



Dispute resolution and access to justice

Extended synopsis

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Overview

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

Key trends and dynamics

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

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

- overly bureaucratic and often costly procedures for lodging complaints;
- political interference in mediating institutions, adjudicating bodies and the judiciary. This is particularly the case in conflicts on 'state land', a fuzzy category where "public interest" is left up to the interpretation of state authorities allowing capture by state representatives, local elites and foreign investors;
- state-sanctioned use or threat of use of violence against communities who act in defence of their land rights;
- a culture of impunity which allows human rights abuses and criminal activity to go unpunished;
- unequal power relations embedded in society that determines access to existing mechanisms and social networks (e.g. gender, ethnicity, poverty, age).
- Limited agency and social networks among some communities to effectively organise mobilisation through collective action.

These factors pose major obstacles to peace and justice in the Mekong Region and highlight the need for legal reforms to address issues that go well beyond land *per se*. Borras Jr and Franco (2018) lay out five social reforms needed for socially just land policies, namely redistribution, recognition, restitution, regeneration, and resistance, backed up by a land ceiling and land floor. Yet lobbying for legal changes has often proved arduous, and can lead to uncertain outcomes. For example, a civil society movement for a Community Forestry Bill in Thailand resulted in an Act that was passed but subsequently lapsed (Zucher 2005). A new bill was passed in 2019 but it remains unclear whether this will be implemented to support or marginalise forestland users.

In the absence of impartial institutions that can adequately deal with land conflicts, the poor majority resort to a variety of informal mechanisms to gain leverage in their negotiations with wealthier and more powerful parties. These include collective actions through protests and campaigns, use of media, partnering with human rights NGOs, appeals to powerful individuals (including working through personalised networks to access decision-making power), and more indirect forms of resistance or "everyday politics" (Kerkvliet 2009) in contexts where direct contestation is not tolerated.

Cases have been documented where collective actions have more or less resulted in community "wins" (e.g. The Guardian 2011; Schoenberger 2015; Baird 2017; Diepart et al. 2019). However, these tactics can pose risks for communities as states can respond violently. Moreover, successful results tend to be contingent on particular conditions that are the specific outcomes of the negotiation between actors (Adler & So 2012; Baird 2017; Diepart et al. 2019). In Cambodia, the production of "contingent rules" are said to be possible when certain conditions are met, namely the opening of a political opportunity structure (such as that provided by Order 01), a capacity to organise on the part of communities affected and supportive social networks (Diepart et al. 2019). In Laos, narratives linked to history, identities and place-based political connections are have been essential for achieving success (Baird 2017; Kenney-Lazar et al. 2018). While limited, these cases nevertheless point to the existence of opportunities for resistance and negotiation, despite the

narrow – and in some cases shrinking – space for contestation and critical dialogue. It is important to note, however, that even in ‘successful’ cases, the poorest households – particularly female-headed households – who are not able to participate in sustained protests or negotiations have often missed out on a fairer compensation package for lost land (Lamb et al. 2015).

A growing trend among NGOs, particularly in Cambodia and Thailand but increasingly also in Myanmar and Vietnam, is the provision of legal aid to help fight expropriation and land seizures on behalf of poor farmers and smallholders. Increased foreign investment in agribusiness and other land-based developments in Mekong Region countries have opened up opportunities for pursuing grievance mechanisms targeting a range of public and private actors at scales and jurisdictions outside of the nation state where land investments are made, including consumer markets. For example, ‘follow the money’ approaches have been employed to identify investors and organisations further up a value chain from a company involved in land violations. Campaigns then encourage these actors to apply pressure to the offending company.

A further strand of analysis looks to the avoidance of conflict in the first place. For example, by incorporating customary land tenure into formal laws, a broader form of tenure recognition may alleviate potential flash points (Dusek 2017). Hunsberger et al. (2015) call for the co-production of knowledge between different stakeholder groups as a means for preventing, resolving and transforming conflicts. Lette (2016) highlights a potential example of this process, where foreign companies Stora Enso Laos (paper) and Outspan Bolevens Ltd. (coffee) have set up projects using land in Lao PDR, and involved communities from the outset agreeing upon grievance mechanisms, in an effort to pre-empt disputes emerging as a reactive force.

Key actors and mechanisms

State mechanisms and remedies to solve land disputes include mediation, administrative bodies and the judiciary. The first point of call for parties involved in land dispute is usually village, commune, district and provincial level authorities. There are cases of local government connecting with wider stakeholder networks to argue for community rights, such as in disputes over access to forest resources (Roberts 2016). However, local government is often unable or unwilling to solve land disputes involving land concessions granted by central government authorities, particularly those involving powerful actors. Complaints are progressively moved upwards to higher level government institutions such as the National Assembly or the Prime Minister’s Office, a process which may incur payments or require backing from powerful figures (Culas et al. 2010).

A number of inter-ministerial bodies or committees are responsible for mediating and adjudicating on land disputes. The Parliamentary Land Investigation Commission in Myanmar was assigned to examine cases considered to be land grabs and propose solutions towards releasing the land to its original owners. In Lao PDR, there has been the Systematic Adjudication Teams of the Lao Land Titling Program (Mahaphonh et al. 2007), and commitments to review disputes after the moratorium on concessions. In Cambodia, there was Order 01 in 2012. More recently, the government has set up a countrywide initiative within the Ministry of Land Management, Urban Planning and Construction to address land conflicts. The National Assembly for Land Dispute Resolution has been restructured to look into high-profile land disputes and oversee resolution processes through the Cadastral Commissions and other relevant authorities (Diepart et al. 2019). A number of studies point to how these and other government bodies – such as those responsible for

allocating land to private investors – are vested with considerable powers to grant and revoke land rights and adjudicate disputes, but provide no recourse for appealing decisions. Importantly, these bodies are subject to political interference and often struggle to resolve complex cases, especially those involving parties from or with connections to the government or military (Adler et al. 2006).

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

Civil society organisations (CSO) in the Mekong Region have adopted a range of roles and strategies to support communities affected by land dispossession. This includes documenting cases, providing legal education on laws and land rights, submitting complaints to government institutions and companies, appealing to national and international human rights organisations, and legal representation in the courts. Some literature actively promotes certain means of mediation or other dispute mechanisms (Kane et al. 2016; Displacement Solutions & Norwegian Refugee Council 2018). Through their extensive regional and international networks, CSOs are exploring different arenas of law, including scrutinising international investment treaties – such as the European Union’s ‘Everything But Arms’ Initiative (EC & IDI 2013) – and leveraging opportunities provided by international developers and investors who adopt international best practice for due diligence purposes (Polack et al. 2014). In Thailand, farmer networks around the country have collaborated to call for ‘four laws for the poor’ (land bank, progressive land tax, community land title, and justice fund) in order to consolidate farmer rights to access, own and use land, avoid land abuses, and provide support mechanisms for farmers to seek justice when conflicts do occur.

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

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

International donors have financed land sector reforms that have included dispute resolution mechanisms, as well as supported judicial reform programs that have had limited success. International financial institutions have also been targeted by CSOs to leverage opportunities provided by their safeguard policies. In Cambodia, the World Bank funded Land Management Administration Program (LMAP) became the subject of a World Bank Inspection Panel investigation after communities facing eviction from Boeung Kak Lake filed a complaint arguing a breach of the Bank's Resettlement Policy Framework (Bugalski & Pred 2010). More recently, communities and their legal representatives in Ratanakiri Province impacted by rubber concessions owned by Vietnamese Hoang Anh Gia Lai Company (HAGL), have triggered the International Financial Corporation's (IFC) dispute resolution mechanism after it was discovered that IFC has investments in companies linked to HAGL (Yun 2015; Work 2016).

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

Key contestations and debates

There is a continuing climate of fear around land disputes in most Mekong countries. In some cases extra-judicial state violence is the main constraint, while in others it is the influential private actors (in collusion with State and military actors) who are behind the actual or threatened violence. In Cambodia and Myanmar, security forces have increasingly used force against evicted villagers, including arbitrary arrests and some reported deaths (Amnesty International 2008; Schwedersky 2010; Chao 2013; ALTSEAN 2014). Poor and marginalised communities fear the institutions created to protect them, such as the police, local government and the courts (CHRAC 2009). In Thailand and Myanmar, women have increasingly found themselves at the forefront of civil society protests, and a more conspicuous presence brings with it an increasing threat of violence (Faxon et al. 2015; Pierce & Nant Thi Thi Oo 2016; The Observatory, Protection International, & APWLD 2017). In Laos and Vietnam, families are often forced to accept compensation packages which are insufficient to begin

a new life. The space to discuss human rights abuses in relation to land issues remains small as civil society organisations fear retribution for criticising government policy. There is an urgent need for government officials to publicly condemn attacks against people who assert their rights and seek redress in the context of land rights violations. Individuals and communities must be able to act without fear of intimidation, harassment or violence, in the exercise of their right to freedom of opinion and expression, and to seek remedy and justice.

Another area of debate currently is the effectiveness of initiatives and committees established by some governments to solve land disputes with just outcomes. For example, the O1 order has revoked ELCs in Cambodia but a key question remains: whom is this land reallocated to? Will it go back to communities or re-allocated to investors? The status of land revoked has remained ambiguous, and communities are not confident to invest in those lands (see Diepart et al. 2019). In the case of Myanmar, studies have found that many cases remain unresolved, especially those linked to military confiscations. For example, in 2012 Union authorities opened up a commission to hear claims of land confiscations, yet although thousands of complaints have been filed, only a few have been settled (McCarthy 2018). Nevertheless, providing dispute mechanisms in Myanmar is vital to maintain cease-fires and build peace (Kramer 2015). In the case of forest conflicts in Laos, Kane et al. (2017) conclude that there exist no effective means of resolution within existing systems of governance.

The extent to which the courts can be relied upon for impartial justice is a key issue in the five Mekong countries in question. Many people do not trust the courts and see them as inaccessible or risky to use. However, alternative dispute resolution mechanisms – such as mediation and consultation – suffer from systemic shortcomings of their own, the evidence pointing to a mix of success and failure (Hall et al. 2015). Indeed, what much of the literature on land disputes in the Mekong demonstrates is that no one system can provide the optimal range of solutions to resolve complex land disputes. Rather, it makes sense for those seeking justice to creatively combine elements from state and non-state, formal and informal mechanisms, including maintaining pressure through protests and use of media (Gillespie and Hualing 2013).

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

Key differences and commonalities among CLMTV countries

The absence of impartial judicial and non-judicial dispute resolution mechanisms, lack of accountability for perpetrators of land rights infringements, and limited access to remedy or justice for people impacted by land grabs are factors common to all five countries. The various mechanisms used to lodge complaints and solve disputes, however, differ. Meanwhile, the nature of land conflicts themselves also varies. In Vietnam and Laos, for example, official complaints have often focused on the issue of adequate compensation for land expropriated by the State for urban and transport infrastructure projects and hydropower dams, while in Cambodia and Myanmar land conflicts have often involved the appropriation of villagers' land by "crony companies" and the military for agribusiness concessions. In Thailand, many disputes reflect contested boundaries between state forestland or protected areas, and farmland. Narratives vary between that of illegal encroachment and the rights of local users who occupied the land before boundaries were established.

Political conditions in the five Mekong countries place limits on resistance and public complaint, and they also determine the avenues and strategies pursued by communities and CSOs in seeking remedy and justice. Land conflicts are more open and confrontational in Cambodia, Thailand and Myanmar. In Laos they are more concealed with only passive, non-confrontational forms of resistance tolerated. There, resistance tends to work "with, rather than against the state by foregrounding the contradictions of land use and ownership within state spaces" (Kenney-Lazar et al. 2018). The circumscribed avenues of resistance may result in attempts to stall a process rather than trying to stop it altogether (McAllister 2015). In Vietnam, increasingly bold direct actions are seen with regards to land conflicts. Experience with public interest litigation to promote accountability in large-scale land deals also differs between countries. While in Cambodia, Thailand and Myanmar there is substantial experience of bringing cases to provincial and national courts, this experience is more limited in Vietnam and Laos.

Key links and interactions across borders and across scale

Although transnational networks have been long established, the nature of these linkages evolves over time. Recent literature looks at the how networks have consolidated resources to campaign for broad media exposure, explore commodity value chains, global patterns of financial transactions, and corporate ownership structures (Hall et al. 2015; Hunsberger et al. 2017; Swift 2015; Work 2016). The case of Koh Kong Sugar Industry Concession in Cambodia highlights innovative mechanisms for seeking accountability and access to justice to redress the impacts of land grabs across borders and scales, when such mechanisms are not available at home. After exhausting all avenues at the national level, communities and public interest lawyers took their struggles to other arenas and jurisdictions, including the Thai National Human Rights Commission, the UK Courts, the European Union (targeting its 'Everything but Arms' initiative); and an international Sugar Industry accreditation scheme, Bonsurco. Also targeted have been companies in the sugar supply chain, including Coca Cola, and international banks and financiers, including ANZ and the IFC.

Literature points to the availability of international mandates and their usage in localised land conflicts, such as the UN FAO Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) (Franco & Khu Khu Ju 2016) and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UN General Assembly 2018). Nevertheless, such guidelines do not guarantee successful avenues to redress land conflict, such as where the institutionalised form of

mediation using international mechanisms has resulted in a new enforcement of power over Cambodian peasants (Bourdier 2019). There are also ongoing efforts by CSOs to have land rights mainstreamed as human rights within ASEAN. However, the ASEAN Intergovernmental Human Rights Commission (AIHRC) is considered to be a toothless body without investigative powers or a complaints mechanism. To date, there is little indication that AIHRC will be able to investigate allegations of human rights violations in relation to land issues in the near future.

Key reform issues and strategic openings

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

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