



# Land rights recognition / formalization / titling / collective tenure

## *Extended synopsis*

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## **Overview**

Land rights and property rights in land are often confused. Tenure rights derive from societal, customary, political, historical and other forms of recognition. Property rights in land backed up by land titles may enhance security of tenure, but there are also risks and pitfalls associated with titling – especially if formalisation leads to neglect or undermining of tenure security on non-titled land. There are some protections such as communal land titling, but these also come with risks. Women and ethnic minorities have been disenfranchised by past titling programs, but progressive titling policy can also enhance security for targeted groups.

## **Key trends and dynamics**

Much farmland in Cambodia, Laos, Myanmar, Thailand and Vietnam is held and cultivated under tenure arrangements unrecognised by the state or the legal frameworks of the countries in which they are located. With increased marketization of agriculture and with insecurity of tenure in the face of large-scale land acquisitions, formalization of land tenure has become a priority for government agencies and donors, some NGOs and other advocacy groups, and farmers and other land users.

Formalisation takes several forms, including:

- Full land title, involving the formal demarcation of boundaries and registration of land, as in the case of Laos' land titles (*bai taa din*), or in Thailand (*chanood*). Full land title is alienable, can be mortgaged, bought, sold and inherited. In some cases the issuing of title follows systematic land adjudication procedures. In others, it is sporadic, either based on individual applications and payments through land offices, or through schemes instituted by respective governments.
- Long term land leases to individual farmers on decollectivised cooperative farmland, as in the case of Vietnam's "red book" land use rights certificates (*so do*).
- Land allocation in individual plots on state land such as in land reform settlement schemes or allocated forest land. For example, the 1975 Land Reform Act in Thailand acknowledged a high level of farmer tenancy and landlessness, and so aimed towards redistribution including usufruct rights for those in degraded forest areas (Feder, Onchon and Chalamwong, 1988).
- Village land demarcation, within which land use zoning allows for different uses and allocation of individual plots under less than fully transferable land title, as in the case of Laos' land and forest allocation scheme with associated temporary land use certificates (Soulivanh *et al.*, 2004).
- Land concessions to smallholders and large commercial investors, for example social and economic land concessions respectively in Cambodia (ANGOC 2012).
- Communal land title, in some cases tied to ethnic or indigenous status of communities in which it is implemented, as in the case of Cambodia's communal indigenous land title (Baird 2013a; Milne 2013).
- Titles sanctioned by actors outside centralised state power. For example, the Karen National Union (KNU) has issued land titles in Karen State, Myanmar as part of a program to achieve autonomous governance in a federal state (Suhardiman, Bright and Palmano, 2019).

The constitutional framework of each country determines the status of formalised land vis-à-vis the state and individual holders.

## Key actors and interests

Formalisation of land tenure is primarily an issue between state authorities and smallholding land users. However, it also involves a range of other actors. The key actors involved include:

- State agencies.  
Land titling has had different bureaucratic locations within different countries of the region. In Laos, for example, the land titling program was initially within the Ministry of Finance at the Department of Lands, but in 2007 the National Land Management Authority was formed (Mahaphonh *et al.*, 2007). Responsibility for land titling has since moved to the Ministry of Natural Resources and Environment. In Cambodia, the Ministry for Land Management, Urban Planning and Construction was established in 1998 to oversee land policy. Studies suggest that the Cadastral Commission has been responsible for overseeing land registration, but it suffers from bureaucracy and corruption, and the pace of registration has been slow (ANGOC 2012: 39; 85).
- Smallholders  
Smallholders have generally been keen to secure land title for their plots, but mainly when the process has been subsidised through systematic land registration under donor funded programs. There has been a much slower uptake of titles where farmers have to pay the full costs of individual plot registration.

- **Large scale land holders**  
Most large-scale land acquisitions are in the form of long term leases or land concessions. This involves the drawing of boundaries within areas of state land. In Cambodia, this needs to be classified as state private land.
- **Bilateral donors and international lending agencies**  
The two main donors that have been involved in land titling and other forms of land formalization in the Mekong region are AusAID and GIZ (Muller, 2013). The World Bank has also been involved in land formalization and wider land policy issues. AusAID and the World Bank supported land titling projects in both Laos and Thailand, and the World Bank supported the Land Management and Administration Project in Cambodia.
- **NGOs and other advocates for secure land rights**  
NGOs have had a somewhat ambivalent position with regard to land titling. On the one hand, security of tenure is an important plank in the rights agenda of NGOs concerned with land grabbing, and land titling is recognised as a way to protect farmers against grabbing (eg KESAN 2012: 15). On the other hand, establishment of alienable title is a concern for NGOs wary of neo-liberal market-based approaches to development (e.g. Bugalski & Pred 2010), and more specifically over the potential for alienable land to be alienated through distress sales or debt foreclosure, particularly where land titling is not supported by economic and other measures to make farming viable (Land Core Group 2009: 5). NGOs have been more enthusiastic about supporting communal land tenure arrangements, for a number of reasons. One is that communal land is seen as less prone to alienation than individualised land titles. Another is that communal land tenure provisions better accommodate common property arrangements that provide secure access to the rural land-short poor for grazing land, non-timber forest products, access to fisheries and other forms of subsistence that are not dependent on land ownership.

## Key contestations and debates

Titling programs often lead to polarised positions. The extension of fully transferrable land title is seen as empowering by those emphasising the turning of land into capital and hence taking advantage of market opportunities (Deininger 2003). It is seen as a means to achieve ultimate tenure security in which it is worth making long term investments, hence achieving higher productivity (for Cambodia, see CDRI 2007: 1; CDRI 2010: 143; for Thailand, see Chankrajang 2015; Feder 1987; for Vietnam see Do & Lyer 2003; Newman, Tarp, & Broeck 2015). There are studies highlighting the potential of titling to stimulate land rental markets (Giné 2005), microfinancing schemes (Green 2019), diversified livelihoods including options to migrate (Chankrajang 2012; Curran & Meijer-Irons 2014), and a conversion to organic farming practices (Sitthisuntikul, Yossuck, & Limnirankul 2018). Tax on titled land is also seen as an important revenue base in support of public investment in infrastructure for development (Hong Loan Trinh & McCluskey 2012). A positive gender perspective sees women potentially benefiting from sole or joint-titling, allowing them a greater say on household expenditure (Menon et al. 2016). One study shows how in Cambodia, a community used receipts from an Order 01 land survey to win back land from a large deal (Schoenberger 2017).

In contrast, critics of programs that push fully alienable land title as the basis for development see such programs as potentially disempowering due to the creation of "fungibility" in land as a quick means by which the poor lose their land through distress sales

and hence fall further into poverty, while also forfeiting their children's inheritance. There can also be pressures to sell land if it is privatised through individual land title, for example, in indigenous communities in Cambodia (Rabe, 2013). There is evidence of increased land transactions following land titling (e.g. ADI & LIC 2007), but there are different interpretations of whether this contributes to rural prosperity or dispossession. Various studies point to how titling may reinforce socio-economic inequality, both within communities (Boutthavong et al. 2016; Diepart & Sem 2016; Hutchison 2008), but also through facilitating capture of land by outside elites (Green & Baird 2016; Ho & Spoor 2006). Land formalization is also open to corruption and maladministration, as documented in Vietnam (Davidsen *et al.*, 2011). It has been proposed on numerous occasions that titling cannot be successful without supporting conditions and institutions, such as support for agricultural production or conservation-driven policy (Hare 2008; Travers et al. 2015).

There is also debate on the extent to which (in)secure tenure is related to (in)security of title. The legal pluralism that pertains in all five countries with regard to land tenure means that even without formal titling, land tenure security may be achieved, and vice versa (Adler et al. 2006; Baaz et al. 2017). Debates cover the extent to which land titling should spread geographically, in particular its extension beyond urban and peri-urban areas to rural areas where land markets are not widespread and where a variety of customary land tenure arrangements are in use.

Communal title is seen by some to provide protections and recognition of indigenous land practices such as shifting cultivation (Ironsides 2017b, 2017c, 2017a), and by others as an isolation of ethnic minorities from market opportunities and ability to take advantage of modern forms of production (Flower 2018). Communal land has the advantage of formalising areas of agricultural land, including old fallows that are part of swidden cultivation systems. At the same time, restrictions on sale and transfer may in the longer run constrain farmer options on such land (Milne 2013). While communal land tenure may not provide absolute security, there is evidence that it provides a better negotiation platform for communities when dealing with external investors (Baird 2013). In an overview of laws on collective land ownership in 100 countries, Wily (2018) identifies increased legislation that either recognises and/or registers communal property. Nevertheless, there are claims that such tenure systems remain fragile in the face of elite forces, such as military actors in Myanmar (Andersen 2016).

Many academic articles move away from a dichotomous image of land tenure (i.e. formal v customary) to embrace a recognition of plural forms (Gillespie, 2016; Dusek, 2017). As well as supporting increased productivity and income gains (Lawry et al. 2017), such an approach is seen as a means to improve the land security of smallholders (J. Diepart & Sem 2018), and food security (Kenney-Lazar 2016; Keovilignavong & Suhardiman 2020).

## **Key differences and commonalities among Mekong countries**

Land formalization processes vary considerably across the Mekong countries:

- In Cambodia, the World Bank established the Land Management and Administration Project in 2002. This project was cancelled in 2009 over a dispute in relation to community evictions at Boeng Kak Lake in Phnom Penh (Cambodian Center for Human Rights 2013). Ahead of the communal elections in 2012, the government implemented a rapid land titling campaign (known as "Order 01") in an effort to address conflicts between agribusiness companies and smallholder farmers whose land rights overlapped onto state land.

- In Laos, from the 1990s a Land and Forest Allocation Policy attempted to clarify property rights for upland farmers (McAllister 2015). In 1997, the World Bank and AusAID established the Lao Land Titling Project. The project ran in two phases until 2009, when it was discontinued as a result of differences between the Lao government and the donors.
- In Myanmar, donor involvement in land titling is embryonic but can expect to attract considerable interest. Land Use Certificates (LUC also known as Form 7) have been issued in lowland areas following the Farmland Law of 2012. Yet the security afforded is offset by the fact that land belongs to and remains under the control of the state. Much land in the upland is under customary tenure systems, and its security remains precarious in the face of threats of acquisition as vacant or fallow land.
- In Thailand, the formalisation of land tenure has been strategically applied at different moments (Larsson 2012). It was applied to negotiate away claims for extra-territoriality by foreign powers in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, and later promoted to encourage farmer loyalty in opposition to communist insurgency. From 1984-2004, a titling program took place, deemed a great success and a model for other countries (Hayward 2017; Nettle et al. 1998).
- Formalisation in Vietnam has been mainly endogenous, following the country's process of decollectivisation since the 1980s (Nguyen Van Suu 2010). In many respects, it has followed the country's policy process of responding pragmatically to local practice and preferences (Kerkvliet, 2005). One of the present debates concerns the consequences of fragmentation of land within households, and whether productivity could be improved through consolidating land into the hands of commercial operators (Huy Quynh Nguyen & Warr 2020).

Communal titling also varies from one country to another. For example, the 2001 Land Law in Cambodia recognises communal land, but it sets up a number of hurdles that have made application for such land tenure recognition a drawn-out process. In Laos, communal land is being recognised on a pilot basis, and it is not tied to indigenous status. There is no provision there for different tenure criteria being applied for different ethnic groups (Baird, 2013). In Myanmar, there are references to the recognition of customary tenure, for example in the National Land Use Policy, or the recent revision to the Vacant, Fallow and Virgin Land Management Act, but there has been no clear activation of these intentions. In Thailand, the land reform network P-Move called for '4 laws for the poor', which included a law on community land titling. There have been two government schemes to issue such titles over the last decade, but both have become moribund.

## Key links and interactions across borders and across scale

Land formalization experience has been specific to each of the Mekong countries. If there are cross-border links, it is the learning from experience of countries that have implemented similar programs. For example, Myanmar is looking to Cambodia's experience in communal land titling. Thailand's 20-year titling program acted as a model for a similar program in Laos.

## Key reform issues and strategic openings

The main areas of reform in land formalization are:

- Ensuring women's name on title deeds  
Vietnam lags behind Laos and Cambodia in terms of the proportion of land titles on which women's names appear either as sole or as joint owners. In Cambodia, formal recognition of women's rights is not matched in terms of real security over land tenure, leaving

women particularly vulnerable to dispossession (STAR Kampuchea, 2013).

- Legislating for and enacting communal tenure  
Communal land is provided for under Cambodia's 2001 Land Law but tied to indigenous status. There are experimental pilot programs in Laos. Communal land provisions are being considered within Myanmar's National Land Use Policy, and there is potential for inclusion within a future National Land Law.
- Distinguishing between lack of tenure and lack of title  
Land titling carries the risk of reducing security of tenure on land that is not titled. A key reform challenge is to maintain security on such land as titling is rolled out (Hirsch, 2011; Dwyer, 2015).
- Recognising but not imposing cultural association between tenure systems and ethnicity/indigeneity  
The requirement for communities to prove indigenous status before gaining eligibility for communal land titling in Cambodia has proven an impediment and is in part behind the very slow roll-out of such titles (Milne 2013).
- Catering to forest rights  
There is a need to find a balance between the rights and security of people living in and around forests and other protected areas, and the conservation of such areas (Fisher, 2011; Neef, 2016). Doing so can also be key to engaging communities in conservation activities.
- Land tenure security and conflict  
Providing land tenure security, whether through titling or the recognition of customary tenure, can be a cornerstone to achieve peace in areas of conflict, particularly relevant to ongoing talks in ethnic states around Myanmar.

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