source: LICADHO 2016

# List of Abbreviations

ADB	Asian Development Bank
ADHOC	Cambodian Human Rights and Development Association
AEC	ASEAN Economic Community
AMAN	Alliance of Indigenous People of the Archipelago (Indonesia)
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
BAL	Basic Agrarian Law (Indonesia)
BIT	Bilateral investment treaty
BPN	National Land Agency (Indonesia)
CARP	Comprehensive Land Reform Program (Philippines)
CARPER	Comprehensive Land Reform Program Extension with Reforms (Philippines)
CADT	Certificate of Ancestral Domain Title (Philippines)
CALT	Certificate of Ancestral Land Title (Philippines)
CBFM	Community-Based Forest Management (Philippines)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFS	Committee on World Food Security
CSO	Civil society organization
DAFO	District Agricultural and Forest Office (Lao PDR)
DAR	Department of Agrarian Reform (Philippines)
DENR	Department of Environment and Natural Resources (Philippines)
DLO	District Land Office (Lao PDR)
ELC	Economic Land Concession (Cambodia)
ETOs	Extraterritorial Obligations
FAO	Food and Agricultural Organization of the United Nations
FARDEC	Central Visayas Farmers Development Center (NGO in the Philippines)
FMB	Forest Management Bureau (Philippines)
FMB	Farmland Management Body (Myanmar)
FPIC	Free, Prior and Informed Consent
GOI	Government of Indonesia
GIZ	German Agency for International Cooperation
GMS	Greater Mekong Subregion
GSP	Generalized System of Preferences (European Union)
HAGL	Hoang Anh Gia Lai (name of a Vietnamese private corporation)
HRC	UN Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labor Organization
IPA	EU-Myanmar Investment Protection Agreement (under negotiation)
ISDS	Investor State Dispute Settlement
IPRA	Indigenous Peoples' Rights Act (Philippines)
JKPP	Network for Participatory Mapping (Indonesia)
KPA	Consortium for Agrarian Reform (Indonesia)
LANGO	Law on Associations and NGOs (Cambodia)
LASED	Land Allocation for Social and Economic Development (Cambodia)
LFA	Land and Forest Allocation (Lao PDR)
LICADHO	Cambodian League for the Promotion and Defense of Human Rights
LTD01	Permanent land title (Lao PDR)
LUC	Land use certificate (Myanmar)

LURC	Land use rights certificate (Vietnam)
MAF	Ministry of Agriculture and Forestry (Lao PDR)
MAFF	Ministry of Agriculture, Forestry and Fisheries (Cambodia)
MAS	Myanmar Agricultural Services
MGB	Mines and Geosciences Bureau (Philippines)
MIFEE	Merauke Integrated Food and Energy Estate (West Papua, Indonesia)
MLMUPC	Ministry of Land Management, Urban Planning and Construction (Cambodia)
MOA	Memorandum of Agreement
MoAI	Ministry of Agriculture and Irrigation (Myanmar)
MoE	Ministry of Environment (Cambodia)
MoEF	Ministry of Environment and Forestry (Indonesia)
MoNRE	Ministry of Natural Resources and Environment (Lao PDR, Vietnam)
MP3EI	Master Plan Acceleration and Expansion of Indonesia Economic Development 2011-2025
MPI	Ministry of Planning and Investment (Lao PDR)
NCIP	Naitonal Commission on Indigenous Peoples (Philippines)
NGO	Non-governmental organization
NLD	National League for Democracy (political party in Myanmar)
NLMA	National Land Management Authority (Lao PDR)
NLUP	National Land Use Policy (Myanmar)
PES	Payment for Environmental Services
PRAI	Principles of Responsible Agricultural Investment
REDD+	Reduced Emissions from Deforestation and Forest Degradation
SDC	Swiss Agency for Development and Cooperation
SEZ	Special Economic Zones
SLC	Social Land Concession (Cambodia)
SLRD	Settlement and Land Records Department
TFIP	Task Force for Indigenous Peoples Rights (name of a Philippine NGO)
TLUC	Temporary land use certificate (Lao PDR)
UDHR	Universal Declaration on Human Rights
UMEHL	Union of Myanmar Economic Holdings Company (largest state-owned company in Myanmar; controlled by the military)
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VFV	Vacant, Fallow, and Virgin Law (Myanmar)
VGGT	Voluntary Guidelines for Responsible Governance of Tenure of Land, Forestry and Fisheries
VRG	Vietnam Rubber Group (a state-owned rubber company)
WREA	Water Resource and Environment Administration (Lao PDR)

# About the author

## **Professor Andreas Neef**

Professor Andreas Neef is Director of the Development Studies Programme at the University of Auckland, New Zealand. His current research focuses on natural resource governance with particular emphasis on the ethics and politics of land grabbing, development-induced displacement, adaptation to climate change, and post-disaster response and recovery in Southeast Asia and the South Pacific. He has worked extensively on land grabbing related to agro-industrial plantations and large-scale tourism projects in Cambodia and the controversial linkages between economic and social land concessions. Andreas Neef served two times as scientific advisor to the German Parliament, on issues of global food security and on international societal and political discourses around the commodification of biodiversity and ecosystem services. He has published widely on transnational land acquisitions, contestation of customary property rights and polycentric resource governance in Mainland Southeast Asia.



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