

# AGRIBUSINESS LARGE-SCALE LAND ACQUISITIONS AND HUMAN RIGHTS IN SOUTHEAST ASIA



Updates from Indonesia, Thailand, Philippines,  
Malaysia, Cambodia, Timor-Leste and Burma

August 2013

Edited by Sophie Chao



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Cover Photo: An Orang Asli man holding up a signage which says “Acknowledge the Orang Asli’s traditional territories” during the first ever pan-state protest in Seremban. The protest was staged outside the State Secretariat building after the Chief Minister made a statement saying that the Orang Asli there are nomadic and squatting on state land (16 November 2011).

Photo: Sze Ning

Design and layout: Sophie Chao

# Updates on Agribusiness and Large-Scale Land Acquisitions in Southeast Asia

## Brief #1 of 8: Regional Overview

By Marcus Colchester and Sophie Chao



Map of Southeast Asia and national briefings covered  
Source:

### 1. Introduction

Large-scale land acquisitions facilitated to promote export-oriented agriculture and land development have become a matter of international concern. Whereas, on the one hand, they are encouraged by national governments to accelerate development, generate revenue and foreign exchange and create jobs, they are also designed to generate profits for (often foreign) investors, provide commodities and food security for other countries and bring wealth to local elites and urban populations. Reconciling these different interests is itself challenging.

However, the rapid imposition of such schemes also pose multiple challenges to host countries in terms of: preserving national sovereignty; ensuring national and local food security; having adequate institutional capacity and legal frameworks to regulate rapid changes in land ownership and use; providing tenurial security to both citizens and investors; ensuring that land acquisition from local communities and indigenous peoples is done fairly; guaranteeing respect for human rights; providing for rule of law and access to justice; preventing negative impacts on the environment and; avoiding

negative impacts on the political economy and the undermining of sound land and forest governance.

These same issues have been a matter for detailed debate at the United Nations, in particular in the context of the Commission on Food Security under the Food and Agriculture Organisation. This work led in May 2012 to 194 countries adopting the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*.<sup>1</sup>

In Southeast Asia, the national human rights institutions of the region have already engaged in a three-year-long process of collaboration to address these same challenges from a rights-based perspective. The first year of work culminated in the promulgation of the *Bali Declaration on Human Rights and Agribusiness in Southeast Asia*, in which the human rights commissions of the region and a supportive network of NGOs emphasised the importance of securing the rights of local communities and indigenous peoples in the face of this unprecedented pressure on their lands.<sup>2</sup> The Declaration, and the wider conference of which it was the outcome, emphasised the duty of States to protect internationally recognised human rights and the responsibility of businesses to respect them, even where national standards and laws are deficient.<sup>3</sup>

The second year of work sought to bring these matters to the attention of the ASEAN Human Rights Commission and to explore with the AICHR ways in which it can receive complaints and make recommendations to inform standard-setting. The meeting also examined the possibilities of the AICHR sanctioning an international fact finding process to look into cross border agribusiness cases of human rights violations, and possibilities for the establishment by ASEAN of a regional human rights instrument for

Southeast Asia.<sup>4</sup> The main outcome of the Phnom Penh workshop was the *Phnom Penh Statement on Human Rights and Agribusiness*<sup>5</sup> in which the workshop participants appealed to the Cambodian Government to resolve the long standing land conflict in Koh Kong province between a Thai-Taiwanese sugar plantation company and local people, and to the European Union and the sugar importers Tate and Lyle and the American Sugar Refining Company to investigate the continuing human rights violations. They also called on the ASEAN Inter-Governmental Commission on Human Rights to develop remedies for human rights violations resulting from trans-border agribusiness investments and operations in the region.

The series of studies of which this is the overview are a contribution to the third year of this process. The aim of the studies has been to pull together in a simple form, updated information about large-scale land acquisitions in the region, with the aim of identifying trends, common threats, divergences and possible solutions. As well as summarising trends in investment, trade, crop development and land tenure arrangements, the studies focus on the land and forest tenure and human rights challenges.

As shown on the map, seven national updates have been compiled based on the available literature for Burma, Thailand, Cambodia, Malaysia, Indonesia, Timor-Leste and the Philippines, each following a similar format. The studies seek to summarise what laws and policies already exist in national human rights frameworks that could ensure respect for rights in large-scale land development and, on the basis of this analysis, recommend possible solutions to the problems identified. In this overview we bring out some of the key findings from these updates.

## 2. Regional trends in Large-Scale Land Acquisitions

Despite overall rapid economic growth and industrialisation in recent decades, the agricultural sector remains very important for the majority of Southeast Asian countries. Even in countries where migration to cities has been extensive, rural populations remain high and a disproportionately high number of poorer people remain in rural areas. Equitable development of lands and forests is thus a key challenge for the region as a whole.

In **Indonesia**, agriculture accounted for an estimated 14.44% of the GDP in 2012, a figure which is projected to increase in 2013. Both domestic and foreign investments are on the rise. Following the development of the road map for the Master Plan on Acceleration and Expansion of Indonesian Economic Development (MP3EI), the Ministry of Agriculture has developed six main economic corridors for the agricultural sector, three of which are dedicated to boosting the development of oil palm plantations in the provinces of Papua, Sumatra and Kalimantan. Oil palm plantations are expected to increase at a rate of 5.22% per year. 21.6 million ha of land will be allocated to plantation development in 2013, of which 9.1 million ha will be allocated to oil palm plantations, with expected expansion to 12 million ha in 2014.

In the **Philippines**, where it is estimated that some 55% of the poor are rural, agribusiness is a central aspect of national development plans. While the country has a long experience of plantation-based agriculture and has been through many rebellions and agrarian reforms to try to more equitably redistribute lands, new laws again encourage foreign investment in land development and partnership schemes that encourage agrarian reform cooperatives and indigenous peoples to

engage in agribusiness joint ventures. However, sound data on trends in land consolidation and large scale land acquisition are sparse. Biofuels policies target the planting of some 1.4 million ha with sugar, cassava, sorghum and jatropha, while oil palm continues to expand on the southern islands from a current extent of some 55,000 ha to a target of over 1 million ha. Investors are coming from a range of countries including Indonesia, South Korea, China, Malaysia and the Middle East, with the World Bank and European Union also involved.

The rapid expansion of Economic Land Concessions in **Cambodia**, in the context of a very weakly developed land tenure system is a cause of widespread concern. Already between 2004 and 2009 some 1 million ha of lands had been allocated to such schemes, a mean rate of land allocation of some 170,000 ha a year. By 2012, the rate of allocations had gone up more than threefold, to a mean of 530,000 ha a year, which jumped the overall figure for lands under concession to over 2.6 million ha by the end of 2012. In all, 3.9 million ha, some 22% of the country, is now controlled by the private sector and particularly local elites. Most of these land schemes produce for foreign markets, notably neighbouring Thailand and Vietnam, as well as China, but also Japan, New Zealand and Europe. Topography and soils determine the types of plantations found in different parts of the country. Whereas land concessions in the cooler and more seasonal northeast focus on rubber, acacia, cashews and pine trees, in the wetter, hotter southern and western provinces cassava, sugar, bananas, soya and rice are favoured with some extensive areas also down to oil palm. The biggest investors are coming from Vietnam, China, Indonesia, Japan and Singapore, as well as some Gulf States.

**Burma** (also known as Myanmar) retains a basically agrarian economy. So far some



810,000 ha are known to have been allocated to larger scale agricultural ventures, many with close connections to the military, of which about a third have been planted and the rest allegedly held for land speculation. However, national and sub-regional plans call for rapid expansion of a diverse range of crops including exports of rubber, palm oil, rice, pulses, sugar and cassava up to over 4 million ha and as much as 3 million ha being proposed to provide national fuel security through cultivating jatropha for biofuels. Key investors are coming from China, Thailand, Taiwan, Hong Kong, Singapore, India, Malaysia, Vietnam and South Korea.

In contrast to these other countries, **Thailand's** agricultural sector is overwhelmingly smallholder dominated. Over, 95% of all land holdings are under 10 ha. In sum, it seems that land laws in Thailand have prevented the consolidation of large land holdings in the hands of national corporations or foreign investors. By contrast, however, the agricultural and food-based industries in Thailand are concentrated in the hands of a relatively small number of large conglomerates, some of which have a wide regional and global reach. Thai agricultural products reach a wide range of markets including Europe, the Middle East, India and regional Asia countries. Also by contrast, Thai investors are gaining control of substantial areas of land in neighbouring Laos, Cambodia and Burma, including enterprises in sugar, cassava, oil palm and shrimp aquaculture. Thailand has received public interest from investors, mainly governments from the Gulf countries, as a source of supply of food for their populations.

In **Malaysia**, plantations-based agriculture has a very long history, having been a cornerstone of the colonial economy. Yet although recent national policies have favoured urbanisation and industrialisation, even so the agricultural sector continues to

contribute some 54% of GDP. Agriculture today is heavily skewed towards plantation agriculture of commodity crops over other food crops. Oil palm is one of Malaysia's major exports earnings, accounting for some 37%. This sector is heavily driven by the private sector, with most of the planted area (61.6% or 3.1 million ha) under private ownership and mostly Malaysian-owned. Only 13.6% (691,000 ha) are planted by independent smallholders, while the remaining 24.8% are under government or State agencies. In contrast, most of the planted rubber in Malaysia is under smallholdings (960,800 ha) rather than under the management of estates. The trend of Malaysian companies expanding abroad continues to escalate, with more than 50 Malaysian companies controlling a notable share of the oil palm plantation sector in neighbouring Indonesia. China remains the biggest export market for Malaysian palm oil, followed by India, the European Union, Pakistan, the US, Japan and Iran. The Ministry of Agriculture and Agro-based Industry's 4<sup>th</sup> National Agricultural Policy (2010-2020) has been accompanied with a number of schemes for agricultural revitalisation, such as the Economic Transformation Programme, the Muda Agricultural Development Authority model and the New Concept Joint-Ventures on Native Customary Rights land in Sarawak.

While similar trends in terms of agricultural investment and production can be discerned in all these South East Asian countries, even if they play out in very different ways given different tenurial and investment regimes, **Timor-Leste** constitutes something of an exception. Whereas 70% of the economy is agrarian, agriculture receives only 2% of State spending and foreign investments in land development remain insignificant. Although the government has ambitious plans for expanding agricultural production, this has yet to lead to foreign investment or notable land allocations.

Some 97% of lands in Timor-Leste are, as yet, unalienated.



A Temiar man walking on his community's traditional land which has just been cleared for agriculture (Lojing, Kelantan, Malaysia) (2013). Photo: Sze Ning

### **3. Problems with land acquisition**

#### *Land tenures and reforms*

Given the overall strong regional trend encouraging substantial investment in large-scale land development, other questions arise. Are the interests of current land users protected to ensure they are not disadvantaged by this trend? Are national institutions and laws robust enough to protect citizens' property rights and other rights related to lands – rights to life, water, livelihood, health and cultural identity? Do people have a decisive voice over land development schemes proposed for their areas? Are indigenous peoples' rights and the rights of women and ethnic minorities assured of effective State protection?

In **Indonesia**, under the 1945 Constitution, the State has controlling power over all lands and resources but at the same time it recognises customary law communities.

The 1960 Basic Agrarian Law provides options for land reform, and the allocation of leaseholds to corporations, while providing weak recognition of customary tenures as usufructs on State lands that must give way to development. World Bank studies suggest that less than 40% of all land holdings in Indonesia are titled, meaning that over 60% of land holdings are held under informal or customary tenures. A survey in Sulawesi suggests there more than 80% of rural land holders there lack formal title. In forest areas, which make up some 70% of the national territory, land ownership has not been

permitted despite the fact that some 33,000 administrative villages (*desa*) are within or overlap areas designated by the administration as State Forest Areas. Only some 0.5% of forest lands have been allocated to communities under a variety of short term leaseholds. Recent rulings by the Constitutional Court have opened up various possibilities for the reallocation of forest lands, including ‘customary forests’, but laws and regulations to implement these new interpretations are yet to be promulgated.

In **Malaysia**, the Constitution protects custom but all land matters are handled at the State level and thus there is considerable variety of tenurial situations. In both Sabah and Sarawak, colonial land laws sought simultaneously to protect custom and yet limit the exercise and extension of customary rights, with the aim of sedentarising people and modernising land use. These policies have been sharpened in the post-colonial period. While laws have frozen the extension of ‘native customary rights’ and records of which areas are recognised are obscure, other laws and policies have sought to ‘consolidate’ and free up native lands for investors. In Sabah, a recent law allows the recognition of communal title but is only being applied when communities relinquish their lands to take shares in a land development joint venture dominated by local politicians. Consequently, communities have filed literally hundreds of cases against developers and the State Governments in the courts. By contrast, the indigenous peoples of the Peninsula have been accorded ‘reserves’ to only very small parts of their customary areas and have even less security of tenure.

In **Cambodia**, efforts to regularise land ownership are relatively new. The great majority of land users lack any formal title. Few land users can trace their links to their lands back to before the civil war ended in 1979. New laws and land titling

programme passed in recent years have led to some land security such that now around 12% of land holdings are titled, mostly in urban areas, but this leaves the great majority of rural communities with yet unclear rights. Although laws have been passed which notionally allow the recognition of indigenous peoples’ lands so far only 5 villages have secured titles and even these titles have been for relatively small parts of their ancestral domains.

In **Burma**, all lands are considered to belong to the State and the great majority of actual land-owners hold lands through customary or informal arrangements but lack any form of land title. The land insecurity has been compounded by nearly over six decades of rebellions and insurgency which has led to large numbers of people being displaced, sometimes repeatedly, especially in the minority ethnic group areas. There are also very large numbers of landless people. Recent government efforts to formalise land holdings – as long-term, conditional leases on State lands – do not recognise rights based on customary law or actual use and may actually create greater uncertainty and pose new administrative obstacles to people seeking land security. At the same time laws are being changed that could facilitate foreign ownership of land.

The cultural pre-eminence of rice farming and the prominence that encouraging smallholder rice production has had in the Thai economy may in part explain why land tenures in lowland **Thailand** are relatively secure. A series of land reforms and land titling programmes, promoted by politicians in populist election campaigns, have resulted in a proliferation of tenures. The overall effect has been that most lowland farms do now have titled owners. At the same time, national laws prohibit non-Thais from owning land. In the 40% of the country designated as forest reserves, the situation is quite different. There the so



called ‘hill tribes’, as well as upland Thais, are deprived of land rights and yet leases have been acquired by resort developers, tea plantations and reforestation schemes.

The **Philippines** has had a long history of political and economic domination by a landed elite of Spanish descent, who established large land holdings in the more fertile lowland areas. Much of the recent history of the country is an expression of efforts to hand back lands to the country’s peasantry and indigenous peoples. The Comprehensive Agrarian Reform Law of 1988 and extended until 2013 led to the distribution of 4.2 million ha of agricultural land to roughly 2.5 million beneficiaries from 1987 to 2010. Likewise the Indigenous Peoples’ Rights Act of 1997 created a wide range of legal options for the country’s 14 to 17 million indigenous people to regularise their rights in lands as individual land holdings, alienable communal lands or inalienable domains. From 2002 to 2012, 158 Certificate of Ancestral Domain Titles were awarded to indigenous people covering around 4.3 million ha of lands and an indigenous population of nearly 920,000. However, despite these efforts large areas of lands and forests remain unsurveyed, or inaccurately surveyed, providing leeway for unscrupulous land transactions.

In **Timor-Leste** land tenure is largely informal. Considering that massive disruptions during the war of liberation against the Indonesian occupying force led to the displacement of some 83% of the population, the fact that customary systems still order the tenurial relations of the majority of the people is testimony to their resilience and broad acceptance. The Constitution upholds customary rights and recent efforts to introduce new land laws have been delayed while improvements are sought to ensure due security for those who hold land. A window of opportunity remains to secure customary lands in

advance of the proposed wave of land development.

### *Impacts of land acquisition*

Given the generally weak tenurial security of local communities and indigenous peoples in South East Asia, State-sponsored land development schemes aimed at promoting large-scale mono-crop agriculture and plantations inevitably pose threats to their rights, welfare, livelihoods and identity. The national reviews identify the following major problems, although the extent to which these are serious problems varies greatly from country to country.

In **Indonesia**, numerous violations of rights have resulted from the lack of regulation of mechanisms of land acquisition by private entities, often exacerbated by bureaucratic corruption at the local level. Absence of Free, Prior and Informed Consent (FPIC) in processes of land acquisition has been the cause of numerous conflicts, of which many have already escalated to violence. Other serious concerns include threats to local food security and livelihoods, forced relocation, lack of or unfair compensation and smallholders arrangements, criminalisation of community members and human and land rights activists, landlessness and impoverishment.

In **Cambodia**, lack of law enforcement and irregularities in the implementation of existing legislation has led to the proliferation of human rights abuses in recent years in the country’s agribusiness sector. Many development projects underway have been implemented without disclosure of information or public consultation with affected local communities. The militarisation of guards and the restriction of access through ELCs for local communities has also been documented. Food insecurity has increased in rural areas and families have become

impoverished as a result of the loss of their farmland and grazing land to large-scale agribusiness investors. Furthermore, chemical waste from plantations and processing mills have in some cases polluted local water sources and poisoned fish, which is the main source of protein for many Cambodian communities. Long-running disputes over land abound, and to date most efforts to seek resolution based on relevant laws and procedures have failed. Companies holding concessions continue to clear disputed land and local farmers have been forced to relocate with little or no compensation for their losses. Despite the ever increasing number of large-scale agribusiness investments and the State programs for community forestry and using students to identify holdings for issuing smallholder land titles, this is still insufficient to protect and support the rights of smallholders and out-growers, especially where concessions have already been granted. Many outspoken community members have protested against these abuses, but also fear for their own security as a result of their activism. It is also widely reported that concessions are being acquired for agribusiness development but in fact exploited primarily for logging purposes.

In **Burma**, civil society concern has been raised on the risks posed to the rights of Burmese rural communities by the convergence of military, business and administrative interests in new projects which lead to the displacement of smallholders and rural communities from their farms, homes and forests. Severe (and sometimes fatal) land conflicts are beginning to emerge as rural communities seek to reclaim land taken from them without their consent and allocated to private companies. Whilst most of these relate to hydroelectric, gas and oil mining and pipelines and infrastructural projects, cases of agribusiness-related land conflicts are on the rise. Very few farmers have official land title certificates and the

administratively complex and corruption-fraught process to get title to their land puts peasant farmers' land tenure security at serious risk. Concerns have also been raised over the transparency and freedom of new contract farming agreements. Frustrations over lost employment and benefit-sharing opportunities have been expressed where Chinese investors import unskilled labour from China to work in large-scale plantations. Agribusiness and other large-scale land conversions have also contributed to an unprecedented rate of deforestation across Burma in the last twenty years, with other contributing factors including illegal logging for fuelwood and charcoal.

**Timor-Leste's** history of displacement, overlapping titles, and lack of legal clarity over land has contributed to numerous land-related disputes. While most of the displaced have now returned to their communities or been resettled, many of the property disputes stemming from or aggravated by the crisis remain unresolved. No significant land conflicts resulting from private sector activities in rural areas have been reported to date in Timor-Leste, but uncertainty over land rights has been identified as one of the most likely triggers of future disputes. There are concerns about the lack of legal clarity concerning which land the government of Timor-Leste could potentially grant to investors, and perceived plans to accelerate development of State land, including through resettlement of families and expropriation. The experience of other subsistence-dominated states in the region, according to some studies, suggests that endeavours to establish large-scale agribusiness projects without the agreement of community members is highly likely to be faced with substantial local resistance.

In **Malaysia**, several national and State joint venture schemes and business models involve smallholders and landowners merely as collective landowners with no

direct role in managing operations. Much of the land claimed under customary rights is not yet titled and in Sabah, State laws have been amended to make it easier for the State to access native customary land (that is untitled) for agricultural projects. In some places, it has indeed been shown that oil palm plantations have proven to be a force for improvement in some rural areas. Yet the benefits of State-sponsored partnership models remain questionable due to the lack of accountability and transparency mechanisms within these models. Ill-regulated deforestation is rampant, including on indigenous peoples' lands, and the government rhetoric of development and modernisation of indigenous peoples persist, as well as entrenched prejudice held against Orang Asli culture, lifestyles and aspirations and of their rights to land and resources.

In the **Philippines**, the absence of a clear land use policy is causing alarm as lands are being converted to other uses, as this could threaten the integrity of the ecosystem and further undermine the gains of the agrarian reform. These loopholes are being used by the local elites and joint ventures to enter areas and secure land deals, often at the detriment of smallholder farmers' livelihoods and rights. Government maps and land records are often not accurate and subject to differing interpretation. The unequal rights between the agribusiness ventures and the smallholders in some instances have caused havoc to the livelihoods of these farmers, eventually affecting their ability to earn income and provide food for their own families. Land disputes involving large agricultural companies often result in the internal displacement or land dispossession of farmers, leaving them with no recourse but to work as farm labourers. There are also reported cases of involuntary disappearance of farmers or activists opposed to big agribusiness companies. The practice of using child labour in plantation has been well

documented in the Philippines, yet persists to this very day. However, not all land deals in the Philippines, however, are inherently inimical to farmers' rights. The examples set by certain firms show that agribusiness can bring about community development and peace, particularly in former hotbeds of Muslim insurgents from the Moro Islamic Liberation Front (MILF).

The situation in **Thailand** differs somewhat from the countries above in that large-scale agribusiness projects do not appear to have led to notable conflicts or abuses. Of main concern are the working conditions of the more than two million migrant workers from Cambodia, Laos and Myanmar in Thailand. While governance in land tenure in Thailand is considered amongst the best in the region, implementation into practice however has been relatively lacking and the complexity of the legal and judicial system and loopholes given to powerful individuals to abuse legislation has been at the disadvantage of the poor as reported in several cases. While a large amount of land in Thailand remains in the possession of small-scale farmers, studies have shown that security of landownership is proportional to the size of the land, whereby small farmers have less access to secure land ownership. Poor and indigenous communities are frequently located on public land rather than on privately owned land and that is where problems in land administration are most intense.

#### **4. Human Rights Frameworks and Land Acquisition**

The countries examined in these briefings have disparate track records in terms of international human rights instruments endorsement, and much progress needs to be made in terms of the domestication of these international laws into national legislation. The gap between policy and practice also remains to be addressed, and to date, no country has developed specific

legislation or policies to deal with the agribusiness sector, despite ongoing expansion in most of these countries. However, certain legal reforms are underway in the region, notably in relation

to land tenure, environmental conservation and freedom of expression, which are promising steps towards rights-based agribusiness development.



Despite protests by the Temiar Orang Asli community, forests within their traditional territories continue to be cleared for oil palm and rubber development under the Ladang Rakyat project (Kelantan, Malaysia). Photo: Sze Ning.

Country	ICCPR	ICESCR	ICERD	ICEDAW	ICRC	ILO 111	ILO 169
Burma				X	X		
Thailand	X	X	X	X	X		
Cambodia	X	X	X	X	X	X	
Malaysia				X	X		
Indonesia	X	X	X	X	X	X	
Philippines	X	X	X	X	X	X	
Timor-Leste	X	X	X	X	X		

Ratification of International Human Rights treaties by SE Asian Countries

**Indonesia** is party to eight major human rights conventions: the Convention against Torture (ratified through Law No. 5 of 1998); the Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Right of the Child; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of Discrimination Against Women; the Convention on the Rights of People with Disabilities and; the

International Convention on the Rights of Migrant Workers and their Families. The protection of rights is also guaranteed through Law No. 39 of 1999 on Human Rights, which reiterates the rights enshrined in the Universal Declaration on Human Rights. Substantial jurisprudence has emerged from the Constitutional Court for the strengthening of protections for human rights of individuals and communities in the face of non-State actors, including corporations. However, the implementation of constitutional and



legal frameworks on human rights continues to fall short of protecting and recognising such rights in practice. One major reason for this is that a number of laws and policies contradict international law, and there is a lack of implementing regulations to apply the said constitutional and legal guarantees.

**Thailand** has ratified several ILO conventions relevant to the agribusiness sector, including the core conventions C.100 on Equal Remuneration, C.138 on Minimum Age and C.182 on Worst Forms of Child Labour. Expropriation of land for agricultural development requires timely and fair compensation to land owners as mentioned in Article 42 of the Constitution. In addition, Thailand supported an initiative within the UN to develop a declaration on the rights of peasants and other people working in rural areas. In September 2012 Thailand voted for the adoption of the UD resolution A/HRC/21/L23 on the Promotion of the human rights of peasants and other people working in rural areas. Although Thailand voted in favour of the Declaration of the Rights of Indigenous Peoples (UNDRIP) it has not been integrated in national legislation and the identity of the indigenous peoples of Thailand is not recognised in the Constitution of 2007. A number of environmental conservation laws also threaten the rights of indigenous peoples in Thailand and have led to numerous conflicts between the State and local communities, who often depend on protected areas for their livelihoods. The Community Forest Act of 2007 is further criticised by civil society organisations and indigenous representatives for its exclusion of forest communities' rights. A regulation on community land titling was passed in 2010 (but not fully promulgated) to address longstanding conflicts with communities on public land. The regulation however has serious shortcomings as it excludes protected areas and its implementation is lacking. The

Human Rights Commission of Thailand plays a key role in supporting indigenous peoples in claiming their rights through the judicial system, and in stimulating negotiation and dialogue where land conflicts between communities and companies prevail.

**Malaysia** has only signed three international human rights conventions: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities. Since 2010 there have been several announcements from the government about initiating the ratification of human rights treaties as well as the drafting of a National Human Rights Action Plan, but none were forthcoming at the time of writing. Likewise, Malaysia signed the United Nations Convention on Biological Diversity (CBD) in June 1992 and voted to support the adoption of the UN Declaration of Rights of the Indigenous Peoples (UNDRIP) in September 2007 yet there has thus far not been any announcement or commitment by the government to domesticate international laws into national legislation. On a more positive note, landmark decisions have reaffirmed the recognition of native rights that arise out of native laws and customs. Furthermore, the advent of voluntary international “sustainability” standards for timber and oil palm – the FSC and RSPO respectively – have opened up additional space for human rights issues to surface. In addition, since SUHAKAM was established, indigenous peoples, communities and representative organisations have used the Commission as a channel for their complaints and memorandums. In 2011, SUHAKAM embarked on its first National Inquiry, the National Inquiry into the Land Rights of Indigenous Peoples. However, it remains uncertain how the recommendations will be received and taken up by the respective

State governments and relevant departments.

**Burma** has acceded certain international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (in 1997), the Convention on the Rights of the Child (in 1991), the Optional Protocol on the Convention on the Rights of the Child (in 2012) and the Convention on the Rights of Persons with Disabilities (in 2011). Burma is also a party to ILO Convention No. 29 on Forced or Compulsory Labour (1955) and voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples in 2007. Despite notable progress in terms of certain rights, such as freedom of expression and association, concerns over the human rights situation today in Burma continue to be expressed by civil society and United Nations bodies and representatives, including the Special Rapporteur on the situation of human rights in Myanmar in relation to ‘violations of land and housing rights, in particular regarding the impact of infrastructure projects, natural resource exploitation and associated land confiscations and grabbing’. In relation to land rights, on a positive note, government and parliamentary officials in recent national dialogues with civil society have recognised the need to conduct land reforms in a more inclusive and sustainable fashion through responsible agricultural investment. The government has also acknowledged weaknesses in the Farmland Law and intends to review the law in relation to land dispute adjudication and rights of local residents to manage and use their farmlands. The formation in September 2012 of a new National Human Rights Commission is an important step towards the promotion and protection of human rights in Burma, and is already being actively used by civil society to raise cases of agribusiness-related land

acquisition that fails to respect human rights.

**Timor-Leste** acceded in 2003 to the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and its Optional Protocol 2, the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination against Women and its Optional Protocol, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. No human rights abuses have been raised to UN human rights bodies to date in relation to private sector activities or agribusiness. However, the issue of land disputes and recommendations for better human rights recognition have been noted on a number of occasions by inter alia the Office of the High Commissioner for Human Rights, the Office of the Provedor for Human Rights and Justice, the UN Special Rapporteur on extreme poverty and human rights, as well as in Timor-Leste’s Universal Periodic Review 2012. Food insecurity was also highlighted as a major concern, particularly in rural areas. In May 2012, the UN Special Rapporteur on extreme poverty and human rights noted the complex situation of land titling in Timor-Leste and the fact that large number of families dwell on land to which they do not hold a legal title, or which is claimed by several parties or the State. She pointed out that the use of eviction practices ‘is in clear violation of its human rights obligation’.

The **Philippines** is a signatory to some 23 international instruments under the UN system, including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Elimination of Racial Discrimination. While the Philippines has

passed several landmark laws on human rights, the challenge remains as to how to enforce these laws against big companies operating with clear disregard for the welfare of farmers and local communities. Currently, the National Human Rights Commission is advocating for a rights-based approach to agribusiness expansion that should lead to the development not only of the State but more importantly of every individual, including the farmer. No specific policies have yet been developed to require that agribusiness companies comply with human rights provisions of international treaties and agreements to which the Philippines is a signatory. A relevant legal development is the passing of the Anti-Enforced or Involuntary Disappearance Act of 2012 which can protect land and human rights activists supporting communities negatively affected by agribusiness developments. Another important legal development in the country is the Supreme Courts' approval of the Rules of Procedure for Environmental Cases through the Writ of Kalikasan (Nature) in 2010, which has the potential to be used as a legal tool against oppressive agribusiness expansion in rural areas, particularly if the business is shown to pose a threat to the environment.

**Cambodia** is signatory to almost all human rights instruments including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Cambodia has adopted the ASEAN Declaration on Human Rights and is a member of the ASEAN Intergovernmental Commission on Human Rights (AICHR), the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee on the implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). The

Cambodian constitutional law also guarantees that all signed international instruments are part of Cambodian law and other articles reaffirm Cambodia's commitment to ensuring that all Cambodians are able to enjoy their economic, social and cultural rights to the fullest extent possible. However, Cambodia has yet to develop and apply principles on business and human rights to the corporate sector, in order to hold the private sector accountable for its conduct, including those businesses that are owned, operated or controlled by the State. At the national level, the RGC has established mechanisms and policies to enforce human rights protections, such as through the establishment of a Human Rights Commission at the National Assembly and at the Senate. The Law on Demonstration was developed to allow citizens of Cambodia to better practice their right to assembly. Furthermore, a law on Environmental Impact Assessment (EIA) seeks to strengthen the accountability of the private sector in terms of environmental preservation. The Law on Agricultural Land and the Law on Access to Information were still in draft form at the time of writing.

## **5. Conclusions and Recommendations**

The similarities and differences in realities and concerns faced by rural communities in Southeast Asia whose lands are targeted for agribusiness expansion, point to an array of possible scenarios for the development of this sector in a way that respects local tenures, customs, livelihoods and economies, and from which genuine and sustainable economic and social benefits can be derived by rural communities. The following section offers a number of non-exhaustive recommendations to this end.



Aerial view of land being developed for oil palm in Ulu Baram, Sarawak (2012). Photo: Sze Ning.

Government policies and targets are encouraging the steadfast expansion of the agribusiness sector in **Indonesia**, and there is concern as to whether legal reform to bring national laws and land allocation mechanisms in line with international law, will be able to keep up with the scale and pace of large-scale land acquisitions. Civil society organisations, often in support of affected communities, are playing an increasingly important role in bringing up human rights violations to the attention of governmental bodies, including Komnas HAM, and pushing for legal reform through the Constitutional Court, the latter of which has demonstrated a progressive stance in its commitment to upholding and strengthening human rights, a promising sign for the near future. However, a lot more work needs to be done in terms of legal reform and monitoring of implementation to ensure that new laws produced comply with international human rights instruments that Indonesia has signed or ratified, and to develop mechanisms to hold (local) government

officials accountable for human rights abuses.

**Thailand**'s agricultural sector appears to remain largely based on small-scale farming with few records of human rights abuses in agribusiness projects reported to date. However, it has been noted that rich and powerful elites are taking advantage of land distribution programmes, and the complicated legal framework on land property rights in Thailand remains a source of concern. Land reform to address this problem and improve the access to land for landless households will be critical. Thai agribusiness has a strong orientation on export and biofuel crops which does impact on local livelihoods and, through increased food prices resulting from export and biofuel-oriented agricultural development, may potentially threaten the food security of the most vulnerable households who still lack adequate access to food. Environmental impacts and encroachment by agribusinesses as well as by small farmers also remain concerns in Thailand. Despite



obvious efforts, it has been difficult for the Thai government to hold the respective companies or individuals to account for their actions. Ambiguity over property rights and a lack of streamlining of the work of relevant government agencies exacerbates these problems. Increasingly, Thai agribusiness companies are becoming key investors in agriculture in other countries of Southeast Asia. In some cases, these Thai companies have reportedly violated human rights through large-scale land acquisitions. Such cases have been brought forward to the Thai Human Rights Commission who has engaged with these companies to seek resolution and remedy. The Thai government has an increasing responsibility to ensure that Thai companies fulfil their human rights obligations when operating abroad, regardless of whether the host country is able or willing to enforce human rights protections.

As the **Philippines** continues to promote and strengthen its agribusiness sector, the government has to step up its efforts in respecting the rights of ordinary citizens and farmers against land grabbing, unfair labour practices, use of child labour and forced deals without respect for Free, Prior and Informed Consent. This issue has to be solved by using a multi-pronged approach in which the participation of different sectors of society is a critical component. The first order of battle is still to complete the distribution of lands under the CARP. A law on comprehensive land use at the national level is another urgent task. It is also imperative that agribusiness companies be required by the government to respect and implement the international treaties on human rights to which the Philippines is a signatory, as their code of conduct. With this mechanism in place, there will be a better chance of agreed collective consent in the monitoring of human rights standards in areas where agribusinesses are operating. Multi-sectoral monitoring should also be done

starting from the identification of areas for the agribusiness expansion, community consultation and negotiation, right up to the implementation of the agreement to ensure that human rights are properly acknowledged and respected in the process. This will in turn pave the way for responsible agribusiness on the ground in partnership with the government and civil society that could foster inclusive and sustainable growth in the long run. A further recommendation is to develop a clearing house for foreign investments on agribusiness which would establish mechanisms and regulations for all investments involving the lease of agricultural lands, and where failure to strictly enforce human rights standards could act as a ground for the cancellation of permits.

In **Malaysia**, the policies driving agriculture and commodities are mainly geared towards large-scale developments and sector modernisation as well as focused on downstream value-added growth within the country and overseas. Yet concomitantly, Malaysia has a dismal record in terms of human rights and agribusiness, especially with regards to the impact of large concessions of timber and oil palm plantations on indigenous peoples' rights to land and livelihood. Unfortunately this is being replicated in the countries where Malaysian investors are operating. To combat this, greater support needs to be provided to NGOs to increase their visibility, reach and influence as well as their effectiveness in various arenas of human rights and environmental advocacy, in Malaysia and abroad. Support for efforts to bring about political and legal reforms in national and State laws and administrative practices that incorporate SUHAKAM's recommendations from its National Inquiry to recognise the land rights of indigenous peoples is essential. A credible time-bound national human rights action plan to sign and ratify the core human

rights instruments that Malaysia is not yet party to is critical. Furthermore, a critical review and assessment of the impacts of current agricultural policies and systems needs to be carried out, with the view to creating and supporting alternative models of agriculture that respect indigenous land rights and customs. The practices of “responsible” companies need to be encouraged and supported. Finally, further research and advocacy to make banks, financial institutions and investment houses more transparent, accountable, and aware of the potential human rights violations in agribusiness financing and investing is crucial.

There is much speculation over where **Burma** is headed in terms of development, investment opportunities and human rights. With agribusiness expansion on the rise, the question remains as to whom most will benefit from these investments in the short and long term, and what this implies for Burma’s political and economic trajectory and its largely rural population. Land reform is urgent and steps taken by the government to this end may usher in a new era of possibility for Burma’s beleaguered citizenry. Much will depend in the types of investment undertaken, the laws that regulate them and their implementation and the overall quality of governance in the concerned areas. In terms of legal reform, it is critical that the government adopt laws and policies that support smallholder farmers’ livelihoods, such as legal recognition of and respect for customary rights and institutions, as well as recognition of upland shifting cultivation as a formal land use category. Smallholder farmers, landless people, and land-poor households have fundamental rights to land and food that need immediate attention and protection under the law. Foreign governments and aid agencies can play a useful role in helping Myanmar figure out how to address land disputes. Fellow ASEAN countries in which the State owns the land can also

provide examples of lessons learned and experiences for how they have sought to resolve land tenure and land rights issues in the context of agribusiness expansion.

In **Timor-Leste**, agribusiness remains at an embryonic stage, and post-conflict infrastructural reconstruction and the development of a formal land administration and legislation remain priority areas of concern. The way in which agribusiness will develop, if it does, will require the development and adequate implementation of land laws that respect and protect the rights of individuals and communities, takes into consideration customary laws and tenures, and requires that principles and rights under international law be respected by both investors and the State. In a country where food consumption, income and security depend on control of and access to land, there is great uncertainty about the capacity of the Timor-Leste State to administer a titling program covering the entire country and to monitor and regulate land acquisitions. The support of international agencies and donors to the government in land titling, and to regulate and monitor land acquisitions, appears critical in the short and medium terms. One policy option for ensuring social and environmental compliance in relation to large-scale investments is for the government of Timor-Leste to require mandatory accreditation with an international industry certification scheme. Obligations on the State and on private investors to engage in wide and transparent consultation with local communities prior to agribusiness development will also be essential. The setting up of an independent Land Commission to gazette community areas, in consultation with the communities, could create a starting point of what is inside or outside community areas. Key to this will be government engagement with local communities to better protect the rights of communities

and access to land held under customary tenure.

In **Cambodia**, Large Scale Land Acquisition for agribusiness development has increased rapidly from 2009 to 2013, during which time more than 1.6 million ha of land have reportedly been converted to private State land for agricultural investments. Yet despite receiving significant revenue for national economic development, it appears that Cambodia is not yet ready for development of the agribusiness sector as existing legal and technical frameworks are limited, making it difficult to manage this windfall revenue. In particular, recognition and protection of local communities' rights to land remain inadequate and indigenous peoples' land rights are particularly poorly protected under existing legislation and titling procedures. International human rights standards on business and human rights have yet to be implemented rigorously. Cambodia still needs to strengthen its land and natural resource management, and better enforce human rights protections and promotion, if it wishes to align itself with other ASEAN countries. Steps to this end could include: developing appropriate schemes to engage smallholders in ways that respect their rights to manage their small-scale agricultural activities and access markets more easily; Land Use Planning carried out throughout the country, and spatial planning data made available for access by the public; areas to be allocated for sustainable use of natural resources by local communities distinct from investment locations; the strengthened and better monitored implementation of national legal frameworks; the implementation of adopted international human rights instruments and in particular recognition and respect in practice of UNDRIP and ICERD; the further active commitment to and involvement of Cambodia in ASEAN's human rights mechanisms and; strengthened

accountability mechanisms for the private sector and government bodies.

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## Endnotes

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<sup>1</sup> See

[http://www.fao.org/fileadmin/user\\_upload/newsroom/docs/VG\\_en\\_Final\\_March\\_2012.pdf](http://www.fao.org/fileadmin/user_upload/newsroom/docs/VG_en_Final_March_2012.pdf).

<sup>2</sup> *Bali Declaration on Human Rights and Agribusiness in Southeast Asia*, available at <http://www.forestpeoples.org/sites/fpp/files/publication/2011/12/final-bali-declaration-adopted-1-dec-2011.pdf>.

<sup>3</sup> Colchester & Chao 2012 (eds).

<sup>4</sup> See Chao 2012.

<sup>5</sup> *Statement of the Phnom Penh Workshop on Human Rights and Agribusiness in Southeast Asia: Making the Bali Declaration Effective* available at <http://www.forestpeoples.org/sites/fpp/files/news/2012/10/Finalised%20Statement%20of%20the%20Phnom%20Penh%20Workshop.pdf>.



# National Updates on Agribusiness Large Scale Land Acquisitions in Southeast Asia

## Brief #2 of 8: Republic of Indonesia

By Indriaswati Saptaningrum



Source: <http://geography.about.com/library/cia/blcindonesia.htm>

### Country facts

Total area: 910,931.32 km<sup>2</sup>  
Population: 237,641,320  
Neighbouring countries: Malaysia, Timor-Leste, Papua New Guinea, Philippines, Australia  
GDP per capita (2012): 33.3 million rupiah (USD \$3,563)  
National Income per capita: 9.5 million rupiah (USD \$924)  
Main exports: oil and gas, coal, wood products, palm oil, cocoa, rubber  
Main imports: machines and mechanics, iron and steel, automotive products, organic chemicals, plastics and plastic products, chemical fertilisers  
Agricultural workforce (% of pop): 38.9%

### Government policies and targets for agribusiness expansion

Indonesia is a country abundant in natural resources, whose economy has heavily depended on the export of minerals, fuels (oil, coal and gas) and agricultural products since the early seventies. Mining and agriculture represented 6.23% of national income in 2012 and are expected to remain key sources of national economic growth. The agricultural sector alone accounted for an estimated 14.44% of the GDP in 2012, a figure which is projected to increase in 2013.

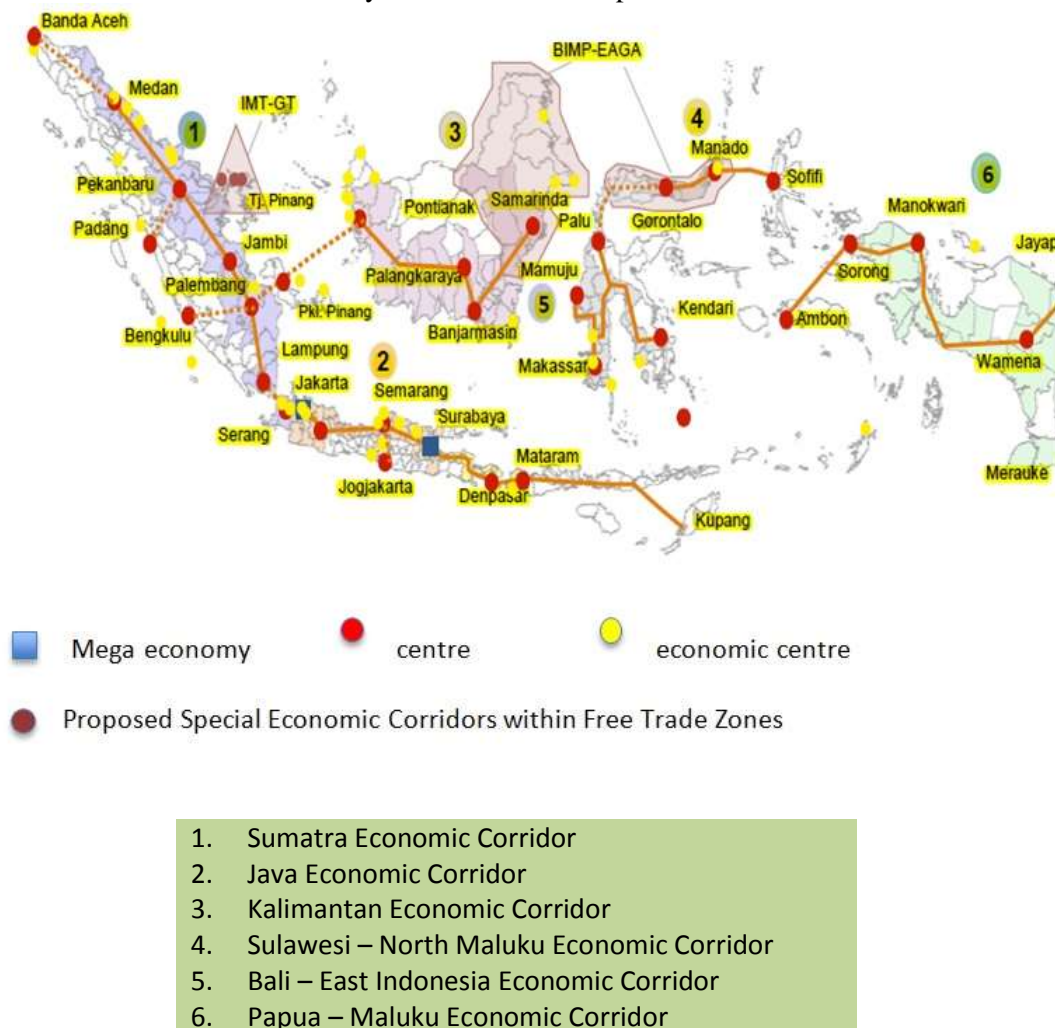
Domestic investment in agriculture in the period of 2010 to 2014 is expected to increase by 45.9% (464.9 trillion rupiah) while foreign investment is

expected to increase by 22.9% (199.9 trillion rupiah). This development in the agricultural sector could potentially create employment for 45.4 million citizens in 2014.

The Government of Indonesia, through its Ministry of Agriculture, has developed a policy framework to facilitate investment in the agriculture sector. Following the development of

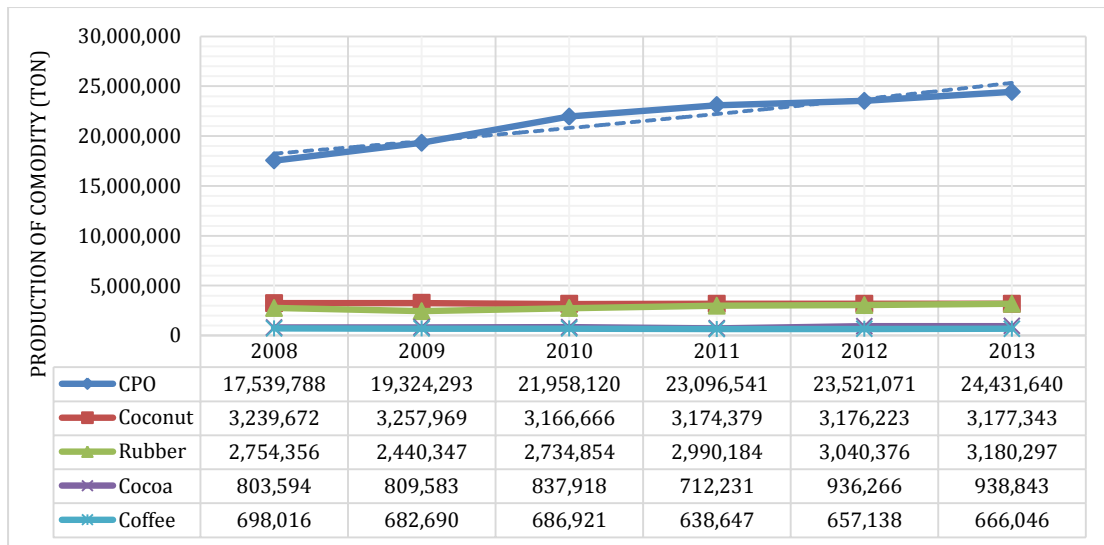
the road map for the Master Plan on Acceleration and Expansion of Indonesian Economic Development (MP3EI), the Ministry of Agriculture has developed six main economic corridors for the agricultural sector, three of which are dedicated to boosting the development of oil palm plantations in the provinces of Papua, Sumatra and Kalimantan.

Six priority economic corridors  
Commodity base/territorial competitive sectors



15 plantation crops will be prioritised as part of the bid to boost agribusiness and develop the country's market competitiveness, according to the Ministry of Agriculture's strategic

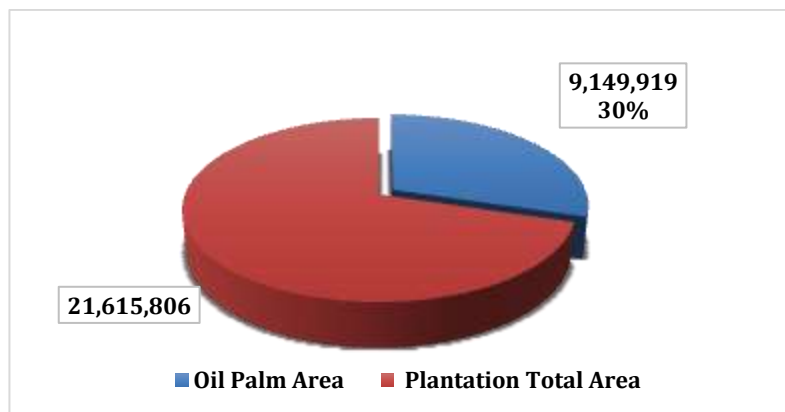
planning for 2010 to 2014. At the top of this list is oil palm, plantations of which are expected to increase at a rate of 5.22% per year, with a total production of 28.4 million tonnes in 2014.



Growth in production of key agricultural crops (2008 – 2013)

In order to implement the plan above, 21.6 million ha of land will be allocated to plantation development in 2013, of which 9.1 million ha will be

allocated for oil palm plantations, with expected expansion to 12 million ha in 2014.



Oil palm plantation coverage in relation to total plantation area

The targets for land conversion to agribusiness plantations suggest that forest conversion will most likely increase in the near future, a trend which various sources suggest is already underway. From 2007 to 2011, the Ministry of Forestry issues 576 conversion licenses for a total of over 1.5 million ha of land to agribusiness companies.<sup>1</sup> The largest areas of conversion were located in Riau (approximately 1.5 million ha) and

Central Kalimantan (652,326 ha). Forest conversion increased to about 8 million ha in 2012, of which 4 million ha has now been abandoned. 2 million ha of this abandoned land was under Business Operating Permit (HGU) title.

In 2011, 292 companies were granted licenses for Natural Forest (HPH) over a total of 23.41 million ha. These concessions were projected to bring returns of 306.99 billion rupiah (USD

\$19.9 million), but in reality, returns have been much higher, in the sum of approximately 7.381 trillion rupiah. The biggest forest concession areas are located in Kalimantan, where they cover approximately 10.67 million ha, granted to 168 companies.

### **Problems with land acquisition**

#### *Lack of recognition of rights to land*

Broadly speaking, the right to land is guaranteed by the Constitution and is supported by the Basic Agrarian Law No. 5 of 1960. The Constitution provides a more socially-anchored approach to land ownership, as enshrined in Article 33.3, placing in the hands of the State the power to utilise land for the greatest benefit to its people. Similarly, the Basic Agrarian Law, which to date is the only law which provides a framework on the recognition of land rights, reflects a social approach to land ownership, however it contains only very general provisions on collective rights to land, notably, the collective rights of indigenous peoples to their customary lands. Instead, the State delegates land to indigenous communities through the issuance of implementing regulations, such as Presidential Decrees. Thus despite normative recognition of customary land (*ulayat*) rights in the Basic Agrarian Law, very few implementing regulations have been developed to secure indigenous peoples' rights to land. As such, the persistent principle of eminent domain in relation to land and land rights facilitates the allocation of large-scale concessions by the government to companies for agribusiness development.

#### *Land conflicts*

In order to help boost national economic growth, government policies since at least 2010 have sought to encourage business- and investment-friendly conditions for agribusiness and other private sector companies, both domestic and foreign. One consequence of increased government decentralisation has been an increase in deforestation rates as well as the ill-regulated issuance of licenses over large areas of land for conversion to plantations, particularly oil palm plantations.

Government policies supporting the practice of large-scale land acquisition by private sector entities for plantations and other forms of agribusiness activities have concomitantly led to an increase in land conflicts. No single reference exists for the number of land conflicts ongoing across the country, but both governmental and non-governmental sources report that the trend is on the rise. The National Land Agency (BPN) recognised in 2012 that there were around 8,000 land conflicts in Indonesia. According to a report launched by legal and human rights organisation HuMa in 2012, 282 land conflicts occurred in 98 regencies/municipalities within 22 provinces across the country.<sup>2</sup>

The highest number of land conflicts took, or are taking place, in Kalimantan and Sumatra and involve plantation companies. Overall, around 2 million ha of land are under dispute, of which 1.7 million ha constitute disputes over forest areas. An earlier report by the National Consortium on Agrarian Reform (KPA) recorded 198 conflicts over 963,411.2 ha of land. The National Human Rights Commission of Indonesia (Komnas



HAM) has recorded an increase in complaints against companies since 2010, as well as an increase in land conflicts between individuals/communities and companies, in particular large-scale plantation operators.

Year	Number of complaints	Land-conflict related complaints
2010	1,119	N/A
2011	1,068	354
2012	1,126	446

Reported escalation of conflict into violence has usually been the result of a combination of more complex and deep-rooted land tenure insecurities and competition. In many cases, such conflict finds its roots in the very initial stages of company operations. Other sources of conflict include the following:

- 1) Unclear mechanisms of land acquisition by private entities, sometimes exacerbated by bureaucratic corruption at the local level

An example of this is the escalation of conflict into violence in three different locations in Lampung Province (Sumatra) towards the end of 2010. In the case of Mesuji, the community of Sri Tanjung village only found out that their land had been allocated for oil palm and timber plantations when the companies arrived with local officials to being the acquisition process. Without prior consultation having taken place, this community and others were forced to accept compensation for the land lost, and a promise that they would be employed to work in the plantations. They were also promised a Nucleus Estate Smallholder (NES) scheme.

A number of documents later gathered by the government Joint Fact-Finding Team (TGPF) suggested that corruption had taken place in this process, as a result of which conflict has sparked frequently throughout 1994 to 2012, when violence re-erupted and local communities burned down oil palm trees and company offices. This was followed by a clash between the communities and the mobile brigade police unit (BRIMOB), a tragic outcome of which was several casualties and the criminalisation of certain local community leaders.<sup>3</sup>

- 2) Absence of Free, Prior and Informed Consent (FPIC) in the entire process of land acquisition

In most cases, lack of respect for and implementation of FPIC has been a root cause of ensuing land conflicts. Where prior consultation does not take place, communities lack the necessary information to make informed collective decisions, and have little choice but to accept company-driven agreements and offers. The acquisition of community lands is often facilitated by the bribing or coercion of village heads and community leaders.<sup>4</sup>

A notable example of the violation of the right to FPIC is the Merauke Integrated Food and Energy Estate (MIFEE) in Papua Province, where consultation is routinely failing to take place, and where customary modes of negotiation and decision-making are being manipulated by companies to facilitate large-scale land acquisition, with little benefits accrued to the indigenous Malind peoples.

- 3) Lack of clear and official spatial planning both at the national and local levels

Spatial planning should ideally be carried out as an open and transparent process in which local communities are properly consulted and invited to participate at all stages. Furthermore, the spatial plan itself should ideally be a publicly available document. In practice however, neither of these conditions are being met.

- 4) Overlapping designation/allocation of areas for different purposes, partly as a result of disparate and ill-coordinated sectoral approaches to natural resource use and management and policy making

Large-scale land acquisition for agribusiness expansion has left countless local communities and indigenous peoples landless. A number of cases also suggest that local communities end up being poorer after ceding their land to companies.<sup>5</sup> Where compensation is paid, terms and amounts tend to be dictated by the company (sometimes jointly with the government) rather than negotiated fairly and openly with the communities.

In many cases, the location permits (*izin lokasi*) issued by the local government are used as a pretext by companies to forcefully evict local communities from the concession area, as was the case in the concession of PT Buana Artha Sejahtera, a subsidiary of Sinar Mas in Central Kalimantan. The local community of Biru Maju village saw their lands grabbed and converted to oil palm plantations, and offers of compensation were only made to them after their village and small-scale agricultural plots had been destroyed.<sup>6</sup> This case and many others have led to Indonesia being reported to the United Nations by civil society organisations for violations of human rights, including land rights.

Land conflicts between local communities/indigenous peoples and companies are often followed by the criminalisation of community members as well as the organisations and individuals supporting them to defend their rights and seek remedy. According to a report by KPA, 156 peasants were detained as result of land conflicts in 2012.<sup>7</sup> The Indonesia Peasants Union recorded 76 cases of criminalisation in the same year.

Law No. 18 of 2004 on Plantations, in particular Articles 27 and 41, has often been used to criminalise peasants and smallholders. Despite the revocation of these provisions by the Constitutional Court in 2011, the criminalisation of rights defenders has continued, justified by the application of the Penal Code. In such cases, the criminalised individuals are accused of stealing, damaging or inciting harm to plantation property. A recent case of criminalisation is that of Anwar Sadat, a local Friends of the Earth Indonesia (Walhi Indonesia) leader in South Sumatra who was charged with seven months' imprisonment for his struggle in the land conflict with PTPN VII Cinta Manis.

Another newly adopted law on the prevention and eradication of forest destruction contains a number of provisions whose scope and definition on the destructive actions against forest areas can potentially be interpreted to criminalise indigenous peoples living within the forest. This law has been criticised by a broad range of human rights NGOs, including the National Alliance of Indigenous Peoples (AMAN) and Walhi, who plan to file a constitutional review against the said law.

## Human rights framework as it applies to agribusinesses

The post-1998 political transition in Indonesia has opened up a new chapter for the protection of human rights, in part being achieved through constitutional and legal reform. Indonesia is party to 8 major human rights conventions: the Convention against Torture (ratified through Law No. 5 of 1998); the Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Right of the Child; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Elimination of Discrimination Against Women; the Convention on the Rights of People with Disabilities and; the International Convention on the Rights of Migrant Workers and their Families. The protection of rights is also guaranteed through Law No. 39 of 1999 on Human Rights, which reiterates the rights enshrined in the Universal Declaration on Human Rights.

While earlier attention to the protection of rights in Indonesia was heavily focused on the protection of civil and political rights, due to the repressive regime under the New Order, a growing body of literature points to a development in social, economic and cultural rights, including in relation to recognition of the rights of indigenous peoples. The Constitutional Court has played a key role in this regard. Established in 2001, the Constitutional Court has jurisdiction over the violation of rights as guaranteed by the Constitution, and provides an avenue for citizens to bring up and seek remedy for such violations. Substantial jurisprudence has emerged from this body for the strengthening of protections for human rights of individuals and communities in the face of non-State actors, including corporations. While earlier case law focused on questions of the constitutionality of privatisation of services (such as electricity and water), later jurisprudence has focused and problematised the issue of collective rights, such as indigenous peoples' land rights and right to manage coastal areas, as part of their right to life under Article 28A of the Constitution.<sup>8</sup>

Selected provisions in Indonesian law that guarantee individual and collective land rights

Law	Recognition of rights
Constitution of 1945	Art 18 (2) The State recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.
UU No. 5 of 1960 (Basic Agrarian Law)	Art 2.4 The implementation of the above mentioned right of control by the State may be delegated to the autonomous region and <i>adat</i> Law Communities Art 3 The implementation of 'Hak Ulayat' ( customary rights over land) shall be based on the unity of the nation and shall not be in conflict with higher regulations

Law No. 32 of 2004 on Local Government	<p>Art (9) on the protection of individual rights over the land Ps 2 (9)</p> <p>State recognises and respects indigenous peoples and their traditional rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia. Ps 203 (3)</p> <p>The appointment of the Chair of the village in indigenous communities and their traditional rights, as long as these remain in existence and are recognised, shall be governed by indigenous law as stipulated by bylaws in accordance with the government regulation</p>
Law No. 18 of 2004 on Plantations	<p>Art 9(2)</p> <p>Recognises the existence of indigenous peoples' rights and their customary law</p>

However, the implementation of the said normative constitutional and legal framework has fallen short of protecting and recognising such rights in practice. This is due to both the issuance of laws and policies which contradict the said provisions, as well as the lack of implementing regulations to apply the said constitutional and legal guarantees.<sup>9</sup>

Examples of the former include Forestry Law No. 41 of 1999, Law No. 18 of 2004 on Plantations, Law No. 4 of 2009 on Minerals and Coal and Law No. 27 of 2007 on Management of Coastal Areas and Small Islands. Particularly relevant to agribusiness expansion is Forestry Law No. 41 of 1999, which fails to recognise *adat* law by incorporating forest controlled by indigenous peoples into State forest.

Overlaps and contradictions in national and international law have in turn led to competing claims, misuse and manipulation of laws and regulations by parties in conflict, as has been the case in land conflicts in Lembata, Eastern Indonesia.<sup>10</sup>

In response to these legal irregularities, civil society organisations have filed constitutional cases to the

Constitutional Court, which has demonstrated a progressive stance in its commitment to upholding and strengthening human rights, a promising sign for the near future. However, a lot more work needs to be done to ensure that new laws produced comply with international human rights instruments that Indonesia has signed or ratified.

### **Strengthening the recognition of indigenous peoples' rights to land**

In recent years, the Constitutional Court has demonstrated a strong commitment to strengthening protections for the rights of indigenous peoples to their customary lands. A case in point is the decision of 2010 on the constitutional review of Law No. 18 of 2004 on Plantations. A petition was filed by four local community leaders who had suffered criminalisation when seeking to reclaim land grabbed from them by oil palm companies.<sup>11</sup> The leaders asked the court to revoke two articles in the law whose definition was obscure and therefore prone to misinterpretation and manipulation by plantation companies. One of these was the application of criminal sanction of up to five years' imprisonment for 'any



action deemed to be disturbing the operation of the plantation'. This ignored the fact that often, conflict arose after companies grabbed land from local communities without their consent or under unfair terms of agreement.<sup>12</sup>

In its decision, the Constitutional Court supported the recognition of indigenous rights to land and prohibited the application of both articles pending research on the existence of *adat* law. It also judged that allegations of criminal conduct (such as illegal occupation) against indigenous peoples and local communities could only be made once comprehensive information on the history of land tenure of the land in conflict had been carried out.

Another important case decision also contributed to the revocation of Article 1(6) in Law 41 of 1999 on Forestry which defines customary forest of indigenous peoples as State forest.<sup>13</sup> This definition, according to the decision of the Court, discriminated against indigenous peoples as land title holders, leading to tenurial insecurity and insecure access to forest resources for their livelihoods.<sup>14</sup> The Court's decision was followed up with the issuance of a Forestry Ministerial letter, containing technical guidance on the implementation of the said decision. In particular, the letter gave authority to the Ministry of Forestry to decide on the status of customary forest, as long as it was recognised in bylaws based on the study conducted by a specially appointed team. However, no further details had been provided with regards to the membership of this team at the time of writing.<sup>15</sup>

### **Strengthening the application of FPIC in strategic planning, zoning and management of natural resources**

Another recent decision of the Constitutional Court in relation to a case made against Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands has led to a strengthening in the application of the principle of FPIC in the development of strategic planning, zoning and management planning for coastal areas and small islands. Prior to this, the absence of consideration given to local and indigenous communities as key actors in the aforesaid activities, had led to two major problems. First is the silencing of community voices such that they are unable to agree or disagree to planned activities. Second is the lack of consultation over policy-making, which both is and leads to, the violation of their rights. The Court further asserted in relation to this case that the absence of participation of customary communities in such processes was tantamount to unequal treatment and was against the right to development as guaranteed in the Constitution.

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<sup>1</sup> *Buku Statistik Kehutanan* 2011.

<sup>2</sup> Widiyanto et al 2012 *Outlook Konflik Sumber Daya Alam dan Agraria 2012*. Pusat Database dan Informasi HUMA.

<sup>3</sup> Although the conflicts that took place in the three locations in Lampung were shared by specific local contexts, similar patterns of escalating conflict have been reported in other parts of the country as a result of unclear and ill-regulated mechanisms through which private companies are allocated land, as well as the overlap of allocated concession permits. A special Joint Fact-Finding Team was established by the government to investigate the situation but its recommendations have yet to be implemented and the conflict was ongoing at the time of writing. For further information see *Laporan TGPF Mesuji*.

<sup>4</sup> See Marti 2008.

<sup>5</sup> Mardiyah 2012: 108 – 111.

<sup>6</sup> For further information see PILNET 2013.

<sup>7</sup> Solidaritas Perempuan 2013.

<sup>8</sup> See for instance *Constitutional Court Decision Number 3/PUU-VIII/2010*

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*Concerning Judicial Review of Law No. 27 of 2007 regarding the Management of Coastal Areas and Small Islands.*

<sup>9</sup> For instance, Law No. 39 of 1999 contains a normative framework but no related implementing regulation has been produced.

<sup>10</sup> See Safitri 2011.

<sup>11</sup> The constitutional review was submitted by, among others, Andi Vitalis and Japin, who were victims of land grabbing in West Kalimantan. Both were criminally charged based on the allegation of disturbing the operations of the plantation company in question.

<sup>12</sup> In the Andi and Japin case, for instance, the company (PT BAS) cleared land and forcefully evicted indigenous communities from their customary lands soon after obtaining their location permit from the local government.

<sup>13</sup> The petition was submitted by AMAN in 2012. See *PUTUSAN Nomor 35/PUU-X/2012*.

<sup>14</sup> *Constitutional Court Decision No. 35/PUU-X/2012*. pp. 175 – 178.

<sup>15</sup> *Ministerial circular letter No S.E.1/Menhut-II/2013 on Constitutional Court Decision No. 35/PUU-X/2012*, issued on 31<sup>st</sup> May 2013. The letter also provides that should customary forest no longer exist, the right to exploit the forest shall be returned to the State and the status of the customary forest will be that of State forest.

# National Updates on Agribusiness Large Scale Land Acquisitions in Southeast Asia

## Brief #3 of 8: Kingdom of Thailand

By Jonas Dallinger



Source:

<http://web.colby.edu/zgmitche/thailand/>

### Introduction

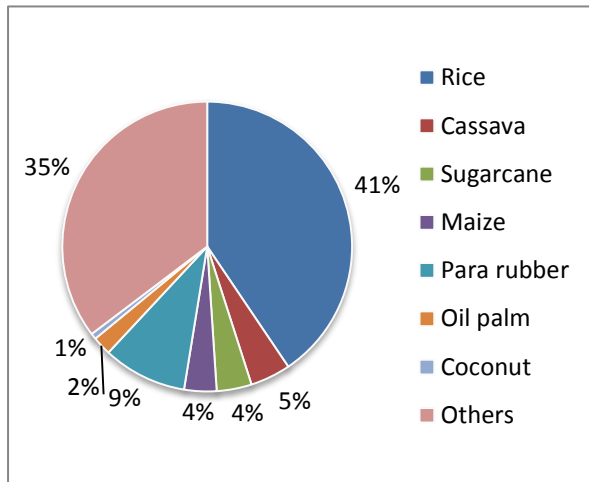
Thailand has a strong agricultural sector and is a leading producer and exporter of rice, rubber, cassava, sugar, poultry and seafood. Currently around 8.6% of the Thai GDP comes from agriculture whereas 38.2% of the labour force is employed in the agricultural sector. With an estimated GDP per capita of USD 10,000, 8.1% of the population is estimated to live below the poverty line. However, rural poverty has reduced drastically over the last 20 years. Large shares of the remaining poor inhabit rural areas, such as the Northeastern and the Northern regions of the country. Inequality in the country is high and Thailand ranks 12<sup>th</sup> in the list of countries with the highest Gini index.<sup>1</sup>

Thailand has one of the lowest official rates of unemployment in the world and its economy depends on the influx of cheap labour from neighboring countries. Making up approximately 10% of the total workforce, 2.5 million migrant workers are reported to be employed in Thailand,<sup>23</sup> of which over 80% are reported to come from Myanmar.<sup>4</sup>

A large majority of the agricultural land in Thailand is used for rice cultivation. Figure 1 gives an overview of the use of agricultural land for the main crops grown.



Figure 1: Utilisation of agricultural land per crop in Thailand (Source: author's own diagram, based on OAE 2013)



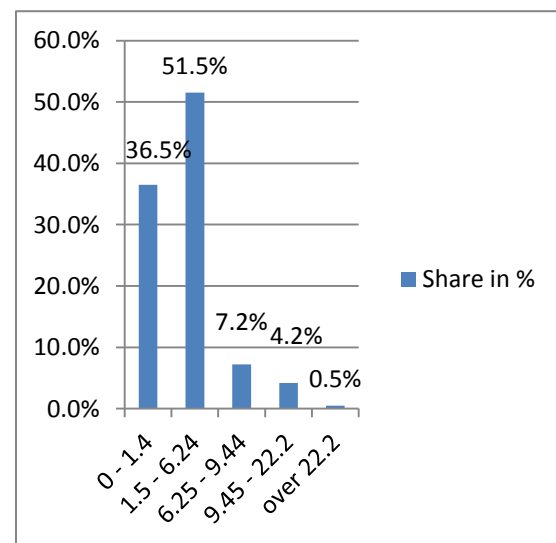
### National trends in Large Scale Land Acquisitions in Thailand

Impressive growth in agricultural production in Thailand during the 1960s to the 1990s has mainly been achieved through area expansion by deforestation and infrastructure development. 28% of Thailand's forest area was lost between 1976 and 1989.<sup>56</sup> Since then, the area of forestland has been slightly increasing according to government figures. More than 50% of the remaining forestland in Thailand is located in the Northern Region of the country.<sup>7</sup> In response to environmental problems arising from continuous deforestation, and triggered by a major flood in the Southern Region of Thailand, a logging ban was put in place in 1989. The Thai National Forest Policy of 1985 aims to maintain a share of 40% of the land resources to be under forest, whereby 25% are to be kept as protected forest and 15% as production forest. The ban on logging did slow down deforestation but could not fully stop it and encroachment into protected forests for agricultural purposes as well as property development remain a serious concern in Thailand as numerous news reports confirm.<sup>8</sup>

The vast majority of landholdings in Thailand are small in size. Information

about ownership of land and the size of land holdings differs between different sources. In the latest agricultural census (2001) almost 95% of land holdings are reported to be smaller than 59 rai<sup>9</sup> or less than 10 ha. Figure 2 gives an overview of the size of landholdings in Thailand according to the Agricultural Census of 2001.

Figure 2: Distribution of landholdings / size (ha) (Source: author's own diagram, based on Agricultural Census 2001)



More than 85% of all landholdings are smaller than 39 rai or less than 6.2 ha.<sup>10</sup> The Land Reform Network of Thailand reports that 90% of the population in Thailand own less than 1 rai (0.16 ha) of land and only 10% own more than 100 rai (16 ha).<sup>11</sup> Other reports state that 87% of the privately owned land parcels are smaller than one hectare.<sup>12</sup>

The ever growing demand in agricultural products for food as well as for energy and industrial usage is driven by countries strongly dependent on imports for their food supply as well as by the interest of investors, speculating with high returns from investing in agricultural land. This trend emerged during the World Food Crisis in 2007/2008 when food prices rose to record highs, and manifested during the following years of volatile but high food

prices. Thailand has received public interest from investors, mainly governments from the Gulf countries, as a source of supply of food for their populations.<sup>13</sup>

The issue of foreigners buying farmland in Thailand has become a cause of public concern and rumours of such a trend abound, particularly after announcements that the Thai government had set artificially high market prices for rice through its price-pledging policy. This policy, implemented by the government of Yingluck Shinawatra has recently been extended until February 2014 to sustain the support of farmers for the current political party. The concern is that foreign companies would try to take advantage of the policy by investing in farmland for rice production in Thailand.

Although foreigners in Thailand are not allowed to own or rent land for agricultural or livestock production under the Foreign Business Act of 1999 they can invest in land by using Thai nominees. The violation of this regulation is a serious concern for the Thai government and is being actively investigated and monitored. Professional companies engaged in promoting this kind of business model, particularly for the property sector, are well established in Thailand. The Department of Special Investigation has started to investigate in certain provinces where rumours exist about foreign ownership in agricultural land. However, so far no evidence has been found of foreigners illegally owning farm land.<sup>14</sup>

No official data on large-scale land acquisition over the past two years could be found for this study, although sources suggested that acquiring large areas of land for plantations in Thailand is extremely difficult for companies because of the limited availability of unoccupied land.<sup>15</sup> Barney refers to the pulp and paper industry when concluding that recent developments “indicate that the allocation

of large-scale concessions to plantation companies in Thailand is now nearly impossible”.<sup>16</sup> The Land Matrix, an online database on land deals, does not report any land deals by foreigners in the agricultural sector in Thailand. Three deals by Thai companies or research institutes are reported and combined cover an area of less than 30,000 ha. This includes the allocation of lands to the Nong Khai Oil Research Center for oil palm development, 240 ha of land under the Kasetsart University and Viengsa Agricultural Cooperative for jatropha as well as an investment by Charoen Pokphand over 672 ha for oil palm. No further information is available on how the land has been obtained, what rights are held over the land by the acquiring parties or whether any conflicts with other rightholders have occurred.

The Land Matrix however reports an increasing number of outgoing investments in agriculture by Thai companies. Six investments by Thai companies in Cambodia and seven in Laos are recorded. They range in size from several hundred hectares to up to 10,000 ha in the case of Thailand’s biggest sugar producer which bought land for sugarcane cultivation in Laos. Investments target agricultural land for sugarcane, cassava, rubber or coffee production.<sup>17</sup> Further reports confirm that Thai companies are growing as investors in the agricultural sector in the region. In Laos, for instance, Thailand has become the third largest investor (as of 2011).<sup>18</sup>

Investments in Cambodia recently led to complaints about the violation of human rights by subsidiaries of a major Thai sugar producer which obtained a number of large scale Economic Land Concessions for sugarcane cultivation in Cambodia.<sup>19</sup> The same company received a 10,000 ha land concession in Laos in 2009. A major Thai energy conglomerate invested in 20,000 ha of oil palm plantations in Indonesia and has plans to expand this area

to 200,000 ha. They also plan expansion into Myanmar, Cambodia and Papua New Guinea. The aim of this company is to increase their oil palm plantations to 500,000 ha by 2020. The palm oil produced on those plantations is destined for biodiesel production and the chemical industry.<sup>20</sup>

Table 1 shows some of the largest Thai companies engaged in agriculture per sector. The size of companies varies significantly with Charoen Pokphand Foods being the biggest player overall. Mitr Phol Group is Thailand's biggest producer of sugar. Sri Trang Rubber is the largest fully integrated rubber producer in the world. Information on how much land the respective companies control is not always accessible. The Plantheon Group is reported to manage 100,000 rai (16,000 ha) of land for the cultivation several agricultural products. United Palm Oil is the biggest listed company owning oil palm estates with a total area of 7,244 ha combining seven company estates.

Table 1: Major companies in agricultural production

Sector	Major players	Main export markets
<b>Rice</b>	Soon Hua Seng Group, Capital Rice Group	Nigeria, South Africa,
<b>Animal Feed</b>	Charoen Pokphand Foods, Betagro Group	
<b>Poultry</b>	Charoen Pokphand Foods, Betagro Group, GFPT	
<b>Rubber</b>	Thai Rubber Latex, Sri- Trang Agro Industry, Thai Forest Industry Organisation	China, Malaysia, Japan, USA
<b>Palm Oil</b>	United Palm Oil Industry, Univanich Palm Oil, Vichitbhan Palm Oil,	EU, Malaysia

	Suksomboon Palm Oil, Chumporn Palm Oil Industry	
<b>Cassava</b>	Soon Hua Seng Group	China
<b>Sugar</b>	Mitr Phol, Khon Khaen Sugar Industry, Khonburi Sugar, Plantheon Group, Thai Roong Ruang Sugar Group	Indonesia, China

### Problems with land acquisition

Land rights are determined by a complex set of regulations in Thailand and regulated by fourteen different departments from the Ministry of Interior and the Ministry of Agriculture and Cooperatives. Broadly, land in Thailand can be classified in three categories which are State land, undocumented land and private land. State land covers forest land, government real estate as well as public land. Undocumented land refers to forest land that has been encroached upon and where limited land titles have been given to the respective beneficiaries for private agricultural activities, community self-help projects or cooperative settlement. Private land covers a number of possible forms of tenure, ranging from full ownership to temporary possession and communal land.

Broadly speaking, three types of land rights can be distinguished. These are full private property, conditional private property and rights to occupy and use land.<sup>21</sup> A large number of different land titles are associated with these different types of land rights. The only full land ownership title deed is called "Chanot" (or NS-4J). NS-3 and NS-3K are ownership titles that prove that a certain area of land has been put to use by a person. No restrictions of use apply under those titles.

And they can be converted to a Chanot title. The right for temporary land occupation is documented in the land titles STK-1 or NS 2. Land which this user claims can be handed over only through inheritance. For government land that has been encroached and is privately cultivated, user right claims can be made to the ALRO or the Royal Forestry Department which hand out the SPK-401 or STK-1 respectively. Land with such claims is in general restricted to agricultural use and cannot be sold. A number of further land titles with slight distinction in rights and conditions do exist.<sup>22</sup>

40% of the land area in Thailand is currently classified as private land. This is the result of the efficient and fast issuing of land titles under a World Bank programme (1980 to 1995) which however did not come without its social and economic tradeoffs. Reports claim that the fast proceeding of land titling has been abused by rich elites to gain access to land which in fact has been used by local communities. Often the land has been obtained for speculative purposes or to be used as collateral for bank loans instead of putting it to agricultural production.<sup>23</sup>

Using the corruption perception index and the index of economic freedom (Heritage Foundation) as indicators, governance in land tenure in Thailand is considered amongst the best in the region. Comparing Thailand's land administration system with those of other countries, Thailand ranks best with regards to security of land tenure and the role of private or customary land allocation as compared to State land. Equality in the distribution of land use rights is high compared to its non-socialist regional peers like Indonesia, the Philippines and Cambodia.<sup>24</sup> The rights of local and traditional economies to participate in natural resource management and the duty of the State to seek participation is part of the 1997 Constitution. Implementation into practice

however has been lacking and a new Constitution is in place since the military coup in 2007. The 2007 Constitution still points out the importance of the inclusion of stakeholders in decision-making processes.<sup>25</sup>

A large amount of agricultural land in Thailand remains in the possession of small-scale farmers.<sup>26</sup> However, pilot studies in rice producing provinces in Thailand have shown that security of landownership, expressed by a full land ownership title (Chanot) correlate with the size of the land, whereby small farmers have less access to secure land ownership. Land concentration also increased between 1963 and 1993, while the share of land under rental contracts increased threefold.<sup>27</sup> In the Agricultural Land Reform Act of 1975, the Agricultural Land Reform Office (ALRO) was established. It is currently responsible for almost six million ha of land in Thailand. Although large shares of cultivated land are owned by smallholders, overall land distribution is extremely unequal as 10% of the population own 90% of the arable land available, according to a newspaper report.<sup>28</sup> While a small number of people own land in abundance, 1.3 million are reported to not own any land at all and for another 1.6 million the land they own is not enough to make a living.<sup>29</sup>

The Agricultural Land Reform in Thailand is not based on the confiscation of land from private owners to be redistributed to poor or landless families. Rather, it strives towards the recognition of user rights of farmers who have encroached land classified as forest land in order to provide them with secure tenure rights. Efforts to re-allocate land from government authorities to landless farmers have raised concerns in some cases about resulting land conflicts because often the concerned land is already claimed by local communities. Local communities fear that



wealthy individuals could take advantage of the redistribution process to get hold of the land as has happened in previous land distribution projects.<sup>30</sup>

Poor and indigenous communities are frequently located on public land rather than on privately owned land and that is where problems in land administration are most intense. To resolve land conflicts between the State and local communities over public land, the Public Land Encroachment Committee (PLEC) was established in 1992. Representation at the provincial level has been put in place since 2002 to monitor the encroachment of public land and to ensure that efforts of the different responsible government authorities are integrated. The capacities of the PLEC to deal with the numerous claims which have accumulated over time are however limited and complainants often approach the Thai Human Rights Commission instead, although the Commission primarily channels those complaints back to the PLEC.<sup>31</sup>

Although the land registry system of Thailand is relatively advanced, confusion arises due to a number of different government agencies' involvement, the use of different types of maps and scales, and conflicting reference coordinates. The complexity of the legal and judicial system and loopholes given to powerful individuals to abuse legislation has been at the disadvantage of the poor as reported in several cases.<sup>32</sup>

### **Human rights concerns related to Large Scale Land Acquisition**

It appears from existing sources that the main human rights concerns in Thailand are not related to large-scale land acquisitions. Rather, the focus of human rights organisations in Thailand has been on the governments' interventions in the violent conflict in its most Southern provinces, political violence during the red shirt protests in 2010, freedom of

expression, as well as the treatment of refugees from Myanmar. Concerns have also been expressed about the conditions of migrant workers, mainly in the garment, fishing and shrimp sectors. Child labour has also been reported in sugar-cane production.<sup>33</sup> Of main concern are the working conditions of the more than two million migrant workers from Cambodia, Laos and Myanmar in Thailand. Instances of forced and child labour have been reported in food processing factories.<sup>34</sup> No reports particularly referring to labour conditions in agricultural production could be found.<sup>35</sup>

However, ongoing land conflicts in Thailand do exist between different parties, often involving local communities, smallholder farmers, indigenous peoples, government agencies as well as the private sector. These conflicts can be related to land acquisition and the problems of land tenure governance outlined above. Most commonly conflicts occur between local people and the State, namely the Treasury Department and the Defense Ministry.<sup>36</sup> One example are the efforts of the 'Land Reform Network for the Poor of the Southern Region' to halt the extension of land concessions over some 30,000 ha to private companies and instead to distribute the land to landless community members. The Network also claims that concession beneficiaries are encroaching into protected areas and has established a task force to monitor their activities.<sup>37</sup>

Recently, the Royal Forestry Department (RFD) announced plans to reallocate 146,480 rai (23,437 ha) in five Southern Provinces of expired concessions given to private companies under the Forestry Reserve Act (1964) to landless farmers for the establishment of community forests. Further concessions which are due to expire will not be extended according to the RFD. This move comes late, as some concessions have expired since decades and unclarity over the land use rights has already led to conflicts between local

communities and plantation companies. Ten conflicts are reported to be ongoing in Surathani and Krabi Province at the time of writing.<sup>38</sup>

One case of human rights abuses resulting directly from land acquisition has been recorded and has received significant national and international attention from human rights organisations. In that particular case, land reform beneficiaries were involved in a conflict with a local oil palm company over the land given to them by the ALRO. Although the ALRO successfully sued the company over the encroachment of the land, and the Cabinet decided to allow further use of the land by the community, the dispute is ongoing and currently pending at the high court. Legal cases have also been filed by the oil palm company against Members of the Southern Peasants' Federation of Thailand (SPFT), a civil society organisation supporting the Khlong Sai Pattana community in their struggle. Since then, violence and threats against the community have continued and three killings are said to have resulted in relation to the conflict.<sup>39</sup>

### **Human rights framework as it applies to agribusinesses**

Thailand has ratified 15 ILO conventions, including the core conventions C.100 on Equal Remuneration, C.138 on Minimum Age and C.182 on Worst Forms of Child Labor.<sup>40</sup> Expropriation of land for agricultural development requires timely and fair compensation to land owners as mentioned in Article 42 of the Constitution. It is now necessary for the State to formulate and implement national legislation to ensure alignment with Thailand's international human rights obligations as committed to in its Universal Periodic Review (UPR) of 2011.

The UPR also underlined Thailand's commitment to enhancing the protection of human rights of migrant workers and

increasing efforts to fight human trafficking.<sup>41</sup>

In addition, Thailand supported an initiative within the UN to develop a declaration on the rights of peasants and other people working in rural areas. In September 2012 Thailand voted for the adoption of the UD resolution A/HRC/21/L23 on the Promotion of the human rights of peasants and other people working in rural areas.<sup>42</sup> However, Thailand is not a signatory to the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.<sup>43</sup> Although Thailand is a member of ILO and committed to ensure Fundamental Principles and Rights at Work, minimum wages and working time regulations do not apply to the agricultural sector.<sup>44</sup>

During the United Nations General Assembly in 2007, Thailand voted in favour of the Declaration of the Rights of Indigenous Peoples (UNDRIP) and is hence obliged to respect this instrument. UNDRIP, however, has not been integrated in national legislation and the identity of the indigenous peoples of Thailand is not recognised in the Constitution of 2007.

A number of environmental conservation laws also threaten the rights of indigenous peoples in Thailand and have led to numerous conflicts between the State and local communities, who often depend on protected areas for their livelihoods. Human rights violations include the eviction of indigenous people from a National Park in 2011. The Community Forest Act of 2007 is further criticised by civil society organisations and indigenous representatives for its exclusion of forest communities' rights. To date, the Thai government has failed in addressing this issue and in making the necessary adjustments to the relevant legal framework. A regulation on community land titling was passed in 2010 to address

longstanding conflicts with communities on public land. The regulation however has serious shortcomings as it excludes protected areas and its implementation is lacking.<sup>45</sup> The Human Rights Commission of Thailand supports indigenous peoples in claiming their rights through the judicial system.<sup>46</sup>

## Conclusions

Transparency of land ownership and land transactions in farmland in Thailand is limited. The direct investment of foreigners in Thai agribusiness or land is prohibited by law and implementation is monitored by state agencies. No reports on large scale land acquisition by agribusinesses in recent years could be obtained for this report and Thailand's agricultural sector appears to remain largely based on small-scale farming.

Nevertheless, access to land is limited for many and at the same time powerful elites own large amounts of land, often for speculation and without bringing them to full agricultural utilisation. Rich and powerful elites taking advantage of land distribution programmes and the complicated legal framework on land property rights in Thailand has been a source of concern in the past. In response to these problems, land reform to address this problem and improve the access to land for landless households has been requested by a network of civil society organisations.<sup>47</sup> Land related conflicts in Thailand are common but seem to occur mainly between local communities and the State.

Thai agribusiness has a strong orientation on export and biofuel crops which does impact local livelihoods and, through increased food prices resulting from export and biofuel-oriented agricultural development, potentially threaten the food security of the most vulnerable households who still lack adequate access to food.<sup>48</sup>

Environmental impacts and encroachment by agribusinesses as well as by small farmers also remain concerns in Thailand. Despite obvious efforts, it has been difficult for the Thai government to hold the respective companies or individuals to account for their actions. Ambiguity over property rights and a lack of streamlining of the work of relevant government agencies exacerbates these problems.

Increasingly, Thai agribusiness companies are becoming key investors in agriculture in other countries of Southeast Asia. In some cases, these Thai companies have reportedly violated human rights through large-scale land acquisition. Such cases have been brought forward to the Thai Human Rights Commission and Thai companies are engaging in a process to solve conflicts. This shows that the Thai government has an increasing responsibility to ensure that Thai companies fulfill their human rights obligations in foreign countries.

Finally, labour laws need to be made applicable to the farming sector. It is important that the conditions of migrant labourers in agribusiness operations be investigated by the State, and as well as the conditions of the numerous smallholders across the country, as well as to hold companies accountable for the abuse of human rights where these occur.

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## Endnotes

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<sup>3</sup> CIA 2013.

<sup>4</sup> Vartiali et al 2013.

<sup>5</sup> Krasachat 2002.

<sup>6</sup> Cropper et al 1996.

<sup>7</sup> OAE 2012.

<sup>8</sup> Thiwatsirikul et al 2012. Sarnsamak 2011; Duangsathaporn 2010.

<sup>9</sup> One hectare equals 6.25 rai.

<sup>10</sup> NSO 2003.

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<sup>12</sup> Nabangchang and Srisawalak 2008.

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<sup>14</sup> Pratuangkrai and Pongvutitham 2012a.

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<sup>17</sup> C.f. Land Matrix Beta.

<sup>18</sup> Pratuangkrai and Pongvutitham 2012, Bangkok Post 2010, Vientiane Times 2011.

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<sup>26</sup> The share of smallholders in area planted with rubber is estimated at 95% and for oil palm approximately 75%.

<sup>27</sup> Phelinas 2002.

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<sup>29</sup> Samranjit 2007.  
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<sup>31</sup> Nabangchang and Srisawalak 2008.  
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<sup>33</sup> Phasuk 2012; Amnesty International 2013;  
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<sup>34</sup> Vartiala et al 2013: 3 ff.  
<sup>35</sup> It should be noted that the sources consulted  
for this briefing were in English only.  
<sup>36</sup> Bangkok Post 2008.  
<sup>37</sup> Nabangchang and Srisawalak 2008.  
<sup>38</sup> Sarnsamak & Saengpassa 2012.  
<sup>39</sup> FIDH 2012.  
<sup>40</sup> ILO (nd).  
<sup>41</sup> UPR Info 2012; UNPAF 2011.  
<sup>42</sup> La Via Campesina 2012 ; Mann 2011.  
<sup>43</sup> Vartiala et.al. 2013: 4.  
<sup>44</sup> Ibid.  
<sup>45</sup> Rattanakrajangsri 2011.  
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# National Updates on Agribusiness Large Scale Land Acquisitions in Southeast Asia

## Brief #4 of 8: Republic of the Philippines

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Source: [www.destination360.com](http://www.destination360.com)

### Introduction

Strategically located near the equator, the Philippines is one of the countries of the Southeast Asia region blessed with an abundance of natural resources. Its arable land and climate are conducive to growing agricultural crops that can provide for the needs of its population and support the country's thriving economy. While agriculture has been the Philippines' traditional lifeline since the Spanish Regime, the sector suffered a breakdown and lagged behind its Asian neighbours due to years of political neglect. More than fifty years ago, agriculture represented

40.4% of the Gross Domestic Product (GDP) of the Philippines, but by 2004 this had declined to 18.8%<sup>1</sup> and by 2011, agriculture only contributed a measly 11% to the economy.<sup>2</sup>

This downward trend has forced the government to rethink its strategy and open up more opportunities in agriculture. During the term of President Gloria Macapagal Arroyo, vast areas of agricultural and forestlands were allocated to agribusiness to cater to the growing demand for food crops and biodiesel

production, largely fuelled by the global need to address climate change. This has continued up to the present where the administration of President Benigno Aquino III has also put emphasis on agribusiness as one of the drivers for economic development.

Several wealthy countries have already made a deal with the government of the Philippines to produce various agricultural crops for export and many more are in the pipeline. Certain sources suggest that some of these deals may have been brokered on the ground without passing through the government,<sup>3</sup> while substantial literature suggests that agribusiness can foil the gains made by the agrarian reform in the country and can cause further disillusionment in rural areas. This premise has been supported by evidence compiled by non-governmental organisations (NGOs) against agricultural corporations that operate with the objectives of profit, but with blatant disregard for the welfare of local communities.<sup>4</sup>

### **National trends in Large Scale Land Acquisitions**

#### *Government policies and targets for agribusiness expansion*

With a total land area of 30 million ha, the Philippines' economy is banking on its natural resources to lift its economic status and achieve its development goals. Of the land area above, 47% or 13 million ha are classified as agricultural lands. These lands can be further divided into land devoted to food grains (4.01 million ha), food crops (8.33 million ha) and non-food crops (2.2 million ha). These figures give some idea of the scale of land available for agriculture in the country.<sup>5</sup>

Agribusiness is another sector, aside from mining, that is in the limelight due to its potential earnings for the country. The

Philippines' leading products are agricultural in nature, such as coconut, banana and sugar.<sup>6</sup> In January 2013, the National Statistics Office noted that over 1.15 million Filipinos were employed in the agricultural sector in the first month of this year alone.<sup>7</sup> This is second after services, which employed around 2.05 million individuals in the same period.<sup>8</sup> About 56.4%, of poor households are engaged in agriculture<sup>9</sup> and this is the primary reason why the government is focusing its attention on agribusiness as its development priority for poverty alleviation.

The majority of laws and policies in the Philippines to promote agribusiness were already in place even before the food crisis erupted in 2009,<sup>10</sup> facilitating the entry of Foreign Direct Investment (FDI) and turning the balance in its favour.

For instance, the Foreign Investments Act of 1991 (amended by RA 8179 in 1996) liberalised the entry of foreign investments into the country by relaxing restrictions on the participation of foreigners as equity shareholders in local firms.<sup>11</sup> As a result, the country has opened up its doors to joint ventures between Philippine-owned corporations and foreign entities.

In terms of landholdings, Republic Act (RA) 7900, otherwise known as "An Act to Promote the Production, Processing, Marketing and Distribution of High-Valued Crops, Providing Funds Therefore, and for other Purposes", allows farmer-cooperatives to lease out up to 1,000 ha of their lands for a period of 25 years. This gives much leeway to agribusiness ventures to deal with cooperatives rather than individual farmers.<sup>12</sup>

This Act is further supported by the Department of Agrarian Reform (DAR) Administrative Order (AO) 9 series of 2006, which guides the investments on agricultural lands covered by the



Comprehensive Agrarian Reform Programme (CARP). The DAR AO identifies a number of agribusiness venture agreements from which the agrarian reform beneficiaries can choose, such as the: (1) joint venture agreements, (2) Production/Contract Growing/Growership, (3) Marketing Contracts, (4) Lease Agreement, (5) Management Contracts, (6) Service Contract and (7) Build-Operate-Transfer.

As a signatory to the Kyoto Protocol, the Philippines also passed the Biofuels Act of 2006 (RA 9367) which aims to phase out harmful gasoline additives and/or oxygenates and mandates the use of biofuels. This has led to the development of biofuel plantations in the country, particularly in Mindanao, ironically converting mixed used lands into monoculture plantations of sugarcane, cassava, sweet sorghum and jatropha.<sup>13</sup> Around 1.37 million ha are currently being targeted for the production of agro-fuels to satisfy the objectives of the Act.<sup>14</sup>

Moreover, demand for other crops such as oil palm is also expected to increase in coming years<sup>15</sup> as well as that for rubber, coffee and food crops. Among the targeted areas for expansion are those lands awarded by the government to Agrarian Reform Beneficiaries (ARBs) and Certificates of Ancestral Domain Titles (CADTs), including forest areas such as those under Community Based Forest Management (CBFM), the Integrated Social Forestry Program (ISFP) and the Socialised Forest Management Agreement (SIFMA) and other privately titled lands, as well as public lands under the jurisdiction of Local Government Units (LGUs).<sup>16</sup>

The combined demand for food, feed and fuel was used by the government to target “idle lands” for agribusiness development. In the 2004-2010 Philippine Medium Term Development Plan, the government of

former President Arroyo targeted 2 million ha for agribusiness projects that would generate 2 million jobs. Although the succeeding administration of President Aquino did not indicate any clear target in its 2010-2016 Philippine Development Plan, it has likewise adopted the former government’s direction on agribusiness and is expected to gain grounds in terms of foreign investments.

Areas for expansion will likely be dictated by the demand for specific products. According to the Department of Agriculture, which implements the Biofuels Feedstock Programme, to meet the required blend for biodiesel by 2014, jatropha must be planted on an additional 132,000 ha while 372,917 ha are needed for coconut. For bioethanol, there is also a need for another 118,022 ha of sugarcane, 372,917 ha of cassava and 107,400 ha of sweet sorghum for the same year.<sup>17</sup> These account only for local demand and not the demand coming by other countries, such as China, which is said to be looking for some one million hectares for jatropha plantations for its agro-fuel requirements.<sup>18</sup>

To consolidate its efforts for expansion, five government corporations are tasked to increase their involvement in the agribusiness sector. The Philippine Agricultural Development and Commercial Corporation (PADCC) is responsible for agribusiness investment promotion, facilitation, and project development. It is the lead agency in agribusiness investments and provides assistance to both local and foreign clients by way of investment matching through land identification and consolidation of idle/underutilised land.

The Philforest Corporation, on the other hand, a government-controlled corporation and wholly-owned subsidiary of the Department of Environment and Natural Resources (DENR), is responsible for forging investments on public lands,

particularly those categorised as “untenured” and idle lands. Untenured lands are lands that are not covered by any tenure instruments but are nevertheless occupied by people.

The Philippine National Oil Company-Alternative Fuel Corporation (PNOC-AFC) also initiates biofuels feedstock production while the Land Bank of the Philippines (LBP) and the Development Bank of the Philippines (DBP) serve as the financial arms for these projects.

#### *Gross areas allocated to agribusiness*

According to government statistics, around 1.83 million ha were developed into agribusiness and agroforestry areas during the period 2005-2010, generating employment for 2.67 million Filipinos through the National Convergence Initiative.

The last two years alone (2009-2010) account for 22% of the total areas developed by the government for these ventures.<sup>19</sup> It is not clear however, how many agribusiness companies have benefited from these lands and under what type of crops, due to the absence of accurate government data. However, it is widely believed that the majority of these transactions have the backing of foreign governments.

In Mindanao, the Department of Agriculture registered at least 310,000 ha of lands developed for agro-fuel cultivation under eight companies in 2009.<sup>20</sup> This constitutes around 82% of land developed for agribusiness in that year for the entire country. Still in Mindanao, around 54,748 ha of lands were cleared for oil palm plantations in 2011 and it is projected that an additional 1 million ha will be needed for oil palm from 2011-2022 at the country level of which half will be located in that same island.<sup>21</sup>

For food crops, the Philippine Government has entered into joint venture, lease or corporate farming agreements with Middle East countries including Qatar, Saudi Arabia, Brunei, Oman and Kuwait to produce rice and corn covering a total land area of 340,000 ha between 2008 and 2009.<sup>22</sup> Most of these lands are located in the conflict areas of Mindanao since the farmers are also Muslims and their agricultural practices conform to the standards of these countries.

Aside from Mindanao, the northern part of the Philippines has been also targeted for large-scale plantation due to its geographic location and vast area of agricultural lands. The biggest agro-fuel plantation being developed by a Japanese-Filipino consortium is located in Isabela, Cagayan spanning 11,000 ha to be planted with sugarcane. The consortium started their operation in 2009 with an initial area of 3,000 ha.<sup>23</sup>

#### *Basic information about investment trends and/or key financiers*

Agribusiness is not new in the Philippines. The country has exported high value crops such as banana, pineapple and coconut products to the US, Japan and the Middle East since the American period. As early as the 1920s, Del Monte Corporation established a pineapple plantation in Bukidnon and in the 1960s, Castle and Cooke entered South Cotabato to set up what is known today as the Dole plantation.

These corporations remained in the Philippines and were later joined by other agricultural companies such as Chiquita and Sumitomo to plant pineapple and bananas in Mindanao. Together, these companies accounted for around USD \$291 million of annual exports from the country in 2000.<sup>24</sup> In addition, Nestle has been operating in the Philippines for decades, investing in coffee plantations in

the hilly regions of the country.

When the food crisis began in the last decade, the Philippines joined the fray in cornering big agribusiness investments from China, South Korea and oil-wealthy Middle Eastern countries in a bid to secure their food and fuel supplies.<sup>25</sup> The Philippine government has aggressively promoted the country as the top agricultural hub in Asia during presidential visits and the administration often boasts about its achievements in this regard, even where agreements are still being negotiated.<sup>26</sup>

Such proclamations are not passing unnoticed. According to Chris de Lavigne, the Global Vice President of US-based company Frost & Sullivan, biofuels in the Philippines are also attracting a large number of foreign and local investors due to its “attractive investment sites for bio-fuel projects”.<sup>27</sup>

Laws that support the entry of foreign investment in the country have long been passed by the government which makes it easy to establish a consortium with Filipino-based companies. Among the areas open for agribusiness are those lands under the Comprehensive Agrarian Reform Programme (CARP) and untenured forest lands under the management of the DENR. The National Development Corporation, the corporate arm of the DENR, facilitates the investment of foreign enterprises in plantations, whereby land is acquired and leased to the investors for a period of 25 years. To circumvent policies on leasing prohibitions, foreign owned firms usually enter into growers’ agreements with the landowners.<sup>28</sup>

Two of the local giants engaged in agribusiness are the San Miguel Corporation (SMC) and Agri-Nuture. Another firm, the First Pacific Co. Ltd, owned by businessman Manny Pangilinan,

is also eyeing agribusiness as its next target and the company is looking for 240,000 ha of land to be planted with high value crops in partnership with Jakarta-based subsidiary PT Indofood.<sup>29</sup> These developments signal a shift in priorities of local corporations as more of these are diversifying into agribusiness ventures.

As the need for land intensifies, foreign governments are solidifying their hold in the Philippines in the guise of technical assistance. The Korean International Cooperation Agency (KOICA), for instance, has established a USD\$ 4 million job training centre to teach farmers how to plant and harvest larger volumes of crops, but in return the Philippine government has to identify and make available some 100,000 ha of prime agricultural land where investors from South Korea will be invited to operate. This is included in the Memorandum of Understanding (MoU) for the Multiple Industry Cluster (MIC) project that includes agribusiness, signed by the Philippine and Korean Governments.<sup>30</sup>

China has adopted a similar strategy, leasing lands in the Philippines through free trade and investments agreements, promising projects worth millions of dollars. However, the most recent agreement with China in 2007 did not materialise as a result of public unrest since the negotiations were shrouded in secrecy.<sup>31</sup> Japan also has several projects in Mindanao that promotes agribusiness as a strategy to achieve economic growth and poverty alleviation.

In 2009, the World Bank also increased its available loans, grants, equity investments and guarantees by 54% from the previous year, all of which are directed at facilitating land deals in developing countries, including the Philippines.<sup>32</sup>

When the government began to push for the extension of the Agrarian Reform Law

in 2009, foreign governments expressed apprehension. Saudi executives representing big agricultural interests and the European Union (EU) reportedly pressured the Philippine government to remove its ban on foreign ownership of land through the provisions of the World Trade Organization (WTO).<sup>33</sup>

### **Problems with Land Acquisition**

#### *Lack of clear land use policy and land data*

The Philippine Constitution of 1987 guarantees the right of every Filipino to own land. Not all Filipinos, however, have the capacity to own land given their social and income statuses. This is especially true for farmers living in the rural areas. The existing skewed land ownership in favour of the local elites has resulted in several decades of unrest that have been partly solved by implementing the Comprehensive Agrarian Reform Law (RA 6657), where lands have been distributed to poor peasants. Moreover, the government has recognised the rights of indigenous peoples over their ancestral domain through the passage of the Indigenous Peoples Rights Act (IPRA) in 1997.

However, as the current trend in agribusiness expansion continues, these minor successes in terms of land rights recognition are increasingly being threatened. While the government is aggressively promoting land investments in CARP and indigenous peoples' areas, farmers are kept in the dark about land deals. Worse, the government refuses to provide timely, adequate, legitimate, accessible and useful information to these communities and other stakeholders. Even the PADCC admits that there is a clear lack of systematic monitoring of land leases and concessions in every region.<sup>34</sup>

The absence of a clear land use policy is

also causing alarm as lands are being converted to other uses as this could threaten the integrity of the ecosystem and further undermine the gains of the agrarian reform.<sup>35</sup> Government maps and land records are often not accurate and subject to differing interpretation. These loopholes are being used by the local elites and joint ventures to enter areas and secure land deals, often at the detriment of smallholder farmers' livelihoods and rights.

Furthermore, among the areas being promoted for agribusiness are untenured lands and forest lands, but untenured does not necessarily mean unoccupied lands. Most often than not, there are families who subsist on these lands for their daily survival. These are the same people who have very meagre resources to develop the land, much less to own it.

#### *Land grabbing and land conflicts*

Land grabbing is also not a new phenomenon in the Philippines. It has been the starting point of many struggles in the country that have led to armed insurgency in the past.<sup>36</sup> While in the past, farmers were up against the landed elite, today, they are confronting the rising demand for land from agricultural companies. This has taken the form of lease agreements between corporate entities and small and medium-sized land owners. In many cases, the asymmetrical distribution of power has resulted in the farmers losing out in terms of interest to these companies, with negative impacts on their livelihoods. There is also a growing fear that the lease of land to corporations will allow large landowners to evade the implementation of the agrarian reform programme, which must be completed by December 31, 2020.<sup>37</sup>

In 2010, the Asian Human Rights Commission, Task Force Detainees of the Philippines, Task Force Mapalad, Partnership for Agrarian Reform and Rural

Development Services (PARRDS), and Food First Information and Action Network (FIAN International) documented around 2,377 cases of human rights violations in agrarian disputes.<sup>38</sup> Unfortunately, there are no clear statistics on the number of cases attributed to land grabbing and there is an absence of consolidated data even at the level of the Commission on Human Rights (CHR).

Cases of farmers being forced out of their lands or being coerced to agree to leasing their lands for conversion to large-scale plantations are being reported by the media and local NGOs. The most prominent case is that documented by the International Fact Finding Mission (IFFM) on the San Mariano bio-fuel project in Isabela, Cagayan. Reportedly the largest biofuels plantation in the country with a planned area of 11,000 ha, the Japanese-Filipino consortium of Green Future Innovations Inc., is already exacerbating land grabbing conflicts and socio-economic inequities as well as undermining food self-sufficiency in the area.<sup>39</sup> Aside from numerous human rights violations, the company is engaged in non-transparent lease negotiations that are resulting in lands being grabbed from the very farmers who depend on the land for survival.

Another case that has been gaining importance is that of A. Brown Company, Inc., which is involved in massive appropriation and conversion of farmlands to oil palm plantations in Mindanao. The Apu Palamguwan Cultural Education Center (APC), Kalumbay, Sentro Kitanglad, Rural Missionaries of the Philippines (RMP) and the Pesticide Network Asia Pacific (PAN AP) conducted an International Fact Finding Mission and documented severe cases of human rights violations such as strafing, illegal arrests and holding farmers at gunpoint while company personnel destroyed their crops. Farmers are also subjected to pesticide poisoning and

indigenous peoples in the area to forced displacement. The conflict also led to the killing of a local activist opposed to the oil palm plantation in 2012.<sup>40</sup>

#### *Rights of smallholders*

The fact that the majority of lands in the Philippines are already occupied by farmers and indigenous peoples, regardless of whether they have legal tenure or not, means that the government is expropriating lands for agribusiness at the expense of these communities, including of smallholders. The legality of owning the land is being used by the government and agribusiness companies as a means to justify their purchase of these lands, which could further aggravate landlessness and cause several forms of insecurity (including food and land) for smallholders and other local communities.

Even where land is already under the Agrarian Reform Programme, the government, with the collusion of local elites and local government officials, can still find ways to circumvent policies in favour of agribusiness development. For instance, in Isabela, the peasants, whose lands are being targeted by Green Future Innovations Inc., were required by the local government to pay an annual amortisation fee of Php 35,000 (or USD \$875) per ha<sup>41</sup> to the Land Bank, along with accumulated interest, in order to keep their land, an amount which is completely disproportionate to their small income. Failure to pay is to be followed by notices of foreclosure that can result in the land being re-allocated under a voluntary offer to sell (VOS), whereby it can be easily purchased by the company or individuals.<sup>42</sup> There were also cases where lands are being spuriously claimed by individuals who are not from the area, thereby displacing the voices of those smallholders who are the original occupants of the farm.



In terms of policy, it is a requirement that consultations be done to obtain the approval of the community for any farm development project. In areas covered by Certificate of Ancestral Domain Titles (CADTs) the company should secure first the free prior informed consent (FPIC) of the indigenous peoples in the area.

However, this is hardly implemented in practice. Investors usually go the easy way by conniving with local officials (who are usually the local elites in the area) or bribing tribal leaders with “comfortable deals”.<sup>43</sup> With the support of the military, such companies can harass smallholders into giving up their lands for sale or for long-term lease at a derisively low price or rent over a period of 25 years.<sup>44</sup> Those who agree to the terms of the company are practically reduced to the status of farm workers, with very limited benefits and are often underpaid.

In some cases, even if the smallholders have already entered into an agreement with the company, the latter can still “turn their backs” on the farmers. This is what happened to the smallholders of Lumbia Farmers Multi-Purpose Cooperative (LUFARMCO) which undertook a joint venture with PNOC-AFC to plant jatropha on their lands in Cagayan de Oro city. In 2009, the company decided to stop their operations and the farmers are now left with jatropha already bearing fruit but without buyers.<sup>45</sup> The unequal rights between the agribusiness ventures and the smallholders are causing havoc to the livelihoods of these farmers, eventually affecting their ability to earn income and provide food for their own families.

De la Cruz 2011 aptly summarise the situation of smallholders in the Philippines:

“The common fears being expressed are two-fold: first, it is feared that farmers who have been occupying the

land under various ownership or tenure arrangements – whether formal or informal – and who have been tilling it for centuries, may become either disposed completely or in the case of those who are title holders, become relegated to the status of farm workers and tenants again.”

#### *Environmental impacts of expansion*

Environmental integrity is being threatened by agribusiness in the Philippines since it requires vast areas of land to be planted with a single crop. The sector promotes the clearing of forestlands and the conversion of these areas into mono-crop plantations, practically reversing years of reforestation efforts. While the government is targeting “idle lands” for agribusiness, this does mean that these lands are without tree cover or do not support biodiversity.

In Mindanao, several hundred thousands of hectares have been converted into oil palm plantations. Aside from leading to the conversion of agricultural or forestland areas formerly allocated for food production, this agro-fuel crop is very much dependent on chemical inputs, which have negative environmental impacts, such as the contamination of groundwater supplies and the loss of biodiversity due to forest clearings.<sup>46</sup> Jatropha, on the other hand, requires five times as much water per unit of energy as sugarcane and corn and about ten times as much as sugar beet. Hence, the growth and yield of jatropha planted in marginal soils are expected to be low aside due to the fact that it will compete directly with the water demands of the local population.<sup>47</sup>

The absence of a comprehensive land use law in the country is also being used by large agribusiness companies to encroach into forest and protected areas, which is depicted by the case of Mt. Kitanglad in Bukidnon where the forest in the lower slopes has already given way to vegetable

production. In the Isabela case, areas of expansion for sugarcane evidently overlap with the land already assigned to Socialised Industrial Forestry Management Agreement (SIFMA).<sup>48</sup>

The environmental impacts of large scale mono-crop plantations being operated by multinational corporations recently hugged the limelight when tropical storms Washi and Bopha hit the areas of Bukidnon, Compostela and Davao provinces, where millions of crops and properties were destroyed and hundreds of lives lost. Environmentalist and leftist groups are blaming the destruction of ecosystems on mono-crop plantations, which are believed to have weakened the environment's ability to repulse the threats of floods and strong winds. This was used by the New People's Army (NPA) as the main reason to attack and destroy the facilities owned by the Del Monte Corporation (NDF Press Statement 2013).

Although the Philippines does not lack laws on the environment, many of these are ineffectively enforced on the ground due to corruption and malpractice. Several ground-breaking laws on clean air and water as well as protected area management and Environmental Impact Assessment (EIA) have already been enacted by the Congress and signed by the President, but lack of financial and human resources as well as lack of political will are hampering their implementation.

#### *Land rights*

A large portion of alienable and disposable lands in the Philippines is already occupied, while some is owned and some is in the process of distribution under CARP. Even those lands characterised as idle lands targeted for agribusiness are not without occupants. Under such conditions, there is an increased possibility of human rights abuses, however nominal, during land negotiations. Cases of land

dispossession have already been recorded by NGOs, and land grabbing has become an urgent issue in the country.<sup>49</sup> Instead of being land owners, local communities are reverting back to being tenants or worse, becoming daily wage farm workers with severely limited negotiating powers.

Furthermore, land lease costs are usually not commensurate to the yield that could be earned by farmers if they were the ones tilling the land. In Mindanao, for instance, Ecofuel, a biofuel company, is leasing one ha of land for just PhP 6,000–PhP 8,000 per year (USD \$150 – 200) when in fact the same size of land could earn farmers at least PhP 42,000 per year (USD \$1,050) if they were to plant rice or corn for a minimum of PhP 5,000 – 9,300 (USD \$125 – 233) per year, or with bananas, with which they could earn a minimum income of PhP 34,000 (USD \$850) per year.<sup>50</sup>

In terms of land development, smallholders have very limited voice in negotiations and decision-making, especially if the national or local governments have already identified their areas for agribusiness development. While local governments are part of the land negotiation process, they usually side with the investors due to the local taxes that they can get out of the land deal, at the expense of poor farmers.

Not all land deals in the Philippines, however, are inherently inimical to farmers' rights. The examples of agribusiness firms Unifrutti and La Frueta in several municipalities of Sultan Kudarat, Maguindanao and Lanao del Sur have brought community development and peace to these former hotbeds of Muslim insurgents from the Moro Islamic Liberation Front (MILF).<sup>51</sup> In 2005, Unifrutti decided to invest in Wao, Lanao del Sur in rubber and pineapple plantations, despite its reputation as a MILF area. The gamble appears to have paid off and has resulted in the

employment of 1,500 farmers by the company, the majority of whom are former rebels, making dividends of peace in return. The farmers are now busy working in the plantation earning income for their families.<sup>52</sup>

#### *Right to food*

It is ironic that while the government is inviting agribusiness companies to invest in the Philippines, the country has continued to rely on imported rice in the past few years. During the food crisis of 2008, rice imports of the country ballooned to 2.1 million metric tonnes.<sup>53</sup> The majority of farmers are also characterised as poor and their only source of income is from farm produce. If the main reason for these investments is to secure food supply, then the question remains, *whose* food security is being prioritised?<sup>54</sup>

Unless the government institutes reform or grants safety nets to small farmers, the sources of livelihood and food supply of the communities will be lost to agribusiness. This may lead to condition similar to that seen in the past where insurgents populate and rule rural areas due to power inequalities experienced by farmers in the face of powerful landlords.

#### *Right to remedy*

There are several statutes in the Philippines that guarantee the right to remedy of farmers. This is enshrined in the constitution, the IPRA Law and CARP Law. Freedom of expression, which is very much alive in the country, can also act as an effective form of redress to balance the power playing field in land deals. For instance, the anomalous agreement with China in 2007 involving 1.2 million ha of land fell apart when civil society protested against its lack of transparency and its detrimental effects on the country in general and to the farmers in particular.<sup>55</sup>

NGOs involved in land advocacy are also numerous in the country, sometimes offering legal assistance to farmers and smallholders. The Commission on Human Rights (CHR) is likewise active in promoting a rights-based approach to agricultural expansion, and farmers can file a case with the CHR against unscrupulous companies.<sup>56</sup>

#### *Judiciary*

While the judiciary itself does not lack laws upon which judges can base their decisions in relation to land disputes, the problem lies with capacity of farmers to make use of formal judicial proceedings to achieve redress. In most cases, farmers have very limited resources to engage in the long and arduous legal process required, and find themselves pitted against opponents with far more resources at their disposal.

Coupled with intimidation from security forces hired by the company or military assigned to secure the company's interests, the farmers, in most instances, are forced to give up the fight. Judges are also subject to corruption whereby decisions tend to be in favour of the agribusiness companies, rather than the affected communities.

#### *Consultation*

Social acceptance is usually embedded in the negotiation process when large-scale agricultural projects are introduced to communities. This is being done through community consultation or by securing the FPIC of indigenous peoples if the area to be developed is an ancestral domain. While companies usually heed this process, they tend to do it haphazardly without divulging important facts (such as potential negative impacts) to the community. Companies also sometimes dangle comfortable deals in the face of tribal leaders or government officials to make the negotiation faster and easier.<sup>57</sup>

*Internal displacement/involuntary disappearance*

Land disputes involving large agricultural companies often result in the internal displacement or land dispossession of farmers, leaving them with no recourse but to work as farm labourers. With wages based on *pakyaw* or payment of a group of labourers based on a completed work, the daily wage is far below the minimum standards, and fall as low as PhP 50 (USD \$1.25) per day.<sup>58</sup>

There are also reported cases of involuntary disappearance of farmers or activists opposed to big agribusiness companies. According to the monitoring of Kalikasan-PNE, 37 environmental activists were killed between November 2001 and June 2010 and another 11 between November 2010 and October 2011, most of whom were involved in campaigns against large-scale mining projects and agribusiness. Among the suspected perpetrators are the police, military and private security of corporations.<sup>59</sup> Some of the victims include indigenous leaders who resist development projects that can potentially destroy their environment. Even women leaders have not been spared in these killings.<sup>60</sup>

**Child and forced labour**

While the Philippines has ratified the International Labour Organisation (ILO) standards on the use of child labour, a recent study conducted by The Center for Trade Union and Human Rights in 2012 revealed that around 24% of workers in palm plantations in Mindanao are children.<sup>61</sup> Child workers work as much as 12 hours a day in oil palm plantations and have to do physically demanding jobs such as hauling 15 to 50 kilos of palm fruit bunches. The study also found out that palm oil companies do not give minimum wage. This is also the case for sugarcane workers in Negros and elsewhere in the country such as in the cases documented

by IFFM in 2011.<sup>62</sup>

The practice of using child labour in plantation has been well documented in the Philippines, yet persists to this very day. Civil society actors blame poverty as the root cause of this inhumane treatment of children, whereby they are forced to work to support their families. The situation is likely to aggravate in the future in light of numerous agreements that are being negotiated by the government for agribusiness, if no measures are taken immediately to address this serious human rights violation.

**The Philippines' international human rights obligations**

The Philippines is a signatory to around 23 international instruments under the UN system. Among those relevant to agribusiness and land grabbing are the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of Racial Discrimination (CERD).<sup>63</sup> The Philippines is therefore bound under international law to protect every citizen and ensure the human right to land and food.

Currently, the CHR is advocating for a rights-based approach to agribusiness expansion that should lead to the development not only of the State but more importantly of every individual, including the farmer. The CHR notes that the State “cannot blindly pursue an export-oriented economic policy without regard to basic and material rights of its citizens.”<sup>64</sup> A right-based approach to agribusiness expansion should conform to the individuals' right to food, right to water and right to development. It must result in the eradication of hunger and must not be to the detriment of the environment. Expansion must not trample upon the

rights of farmers and indigenous peoples to their land. It should lead to the development of not only the State per se but of every individual.<sup>65</sup>

While the Philippines has made some progress in ensuring that the human rights of vulnerable groups are being respected, these initiatives should be reinforced by further action on the ground. Brad Adams, Asia Director of Human Rights Watch summarises the situation as follows,

“The overall human rights situation in the Philippines improved in 2012 with fewer extrajudicial killings and the passage of historic laws promoting rights. But the government has failed to address impunity for the most serious abuses. On prosecuting rights abusers, it needs to walk the walk, not just talk the talk.”

### **Human rights framework as it applies to agribusiness**

In general, the government of the Philippines professes that all land investments are guided by laws and respect the rights of the agrarian reform beneficiaries, indigenous peoples and smallholders as well as protect the integrity of the environment against the detrimental effects of these investments. It also asserts that the entry of foreign companies in agribusiness would generate more jobs to carry the rural population out of poverty.

However, no specific policies have been developed to require that agribusiness companies comply with human rights provisions of international treaties and agreements to which the Philippines is a signatory. Compliance still rests with these companies under the principle of voluntary self-regulation.

The majority of documented cases of human rights abuses are coming from the mining and political sectors, but local

NGOs and rights groups have also started to record cases of abuse in the agribusiness sector in the past five years. These abuses range from lack of consultation, internal displacement, forced disappearances, arbitrary arrests, killings of activists and harassment by pro-company military forces.

The documentation of such abuses is often done by a local organisation in partnership with a foreign organisation with a focus on farmers and human rights. These organisations often conduct international fact-finding missions that expose these abuses and engage in dialogues with government officials to provide immediate relief to affected individuals and communities.

### *Recent legal developments which strengthen or weaken rights*

A law that can criminalise enforced disappearances, and which is said to be one of its kind in Asia, has recently been passed in the Philippines.<sup>66</sup> The Anti-Enforced or Involuntary Disappearance Act of 2012 will be one tool in helping in the struggle for a genuine agrarian reform and in empowering farmers to fight against large-scale land grabbing in the country, especially those by agribusinesses that use the security forces of the government to advance their interests.

According to the new law, enforced disappearances are defined as the detention of a person by state officials or their agents followed by a refusal to acknowledge the detention or to reveal the person's fate or whereabouts. Although not yet well documented, it is widely acknowledged that enforced disappearances are taking place in the agribusiness sector and related human rights advocacy.

Another important legal development in the country is the Supreme Courts' approval of the Rules of Procedure for



Environmental Cases through the Writ of Kalikasan (Nature) in 2010. This is a remedy available to Filipinos or public interest groups on behalf of marginalised people whose constitutional right to a balanced and healthy ecology is violated or being threatened by development.<sup>67</sup> The Writ has the potential to be used as a legal avenue against oppressive agribusiness expansion in rural areas, especially if the business is posing a threat to the environment.

While the Philippines has passed several landmark laws on human rights, the challenge remains as how to enforce these laws against big companies which are viewed as allies of the State in pursuing economic development, but which in reality may be operating for profit alone and with clear disregard for the welfare of ordinary farmers and local communities.

### **Recommendations**

As the Philippines continues to promote and strengthen its agribusiness sector, the government has to step up its efforts in respecting the rights of ordinary citizens and farmers against land grabbing, unfair labour practices, use of child labour and forced deals without respect for Free, Prior and Informed Consent.

This issue has to be solved by using a multi-pronged approach in which the participation of different sectors of society is a critical component. Agribusiness expansion is an inevitable reality that needs to be addressed by the government, the private sector and civil society by devising ways to counter its negative repercussions on property regimes and fundamental human rights.

The first order of battle is still to complete the distribution of lands under the CARP. By having their individual land titles, farmers will hold the instrument in which to anchor their land struggles and allow these struggles to withstand scrutiny in

court. Without this legal document, farmers can immediately succumb to pressures posed by agribusiness due to the massive resources and political clout of this sector and its actors and allies.

A law on comprehensive land use at the national level is another urgent task. At present, the permanent forest line has yet to be established and land uses can easily be altered at the local level without due consideration for the environment and existing local food production systems. Setting aside permanent areas for agricultural production would prevent the encroachment of agribusiness into critically sensitive and culturally significant areas. Each land use should also conform to the biophysical and socio-economic conditions of the area in order to maintain its integrity as a distinct ecosystem.

It is also imperative that agribusiness companies be required by the government to respect and implement the international treaties on human rights to which the Philippines is a signatory, as their code of conduct. With this mechanism in place, there will be a better chance of agreed collective consent in the monitoring of human right standards in areas where agribusinesses are operating.

Multi-sectoral monitoring should also be done starting from the identification of areas for the agribusiness expansion, community consultation and negotiation, right up to the implementation of the agreement to ensure that human rights are properly acknowledged and respected in the process. This will in turn pave the way for responsible agribusiness on the ground in partnership with the government and civil society that could foster inclusive and sustainable growth in the long run.

A prerequisite to this is to have a clearing house for foreign investments on agribusiness. This would establish

mechanisms and regulations for all investments involving the lease of agricultural lands as well as maintain a database system where information would be kept. Documented investments would be subject to a permit system whereby companies need to register and will be mapped for easy monitoring. Failure to strictly enforce human rights standards could act as a ground for the cancellation of permits.

It is also of critical importance to explore other avenues to making agribusiness acceptable to indigenous peoples. For instance, in cases of conflicts, the State should honour traditional conflict resolution mechanisms that are known to indigenous peoples and have in the past proven effective on the ground. In this way, indigenous peoples will be better included in decision-making processes relating to issues that profoundly affect their daily lives, and will ensure that their rights are respected by agribusiness companies as part of their corporate social responsibility.

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<sup>64</sup> Rosales 2012.  
<sup>65</sup> Ibid.  
<sup>66</sup> Human Rights Watch 2012.  
<sup>67</sup> Salonga Center 2013.



# National Updates on Agribusiness Large Scale Land Acquisitions in Southeast Asia

## Brief #5 of 8: Federation of Malaysia

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Source: [www.lib.utexas.edu](http://www.lib.utexas.edu)

### Acronyms

ASEAN	Association of South East Asian Nations
BN	Barisan Nasional (National Front)
CBD	Convention on Biological Diversity
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
COAC	Centre for Orang Asli Concerns
CRC	Convention on the Rights of the Child
CT	Communal Title
EIA	Environmental Impact Assessment
EU	European Union
ETP	Economic Transformation Programme
FD	Forest Department
FELCRA	Federal Land Consolidation and Rehabilitation Authority
FELDA	Federal Land Development Authority
FPIC	Free Prior Informed Consent
FR	Forest Reserve(s)
GDP	Gross Domestic Product
GLC	Government-linked Company
HCV	High Conservation Value
IADA	Integrated Agricultural Development Area
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial

	Discrimination
IESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
ISPO	Indonesian Sustainable Palm Oil
JAKOA	Jabatan Kemajuan Orang Asli (Department of Orang Asli Development)
JHEOA	Jabatan Hal-Ehwal Orang Asli (Department of Orang Asli Affairs)
JOANGO	Jaringan Orang Asal dan NGO Tentang Isu Hutan (Network of Indigenous Peoples and Non-Governmental Organizations on Forest Issues)
JOAS	Jaringan Orang Asli Se-Malaysia (Network of Indigenous Peoples of Malaysia)
JKOASM	Jaringan Kampung Orang Asli Semenanjung Malaysia (Peninsular Malaysia Orang Asli Network)
LCDA	Land Custody and Development Authority (Sarawak)
LTC	Latex Timber Clone
MPOB	Malaysia Palm Oil Board
MSPO	Malaysian Sustainable Palm Oil
MTB	Malaysian Timber Board
MTCC	Malaysian Timber Certification Council
MTCS	Malaysian Timber Certification System
NCR	Native Customary Right
NKEA	National Key Economic Area
NT	Native Title
P&C	Principles and Criteria (RSPO)
PM	Peninsular Malaysia
PAS	Parti Islam Se-Malaysia (Pan-Malaysian Islamic Party)
PELITA	Land Custody and Development Authority (Sarawak)
PEMANDU	Performance Management Delivery Unit
PR	Pakatan Rakyat
PRF	Permanent Reserved Forest
RISDA	Rubber Industry Smallholders Development Authority
RSPO	Roundtable for Sustainable Palm Oil
SALCRA	Sarawak Land Consolidation and Rehabilitation Authority
SLC	Sarawak Land Code
SLDB	Sabah Land Development Board
SLO	Sabah Land Ordinance
SUHAKAM	Commission on Human Rights, Malaysia
UN	United Nations
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNHCR	UN Human Rights Commission

## 1. Introduction

Agriculture is a significant sector in Malaysia's history of economic development, but has over the last few decades been overtaken by the growth of the manufacturing and services sectors. While agriculture has remained important, its face has changed radically. Today, agriculture is heavily skewed towards plantation agriculture of commodity crops

over other food crops. There is a clear distinction between these two sectors of Malaysian agriculture, the former being well-organised, well-funded and dominated by large-scale plantations, the latter being dominated by small farmers, and described as “fragmented, disorganized and sub-optimal.”<sup>1</sup>

Two different ministries are responsible for each sector: the Ministry of Plantation

Industries and Commodities, and the Ministry of Agriculture and Agro-based Industries. The former was previously the Ministry of Primary Industries, created in 1972 and originally responsible for only two commodities, tin ore and rubber.

The plantation and commodities sector now comprise oil palm, rubber, timber, cocoa, pepper and tobacco, all of which have been important export crops for the country's economic development over the past fifty years. This sector is now one of Malaysia's major exports earnings, earning RM127.5 billion in 2012, or 18.2% of national total export earnings.<sup>2</sup> Out of this, oil palm exports contributed RM71 billion in 2012, or 55.7% of the sector earnings (the figure for 2011 was RM80 billion).

The Malaysian Department of Statistics calculated that oil palm contributed 37% to the country's GDP in 2011, compared to "other agriculture" at just 17.2%.<sup>3</sup> The National Commodity Policy (2011-2020) underpins this sector, which aims to modernise the sector and diversify high value-added products, amongst others. It also aims to almost double export earnings of the sector to RM242.6 billion by 2020.

The earning potential of the plantation and commodities sector has vastly overshadowed other agricultural crops (for want of a term, "agrofood" will be used to distinguish this sector), which has lagged behind in terms of land use and returns to capital. Once responsible for 28.8% of national GDP in 1970, it declined to 7.7% in 2011.<sup>4</sup> Although this left-behind agricultural sector (excluding industrial crops) contributed RM20 billion to the country's gross national income in 2009,<sup>5</sup> Malaysia remains a net food importer, with a hefty food import bill that amounted to RM40.5 billion in 2010 for agricultural-based products (RM31 billion in 2011).<sup>6</sup>

The Ministry of Agriculture and Agro-based Industry, in a nod to rising food costs and issues of food security and self-

sufficiency, has adopted the 4<sup>th</sup> National Agricultural Policy (2010-2020), also called the Agrofood Policy, which focuses on high-value agricultural development, private sector investment and sector modernisation. However, this push is heavily focused on making the country more self-sufficient in rice (up to 85%) by developing large-scale rice farming in Sabah and Sarawak, but lacks provisions for other agricultural products.<sup>7</sup>

Malaysia's target to become a high-income nation has led to a proliferation of national programmes to modernise traditional sectors like agriculture. Agriculture and commodities are two separate areas for intervention under the country's Economic Transformation Programme (ETP) that aims to transform Malaysia into a high-income nation by 2020. Called National Key Economic Areas (NKEAs), of which there are 12, these areas were identified by the private and public sectors to kickstart the ETP – so-called high impact projects that will drive the highest possible growth in income.

The ETP is one of four programmes overseen by the Performance Management and Delivery Unit (PEMANDU) under the Prime Minister's Department, which is tasked to facilitate the shift of Malaysia into the high-income nation bracket by 2020. Modernisation and diversifying into high value-added downstream activities and products are seen as means to achieve these NKEAs, rather than the primary production of agricultural products, as land available for agriculture is now limited.

#### *Impacts from Malaysia's agricultural development*

Large-scale agricultural land use, especially for plantations, has imposed (and still does have) significant social and environmental impacts, especially on the rural and indigenous societies of Malaysia. One of the things that make it challenging to mitigate these impacts is that individual

States, rather than the Federal government, have control over land use.

According to Malaysia's Federal constitution, land and forests are State matters, and earnings from land-based development (such as logging, oil palm and rubber plantations) are the primary source of revenue for State administration and development initiatives. Logging used to provide States with the bulk of their revenue and a support base for political elites through licences and contracts since the 1960s, until it diminished in importance.<sup>8</sup> Now, large-scale development of oil palm and associated industries are the dominant development driver in many States.

As land is the purview of the States, rather than a Federal responsibility, the States themselves decide how land is apportioned for various uses and users, and this is reflected in respective State land ordinances and policies. As can be seen in the examples in this brief, critical human rights violation have resulted from a number of States' development policies in this regard.

Indigenous communities throughout Malaysia have faced and continue to face enormous challenges in their bid to defend customary lands and forests from being usurped for land-based development that funds State coffers. Although there are provisions in State and Federal laws that acknowledge the existence of *adat* (customary laws) and native land rights, these have not consistently translated into secure tenure.

Rather, it has been the norm for these to be limited in State laws and watered down in tandem with increasing competition for land and natural resources. Indigenous peoples find themselves in a situation where the State sets the rules for access to land and forest resources. In defending or asserting their rights, they face challenges in accessing information and engaging

with the relevant authorities. They must also grapple with intimidating processes and shifting goal posts as the rules and operational policies change with some regularity.<sup>9</sup>

As land for agricultural purposes become limited, States, especially Sabah and Sarawak, have turned to 'Native Customary Rights' or NCR land as the "last frontier" for such expansion<sup>10</sup> – the majority of which remain unregistered or untitled – by using legal devices within their means to make such lands accessible for development.

This brief examines the trends and recent developments in the agribusiness sector (defined as large-scale agriculture by national or international corporations involving local or international investors as opposed to small-scale subsistence based agriculture) and human rights in Malaysia. Human rights in this context significantly relates to the fundamental rights of Malaysia's indigenous peoples – the Orang Asli in Peninsular Malaysia and Orang Asal communities in Sabah and Sarawak.

## 2. The agriculture sector in Malaysia

### *Land use*

The total land area of Malaysia is about 330,000 km<sup>2</sup> (33 million ha), of which agricultural land covers 24%<sup>11</sup> or 79,200 km<sup>2</sup> (7.9 million ha). Agricultural land use is heavily skewed towards commodities such as oil palm and rubber, as opposed to the food production sector. Of the total land use under agriculture, 5,076,929 ha, or 64%<sup>12</sup> were under oil palm plantations as of 2012, often located in the best tracts of arable land. This sector is heavily driven by the private sector, with most of the planted area (61.6% or 3.1 million ha) under private ownership and mostly Malaysian-owned. Only 13.6% (691,000 ha) are planted by independent smallholders, while the remaining 24.8%

are under government or State agencies, such as the Federal Land Development Authority (FELDA), Federal Land Consolidation and Rehabilitation Authority (FELCRA), Rubber Industry Smallholders Development Authority (RISDA), Sarawak Land Consolidation and Rehabilitation Authority (SALCRA), Sarawak Land Custody and Development Authority (LCDA), and Sabah Land Development Board (SLDB). These are primarily land development schemes that apportion land to the landless (e.g. FELDA schemes in Peninsular Malaysia), or to members of native communities (e.g. SALCRA and LDCA in Sarawak; and SLDB and the Agropolitan schemes in Sabah). These schemes are not however without attendant issues regarding land right conflicts.

The highest growth in oil palm-planted areas is in Sarawak, where this increased 5.3% from 2011 to 2012 (compared to just 0.4 and 0.8% in Peninsular Malaysia and Sabah respectively), and where the State has targeted 2 million ha to be planted by 2018, from the current 1.2 million ha of oil palm. As land for agriculture become limited, most of the targeted expansion will be on peat land and land claimed by natives encumbered with customary rights, which as yet is not officially recognised or titled as such.

Rubber is the commodity with the second largest land use, but at 1.02 million ha (in 2011, on a decreasing trend from 1.25 million ha in 2007), it represents only 20% of the total area under oil palm. The area under rubber has been in decline, but there is a target to increase this area to 1.2 million ha by 2020, albeit still minimal a target compared to oil palm. Furthermore, most of the planted rubber is under smallholdings (960,800 ha), constituting 94% of total planted area and involving 400,000 smallholders,<sup>13</sup> leaving only 49,900 ha under estates. This contrasts starkly with the oil palm sector, where

most of the planted areas are under the management of estates.

Although smaller in area compared to oil palm, the impacts of rubber development on local indigenous communities<sup>14</sup> (and the environment) can be just as significant, exemplifying the impacts that can be caused by States having total control of land for development purposes. Recently, an area of concern developed in the State of Kelantan where a vast area was zoned from the State's Permanent Reserved Forest (PRF) for Latex Timber Clone (LTC) rubber plantations. Up to 199,000 ha or 32% of the 623,000 ha of Kelantan's total PRF have been zoned for this project, including some 31,000 ha for the purposes of *Ladang Rakyat*, a Kelantan-State poverty alleviation programme, which is supposed to benefit Orang Asli participants via dividends<sup>15</sup> from the plantation, but that is reported to have encroached on native claimed lands, which the State of Kelantan does not recognise.

Apart from oil palm and rubber, other commodity crops are mainly smallholder crops planted in hectares that are just a fraction of oil palm-planted area. Examples include cocoa (92% of its total planted area of 21,000 ha under smallholdings) and pepper (of which 98% of 14,600 ha is grown in Sarawak)<sup>16</sup>.

In terms of food crops, rice is by far the most important as the country's staple crop, which Malaysia has not been able to reach self-sufficiency in. Mostly farmed by small-scale rice farmers, numbering approximately 300,000 in 2009,<sup>17</sup> the sector is characterised by decreasing planted area over time (currently around 678,000 ha according to the Department of Statistics in 2010<sup>18</sup>), ageing farmers and a lack of uptake by the younger demographic. To ensure food security in terms of this staple food crop, the government is looking at commercialising paddy farming into large-scale ventures by

consolidating existing paddy farms as well as developing new granary areas, especially in Sabah and Sarawak. This imminent change from small-scale production to large-scale “modern” rice production will involve the acquisition and consolidation of existing small farms and other land uses and facilitate the exit of willing paddy farmers. Rural landscapes and livelihoods are set to change further with the onset of the policies that aim to modernise Malaysian agriculture.

The other agro-food sector to consider is vegetable farming. In total, 70,282 ha in Malaysia are currently under vegetables and cash crops such as root vegetables. Large tracts of the hill forests of Cameron Highlands in the State of Pahang had been previously converted over decades for intensive farming of vegetables, flowers and tea. Cameron Highlands supply half of Malaysia’s vegetable needs<sup>19</sup>, and apart for some flower farms and the tea plantation, Cameron’s farms tend to be small – 1 to 2 ha.

Due to serious environmental damage caused by intensive farming, pressure from NGOs and civil society, and stricter government regulation there is now better control of land clearing but this has also led farmers to move to neighbouring states<sup>20</sup>. This is notably the case in Kelantan, where the destruction of the Lojing Highlands for highland vegetable farming has caused significant impacts on the Temiar, whose customary lands have been decimated in the process.

Kelantan has earmarked 25,436 ha of State land in the Lojing Highlands for agriculture. This represents 80% of the highlands, which was first opened up for logging in 1978 under the Kelantan Development Authority. After 1990, large swathes were given to PAS-linked companies to be cleared for agriculture (see also Section 6). State agencies such as the Kelantan State Economic Development

Corp, the Kelantan Islamic Foundation and the Kelantan Darulnaim Foundation were given land, which was then leased by them to other companies.<sup>21</sup>

#### *Trend in oil palm agribusiness growth in Malaysia*

The development of oil palm in Malaysia has dominated the country’s commodity sector since the 1960s, beginning with transnational companies controlled largely by British companies, such as Sime Darby, Harrison & Crosfield and Guthrie & Co. These companies started up tea, coffee and rubber plantations before crossing over to oil palm. After independence, the nationalisation of these companies occurred, largely in the 1970s and 80s. This period also saw the growth of home-grown Malaysian plantation companies entering the fray, such as Genting, IOI, IJM, Tabung Haji (TH), PPB Oil Palm and Tradewinds.

Since the 1990s, the trend of nationalisation and the growth of local plantation companies shifted to transnational expansion by Malaysian plantation companies. This involved both upstream investments in plantation development, especially in Indonesia; and downstream investments in Europe, China, India, and lately, Africa. The post-1990s saw the creation of mega palm oil-based corporations – from the merging of major companies Sime Darby, Guthries and Golden Hope (previously Harrison & Crosfield) into the “new” Sime Darby; and PPB Oil Palm being absorbed by Wilmar, a Singapore-based corporation. These created some of the largest transnational oil palm conglomerates in the world. The trend of Malaysian companies expanding abroad continues to escalate, including companies without previous experience in oil palm development. Currently more than 50 Malaysian companies control a notable share of the oil palm plantation sector in Indonesia.<sup>22</sup>



### *Investment in agribusiness*

Overall, investment in the primary sector falls significant behind the services and manufacturing sector in Malaysia. The primary sector (including mining) only registered 2.3% of the total investments (foreign and domestic) of RM162.4 billion, which is RM3.8 billion. Of this, RM1.8 billion (47%) was foreign investment.<sup>23</sup>

For plantation and commodities, the investment was mainly domestically sourced. The Malaysian Investment Development Authority (MIDA) reports that in 2012, RM548.7 million of investments were approved for plantation and commodities, all of which were domestic investments. RM362.8 million or 66.1% were for oil palm, while the rest, RM185.9 million, was aimed for rubber.

In contrast, RM507.8 million of investment were approved for the agriculture sub-sector. Most of this was domestic, up to 92.8% (or RM471.5 million), with only RM36.3 million (7.%) foreign-sourced.

The goal of the government is to target investments towards value-added downstream activities rather than primary production of major agricultural products. RM2.9 billion were invested in 64 projects in 2012 for the production of downstream products, such as palm oil and palm kernel oil products, oleochemicals, palm biomass products and energy generation from palm biomass. RM2 billion of this were domestic investments.

In terms of agribusiness financing, all major local banks (including locally incorporated subsidiaries of foreign banks, such as HSBC Malaysia) are very much involved in the financing of private sector agriculture developments, including the Bursa Malaysia (Malaysian stock exchange) listed companies. While the Federal government funds State development agency programmes in the

Peninsular as well as in Sabah and Sarawak, for established companies, oil palm development may be self-financing.

Foreign investment funds are also active in Malaysian agribusiness. In March 2013, the Norwegian Government Pension Fund Global (GPF) made known in its annual report that it had divested in 23 oil palm companies in Malaysia and Indonesia because “their long-term business model was deemed unsustainable”.<sup>24</sup> This included major plantation companies that were members of the RSPO. Malaysian companies that the fund divested from include PPB, IOI, Genting, Tradewinds, TSH, IJM, Hap Seng, United Plantations, KLK, Ta Ann, Boustead and Berjaya.

This was part of the US\$667 billion Sovereign Investment Fund that was targeted by NGOs such as the Rainforest Foundation Norway and the Environment Investment Agency. By the end of 2012, the GPF still had US\$450 million invested in oil palm, and in fact, quadrupled their investment in Sime Darby. However, other investment firms, e.g. JP Morgan, saw this major divestment exercise as an opportunity for others to buy up shares in these oil palm companies.<sup>25</sup>

Through JP Morgan SSAC (Special Situation Asia Corp), JP Morgan is also invested in a tree plantation in Sabah (Sabah Forestry Industries, with India's Ballapur Paper Holdings). JP Morgan itself employs an Environment and Social Risk Assessment Policy that “integrates environment and social impacts into its analysis and financing decision making process”.<sup>26</sup> Funds specialising in emerging markets (i.e., in higher risk environments) such as the Global Emerging Markets Forestry Funds have also invested in another timber plantation project in Sabah, the Hijauan Bengkoka Plantations.

Other ways of utilising foreign investment funds is through listing with the London

Stock Exchange, as in the example of Asian Plantation Limited, a fairly new plantation player with oil palm plantation units in Sarawak. It was listed in November 2009 in the AIM (previously the Alternative Investment Market) arm of the LSE that targets smaller companies to float shares with a more flexible regulatory system than is required for the main market.

In Sarawak, Global Witness uncovered that the US investment fund Goldman Sachs had underscored a total of US\$1.6 billion bond for the Sarawak State government's SCORE (the Sarawak Corridor of Renewable Energy) project, one of the five regional corridor projects to attract large-scale global and domestic investments to develop underdeveloped regions of the country. In Sarawak, SCORE is underpinned by its huge energy potential through its planned hydropower dams, coal-fired power plants, and prioritises 10 different energy-intensive industries such as aluminium and steel. Oil palm is also listed as a priority industry.<sup>27</sup> According to Global Witness:

“The bond structure uses offshore companies owned by the notoriously corrupt Sarawak regime to borrow large sums from international investors. Described by one analyst as “unusual” and “under the radar” (3), the bonds are nominally used to finance the state development project known as the Sarawak Corridor of Renewable Energy (SCORE). However, the Sarawak government has never disclosed the bond listing to its State Assembly, while Chief Minister Taib Mahmud has sidestepped questions from an elected assemblyman enquiring as to the use of a secretive trust fund linked to the bonds. Documents on the Financial Exchange of Labuan, Malaysia's offshore financial centre, clearly show that this trust fund is used for bond repayment.”<sup>28</sup>

While international banks such as HSBC, as well as investment funds such as JP Morgan and Goldman Sachs make note of their commitment to the Equator Principles, this has not stopped controversial investments from occurring. Apart from the Goldman Sachs issue above, HSBC Malaysia's investment into timber and oil palm development was also called into question after the investigation by Global Witness into the financial reports of some of the biggest logging and plantation companies in Sarawak.

More significantly, Global Witness uncovered the covert and deeply-rooted manner in which corruption is ingrained in agricultural development and investment in Sarawak, involving corrupt practices by the ruling Chief Minister Taib Mahmud's family and close associates to dodge Malaysia's laws and taxes at the expense of the rights of native communities and environmental sustainability.<sup>29</sup>

At the other end of the spectrum, domestic oil palm investment schemes have cropped up since 2007, allowing the man on the street the ability to invest in oil palm development by the purchase of oil palm blocks in high-interest schemes where returns are based on production rather than dividends based on corporate profits. The earliest scheme was set up in 2007, called the Country Heights Grower Scheme (with a plantation concession in Gua Musang, Kelantan) which guaranteed an 8% return on investment annually for the first three years and increasing to 12% for the next two. More schemes have emerged since then, such as the East West One Planters Scheme (EWOPS) with 15,725 acres (6,364 ha) in Ranau, Sabah, Golden Palm Growers Scheme (GPGS) with 11,000 acres (4,452 ha) in Gua Musang, Kelantan, and Golden Agro Growers Scheme with 12,587 acres (5,094 ha) in Mukah, Sarawak. The areas of these schemes have remained moderate (4,000 to 6,000 ha for each scheme) and it is still too early to consider their significance. The earliest

scheme – CHGS – folded in 2012 due to its inability to continue paying the minimum guaranteed payment to investors, a symptom of the inexperience of the scheme managers.

While the schemes are “monitored” by the Company Commissions of Malaysia and independently audited, as claimed in their publicity materials, there is little to hold the companies running these oil palm investments responsible towards those whose rights may be encroached by these plantations.

#### *Main export markets for key commodities*

China has remained the biggest export market for Malaysian palm oil and palm oil-based products for the past twelve years. For instance, Malaysia exported 3.5 million tonnes in 2012 and 4 million tonnes in 2011 to China. In 2012, exports to China accounted for 19.9% of Malaysia’s exports, followed by India (15%), the European Union (12.6%), Pakistan (7.6%), the US (5.9%), Japan (3.2%) and Iran (3.1%). These combined top seven countries accounted for 67.4% of total Malaysian palm oil exports in 2012.<sup>30</sup>

Malaysia is currently the world’s fourth largest producer of natural rubber after Thailand, Indonesia and Vietnam. Natural rubber production in Malaysia has however declined by 7.4% to 0.9 million tonnes in 2012 from 1.0 million tonnes in 2011. Malaysian rubber products are currently exported to more than 190 countries globally. The United States, Germany and Japan are the largest markets for Malaysian rubber products, accounting for about 40% of Malaysia’s total exports of rubber products. Other important markets for Malaysian rubber products manufacturers include China, the United Kingdom and Brazil.

The government banned the export of rubberwood sawn timber in 2005 due to

the shortage of the raw material for the domestic furniture industry. The ban was intended to increase the value-added production of timber products, especially the furniture sector. It was lifted in 2008 after taking into consideration excess stock and requirements in the local furniture sector, as well as to assist suppliers, especially smallholders, in gaining good returns for their rubberwood.<sup>31</sup>

Where timber and timber products are concerned, export revenues for the last five years have averaged RM19 billion to RM20 billion annually. In 2012, primary timber products accounted for RM11.42 billion (56%) while value-added products accounted for RM8.7 billion (44%) of timber and timber product export revenues. To achieve the government target of RM53 billion by 2020, the sector is targeting an increase in downstream industries. Traditional markets for Malaysian timber and timber products are Japan, the US and the EU while countries like India, Australia, Taiwan and Singapore are also showing strong demand.

### **3. Government policies and targets for agribusiness expansion**

The Malaysian agriculture sector has declined over the years due to a variety of factors including shortage of labour; scarcity of land resources available for the expansion of the sector, and the increasing focus on and rapid growth of the services and manufacturing sector. The latter have overshadowed the relative importance of agriculture in the Malaysian economy, especially with regard to output and employment. Yet agriculture is still deemed nationally important to meet food security needs, and especially in providing income to rural communities. The latest thrust by the government is to transform agriculture into “agribusiness” by turning agriculture into large commercial-scale ventures.

For example, one of the main thrusts for

the agriculture sector of the Economic Transformation Programme (ETP) of PEMANDU is to promote commercial-scale farming of rice by the amalgamation of land through the provision of standardised land management contracts and financial incentives to encourage farmers and landowners with an option to exit farming by outsourcing the management of their land to a development authority.

An example of this is the Muda Agricultural Development Authority or MADA model, which is also targeted at new rice-growing areas in Pahang, Sabah<sup>32</sup> and Sarawak<sup>33</sup> to be developed as Integrated Agricultural Development Areas or IADA,<sup>34</sup> jointly by the State and Federal governments. With this model, the government aims to have farmers and farming cooperatives more involved in downstream activities and to increase farmer incomes reportedly up to five times if they choose to be employed to operate large-scale farms.

Apart from the large-scale commercialisation of agriculture into “agribusiness” through the launch of the new Agrofood Policy (2011-2020) with an allocation of RM1.1 billion, in terms of oil palm - the most lucrative commodity - the scarcity of land for expansion in Malaysia means that the target of expansion by the private sector is largely overseas (see section 4). While the established private sector has set its sight on regions with vast tracts of land available for oil palm development abroad, domestic expansion has been facilitated by respective State governments and involving State agencies with or without the inclusion of the private sector.

Sarawak leads in terms of availability of land for domestic expansion of oil palm. Sarawak had 1.2 million ha under oil palm at the end of 2012, almost double the area in 2007 (682,025 ha). In the past two years,

the area has increased approximately 200,000 ha from just under a million in 2010. The State of Sarawak has targeted an increase in this area to 2 million ha by 2018. Most of the current planted areas are under private ownership (81% or 973,700 ha), while government agencies such as SALCRA, FELCRA and FELDA manage just 102,100 ha (8.5%). Smallholders manage 76,900 ha (6.4%).

The once hotly touted New Concept joint-ventures (JV) on NCR land manage just 62,000 ha (5.1%). Of the new areas targeted to be developed over the next five years (over 800,000 ha in total), most would involve Native Customary Rights (NCR) land, of which 300,000 ha “have been earmarked,” according to the Sarawak Minister of Land Development, whose Ministry has estimated that there are at least 1.5 million ha of NCR land State-wide that have not been officially recognised.<sup>35</sup> It has been reported that 191,851 ha of this NCR land has been developed by joint-ventures and smallholders.<sup>36</sup>

NCR lands had once been targeted to be developed under the New Concept JV model through the partnership of private companies (with 60% share of the JV) and NCR landowners (30% share), and facilitated by the Sarawak Land Custody and Development Agency (LCDA or PELITA by its Malay acronym) with a 10% share in the JV. However, this model has proven ineffective and problematic over time<sup>37</sup> and the standard contractual agreements between the NCR communities and PELITA as their Trustees for the JV (called the Principal Deed) have been judged by the High Court recently to be “null and void” (see Appendix 1).

Not unsurprisingly, according to current reports,<sup>38</sup> different models are being trialled to put NCR land into productive use, including a model involving FELCRA as managers, but in which NCR

landowners would retain a 90% share of the venture, and LCDA 10%. FELCRA's responsibilities would include managing and marketing, for which they would charge management fees.

*Facilitated expansion of planting areas on native lands*

Expansion of plantation areas in both Sarawak and Sabah has been encouraged by the amendment of laws by the respective States aimed to facilitate expansion of large-scale agriculture on native land. This may take the form of public investment from State and Federal funds through government-linked agencies, and/or might involve private entities either in managing or investing in such projects.

In Sabah, such expansion has taken the form of various programmes such as the Agropolitan schemes (with the involvement of the Sabah Land Development Board - SLDB - as managers or project implementers, especially for oil palm related schemes), which invariably includes the objective of poverty alleviation. Other agencies, such as the Sabah Rubber Industry Board, might be involved, depending on the suitability of each area targeted. In Sarawak, the State facilitates the consolidation of native land primarily through PELITA and SALCRA.

In these cases, the States are using State laws as legal devices to make available more land for production, targeting "idle" native lands under customary claims, which are either inadequately protected within the States' constitution, or completely unacknowledged.

**Sabah: Amendments to land laws**

On 12<sup>th</sup> December 2009, the Sabah Land and Survey Department announced that it would hasten the process for awarding recognition of customary claims to land through Communal Titles (CT). Amendments were made to Section 76 of

the Sabah Land Ordinance to fast-track the issuance of CT under the Fast Track Planned Land Alienation programme. The purpose of this move was to assign these lands to large-scale agricultural development projects through joint venture agreements involving communities and government-linked development agencies and/or the private sector.<sup>39</sup>

Box 1: Special terms for the awarding of communal titles

**SPECIAL TERMS (For the issuance of Communal Title)**

The said land is demised herein expressly as a Communal Title for the purpose of cultivation of agricultural crops of economic value.

The said land shall be cultivated, developed and maintained in accordance with good husbandry practice as stated hereunder throughout the whole period of tenure of the said land.

Only plants or trees approved by the Director of Agriculture, shall be cultivated or planted on said land.

The Collector shall act as Trustee for said land for the beneficiaries.

Transfer or charge (sic) of said land is prohibited.

Sublease of the said land is prohibited except to a State government agency, a company or body corporate registered under Malaysia (sic) law, which shall be first approved by the Director of Lands and Surveys with the sanction by the Minister.

Subdivision of the said land is prohibited except with the written permission of the Director of Lands and Surveys.

The government may at any time, excise from any lot, an area for use and benefit of the community without compensation.

The beneficiaries shall at all times comply with the directions of the Collector in relation to

the use and occupation of the said land by the beneficiaries and their families and also in all matters relating to rights of way, drainage, irrigation canal, bridges or any other easements and allocation of lots shall determine any lot boundary disputes.

The addition, removal or replacement of any beneficiary to the said land shall be subject to the approval of the Director of Lands and Surveys upon due enquiry by Collector.

No dealings by the beneficiaries of their interest shall be recognized unless and until approved by the Director of Lands and Surveys and no beneficiary or other person shall have any caveatable interest over the said land save in respect of an interest claimed by the government.

Source: Flyer entitled ‘Special Terms’. Sabah Lands and Surveys Department, undated.

As indicated in Box 1, there are conditions attached to the issuance of CTs. Moreover, decisions regarding land use are in the hands of the Sabah Department of Agriculture, while entitlements pertaining to who ought to benefit (the participants or “beneficiaries”) and changes for the inclusion of new beneficiaries or the exclusion of existing ones are decisions to be made by Trustees appointed by the government. Observations from fieldwork suggest that local communities are anxious about government officials being made Trustees for their land and much prefer local action committee groups to be Trustees.<sup>40</sup>

To summarise, amendments to Section 76 of the Sabah Land Ordinance 1930 to the use of Communal Title envisages lands on which customary rights have been established as a “frontier” that is to be used for the expansion of large-scale commercial plantation agriculture, propelled by a prior perception that such lands are “idle”, i.e., unproductive. As evidenced by the Lalampas project<sup>41</sup>, the intention of CT may dismiss “customary

rights” issues, and the allocation of land to beneficiaries may become an administrative issue that is not based on traditionally claimed land (see Box 2), but rather allows land to be consolidated for large-scale agricultural projects with the objective of “poverty alleviation” programmes.

Box 2: Interpretation of Communal Titles based on NCR

“The foundation of communal title is premised on native customary rights (NCR) of the indigenous community in land resources managed by the native community according to their local practices, tradition and custom. Sabah Land Ordinance further provides that land issued with communal title can be subsequently sub-divided into individual titles as and when decided by the native community.

However, the indigenous communities are very concerned that the issuance of communal titles by the government was somehow associated with joint venture land development schemes with government agencies or corporations. The element of land ownership and participation by the indigenous community in managing traditional NCR land is no longer a relevant consideration.”

Quote from Kong Hong Ming, a well-known “NCR lawyer” in Sabah, under whom landmark cases upholding natives’ rights to NCR land have been won.

[http://sabahkini.net/index.php?option=com\\_content&view=article&id=6370](http://sabahkini.net/index.php?option=com_content&view=article&id=6370)

The State of Sabah is moving full steam ahead with the awarding of Communal Titles, despite criticism from NGOs. As of February 2013, seven CTs had been issued for 2,716 individuals in three districts, while the State envisages that a total of 69 CTs will eventually be awarded covering approximately 36,000 ha for 162 villages and involving 9,000 beneficiaries. This averages out to 4 ha per beneficiary and



222 ha of managed agricultural land per village.

In addition to the Sabah Land Ordinance, the Sabah Land Acquisition Ordinance (1950) was also amended in 2009. Under Section 2 of the Ordinance, any land may be subject to compulsory acquisition by the State for a “public purpose”, such as townships, roads, resettlement, conservation or the exploitation of natural resources. The 2009 amendment further broadened the scope to include corporations. Where such acquisition takes place under this section, untitled NCR lands are often not recognised nor compensated.<sup>42</sup>

*Sarawak: Amendments to weaken NCR claims*

Similarly, efforts were made by the Sarawak State government to the Sarawak Land Ordinance that have made it extremely difficult for native communities to claim and secure their native customary lands. With the amendments that were made from the 1990s to 2000, the Sarawak Land Ordinance fails to recognise traditional forms of occupations according to native customary laws, and also gives the State broad authority to extinguish NCR.<sup>43</sup>

*Peninsular Malaysia: Land acquisition for development agencies*

The Federal Constitution confers special rights and protections to the Orang Asli community in Peninsular Malaysia and provides some recognition of their “special status”, but Malaysian policies contain instruments that are not consistent with the spirit of the Federal Constitution. The APA Act provides for the declaration of Orang Asli Areas (Section 6, for areas “predominantly or exclusively inhabited by aborigines”) and Orang Asli Reserves (Section 7, for areas “exclusively inhabited by aborigines”).

Land under S6 and S7 are protected to various degrees from being alienated, granted, leased, and under section 7 cannot be declared a reserved forest. However, as of 31 December 2010, figures released by JAKOA state that 145,379.67 ha are officially ‘earmarked’ for the Orang Asli. This includes 20,670.83 ha (14.2%) that have been gazetted under the APA Section 6 and Section 7.<sup>44</sup> A further 26,288.47 ha (19.56%) have reportedly been approved but have yet to be gazetted.

The largest category (85,987.34 ha or 59.14%) is classified as land under application, awaiting the approval of the state governments. According to these official figures, although the Orang Asli is acknowledged to “hold” land of over 145,000 ha, most of this has not been state-approved and only 14% has been gazetted.

The issue of non-gazettement is decades old: “In some cases, according to the JHEOA’s Data Tanah of the early 1990s, the approval for gazettement was given in the mid-1960s and mid-1970s, but to date the actual gazettement was never effected.”<sup>45</sup> The failure to reserve these lands makes it difficult for Orang Asli to defend them against government or commercial interests.

Without secure tenure, Orang Asli communities are also vulnerable to relocation and resettlement to make way for large infrastructure and development projects. Prominent cases include the building of the Kuala Lumpur International Airport in Sepang, Selangor; the Sungai Selangor Dam in Pertak, also in Selangor; and the Temenggor Dam in Grik, Perak. Other cases include private housing developments, golf courses, universities, highways and plantations.<sup>46</sup> Besides resettlement, Orang Asli communities have also been subject to regroupment schemes, ostensibly for objectives such as security, poverty eradication, and the provision of services and facilities.<sup>47</sup>

However, many of these schemes have not been found to lift the communities out of poverty owing to unsuitability and/or non-delivery of economic or livelihood projects, poor services and facilities including in terms of health and education, and poor returns from agricultural ventures such as RISDA and FELCRA.

In particular, the orang Asli had been left out of Federal land development schemes. In Peninsular Malaysia, under the National Land (Group Settlement Areas) Act 1960, land agencies such as the Federal Land Development Authority (FELDA), the Federal Land Consolidation and Rehabilitation Authority (FELCRA) and other State land agencies may acquire State land for the purpose of land settlement, which culminates in the issue of land titles to the settlers. Many of these early programmes and plantations have been established in areas traditionally inhabited by Orang Asli, but the Orang Asli themselves have not been included in these programmes.

This was recently brought to light in a landmark land rights case involving FELCRA. In December 2012, the High Court ordered the return of land that was gazetted as a Malay Reserve to the Semelai Orang Asli as their customary rights were deemed to take precedence over others. In so doing, it was also ruled that a FELCRA land development scheme was illegal on the said land. The State agency was ordered to gazette the area as the Semelai's native customary land within a year.<sup>48</sup>

Instead of these Federal and State land settling programmes, the Orang Asli were resettled under Regroupment Schemes or "*Rancangan Pengumpulan Semula*" (RPS), with the primary aims of poverty eradication, modernisation and provision of social amenities, and to reorganise them in suitable centres in their traditional areas. This involves relocating and transforming the Orang Asli into settled farming

communities planting cash crops such as oil palm or rubber on allocations of land that represent a fraction of their original territories.

This was reiterated in a new policy – the Orang Asli Land Ownership and Development Policy – which was passed by the National Land Council in November 2009. With the objective of granting land titles under section 76 of the National Land Code 1965, the Policy provides for the head of an Orang Asli household to be granted between two to six acres of plantation land with an additional half acre for housing.

The Orang Asli, most of whom had no input into the formulation of the policy, objected strenuously to it and a protest memorandum and demonstration were organised by the Peninsular Malaysia Orang Asli Network (JKOASM) shortly after. This policy, as did the prior regroupment scheme, undermines their traditional rights as the total area under fixed titled lots are just a fraction of their customary territories and resource catchments, thereby leading to a substantial loss of ownership and control over their customary lands and territories.

#### **4. Trends in agribusiness expansion: going abroad**

Even as Malaysian States attempt to free up "idle" native customary land for large-scale expansion of agriculture, the litany of court cases suggest it is not all plain sailing. Instead, an increasingly attractive option for Malaysian plantation conglomerates is now to expand abroad.

Indonesia has been a key regional target for investment. Malaysian and Singaporean investors currently control more than two-thirds of Indonesia's total oil palm plantations through joint ventures with local companies.<sup>49</sup> The major Malaysian oil palm investors in Indonesia include Sime Darby, Tabung Haji

Plantations, Kuala Lumpur Kepong (KLK), Genting Plantations and IOI Corporation, which are amongst the largest companies in Malaysia.

Papua New Guinea (PNG) is also an important country in the region for Malaysian companies' oil palm expansion plans. Currently, two major companies are heavily invested here, including Kulim, the parent company of New Britain Palm oil Limited (NBPOL) and KLK, which has had a disastrous start in their first venture in PNG by investing in 51% of Collingwood Plantations Pte Ltd, a Singaporean company with leases over 44,342 ha in Oro Province. The community of Collingwood Bay has lodged a complaint with the RSPO accusing the company of breaching the RSPO's Code of Conduct as well as the P&C, as the communities have opposed oil palm developments on their land since 2010.<sup>50</sup>

Beyond Asia, Africa is an emerging target country for Malaysian oil palm companies. Sime Darby has a concession of 220,000 ha in Liberia, part of which was part of a Guthrie Plantations Ltd (which has since merged into Sime Darby) concession of over 20,000 ha since 1981.

Making the news recently is a non-oil palm player, Wah Seong Corporation, an oil and gas services company, which has undertaken its first diversification into the oil palm industry with an investment stake of 51% in Atama Resources Incorporated for USD\$ 25 million. Atama holds a 30-year concession over 470,000 ha in the Republic of Congo, 180,000 ha of which have been shown to be suitable for oil palm cultivation. Atama is only required to pay Francs CFA 2,500 or USD \$5 for each planted ha when the oil palm starts production.

A case study by The Rainforest Foundation UK mentions that evidence

suggests that the forests designated to be converted appear to be virgin rainforests.<sup>51</sup> No evidence was available to suggest that social and environmental impact assessments, or High Conservation Value (HCV) assessments had been carried out, or that Free, Prior and Informed Consent (FPIC) had been adhered to in the development. It was also reported that stock-watchers have questioned how Wah Seong could afford the cost of developing the oil palm plantation that they estimated to be of USD \$650 million, and market research has suggested that the cost could be partly offset by forest clearance, e.g. through the sale of logs.<sup>52</sup>

Many of the major Malaysian plantation companies have vast landbanks abroad, generally with larger hectarages than their landbanks in Malaysia, such as Sime Darby, KLK and Kulim. As can be seen from Table 1, which shows nine major Malaysian companies with known landbanks abroad, 51% or 1.3 million ha are overseas concessions.

This will increase as these Malaysian companies and others continue to seek land abroad to expand their plantation area. An example of this is Felda Global Ventures, which is also targeting investment in Papua New Guinea and Africa. It has recently been reported that Malaysia is amongst the top foreign investors along with the US, the UK and the United Arab Emirates in land acquisitions in Africa and elsewhere.<sup>53</sup>

The acquisition of landbanks abroad is not the only overseas activity of Malaysian companies. Recently a Malaysian company was reported to be setting up a palm oil refinery in Nairobi to target the rapidly growing East African consumer market. Pacific Interlink's plant is expected to be the largest in the region when it starts operating next year<sup>54</sup>, which will fuel further development of oil palm in the region.

**Table 1: Malaysian companies with overseas landbanks for plantations**

Company	Malaysia (ha)	Indonesia (ha)	Other SEA (ha)	Africa (ha)
Sime Darby <sup>55</sup>	314,294	299,262		220,000
KLK <sup>56</sup>	110,000	140,000	44,342	
Kulim <sup>57</sup>	43,890		129,130	
IOI <sup>58</sup>	169,000	60,000		
Genting Plantations <sup>59</sup>	93,503	74,000		
Tabung Haji <sup>60</sup>	91,078	82,147		
United Plantations <sup>61</sup>	40,874	15,000		
Wah Seong <sup>62</sup>				180,000
Felda Global <sup>63</sup>	366,575	56,385		
<i>Total by region</i>	<i>1,229,214</i>	<i>726,794</i>	<i>173,472</i>	<i>400,000</i>
<i>Total</i>	<i>2,529,480</i>			
<i>Total outside Malaysia</i>	<i>1,300,266</i>			

(Source: respective company websites)

## 5. Gross areas allocated to agribusiness and plantations in Malaysia

By far, the majority of agricultural land use for agribusiness and plantations in Malaysia is for oil palm (70% of 7 million ha), hence the focus of this section will be on that crop. However, other major changes in land conversion to agriculture or commodities will also be highlighted.

Although oil palm expansion in Malaysia has significantly slowed down since the heady past two decades (see Tables 2 & 3), data from MPOB suggest that most of the current expansion in oil palm plantations in Malaysia is occurring in Sarawak. Between 2010 and 2012, 70% of the increase in the national total planted area took place in Sarawak.

**Table 2: Area under oil palm, 1990-2012**

Year	Peninsular Malaysia	Sabah	Sarawak	Total
<b>1990</b>	1,698,498	276,171	54,795	2,029,464
<b>1995</b>	1,903,171	518,133	118,783	2,540,087
<b>2000</b>	1,982,229	1,000,777	330,387	3,313,393
<b>2005</b>	2,298,608	1,209,368	543,398	4,051,374
<b>2009</b>	2,490,084	1,361,598	839,478	4,691,160
<b>2010</b>	2,524,942	1,409,676	919,148	4,853,766
<b>2011</b>	2,546,760	1,431,762	1,021,587	5,000,109
<b>2012</b>	2,558,103	1,442,588	1,076,238	5,076,929

Source: Malaysia Palm Oil Board

**Table 3: Percentage increase in oil palm planted area, 2010-2012**

Year	Peninsular Malaysia	Sabah	Sarawak	Total
<b>2009-2010</b>	1.40% (34,858 ha)	3.53% (48,078 ha)	9.49% (79,670 ha)	3.47% (162,606 ha)
<b>2010-2011</b>	0.86% (21,818 ha)	1.57% (22,086 ha)	11.14% (102,439 ha)	3.01% (146,343 ha)
<b>2011-2012</b>	0.44% (11,343 ha)	0.76% (10,826 ha)	5.35% (54,651 ha)	1.54% (76,820 ha)

\* 71% of increase in total planted area between 2011 and 2012 occurred in Sarawak; 70% between 2010-2011; and 49% between 2009-2010.

Table 4: Oil palm planted area by categories, 2011-2012

Category	Dec 2011 (ha)	Dec 2012 (ha)	Change (ha)
Private	3,037,468	3,126,990	89,522
FELDA	703,027	706,069	3,042
Independent			
Smallholders	697,826	691,688	-6,138
State Agencies	319,786	306,187	-13,599
FELCRA	162,259	167,361	5,102
RISDA	79,734	78,634	-1,100
Total	5,000,100	5,076,929	76,829

As the largest increase in the national oil palm planted area was due to expansion by the private sector (see Table 4, data only available for 2011 and 2012), it may be conjectured that most of the 89,522 ha

#### *Large-scale commercial timber plantations*

Aside from oil palm plantations, for which scarcity of available agricultural land is a major limitation for expansion, the Malaysian government is aggressively pursuing the development of large-scale commercial forest plantations. The Ministry of Plantation Industries and Commodities was given the mandate to pursue this in 2005 in order to overcome the shortage of timber supply from native forests by encouraging the participation of State government agencies, government-linked companies (GLCs) and the private sector in the development of commercial plantations through the provision of soft loans.

A “special purpose vehicle” known as Forest Plantation Development was set up by the Malaysian Timber Industry Board in February 2006 to promote, support and manage the funding facilities from the government for this purpose. The Ministry intends to develop a total of 375,000 ha of forest plantations at an annual planting rate of 25,000 ha per year for 15 years, focusing mainly on rubberwood (i.e. latex timber clone) and *Acacia mangium*.<sup>64</sup> Section 6 below tells of how the Kelantan government have allocated vast amounts of forested lands to LTC plantations.

increase in private plantations occurred in Sarawak, which registered an increase of 54,651 ha between 2011 and 2012. Covering 119,352 ha, this contributes 53% of the total targeted by the government.

## **6. Problems with land acquisition**

### *Sabah and Sarawak: oil palm expansion*

Agricultural expansion has replaced forestry as the main activity in the economies of both Sabah and Sarawak. Oil palm has been touted as the main means of bringing development to impoverished rural communities and to fuel economic development through exports. Yet much of the land now being targeted for oil palm development is encumbered by Native Customary Rights (NCR).

Various devices have been developed to convert these lands to commercial production. These include national and State joint venture schemes and business models involving smallholders and landowners. In some joint ventures schemes, participants are merely collective landowners with no direct role in managing operations; a company manages the land as a typical large plantation.

There are also a range of programmes to support smallholdings that are driven by landowners themselves: some are government assisted, some are semi-assisted and others are wholly independent or involve private partnerships with business entities. Smallholder landholdings range in size from 15 acres of

land in Sabah to up to 40 ha in Sarawak. These different models are evaluated in Majid Cooke, Toh & Vaz 2011.<sup>65</sup>

The expansion of oil palm plantation agriculture in Sabah and Sarawak is driven by the States' master narrative on agricultural modernity and the States' legal devices support this. In the political economy of oil palm production, indigenous smallholders and landowners are important to agricultural expansion because most of their lands are assumed to be "idle" (left fallow or reserved under customary laws), indicating that these are available for conversion to plantation agriculture. The mechanisms for this are found in provisions of the Sarawak Land Code of 1958 and the Sabah Land Ordinance of 1930.

In the perspective of these States, traditional smallholder production with its emphasis on subsistence production, crop diversity and reliance on socio-cultural relationships is seen as "backward" and inferior because of alleged low productivity, and apparently aligns poorly with the aspirations of a modern Malaysia.<sup>66</sup> The narrative also speaks of freeing up these "idle" lands to provide opportunities for impoverished indigenous communities to access capital and markets to improve their lives.<sup>67</sup>

#### *Sarawak: land development and native customary land*

Several major types of collaborations between local native communities and State statutory bodies and/or private sector oil palm companies have been introduced in Sarawak. The significant model is the *Konsep Baru* joint venture scheme, or New Concept NCR land development project under the Sarawak Ministry of Land Development, first introduced in 1995 as joint-venture projects involving NCR landowners, private sector plantation companies and the State-owned statutory body, Land Custody and Development

Authority (LCDA or PELITA). Upon entering into an agreement to become a shareholder of a joint-venture company, the NCR landowners stop being in control of their landholding for the duration of the project (60 years), as they sign a trust deed which places a government agency as a Trustee for the participating landholder, resulting in the latter not having any functions or control in the joint venture.

Apart from these ventures, which assure NCR holders that their land may be returned to them after 60 years (upon application), a new initiative was started in 2010 by the Federal and Sarawak State governments to carry out en-bloc surveys of NCR land under Section 6 of the Sarawak Land Code, which is a communal grant called Native Communal Reserve land (also "NCR") in Sarawak, where the State still has decision making authority over. Proponents say that the main objective of these surveys is "to allow for the commercial development of the land so that it can benefit the rural people in line with the objectives of the New Economic Model".<sup>68</sup> The Federal government has been funding these perimeter surveys – RM20 million was allocated for this after the 2011 Sarawak State elections, RM60 million during the elections<sup>69</sup>, and RM30 million more has just been announced after the 13<sup>th</sup> general elections for the 2013 budget.<sup>70</sup>

The area that is applicable for survey and gazettelement is based on the Sarawak Land Code, which limits "NCR" to those areas designated as such prior to 1958, and pertains to *temuda* or cultivated land only. The Sarawak State government does not recognise *pemakai menoa* (communal lands or territorial domains) or *pulau galau* (reserved forests within their territorial domain) as "NCR land".<sup>71</sup> This is a point of contention with the courts' common law decisions based on the Rumah Nor and Madeli Salleh cases, i.e., that Native Customary Rights land



includes both *temuda* and *pulau galau* areas.<sup>72 73</sup> The opposition party in Sarawak is pushing for titling of native customary land under Section 18 of the Land Code gives the native claimants title and ownership to their NCR land.

In this sense, the incumbent Sarawak government, through its legal interpretation of what is acceptable as native customary rights, limits rights to land for the State's indigenous peoples to that which is under current occupation and cultivation, negating the wider traditional and cultural systems of indigenous land ownership and management, and reserving these forested lands to be developed by the State.

*Sabah: Land development on native lands*

In Sabah, oil palm already occupies 90% of land planted with industrial crops,<sup>74</sup> and any future expansion will either use up the remaining 10% of areas under other crops, or take place on lands not under industrial crops, such as those claimed by indigenous communities under customary rights and which are still largely used for subsistence agriculture. Much of the land claimed under customary rights is not yet titled. Similar to Sarawak, there are multiple ventures in Sabah involving the Sabah Land Development Board (SLDB) with other companies and indigenous communities. As in Sarawak, State laws have been amended to make it easier for the State to access native customary land (that is untitled) for agricultural projects.<sup>75</sup>

Under the Sabah Land Ordinance of 1930 (SLO), there are various sections that allow for securing land for natives. The SLO was conceived to ensure that native communities would not be disenfranchised as other ethnic groups began to assert their interests in agriculture. Section 15 of the SLO recognises individual and household rights to Native Titles (NT) and collective rights for shared access through

Communal Titles (CT) (section 76) and native reserves (section 78). These sections were attempts at codifying some aspects of customary law, formalised and used from the period of British influence in Sabah under the North Borneo Company for the establishment of commercial agricultural development.<sup>76</sup>

The land titling process as provided by the SLO is complex and can take many years.<sup>77</sup> Much fallow land and secondary forest remains untitled, and there is a longstanding problem of overlapping land claims that are mostly unresolved. Moreover, for as long as lands claimed under customary rights (largely secondary forests) remain untitled, they are unacknowledged<sup>78</sup> and officially categorised as "State land".

As these lands are uncultivated, they are considered to be "idle" or unproductive. This combination of factors leads to a situation whereby every year, the Lands and Survey Department of Sabah reportedly receives 30,000 land applications, out of which only 12,000 are processed.<sup>79</sup> By 2009, there was a reported backlog of 285,000 cases.<sup>80</sup>

As long as customary lands are acknowledged, State development projects in the name of poverty alleviation can take priority over customary rights. Being untitled also makes these lands hugely vulnerable to encroachment by individuals or companies when the State land administration favours economic benefits over traditional claims.

Box 3: A note on industry – community agricultural ventures in Sabah and Sarawak

Majid Cooke et al 2011 found that oil palm plantations have proven to be a force for improvement in some rural areas, as exemplified by the cases of independent smallholders who are benefiting from the rapid growth of oil palm plantations and mills in their midst. However, the benefits of State-sponsored partnership models remain questionable due to the lack of accountability and transparency mechanisms within these models. The case studies of oil palm business models in Sabah and Sarawak featured in Majid Cooke et al 2011 have shown that more care needs to be invested into managing land use change for the benefit of affected communities. In particular, it is essential to improve the quality of consultation and participatory planning with local communities for any type of venture. It was found that many communities that signed up to joint venture schemes did so because they felt that they had no other choice – the oil palm schemes were considered the only way they would gain secure tenure to customary lands, and to attract the kind of investment for infrastructure and services not available in rural areas.

*Kelantan: conversion of forests to plantations*

Starved of Federal funds since the 1990s when the opposition won the State, the imbalance in Federal funding allocation compared to other Malaysian States saw Kelantan's timber production rise spectacularly in the 1990s, and following that, degazettement of forest reserves for agricultural purposes, led by Federal and State agencies.<sup>81</sup> The onslaught has continued since.

A considerable area of the State's remaining PRF has been earmarked and is being converted to rubber plantations, leading to critical environmental and humanitarian crises. The conversion of the PRF involves clearing natural forest to be replaced by Latex Timber Clones (LTC), with approval given by the relevant authorities of the State. The Malaysian Timber Certification System's public summary, dated May 2011, reports that SIRIM, the national certification body, certified the Kelantan FMU in February 2011. According to the auditors, numerous "stakeholders" had pointed out that plantations of such a large scale would contravene the MTCC MC&I2002 Criterion 6.10.

Criterion 6.10 clearly states that forest conversion to plantations or non-forest

land uses shall not occur except in circumstances where conversion:

- a) Entails a very limited portion of the forest management unit;
- b) Does not occur on high conservation value forest areas; and
- c) Will enable clear, substantial, additional, secure, long-term conservation benefit across the forest management unit.

These objections were sidestepped by the State Forestry Department with a clarification that the contentious 199,352 ha LTC area would be excluded from the total PRF of 623,749 ha, or 32% of the total PRF. The auditor was therefore requested to limit the scope of the certification audit to the remaining 424,497 ha.<sup>82</sup> In May 2012, the FMU passed a surveillance audit based on the forest management plan presented.<sup>83</sup>

An Aidenvironment analysis<sup>84</sup> shows that the conversion of forest to LTC plantations has been going on for many years in Kelantan's PRF. Forestry statistics from the Peninsular Malaysia Forestry Department show that between 2005 and 2008, the planted forest area increased from 71,238 ha to 108,512 ha (equivalent to 9,300 ha annually). Meanwhile, the figures obtained from EIA reports show that 11,497 ha of LTC plantations were

approved in 2008, and 16,027 ha proposed in 2009, all within the PRF.

The study also reported that between 2007 and 2010, the Federal Department of Environment had approved at least 38 oil palm and LTC projects in Kelantan forest reserves covering a total of 60,000 ha in 23 different forest reserves. Finally, a review of Gazette Notifications over the same period shows that none of the LTC areas had been proposed for degazettement, hence they continue to be officially classified as PRF.<sup>85</sup>

As much as 31,071 ha of LTC is under the Kelantan government's poverty alleviation programme *Ladang Rakyat* (Peoples' Farm). The Attorney-General's 2012 report criticised the state's poverty alleviation project as being unsatisfactory, noting the grievances of the Temiar whose ancestral lands have been affected. The *Ladang Rakyat* is aimed at granting monthly dividends of RM200 to Temiar participants, from the "profits earned by leasing lands to private companies for plantations," according to one report.<sup>86</sup> The Temiar protested in May 2011 for the first time, demanding that the PAS State government return their ancestral land to them.<sup>87</sup>

Despite these demonstrations, there has been little indication that the State intends to address the concerns of these communities.<sup>88</sup> When asked to comment on the Temiar's concerns, a State executive committee member reportedly dismissed the claims of Orang Asli to their native territory. He went on to express his conviction that the Orang Asli needed to adapt to changing times and stop relying on the forests:

"It's better for them to take a chance, join the development. Their kids need education and a better life."<sup>89</sup>

The entrenched prejudice held against Orang Asli culture, lifestyles and

aspirations and ignorance of their rights to land and resources is shown clearly here, despite these having been affirmed by the courts and reflected in the Federal Constitution.

### *In sum*

In the examples from Sabah, Sarawak and Kelantan above, land development programmes persist in spite of planning guidelines set by the Federal government because of the system of federalism enshrined in the Malaysian Constitution, which makes the management of land and forests a State matter. This is proving to be a weak basis for wise land use, conservation and upholding human rights.

This situation also persists partly because of a passive general population, government-controlled media, a muzzled civil society, and the Federal government's lack of will to enforce resource management and environmental laws at the State level. These include the National Physical Plan, which sustains the Central Forest Spine of Peninsular Malaysia, and the forestry guidelines that state that no logging should take place at elevations above 1,000 metres.<sup>90</sup> Both important planning guidelines are treated as mere suggestions and are not enforced in practice.

## **7. Human rights framework in Malaysia**

Malaysia, although a member of the UN Human Rights Council, has an appalling record in the number of core human rights convention signed, ranking 187 of the 193 member States in this regard. Malaysia has only signed three international human rights conventions: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), which were ratified in 1995 although both still have important reservations; and the Convention on the

Rights of Persons with Disabilities, which was signed and ratified in 2010.

Six more have yet to be signed: the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the UN Conventions against Torture; Migrant Workers' Rights; and On Enforced Disappearance. In addition, Malaysia has yet to sign or ratify the 1951 UN Convention on Refugees.

Since 2010 there have been several announcements from the government about initiating the ratification of human rights treaties as well as the drafting of a National Human Rights Action Plan, but none were forthcoming at the time of writing.

Malaysia signed the United Nations Convention on Biological Diversity (CBD) in June 1992, which contains Articles that elaborate the rights and interests of indigenous peoples and acknowledge the importance of traditional knowledge to conservation and sustainable resource use. In addition, Malaysia voted to support the adoption of the UN Declaration of Rights of the Indigenous Peoples (UNDRIP) in September 2007 as a member of the Human Rights Council.

Through its adoption by the General Assembly of the UN, UNDRIP is now widely considered as part of customary international law. As a nation State that endorsed the declaration, Malaysia is expected to incorporate these principles into national laws.<sup>91</sup> Unfortunately there has thus far not been any announcement or commitment by the government to do so.

Malaysia also signed the ASEAN Human Rights Declaration on 18<sup>th</sup> November 2012, which states that every person is entitled to certain rights regardless of race, gender,

age, language, religion and political opinions, among others. The Declaration represents a significant first step forward in fostering a human rights culture within the region of Southeast Asia.

In addition to these international and regional human rights instruments, a number of important judgments pertaining to native customary rights have emerged from common law. This refers to case law developed by judges through the precedential decisions of courts of the Commonwealth, rather than through legislative statutes. In Malaysia as a whole, precedents include landmark decisions that have reaffirmed the recognition of native rights that arise out of native laws and customs.<sup>92</sup> Appendix 1 highlights these legal developments and the important role they can play in enforcing the human rights obligations of Malaysia in relation to its indigenous peoples.

#### *Expansion of agribusiness: a challenge to indigenous governance*

As mentioned in an earlier section, although State and Federal laws acknowledge the existence of indigenous customary laws, the poor translation of this into secure tenure has significantly affected indigenous communities' rights in terms of defending their customary domains from appropriation by States to be handed out as concession areas for plantation companies and/or State development agencies.

In several cases, provisions in the law for land acquisition have been used to impose resettlement on indigenous communities in order to make way for large infrastructure projects such as dams, highways, pipelines and even airports. Scant compensation (if any) is offered for the loss of livelihoods and disruption to their lives.<sup>93</sup> In cases where compensation is offered, what seems like a windfall can be whittled away in a short time and the communities now dislocated from their resource catchment

face an uncertain future.<sup>94</sup> For communities whose identities are inextricably linked to cultural landscapes, being removed from their lands has profound long-term impacts and in cases, precipitated the disintegration of their society.<sup>95</sup>

Throughout Malaysia, indigenous communities have turned to the courts to seek recourse in land conflicts. Typically, cases are brought to the courts as a last resort after all other alternatives have been exhausted, which typically include reports to the police and local government, appeals to local representatives, and the media, and even the setting up of peaceful blockades to prevent access to forested lands by bulldozers and other heavy machinery, or to existing plantations on lands claimed by natives.

The majority of cases involve the acquisition of, or entry into, customary lands by corporations and government entities, almost always without the knowledge or consent of native communities. In one of the disputes between NCR landowners and oil palm companies in Sarawak that is pending in the High Court, one of the claimants was brutally assaulted by plantation security personnel in March 2013. The villagers had in 2012 lodged a suit against United Teamtrade, a local Sarawak company linked to Sarawak's ruling political party, for encroaching upon their native customary land.<sup>96</sup> There are currently over 200 cases of this nature in Sarawak, a similar number in Sabah and a sizeable number in Peninsular Malaysia.

Many of these cases have been pursued thanks to the sustained commitment and persistence of pro bono lawyers and social justice NGOs. Court processes can drag on for years and even after a successful judgment, results can be overturned in the extended appeals process. For these reasons, it is common for plaintiffs to

abandon the process mid-way. They are intimidated by the unfamiliarity of the court process and the sustained drain on resources from repeated court appearances. Many cases outlive their plaintiffs, a tragic case of justice delayed being justice denied.

Court cases impose a heavy burden on the judiciary to uphold the spirit and letter of the law in cases, which are most frequently against the government and its agents. Despite many disappointing outcomes, there have been a handful of significant judgments in case law that today form the strongest basis for reinforcing rights to customary land in Malaysia.

For Peninsular Malaysia, the key cases shared here (see Appendix 1) demonstrate how Orang Asli communities and their supporters have drawn on international legal frameworks to assert their rights to land based on their history of continuous occupation. The cases involve the recognition of native title and usufruct rights as recognised in *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (1997) and *Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors* (2002).<sup>97</sup>

As explained by Colin Nicholas of the Centre of Orang Asli Concerns (COAC), the practice of most State governments has been to use the 1954 Aboriginal People's Act as the legal basis for compensating the Orang Asli only for their crops and dwellings whenever their lands are confiscated from them:

"The 1954 Act has also been used to argue that the Orang Asli do not hold proprietary interest in their land, and that the state governments exercise wide powers as to the disposal and compensation of these lands. The Orang Asli, as such, are only tenants-at-will, living on state land at the state's largesse".<sup>98</sup>

In December 2012, another important legal decision saw the Orang Asli of Tasik Bera

in Pahang successfully defend their claim over an area of 2,000 ha that had been encroached upon by a FELCRA agricultural development scheme. The judge ruled that the Semelai community had pre-existing rights to the territory which made the development illegal. He ordered that the land be returned to its rightful claimants and further instructed the State government to ensure that the customary lands of the Semelai be gazetted within the same year.<sup>99</sup>

#### *Human right obligations of agribusinesses*

Despite Malaysia's obligations under the CBD, UNDRIP and common law on native land rights, none of these had been incorporated within relevant local laws.<sup>100</sup> Hence, the government agencies tasked with awarding concessions for large-scale agricultural development and the private sector actors awarded these concessions in general are not adhering to the human rights elements within these instruments to protect indigenous peoples' rights to land and resources.

As land and forests are within each individual State's jurisdiction, States are able to convert State forests for large-scale agricultural development without any due consultation, regardless of whether the land is under native customary claim or not. Land acquisition acts, such as that in Sabah, have also been amended to make it easy for corporations to acquire land for reasons other than "public purposes", such as agricultural development in the context of poverty alleviation.

Apart from the States' (not including Selangor) not pursuing any obligations with regards to compliance with human rights, the advent of voluntary international "sustainability" standards for timber and oil palm – the FSC and RSPO respectively – have opened up additional space for human rights issues to surface.

There are currently 24 Malaysian oil palm growers who are members of the RSPO but only 12 of these have obtained certification, although not all of their units may have been certified. Boustead Plantations, for instance, only has one certified unit. The total production area in Malaysia certified is of 838,236 ha out of a global total of 1,813,927 ha.

The production area currently certified in Malaysia represents just 17% of the 5 million ha under oil palm in the country. Being bound to the RSPO certification system's rules, companies with certified holdings must have time-bound plans to ensure that all their holdings will be certified, and currently uncertified holdings need to be free from conflicts (including legal, land and labour conflicts).

Although 12 other Malaysian growers who are RSPO members have not had any of their units certified, under the RSPO Code of Conduct, "members will work towards implementation and certification of the P&C." However, no time limit is specified to this end. Breaches to the code, by-laws and statutes "may lead to exclusion from the organization."<sup>101</sup>

So far, one company, IOI Corporation, has had its certification process (of all new certifications) suspended due to a longstanding conflict with NCR claimants in one of its subsidiaries in Sarawak, IOI Pelita Plantation in April 2011<sup>102</sup>, where the High Court had recognised the claimants' right to land, but stopped short of prescribing steps to solve the impasse.<sup>103</sup> In 2012, IOI's suspension was reduced to a suspension of new certifications in Sarawak.<sup>104</sup> Pending satisfactory progress by the currently ongoing mediation process facilitated by the RSPO's Grievance Panel, IOI Pelita remains uncertifiable at the time of writing.

Currently, the RSPO is the only sustainability standard for oil palm in Malaysia, although this may change as the



local industry is working on the development of a local standard, the Malaysian Sustainable Palm Oil (MSPO), which is very much like the Indonesian Sustainable Palm Oil (ISPO) standard. However, unlike the ISPO, whose standard is compulsory for all oil palm companies operating in Indonesia from mid-2014 onwards, it is reported that the MSPO standard (the development of which is being driven by the Malaysian Palm Oil Board), which may be launched at the end of 2013, will remain voluntary.<sup>105</sup>

Although FSC, FSC-based standards (i.e. MTCS) and the RSPO are being implemented in Malaysia, implementation still remains wanting on the ground. National Interpretations are based on appropriate local laws and international conventions signed and ratified by Malaysia. There are a number of issues with this. Firstly, that the interpretations deem local laws and standards as acceptable; secondly, the fact that Malaysia has a poor ratification record of international conventions, which negates the protections that these proffer.; and thirdly, that where conventions have been ratified, they have not been domesticated within local laws, which means that implementation of these are lacking and exists only on a case-by-case basis where plaintiffs have filed lawsuits against companies and/or government agencies.

This was evidenced in interviews with a few companies that have been certified or are pursuing certification in Sabah (mainly forest plantations),<sup>106</sup> which suggested that without the government or States' willingness and involvement in ensuring that fundamental rights are upheld, the companies find it difficult to fully recognise native customary land rights of communities within their concession areas.<sup>107</sup> Although these companies may have taken steps to survey and map customary boundaries in a participatory manner with affected villagers so as to

identify and demarcate NCR lands, they are unable to excise these lands from their licensed area as only the State Land and Survey Department is authorised to do so.

Although both Sabah and Sarawak governments have shown willingness to issue Communal Titles and Native Communal Reserves respectively for native claimed lands, as laid out in previous sections, the States in general are unlikely to recognise or enforce the full extent of NCR and hence land conflicts have become and remain a chronic issue in all three regions of Malaysia.

Yet there are a few examples of small successes. For example in the Tinjar region of Sarawak, the Asian Plantation Limited (APL) bought over plantation land in 2010 that was subject to conflict with local longhouse communities who claimed the land. APL entered into a negotiated agreement with the affected communities – who were represented by their own lawyer – and developed a 40:60 oil palm JV with the community cooperative that was set up for this very purpose.<sup>108</sup>

This is an example of a company that publicly professes to be socially responsible that has found a way to create a more inclusive model of agricultural development outside of State-sponsored schemes, and although currently few and far between, this evolution of alternative models with more equitable involvement of communities need to be watched and shared to learn their advantages and disadvantages for the various stakeholders involved.

Since SUHAKAM (see Box 4) was established, indigenous peoples, communities and representative organisations have used the Commission as a channel for their complaints and memorandums. Over 2,000 complaints from indigenous communities have been brought to the Commission “alleging various forms of human rights violations

on the land rights of Indigenous Peoples in Peninsular Malaysia, Sabah and Sarawak.”  
109

**Box 4: The Malaysian National Human Rights Commission**

The Human Rights Commission of Malaysia (SUHAKAM) was set up by the Federal Government under the Human Rights Commission of Malaysia Act 1999 (Act 597), five years after the idea was mooted. The initiative to set up a national human rights institution began with Malaysia's participation in the United Nations Commission on Human Rights (UNCHR) in 1993, where Malaysia was elected as a member of the Commission by the United Nations Economic and Social Council, and went on to serve for two more terms. This membership was an impetus for the Government to finally set up the national human rights institution.

SUHAKAM is set up as an impartial rights-based organisation that supports the promotion of indigenous social and economic systems based on the principles of UNDRIP, ILO Convention 169 and the Convention on Biological Diversity (SUHAKAM 2011). Although SUHAKAM is set up by the Parliament and receives funding to run its programmes from the government, it has limited powers. The Commission is mandated to report on human rights abuses in the country, yet it has no authority to penalise. The Commission publishes Annual Reports, which provides an overview of human rights issues, yet, since its inception in 2000 these issues have yet to be discussed in Parliament. In October 2012, the Minister in charge of law in the then Prime Minister's Department (replying to a question during a Parliament sitting) stated that the Government would propose the setting up of a permanent committee to discuss SUHAKAM reports, although no other details were given. At the time of writing, such a committee has not been created.

In response, in 2011 SUHAKAM embarked on its first National Inquiry, the National Inquiry into the Land Rights of Indigenous Peoples.<sup>110</sup> The Inquiry commissioned case study research by independent researchers and local universities, and consultations and public hearings were held in the Peninsula, Sabah and Sarawak to gather evidence from indigenous communities, government departments and agencies, companies, NGOs and the general public. The final report which has been provided to the Federal government but which has not been made publicly available<sup>111</sup> includes recommendations to improve the current status of land rights for indigenous communities.

While it is remarkable that such an inquiry has gone ahead, and various government authorities and companies have cooperated in some aspects of the study, it remains uncertain how the recommendations will be received and taken up by the respective State governments and relevant departments. In this regard, political will and leadership from senior government officials and policy makers will be essential to implement the recommended reforms, however support for this remains uncertain, as a new cabinet has just been put into place after the thirteenth general elections in May 2013.

In the face of States' reluctance to recognise native land rights and the lack of any government initiative to domesticate international laws, it behooves civil society and affected communities themselves to force a debate on these issues. For example, in response to the ongoing anti-dam campaign in Sarawak<sup>112</sup> that has highlighted a lack of consultation and respect for Free, Prior and Informed Consent in the State's plan to build a series of twelve dams, a SUHAKAM commissioner had suggested that the campaigners try to obtain a court injunction against the project led by

Sarawak Energy Berhad (a public listed company 100% owned by the Sarawak government), using international human rights law (specifically UNDRIP, CRC and CEDAW) that Malaysia has endorsed and/or ratified as its basis.

This strategy has to date not been widely used in Malaysia. One example where it has been used is where CEDAW was cited and upheld by a judge hearing a discrimination case, where the government was sued by a relief teacher who was dismissed for becoming pregnant.<sup>113</sup> This was reported to be the “first time that a court has awarded damages over the breach of fundamental rights under the Federal constitution.”<sup>114</sup>

## **8. Conclusion and recommendations**

By all intents and purposes, in the face of the decline of the traditional farming sector, the policies driving agriculture and commodities in Malaysia are mainly geared towards large-scale developments and sector modernisation as well as focused on downstream value-added growth within the country and overseas. Within the country, Malaysia has a dismal record in terms of human rights and agribusiness, especially with regards to the impact of large concessions of timber and oil palm plantations on indigenous peoples’ rights to land and livelihood. Unfortunately this is being replicated in the countries where Malaysian investors are operating.

Despite persistent protests by indigenous communities, the governance of land – in terms of the awarding of concessions by the State governments to private sector entities or otherwise – is based on a dominant narrative of economic development whereby large-scale and commercial are conceived as the ideal models for agricultural development and poverty eradication. The new agricultural policies reflect this, although there is

evidence from literature that might suggests otherwise.<sup>115</sup>

Policies need to be evidenced-based; hence the question needs to be asked: are current approaches in agricultural development, and especially the oil palm sector adequately enabling rural people to improve incomes, escape poverty and participate effectively? An independent assessment of joint ventures and other agricultural approaches with the full cooperation of the companies and State agencies concerned may be one way of ascertaining whether these schemes represent the best ways to mobilise agricultural development on customary lands. Strategies to develop and monitor a wider range of performance indicators are also needed to restore confidence in existing programmes.

The pressure is increasing from grassroots and community-based organisations who are asserting their claims to their customary areas and protesting against a type of development that is detrimental to their lands, livelihoods and traditions. In recent years, there have been much more visible and vocal demands from these groups, in part due to greater access to information, advisors and support networks, as well as access to online and social media to publicise conflicts and injustices. Such groups are also starting to organise politically, as evidenced by a number of rights-based activists and lawyers who became candidates in opposition parties in the recently concluded thirteenth general elections. Although most lost to the incumbent party’s candidates in crisis regions that matter politically (e.g. Sabah and Sarawak), this is nevertheless a positive step for the future.

The need for fundamental changes in laws to protect human rights has also seen great support from social and legal advocacy NGOs, environmental NGOs and civil society. One such positive development,

for example, is the establishment of a new Malaysian NGO coalition in 2013 that is willing to engage with the oil palm industry and RSPO on such issues, and to dialogue with neighbouring countries also affected by the palm oil sector, such as Indonesia, in order to develop strategies of advocacy. It will be advantageous for similar engagements to occur with civil society and relevant organisations from countries where expansion of agribusiness is being targeted by Malaysian investors.

In terms of recommendations, greater support needs to be provided to NGOs to increase their visibility, reach and influence as well as their effectiveness in various arenas of human rights and environmental advocacy, in Malaysia and abroad. Similarly, support for efforts to bring about political and legal reforms in national and State laws and administrative practices that incorporate SUHAKAM's recommendations from its National Inquiry to recognise the land rights of indigenous peoples is essential.

Furthermore, a credible time-bound national human rights action plan to sign and ratify the core human rights instruments that Malaysia is not yet party to is critical. These instruments need to be incorporated into domestic laws. Moreover, there needs to be a discussion on the "Federal vs State" responsibilities vis-à-vis land and resources and support for research on new mechanisms that will encourage and/or incentivise States to stop wholesale conversion of forests and customary lands to plantations and farms.

In addition to the above, a critical review and assessment of the impacts of current agricultural policies and systems needs to be carried out, with the view to creating and supporting alternative models of agriculture that respect indigenous land rights and customs, and incorporate indigenous peoples' economic and development needs on their own terms. States need to be lobbied to include

practices such as freedom of information, compulsory participatory processes and independent impact assessments in the awarding of large-scale land concessions for development projects.

Where reforms are delayed or non-forthcoming, legal actions should be pursued and sustained, using international human right frameworks or fundamental rights under the Federal Constitution as a basis that can further build on existing case law precedents. Legal aid and other relevant assistance for individuals and communities to claim their rights via the courts still remain viable options, and should be supported by law associations, community-based organisations and funding agencies.

The practices of "responsible" companies, where evidenced by openness, transparency and proven implementation of policies to respect human rights and engage with native communities on rights issues, need to be encouraged and supported. These actors constitute an important stakeholder group who may be able to play a leading role to nudge the agribusiness industry towards building better, more equitable models of agricultural development.

They should be encouraged to work with civil society and other bodies to bring about change in how native land issues should be handled on the basis of moral and legal arguments, rather than only on the basis of economic imperatives. Alternative models of collaboration that fully respect native rights, even though the State does not currently support them, should be explored fully with all relevant stakeholders.

Finally, further research and advocacy to make banks, financial institutions and investment houses more transparent, accountable, and aware of the potential human rights violations in agribusiness financing and investing is crucial. This is

particularly relevant for major local banks, as these are fully involved in financing agribusiness in Malaysia.

### **Appendix 1: Legal developments enforcing human rights protections in Malaysia**

Without the domestication of signed or ratified international conventions into local laws and regulations, the operationalisation of various “sustainability” standards such as the RSPO remains unconvincing, the Federal Constitution notwithstanding. Until such an exercise is held to review and reform laws (as one of the recommendations from SUHAKAM’s National Inquiry final report), it can be expected that affected claimants will continue to file legal cases against companies and governments, on the basis of several key judgments.

#### *Landmark cases in Peninsular Malaysia*

In the primary landmark case of *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (1997), new judicial concepts were introduced, in particular, that of native title. The judge laid down his understanding of native title by drawing upon precedents in the United States, Canada and Australia (specifically the *Calder* and *Mabo* cases respectively), stating that “it is the right of the native to continue to live on their land as their forefathers had done”, a right “acquired in law” and not based on any document or title. This also meant that “future generations of the aboriginal people would be entitled to this right of their forefathers”. Specifically, he defined this “right over the land” to include: “the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial.”

The judge ruled that compensation had to be given not just for rubber and fruit trees,

but “for what is above the land over which the plaintiffs have a right”, that is compensation “for the loss of livelihood and hunting ground”. These, he established, were protected under Article 13 of the Federal Constitution (concerned with proprietary rights to land) and could not be excluded by the Act. Compensation was thus given for five types of deprivation: of heritage land, of freedom of inhabitation or movement, of produce of the forest, of future living for the plaintiffs and their immediate families, and of future living for their living descendants. Compensation was valued at MYR 26.5 million for 53,273 acres of land. When this was reviewed in the Court of Appeal, the presiding judges upheld the decision, and reaffirmed that “deprivation of livelihood may amount to deprivation of life itself and that state action which produced such a consequence may be impugned on well-established grounds”. This judgment was affirmed by the Federal Court.

In December 2012, another important legal decision saw the Orang Asli of Tasik Bera in Pahang successfully defend their claim over an area of 2,000 ha that had been encroached upon by a government agricultural development scheme. The judge ruled that the Semelai community had pre-existing rights to the territory that made the development illegal. The court ordered that the land be returned to its rightful claimants and further instructed the State government to ensure that the customary lands of the Semelai be gazetted within the same year.<sup>116</sup>

#### *Landmark cases in the High Court of Sabah and Sarawak*

A landmark case in Sarawak, *Nor anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* has challenged the limitations in the interpretation of native customary lands under the Sarawak Land Code (SLC) of 1958. The SLC limits the recognition of native customary lands or

“native customary rights” (NCR) to a strict legal definition, as “land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1<sup>st</sup> day of January 1958 and still subsist as such”. NCR in this statutory sense is “created” when land is planted with at least 20 fruit trees per acre, or where land has been continuously occupied or built upon for three years. There are several other conditions to be met in addition to the above. However, these claims are only applicable if the NCR land was created prior to 1<sup>st</sup> January 1958. Effectively, no new NCR can be created after this cut-off date except with a permit from the Superintendent of the Lands and Surveys under section 10 of the SLC.

The plaintiffs were residents of Rumah Luang and Rumah Nor, both Iban longhouses along the Sekabai River in Bintulu. The headman, Nor anak Nyawai, asserted that the companies had trespassed onto their ancestral lands. According to the plaintiffs, the Superintendent of Lands and Survey Department had issued a provisional lease that enabled Borneo Pulp Plantations Sdn Bhd and its sub-contractor Borneo Pulp & Paper Sdn Bhd to clear land for an industrial tree plantation as part of a concession of 300,000 ha. The plaintiffs said they had opened up this land and could prove that they had continuously occupied it for generations.

In the 2001 ruling, the High Court of Sabah and Sarawak recognised that the community had native customary rights over their farmland, and also fallows, and reserves of old growth forest according to traditional resource management practices. The ruling essentially set a precedent by recognising *temuda*, *pemakai menoa* and *pulau galau*<sup>117</sup> as forms of native customary rights over land, and not just in the strict sense of the SLC 1958. The judgment confirmed that common law respected the pre-existing rights of



indigenous groups under native law and custom.<sup>118</sup>

In 2005, their victory was partially overturned in State Appeals Court due to “lack of evidence of occupation of the disputed area”. Confusingly, all their lands outside the disputed area were still considered by the court to be valid native customary rights lands. In 2008, the Federal court declined to hear the case. This means that questions of native customary land rights continue to be decided arbitrarily, on a case-by-case basis. Though many High Court decisions since 2008 have chosen to uphold native land rights as defined in the Rumah Nor 2001 decision, hundreds of indigenous communities across Sarawak and Sabah continue to suffer the same loss of land as in the Rumah Nor case, as common law on native law and customs remains in the realm of the courts, and have not been incorporated into the relevant State laws.

However, the findings of Rumah Nor has been significant. In a recent June 2013 case heard by the Court of Appeal by the Sarawak State government against the judgment where the judge had ruled in favour of plaintiffs that they were rightful owners of NCR land that was issued by the state government to the Kanowit Timber Company, including their *pemakai menoa* area<sup>119</sup>. The appeal against this decision by the State government was dismissed, affirming that *pemakai menoa* is part of NCR land. Despite this the State government has not recognised the *pemakai menoa* in the perimeter surveys to award Native Communal Reserve (also NCR) to longhouse communities.

#### *Judgments against “New Concept” of oil palm development on NCR land in Sarawak*

Apart from conflicts over native claimed land, another recent key case concerns the Sarawak State government’s New Concept oil palm development. Boustead Kanowit

Pelita, a three-way Joint Venture between Native Customary Rights (NCR) landholders in Kanowit District, Pelita Holdings Sdn Bhd, a wholly-owned company of the Land Custody and Development Authority under the (LCDA, or also known under its Malay acronym Pelita). LCDA is a State-owned statutory body, whose board of directors includes the Sarawak Chief Minister as Chairman and Deputy Chief Minister as Deputy Chairman. The third party to the JV is the investor and oil palm plantation company Boustead Plantations Berhad, based in Kuala Lumpur and a member of the Roundtable of Sustainable Palm Oil (RSPO).

This is the first of the NCR Pelita JVs promoted by the Chief Minister in the 1990s under the “New Concept” development initiative to develop oil palm plantations on NCR land. The JV agreement between Pelita Holdings with the-then Kuala Sidim Berhad (now Boustead Plantations) was signed on 6<sup>th</sup> May 1998.

Land was developed for oil palm between 1996 and 1998, but the Principal Deed between NCR landholders and Pelita Holdings, which makes the latter Trustees for the landholders in any matters pertaining to the JV, was only signed in 2002 (effectively giving the LCDA power of attorney over all matters dealing with their land and the JV development). However, verbal assurances to the community, including that the community would start receiving “dividends” from the project after a period of four years from project initiation were not fulfilled. In fact, the project has not been financially viable thus far.

After adopting various strategies to voice their concerns (letters and memorandums, police reports and blockades on the ground), a group of villagers filed a writ of summons in 2009 against Pelita Holdings,

the Land and Survey Department and the government of Sarawak for breach of trust. The plaintiffs claimed that the defendants were negligent in not ensuring that the investors developed their NCR land profitably as guaranteed; and that they were defrauded by misrepresentation that the joint venture would bring profit. This is the first case where a suit has been filed against a trustee in a joint venture project for breach of trust.

In April 2012, the court judged in favour of the plaintiffs and found the Principal Deed and the JV agreement to be illegal thus null and void; and that Pelita Holdings and the State government of Sarawak had breached or were negligent or failed in their fiduciary duty to the plaintiffs. The court also ruled for the land to be returned to the NCR landholders. However, the case has not concluded as Boustead has appealed the decision, and a stay of execution has been granted. This is not the first of the NCR Pelita JVs to have been heard in court.

In 2011, the Principal Deed of a JV between LCDA and Tetangga Arkab in the Tetangga Arkab Pelita Pantu for 7,000 ha of oil palm development was also called into question by the High Court. In the judgment, the judge said the principal deed and the JV agreement had deprived the plaintiffs of their native customary rights land which is a source of their livelihood and caused them to lose the rights to their property, which constituted violations of Articles 5 and 13 of the Federal Constitution. The written judgment was hugely critical of the premise of the Principal deed and the JV agreement:

“Firstly, PHSB was to receive and collect the benefits of the development of the native customary rights land into an oil palm plantation, not the landowners;

“Secondly, the commercial development of the native customary rights land into an oil palm plantation

was to be carried out by a joint-venture company formed by PHSB and TASB, a company exclusively chosen by PHSB under a joint-venture agreement in respect of which the landowners are not even a party to.

“Thirdly, the native customary rights lands are immediately amalgamated and title is to be issued in the name of the ‘joint-venture’ company and the landowners would have no beneficial legal equitable or caveatable interest in the land to be issued with title.

“And one can go on and on to illustrate how the terms of the principal deed have stripped the landowners of their rights in every conceivable way and reduced those rights into nothingness.

“The fact that the landowners were not parties to the agreement between PHSB and TASB, under which it was agreed for the commercial development of the native customary rights land by Tetangga, meant that the landowners’ rights in and over the oil palm plantation was also definitively zero.”

Judge Linton Albert, 2<sup>nd</sup> March 2011, in *Masa Anak Nangkai & Ors v. Land Custody and Development Authority & Ors* (2011)

The decision of the court on these cases has wide implications on other joint venture agreements between Pelita, companies and NCR landholders natives, as there are more than 20 JV companies with natives that may be affected by this ruling.

#### *Selangor Orang Asli Land Task Force*

Apart from the legal path through the courts, the State of Selangor also shows how the process of democracy which put rights-based activists (turned into opposition party candidates) into decision-making posts in the government can also

direct State policies towards the protection of human rights.

The Selangor State government changed hands from the incumbent Barisan Nasional (BN) coalition (also the ruling coalition of Malaysia) to the opposition coalition Pakatan Rakyat (PR) in the 12<sup>th</sup> general election in March 2008,<sup>120</sup> which also saw three other States previously under BN administration in Peninsular Malaysia taken by the opposition. It was a landmark election, where for the first time since 1969 BN lost two-thirds of parliamentary majority needed to amend constitution. In 2008, the new Selangor government announced a 25-year logging moratorium in the State.

In 2011, the State government successfully amended its laws to make public hearings compulsory before degazetting a forest reserve. Under the previous administration, forest reserves could be degazetted for development in private meetings without public scrutiny.

Set up in 2009, the Orang Asli Task Force was established by the new Selangor State government to tackle indigenous land issues in the State. At its launch, the Chief Minister explained that the Task Force would “concentrate on gazetting of land belonging to the community and fair compensation payments to be made for land taken for development purpose”.

A landmark decision was also made to withdraw an appeal (lodged during the BN administration) to the Federal Court over the long-standing Sagong Tasi case, which had been in the courts since 1996. This resulted in a settlement of RM 6.5 million finally being paid to Temuan natives for the acquisition of their land for the Kuala Lumpur International Airport.

Selangor is the first State to set up a special mechanism to resolve indigenous land rights issues. Perak, under its short-lived PR government also set up such a

taskforce, but it was discontinued after the overthrow of the PR government in 2008. However, not all opposition-led States share similar policies, as evident in the case of Kelantan, where the incumbent administration led by PAS (Parti Se-Islam Malaysia, which is part of the opposition coalition) has been strongly criticised for the conversion of large areas of forest for rubber and oil palm plantations as well as vegetable farms.<sup>121</sup>

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<sup>11</sup> <http://data.worldbank.org/indicator/AG.LND.AGRI.ZS>

<sup>12</sup> Figures as at December 2012 from MPOB: <http://bepi.mpob.gov.my/index.php/statistics/area/110-area/567-oil-palm-planted-area-dec-2012.html>

<sup>13</sup> <http://pkpkm.org/index.php/en/new-direction-and-strategy>

<sup>14</sup> Not negating the fact that rubber is a very important crop that contributes to rural livelihoods.

<sup>15</sup> The Ladang Rakyat project reportedly grants participants monthly dividends of RM 200, which is drawn from profits earned by leasing lands to private companies for plantations.

<sup>16</sup> See slide 5, Profile of Commodities, Plantation Industry and Commodities in Malaysia, by Mohamad Sanuri Shahid, Ministry of Plantations Industries and Commodities. 19 September 2012

<sup>17</sup> Zain Fahmi et al 2013.

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<sup>39</sup> Majid Cooke & Toh 2012.

<sup>40</sup> Ibid.

<sup>41</sup> Another issue was the overlapping objectives of “awarding NCR land” to claimants and poverty alleviation. In the Agropolitan scheme in Lalampas, the decision of who became a project beneficiary (i.e. whose name would be listed in the Communal Title grant) was a messy affair, as the district originally included the hardcore poor from other parts of the district who may have had no links to the ancestral lands at Lalampas. Following community protest, it was concluded that only those with claims to customary land at Lalampas could become beneficiaries. Despite discontentment, many signed the agreement to allow the Sabah Land Development Board (SLDB) to manage their customary land for 30 years for oil palm development.

<sup>42</sup> SUHAKAM 2012:41.

<sup>43</sup> Bulan & Locklear 2008.

<sup>44</sup> The Act provides for the declaration of Orang Asli Areas (section 6, for areas “predominantly or exclusively inhabited by aborigines”) and Orang Asli Reserves (S7, for areas “exclusively inhabited by aborigines”). Land under S6 and S7 are protected to various degrees from being alienated, granted, leased, and under S7 cannot be declared a reserved forest.

<sup>45</sup> Nicholas 2010:24.

<sup>46</sup> Nicholas 2010.

<sup>47</sup> Ibid.

<sup>48</sup> “Orang Asli win back part of Malay Reserve land.” The Malaysian Insider, 19 December 2012.

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<sup>66</sup> Assumptions of economic backwardness and low productivity are so entrenched that even in instances where smallholders have shown clear initiative in spearheading cash crop production of rubber, cocoa or pepper as in Sarawak before the 1980s, the established perception about them remains (Cramb 2007 & Cramb 2011)

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<sup>85</sup> Ibid: 37-38.

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- <sup>91</sup> Nicholas et al 2010.
- <sup>92</sup> Bulan and Locklear 2008.
- <sup>93</sup> Nicholas 2010.
- <sup>94</sup> Hong 1984.
- <sup>95</sup> Yong 2003.
- <sup>96</sup> <http://weehingthong.wordpress.com/2012/08/16/sarawak-500-natives-storm-serian-police-station/>
- <sup>97</sup> Nah 2008 discusses these cases.
- <sup>98</sup> Nicholas 2005:39.
- <sup>99</sup> "Court rules part of Malay reserve land in Bera belonged to orang asli." 19 December 2012.  
<http://thestar.com.my/news/story.asp?file=/2012/12/19/nation/20121219145307&sec=nation>
- <sup>100</sup> Only the new State government of Selangor (after the 2008 general elections) introduced landmark legal and policy changes, not only to recognise Orang Asli rights to land, but also to make it compulsory to hold public enquiries or hearings before a forest reserve is degazetted. However, it must be noted that Selangor is the most developed state in Malaysia and does not rely on forestry or agriculture for State revenue.
- <sup>101</sup> [http://www.rspo.org/en/rspo\\_code\\_of\\_conduct](http://www.rspo.org/en/rspo_code_of_conduct)
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- <sup>107</sup> Majid Cooke & Toh 2012.
- <sup>108</sup> <http://www.asianplantations.com/en/news/press-releases/190-dulit-acquisition-completion-a-company-update.html>
- <sup>109</sup> SUHAKAM 2011.
- <sup>110</sup> The Official Website of The National Inquiry Into The Land Rights of Indigenous Peoples  
<http://www.suhakam.org.my/web/682315/1>
- <sup>111</sup> It has, however, been leaked by the whistleblower site Sarawak Report:  
<http://sarawakreport.org/suhakam/suhakam-chapter1.html>
- <sup>112</sup> In response to Sarawak's plan to build a series of 12 dams under the Sarawak Corridor of Renewable Energy (SCORE) project, Sarawak NGOs and indigenous leaders have launched an anti-dam campaign which is also supported by international NGOs such as the Bruno Manser Fund (Switzerland), International Rivers (US), Borneo Project (US), the Rainforest Action Network (US) and Rainforest Foundation Norway.
- <sup>113</sup> Case notes available from:  
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- <sup>114</sup> "Pregnant woman wins landmark discrimination case." The Malaysian Insider, 12 July 2011.  
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- <sup>115</sup> Li 2011, McCarthy 2010
- <sup>116</sup> "Court rules part of Malay reserve land in Bera belonged to orang asli." The Star, 19 December 2012.  
<http://thestar.com.my/news/story.asp?file=/2012/12/19/nation/20121219145307&sec=nation>
- <sup>117</sup> According to Iban custom, their entire territorial domain is known as *pemakai menoa* which includes areas of *temuda* (hills rice and fallowed land) and *pulau galau* (village forest reserves) (Ngidang 2003, Ishikawa 2007).
- <sup>118</sup> Yong 2010:11.
- <sup>119</sup> "Swk loses appeal over NCR decision." Free Malaysia Today, 22 June 2013.  
<http://www.freemalaysiatoday.com/category/nation/2013/06/22/s%80%99wak-loses-appeal-over-ncr-land-decision/>
- <sup>120</sup> And more recently, Pakatan Rakyat retained the state in the thirteenth General Elections in May 2013.
- <sup>121</sup> "Authorities should not take sides over Orang Asli dispute, Suhakam." The Sun, 4 February 2012.  
<http://www.thesundaily.my/news/285029>

# National Updates on Agribusiness Large Scale Land Acquisitions in Southeast Asia

## Brief #6 of 8: Kingdom of Cambodia

By Chan Khiev



Source: [www.vidiani.com](http://www.vidiani.com)

### Country profile

Cambodia covers a total area of 181,035 km<sup>2</sup> (of which water represents 2.5%) and its population was of 14,805,358 in 2009.<sup>1</sup> The country shares borders with Vietnam to the east, Laos to the north, Thailand to the west, and the ocean coast to the southwest. The official language is Khmer, spoken by 95% of the population. English is the second language in towns and cities where Vietnamese, Thai, Chinese and French are also spoken.

The tropical climate of Cambodia makes it a prime location for intensive agricultural cultivation, compounded with the availability of highly fertile land and abundant monsoon rains. Around 71% of Cambodia is agricultural land and about 82% of Cambodians live in rural areas. The majority of these communities' livelihoods are dependent on agriculture, further supported by small businesses, livestock-raising and use and trade of Non-Timber Forest Products (NTFP).

Rice cultivation is the most widespread agricultural activity in Cambodia, followed



by that of cassava, eucalyptus, acacia, maize, sugarcane, soya bean, oil palm, rubber and other crops.

### National trends in Large Scale Land Acquisitions

The National Strategic Development Plan (NSDP) is a strategic directive of the Royal Government of Cambodia (RGC) towards national development. Agriculture and agribusiness are highly prioritised in this directive and feature prominently in national development plans. Large-scale land investments by both national and foreign investors via the granting of Economic Land Concessions (ELCs) are widespread. ELCs are conceived by the RGC as key to increasing national income and budget, generating employment opportunities for local communities and developing infrastructure systems in rural areas. The solicitation of investments has led to a rapid increase in the number of agribusiness companies operating in Cambodia over the last few years.<sup>2</sup>

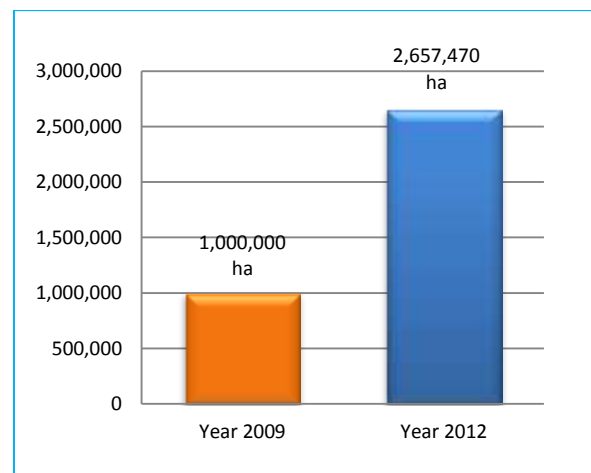
In parallel to this acceleration in Large Scale Agribusiness Land acquisitions, urban development has boomed, testified to by the towering skyscrapers in towns and cities and the purchase of luxury and costly vehicles by wealthy urbanites. However, behind the scenes, human rights defenders have pointed to a vast and growing gap between the living standards of the rich and the poor resulting from inequitable development, and accompanied by frequent human rights violations and neglect in remote rural areas.

World Bank data suggests that around one million ha of land were transferred to private sector investors from 2004 to 2009. By late 2012, national NGOs working on land tenure security and land reform reported that the government had designated at least 2,657,470 ha as Economic Land Concessions to private companies.<sup>3</sup> This represents a 16.7%

growth in private sector land investments since 2011.

In 2012 alone, the government of Cambodia issued 66 sub-decrees reserving 381,121 ha of land (including 108,524 ha transferred from State public property to State private property) for ELCs, and most of the newly granted concessions and land-reclassifications also affect protected areas.<sup>4</sup> Furthermore, independent research indicates that about 3.9 million ha (representing more than 22% of the country's total surface area) are currently controlled by private sector firms.<sup>5</sup>

Figure 1 Trends in land transfers (2009-2012)



As shown in the diagram above, more than one and a half million ha of land were transferred by the RGC to companies between 2009 and 2012. However, questions remain as to whether the unprecedented scale and pace of these investments is being accompanied by enforceable rule of law, democracy, transparency and accountability. Questions also remain as to whether current social and environmental requirements and policies for investments support responsible investors to achieve real accountability and sustainability in their operations.

*Government policies and targets for agribusiness expansion*

In line with the NSDP 2009-2013, the expansion of agribusiness is a top priority and one of the four pillars of the government's strategy for growth and development (the others being infrastructure, private sector development and human resource development). Both national and foreign investments are encouraged under the NSDP. The RGC has publicly disclosed proposal solicitation for agribusiness investors and supports private agencies and institutions in guiding companies seeking to invest in Cambodia.

In November 2010, Cambodia ratified a multi-lateral free trade agreement with New Zealand, Australia and ASEAN, with the aim of facilitating trade in goods and services through preferential treatment and requirements.<sup>6</sup>

In February 2013, the MAFF developed a six-point agreement with the Head of the National Assembly of the Republic of Belarus relating to the expansion of agricultural investments by Cambodia and Belarus. The agreement features capacity-building support to this end from Belarus, as well as the import of machinery and agreements for trade in specific agricultural products.

In the same month, the MAFF held a meeting with relevant government officials of the Ministry to reflect on the achievements of 2012 and strategic directions for 2013 in terms of effective management and use of pesticides and fertilisers. 20 points of recommendations resulted from this meeting towards the strengthening and capacity-building of pesticide and fertiliser use in agriculture and agribusiness operations.

However, a number of large-scale land investments in recent years appear to have taken place with little regard for existing national legal frameworks,<sup>7</sup> social and

environmental corporate accountability, or the State's obligation to protect and respect the human rights of Cambodian citizens and to provide remedy where these have been violated.

For instance, in line with Article 59 of Cambodia's Land Law of 2001, the maximum size of ELCs is of 10,000 ha, but some ELCs have been granted over up to twice or thrice this amount.<sup>8</sup> Article 59 also prohibits the granting of different ELCs to the same concessionaire. However, one domestic company, L.Y.P., has been allowed to operate seven<sup>9</sup> different ELCs in three different locations over a land area of over 60,000 ha for its sugarcane investments.<sup>10</sup> Another domestic company, M.R.T., is currently operating four<sup>11</sup> different ELCs in four different locations over a land area of 220,852 ha for its palm oil investments.<sup>12</sup>

Some foreign investors have also been granted land well over the legal limit. These include Chinese company Pheapimex,<sup>13</sup> which holds 315,028 ha of land for cassava, acacia, rubber and eucalyptus plantations, and Chinese company Wuzhishan LS Group<sup>14</sup>, which holds 199,999 ha in Mondulhiri for its pine tree plantations.

*Gross areas allocated to agribusiness in last three years*

The highlands and red soils of east and north Cambodia make them prime locations for the development of rubber, cashew, acacia and pine tree plantations, while investments in central and western Cambodia are primarily for cassava, sugarcane, banana and soya-bean plantations, and rice paddies.

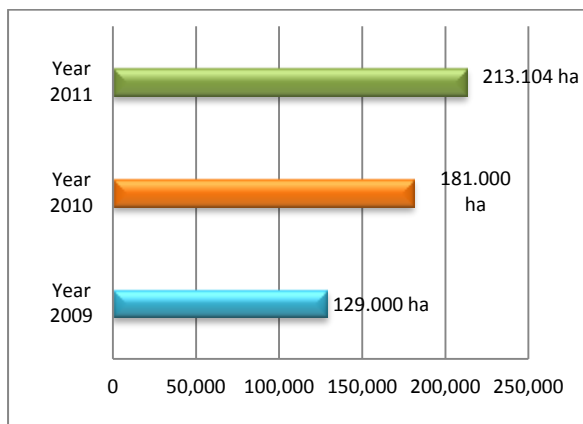
Provincial spatial plans for plantations in Cambodia are largely determined by export trends and access. For instance, cassava, banana and soya-bean are exported to Thailand, and therefore plantations for these crops are to be found



in provinces bordering Thailand, such as Battambang, Bantey Meanchey, Oddar Meachey and Koh Kong. Rubber and acacia, which are primarily exported to Vietnam and China, are planted in Kratie, Stung Treng, Rattanakiri and MondulKiri provinces, which border with these two countries.

According to the 2010 annual report of the Ministry of Agriculture, Forestry and Fisheries (MAFF), the total area of land that has been planted with rubber is of 181,000 ha, representing a 39% increase since the year before (129,000 ha). In 2011, rubber plantations occupied up to 213,104 ha, representing a further 17.5% increase since 2010. Family-held plantations are reported to have increased to 81,000 ha in the same year. In its progress report, the MAFF notes that it expects to reach its goal of 300,000 ha of rubber plantations by 2020.

Figure 2: Rubber plantation trends



No information is available related to the baselines and expansion of sugarcane, cassava, acacia, eucalyptus and soya-bean plantations on the MAFF's website, or in other available sources.

275,637 ha of land were granted to 39 different investment companies<sup>15</sup> in 2010 and 2011 for rubber plantations. Most of these plantations are located in provinces inhabited by indigenous peoples, and where protected forests and areas of high biodiversity are to be found. 42,422 ha of

this area are held by five investment companies under the same concessionaire, all of which bear similar names, locations, plantation types (sugarcane and acacia) and concession approval dates.<sup>16</sup>

According to records in the ELC database of the NGO-Forum on Cambodia, the last two years have seen an acceleration in the granting of ELCs by the RGC, including concessions which overlap with national parks, wildlife sanctuaries and conservation areas (see section below on 'Environmental Impacts').

On 1<sup>st</sup> November 1993, His Majesty King Norodom Sihanouk signed a Royal Decree on natural protected areas, the protection of ecosystems, the environment and biodiversity wildlife, and climate change. Today, Cambodia has seven national parks<sup>17</sup> covering a total area of 871,250 ha, and ten different wildlife sanctuaries<sup>18</sup> covering a total area of 1,568,750 ha.

However, in the course of 2011, 63,653 ha within the Vireak Chey national park were reportedly granted by the RGC to seven different companies for agribusiness and rubber plantations. 124,414 ha of forest in Botum Sakor national park, Koh Kong province, were also converted to private State land and granted to six different companies, the latest being Paradise Investment Co., Ltd, which holds an area of 9,137 ha for agribusiness development, as approved in April 2011. Another company, Virtus Green Plantation Cambodia, holds 6,718 ha within Boukkor national park, as granted in February 2011. Furthermore, 38,035 ha of forest land in the Oral mountain wildlife sanctuary were converted and granted to eight companies, three of which obtained the land in question as ELCs in 2011 and one in 2012.

Figure 3: Proposed ELCs within the Boeng Pae wildlife sanctuary

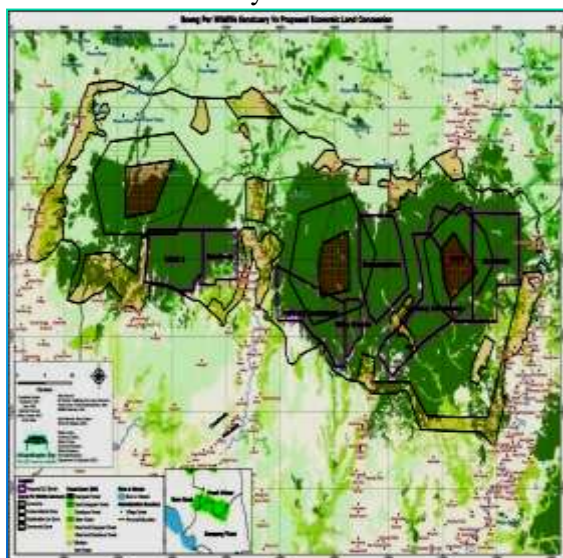


Figure 4: ELC overlap with National Park



### Main export markets

China, Vietnam and Thailand are the main export markets of Cambodia. In February 2013, Deputy Prime Minister and Chairman of the Council for Agricultural and Rural Development, H.E Yim Chhay Ly, reported that Cambodia earned around \$50 million a year from exports of dried cassava to China. Chhay Ly added that Cambodia's agricultural exports to Vietnam and Thailand amounted to between 7,000 and 8,000 tonnes a year.

Most foreign firms operating in Cambodia are run by Chinese, South Korean and Japanese companies. Such firms are predominant in the agriculture and agribusiness sectors, but also in the garment and textile, footwear, tourism, construction and real estate sectors.

Rubber produced in Cambodia is primarily sold to Malaysia, Singapore, China, Japan and some European countries, according to Mok Kim Hong, General Director of rubber plantation company Chub and President of the Cambodia Rubber Association. Since export to Europe began, the price of rubber has doubled, fetching around USD \$5,400 per tonne in Ho Chi Minh City, compared to \$2,500 per tonne in 2012. Vietnam imports rubber from Cambodia to supply their factories and also to resell to other countries.

Meanwhile, figures from the Ministry of Commerce suggest that total rubber exports increased by 65.8% to 11,822 tonnes in the first quarter compared to the same period in 2012. In terms of US dollars, exports soared 205% at a cumulative rate of USD \$55 million per year, representing an increase of USD \$18 million per year since 2012.<sup>19</sup>

Oil palm<sup>20</sup> seeds are imported by Cambodia from Malaysia and Costa Rica, and Cambodia exports its own Crude Palm Oil (CPO) products to markets including Malaysia, Switzerland, Holland, India and France.

### Key companies or conglomerates

The main agribusiness investment companies operating in Cambodia are from Vietnam, Thailand, China, Indonesia and Singapore. Some domestic investors are now also forming conglomerates with operations in several sectors of investment, including agribusiness.

As mentioned earlier, New Zealand has signed a bilateral trade agreement with

Cambodia - by December 2011, New Zealand exports to Cambodia totalled NZ \$5.6 million, while imports from Cambodia totalled NZ\$4.6 million.

L.Y.P Group, set up in 1999 with its head office located in Phnom Penh, is engaged in trade and business distribution with neighbouring countries and Cambodia. The Group is the one of the leading business and industrial conglomerates in Cambodia, and continues to diversify its investments in numerous sectors, from hospitality, restaurants and real estate development to plantation and infrastructure development. Currently, L.Y.P operates the biggest area of plantations in the country, as well as massive satellite city development projects, prominent hotel and casino resorts, power plants both in and out of Cambodia, and the largest safari theme park in the world. More than 10,000 people are employed by L.Y.P in its various operations across Cambodia.<sup>21</sup>

Another leading pioneer in the agricultural and agro-industrial sectors in Cambodia is Mong Reththy Group (M.R.G), established in Phnom Penh in 1989 and operating in trade, business and investments in the commercial, construction, transport, import and export, food chain, agricultural and agro-industrial sectors. M.R.G employs over 3,000 office staff, local employees and workers in its nine different investments. The objectives of the Group are to expand Cambodia's agricultural and agro-industrial sectors, to promote production and export, to develop human resources and labour markets, and to ensure prosperity and sustainability of national development and economic growth in Cambodia's rural areas.<sup>22</sup>

Another important company operating in Cambodia is Men Sarun, established in 1994 in Phnom Penh, whose operations involve rice and wheat production and processing, as well as rubber and coffee plantations. The company holds three rice-

processing factories which supply the Ministry of National Defence and the Ministry of the Interior, as well as the domestic market. M.S also holds two ELCs<sup>23</sup> over 1,724 ha of land for its plantations of rubber, coffee and other crops.<sup>24</sup>

Charoen Pokphand (CP), a Thai conglomerate, is the one of the largest importers of seeds to Cambodia and holds a dominant position in the maize industry, where it also provides technological support and contract farming schemes, and operates a commercial mill.

Bridgestone tire-maker, a Japanese company, purchases the largest amount of Cambodian rubber, with a 66% increase in the first quarter of 2013. Demand for Cambodian rubber in Vietnam is also on the rise, particularly in Ho Chi Minh City. Nguon, president of Kong Nuon Import-Export, is the exclusive importer of Bridgestone tires to Cambodia.

#### *Basic information about investment trends and/or key financiers*

The Cambodian Ministry of Commerce's annual report documents investment trends and import-export trade in Cambodia. This includes the top ten countries in export-import relations with Cambodia as well as the top ten products traded.<sup>25</sup> However, no information is available on agricultural investment and key financiers specifically.<sup>26</sup>

Many projects in Cambodia are financed by donors and development partners, namely USAID, UNDP, UNICEF, OXFAM, GIZ, the World Bank and the Asian Development Bank (ADB). For instance, USAID supports a broad range of programmes designed to improve health, education, economic growth, poverty alleviation, agriculture, natural resource management, democracy, governance, human rights and anti-trafficking in persons. USAID Cambodia provided over

USD \$65 million in assistance in 2012 alone. Oxfam, GIZ, JICA, UNICEF, UNDP and other UN agencies are also playing significant roles in both granting and providing capacity building aid as well as technical support to the RGC.

Private sector support and participation is promoted by the RGC to help address and resolve existing obstacles and limitations to the development of the agricultural sector, such as in terms of technical services, infrastructure development, information and communication technology (ICT) for rural development, training and skills development, marketing and rural finance.

Basic information on investment trends is not available on any government institution websites. However, some information can be accessed from civil society organisations<sup>27</sup> working to monitor development projects, research reports of freelance consultants and independent academic research.<sup>28</sup>

One sector where investment trends have been notable is in the sugarcane and rubber sector from 2009 to 2013. By 2010, nine sugarcane companies were operating on 60,899 ha in four different locations: Koh Kong, Kampong Speu, Oddar Meanchey and Stung Treng province. Seven of these companies are operated by L.Y.P Group and hold more than 60,000 ha in total, which is in violation of the legal limitation of the area of ELCs in accordance with Cambodia's Land Law. As of November 2011, a further five Vietnamese companies were granted land to develop sugarcane plantations of a total area of 33,407 ha.

Rubber plantations are also expanding rapidly, notably in those provinces bordering Vietnam. Companies in operation include Hong Anh, Jing Zhong Tai, Fu Sheng Hai and Try Pheap.<sup>29</sup> Five of these companies hold 38,570 ha of land in total, and appear to belong to the same

concessionaire, as they are under the same name and were approved on the same date in the same district of Koh Nhaek, Monduliri province.<sup>30</sup>

### **Problems in land acquisition**

It is estimated that 3.9 million ha of arable land in Cambodia (equivalent to 22.1% of the country's total land area) have been handed over to private investment. In recent years, thousands of hectares of ELCs have been granted for industrial-scale agriculture, with many of these reportedly being in violation of existing residents' land rights. Local NGOs report that by the end of 2012 more than 2 million ha of land have been granted and transferred to private companies as ELCs and Special Economic Zones (SEZs). Records also note that ELCs have led to the expropriation of residential and agricultural land of local communities, and numerous households have reportedly lost land after coming into dispute with powerful private sector actors engaged in land speculation.<sup>31</sup>

Around 3.9 million ha<sup>32</sup> of arable land is currently under private sector investment, of which more than 2.6 million ha was transferred by the State. Information on access to planted arable land is lacking to date. Some granted ELCs have specified land utilisations within different plantation stages, but others do not. ELC statistics also differ between State (i.e. MAFF) and national NGO sources. According to the former, there are 117 ELCs over an area of 1,181,522 ha, whereas according to the latter, there are over 300 ELCs covering a total area of 2.6 million ha.



Figure 5: Arable land under private sector use (total: 3.9 million ha)



The Cambodian government does not yet have in place a proper monitoring system to ensure the lawful implementation of ELCs in accordance with existing regulations. This has led to demarcation problems where borders of ELCs are vague, restriction of access and ensuing accusations of trespass, and illegal clearing and logging with no or little actual agricultural plantation, whereby joint investment with partners is then solicited for remaining unplanted areas.<sup>33</sup>

In the RGC, citizens are entitled to land ownership under the Land Law of 2001, as well as Sub-decree N°48 on sporadic land registration of 2002 and systematic land registration of 2006, as well as other national policies supporting the Cambodian constitutional law of 1993. However, in practice, most Cambodians are not aware of or know very little about these laws and policies, with the exception of some government officials working on land issues such as cadastral officials, real estate businesses and NGOs working on land tenure and food security.

By 2013, ELCs for plantations of inter alia sugarcane, rubber, cassava, acacia, eucalyptus and palm oil under private sector investment covered around 65% of total arable land. This rapid expansion of agribusiness has been accompanied by increasing attention from civil society to human rights violations, with questions

raised as to the accountability of operating companies, including those which are partly or totally owned or operated by the State itself.

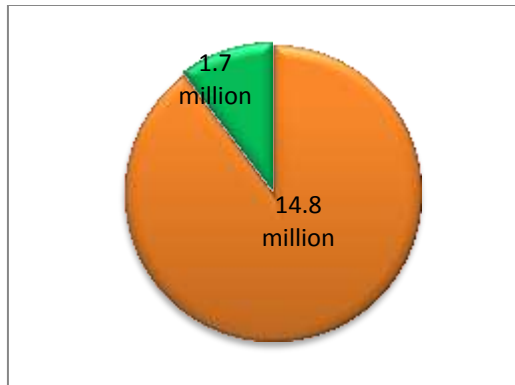
#### *Lack of recognition of land rights*

The Cambodian land registration system began in the late 1990s. Following the Land Law of 2001, a number of regulations which provide a legal framework for land registration were also redesigned and the roles and responsibilities of Cambodia's cadastral authorities outlined. The RGC, with support from its development partners, has been working to develop the country's land administration capacities, with the aim of eventually registering all of Cambodia's land parcels. However, the land registration process has advanced very slowly in practice.

The total population<sup>34</sup> of Cambodia in 2009 was of 14.8 million. However, based on the report of the Ministry of Land Management, Urban Planning and Construction (MLUPC) in 2011, only 1.7 million people have received land ownership titles.

In May 2012, the Prime Minister of Cambodia issued PM Directive 01, ordering the cut-off of land under conflict from ELC areas<sup>35</sup> and offering certificates to local communities for land ownership. This move was meant to accelerate the land registration and ownership process, bearing in mind that over thirty years after the Pol Pot regime, only over a million people had received such land titles. However, reliable statistics concerning people entitled to land ownership via implementation of the PM's directive 01 was not available as of early 2013.

Figure 6: Estimated population entitled to land ownership certificates, and actual certificate ownership in 2011



The total population of indigenous peoples in Cambodia is estimated at 1.4 million, consisting of 24 different ethnic living in 15 provinces, 39 districts, 68 communes and 186 villages.<sup>36</sup> However, out of this population, only five indigenous communities held land registered as communal collective land by 2012.

#### *Impacts of Large-Scale Land Acquisitions on the livelihoods of local communities*

Due to lack of law enforcement and irregularities in the implementation of existing legislation, human rights abuses have multiplied in recent years in Cambodia. Almost every investment project by private sector investors has led to inequitable development, including for smallholders and local communities, who find themselves deprived of promised benefits and whose rights are not adequately protected by State agencies.

Furthermore, many development projects underway have been implemented without disclosure of information or public consultation with affected local communities, meaning that these communities are not able to access information related to the nature of the project, its impacts on their livelihoods, forms of compensation, or complaint/grievance mechanisms.

Food insecurity has increased in rural areas and families have become impoverished as a result of the loss of their farmland and grazing land to large-scale agribusiness investors. Struggling to make a living, some parents are having to taken their children out of school in order to work and support the family make an income. Some people who lost all their land have had no choice but to work on the plantations, despite low pay and irregular work hours and salary.

Many affected farmers can no longer grow enough food to feed their families, with some having to resort to selling off their livestock, as former grazing land is converted to plantations. In some cases, company guards have shot or confiscated livestock from local communities, such as buffalos and cattle.

Certain crops that local farmers have been cultivating for generations, including cashew, jackfruit, coconut and mango, have been destroyed in the process of land conversion. Furthermore, chemical waste from plantations and processing mills have in some cases polluted local water sources and poisoned fish, which is the main source of protein for many Cambodian communities. Further limiting these communities access to natural resources, some company staff have reportedly prevented local inhabitants from entering forest land to collect NTFPs.

Many outspoken community members have protested against these abuses, but also fear for their own security as a result of their activism. Long-running disputes over land abound, and to date efforts to seek resolution based on relevant laws and procedures have failed. Companies holding concessions continue to clear disputed land and local farmers have been forced to relocate with little or no compensation for their losses.



### **Associated human rights abuses**

Agribusiness investment is being promoted in Cambodia as a key mechanism towards enhancing local food security, improving local livelihoods and encouraging green growth development.

However, lack of due consideration and consultation over the potential negative impacts of such development on local communities and the environment had led to the eruption of conflicts between companies and local communities whose farmland and community forests have been ‘grabbed’, and who have suffered forced evictions without fair compensation. Women and children’s wellbeing have been particularly affected by these abuses.<sup>37</sup> Poverty and impoverishment in rural areas as a result of indiscriminate land leasing to private sector companies without benefit-sharing mechanisms for local communities, remains significantly high.

Lack of law enforcement, lack of public consultation and lack of acknowledgement of the rights of local communities to land have been identified by NGOs working on land-related issues as root-causes of land conflicts. As result of land grabbing, people are being forced to migrate to urban areas to find employment, or become migrant workers in other ASEAN countries, where protection of their rights and access to information is even weaker. Most land conflict cases to date in the agribusiness sector have been settled without payment of due and fair compensation to the grieved parties.

#### *Resettlement and forced evictions*

Forced evictions and resettlement of local communities without fair and just compensation or prior public consultation has been reported on several occasions in Cambodia. The result of these evictions has been the loss of access to land and livelihoods by local communities.

Nor do resettlement areas always provide these communities with access to public services, adequate infrastructure, health services or schools. Individuals who have protested against resettlement have faced pressure from government authorities and investment companies, as well as arrests and imprisonment in certain cases.

#### *Indigenous peoples’ rights to land and culture*

As of 2013, few indigenous peoples in Cambodia hold legal status as communities with formal rights to land. One reason for this is that the governmental and administrative procedures required are tedious and complex, and the process slow. Another is that while the government is pushing for increased and vaster land investments by the private sector, meaningful participation and awareness on the part of these communities of the rights of indigenous peoples under international law are significantly limited. Furthermore, indigenous peoples affected by large-scale agribusiness projects are being persuaded to accept private land ownership, which contrasts with their customary collective modes of land ownership and use.

As a result of these discrepancies and imbalances in knowledge and power, vast amounts of indigenous peoples’ customary lands are being converted to ELCs, leading to the erosion of these communities’ livelihoods, culture, sacred forests and protected forests.

In Cambodia, collective land registration is determined after registration of private land. By 2013, only five indigenous communities had received land registration certificates, whereas the remaining 163 communities were in the process of claiming legal rights over their land through the Ministry of Rural Development and Ministry of the Interior at the time of writing.

### *Impacts on community forestry*

The complex procedures required for the creation of Community Forests under existing legislative and administrative structures have made community forestry areas an easy target for conversion to, or overlap with, ELCs. Documented instances include clearance of community forestry areas and logging by influential individuals and concessionaires. Forestry activists and local communities have faced intimidation from company security guards and some NGO workers supporting local communities have been threatened and accused of incitement.

### *Land conflict and land registration*

Most land conflicts in Cambodia involve large-scale investments in agricultural land. With the aim of reducing such land conflicts, the Prime Minister's Directive 01 of May 2012 ordered a cut-off of land under conflict from ELC areas and the restitution of these lands to affected communities, as well as the granting of certificates of land ownership.

However, the recent land report on Directive 01 notes challenges in actual implementation and effective action towards concretising these objectives. For instance, some ELCs are in violation of existing guidelines and the Directive. An example of this is the case of company Union Development Group (UDG), which operates on 36,000 ha of land in Botum Sakor and Kiri Sarkor districts, Koh Kong province. Even though conflict over residential and farmland was ongoing, the area was not cut off, but rather communities were offered small areas of heavily vegetated land outside the UDG's concession, without any road access or infrastructure.

In other cases, areas within the collective lands of indigenous peoples have been measured and then divided up as private ownership parcels. Community forestry

areas have been encroached upon and cleared for private company use. Land conflicts continue to occur and comprehensive solutions have yet to be developed and implemented. Instead, the relocation of people away from conflict-affected land to resettlement sites where ELCs overlap with local community land is becoming routine practice.

### *Rights of smallholders/out-growers*

By 2013, and despite the ever increasing number of large-scale agribusiness investments in Cambodia, no appropriate action has been taken by the State to protect and support the rights of smallholders and out-growers. The potential of contract farming as a mechanism to secure local communities' land tenure security has not been considered seriously by the State as a requirement on investment companies.

The government still lacks the ability to seek better access to the global market or free market for smallholders. For instance, in Svay Rieng province, Monorom commune, a private company has invested in sugarcane and cassava plantations through hiring farmland from the local community. Some of the inhabitants are hesitant to lease their farmland to the company as they worry about the impact of large-scale mono-crop plantations on the quality of the soil, and have asked to instead engage in smallholder contract farming with the company. However, the company does not accept to buy sugarcane or cassava from the local communities as smallholders.

Conflict has also arisen from smallholder contract farming in other parts of Cambodia. For instance, indigenous people in Mondul Kiri province have come into land-related conflict with companies Dak Lak and KDC-Socfin. Both companies have implemented contract farming by clearing the land under conflict and have lent smallholders money to buy

rubber seedlings for a plantation. Rubber plantations are a long term strategic investment, as at least five years are required after planting before resin can be harvested. What has resulted is that the indigenous people under the contract scheme have become indebted to the company due to increasing loan interest, and their daily income is increasingly dependent on access to NFTP alone and employment with the company, to support their daily needs. Engaging in the smallholder contract scheme has effectively led to impoverishment rather than enrichment in this and other documented cases.

#### *Environmental impacts*

Most large scale investment projects in Cambodia have drawn more benefits from *access* to the concessions, for instance, from logging from forest clearance, rather than from actual *production* from plantations. Corruption, weak rule of law and lack of accountability enforcement mechanisms on the part of the State have allowed this to take place.<sup>38</sup>

While such logging is prohibited by national legal frameworks, including the Sub-decree on Economic Land Concessions, the Law on Forestry and the Law on Natural Resource Management among others, these laws are disregarded in practice and the reality of implementation differs starkly from their provisions.

Such illegal action have led to protests, such as that of the ethnic minority group Jarai in Rattanakiri province, who filed a complaint against a Vietnamese company for illegal logging and deforestation in early April 2013.<sup>39</sup>

Figure 7: Bird's eye view of forest and clearing activities for plantation development in Cambodia



Negative impacts on the environment include the pollution of water sources and soil due to chemicals, pesticides and fertilisers, with documented impacts on the health of both people and livestock as well as flora and fauna.

In 2012, the Ministry of Environment and the Prime Minister of Cambodia announced a moratorium on the granting of ELCs following a plethora of conflicts at the community level, with protests held in Phnom Penh city in front of Prime Minister's residence and relevant government institution offices.

However, NGO Adhoc reports that 33 ELCs covering an area of 208,805 ha have been granted following the announcement of this moratorium.<sup>40</sup> The explanation given by the government for these leases are that they were already being processed when the moratorium was declared. Of further concern in terms of environmental impacts, local Cambodian NGOs record 18 ELCs covering an area of 272,597

ha<sup>41</sup> located inside wildlife sanctuaries and protected areas.

### **Human rights framework**

Cambodia is a signatory to almost all human rights instruments including the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. As of 2012, the RGC has made considerable and active efforts towards the implementation, protection and promotion of human rights.

For instance, Cambodia has adopted the ASEAN Declaration on Human Rights and is a member of the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). Cambodia is also member of the ASEAN Committee on the implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW), some provisions of which are directly relevant to economic development in the agribusiness sector.

However, there are serious concerns and increasing attention on the human rights impacts of agribusiness investments in Cambodia, such as land grabbing, forest resettlement, forest clearance, environmental destruction, loss of biodiversity and wildlife, loss of collective land for indigenous peoples and other minority groups, and the erosion of these peoples' and groups' traditional cultures as a result.

Furthermore, the RGC has yet to develop and apply principles on business and human rights to the corporate sector, in order to hold the private sector accountable for its conduct, including those businesses that are owned, operated or controlled by the State. Existing

Corporate Social Responsibility (CSR) programmes tend to focus on ad hoc charity work and company-driven and determined compensation, meaning that root issues such as land access, food security and sustainable local livelihoods are not adequately, if at all, addressed.

### *Human rights obligations of Cambodia*

The Kingdom of Cambodia became a party to ICESCR on 26<sup>th</sup> August 1992. By becoming a party to the covenant, the State has made a legally binding commitment to its citizens and to the international community to implement the provisions of the treaty to promote and protect economic, social and cultural rights.

Article 31 of the Cambodian constitutional law also guarantees the Covenant as part of Cambodian law and other articles reaffirm Cambodia's commitment to ensuring that all Cambodians are able to enjoy their economic, social and cultural rights to the fullest extent possible:

“The kingdom of Cambodia shall recognise and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenant and conventions related to human rights, women's and children's rights.”

Cambodia's initial report to the Committee of Economic, Social and Cultural Rights was due for submission in June 1994, but was only submitted in October 2008 for consideration by the Committee in May 2009.

Furthermore, a number of the Articles of the ICESCR stand out in relation to the impacts of agribusiness expansion in Cambodia, namely:

Article 11: the right to an adequate standard of living, including adequate food, clothing and housing and continuous improvement in living conditions is yet to be implemented widely. Affected communities forced to move to

resettlement sites as result of land grabbing report lack of adequate infrastructure in resettlement areas, loss of daily income, unfair compensation terms and amounts, and lack of access to or existence of, public facilities for health and education.

Article 12: the right to physical and mental health is not yet fully respected or protected in Cambodia, where a vast majority of local people in rural development areas are living in fear of reprisals and intimidation, should they oppose development projects on their lands. Land grabbing has frequently been accompanied by the use of excessive force by State and private sector actors to put pressure on communities, including through the use of death threats, arbitrary arrests and imprisonment. Human rights defenders have also reported threats, intimidation and accusations of incitement and ‘disinformation’.

Cultural rights: respect for and protection of cultural rights is also far from widely applied in Cambodia, particularly in relation to the land and the cultures of indigenous peoples. Collective lands of indigenous peoples have been handed over by the State to private investors, including these peoples’ protected forests and spiritual areas, which have been indiscriminately cleared. Ancestral graves have also been dug up. As a result, the continued practice of customary traditions and livelihoods by indigenous peoples in Cambodia is seriously threatened.

Figure 8: People seeking intervention in land-grabbing case



#### *Recent developments in human rights*

At the national level, the RGC has established mechanisms and policies to enforce human rights protections, such as through the establishment of a Human Rights Commission at the National Assembly and at the Senate. The national legal framework has also been adjusted to better accommodate international human rights instrument requirements.

The Law on Demonstration was developed to allow citizens of Cambodia to practice their right to assembly, albeit with a limit of 200 individuals at a time. Specific locations have been allocated as ‘Freedom Parks’ for civil society gatherings and expression of views, but collective marching and campaigning outside these designed areas remain prohibited.

At the regional level, the RGC is actively involved in the ASEAN human rights mechanisms mentioned above, and the implementation of its Declaration of Human Rights. In May 2011, the Ministry of Environment signed an MoU with Global Green Growth Institute (GGGI) represented by the Republic of Korea to enhance and ensure inclusive, equitable, coherent and balanced sustainable development through Cambodia’s National Strategic Plan on Green Growth 2013-2030 to mitigate and adapt to climate change.



Furthermore, a law on Environmental Impact Assessment (EIA) seeks to strengthen the accountability of the private sector in terms of environmental preservation. The Law on Agricultural Land and the Law on Access to Information were still in draft form at the time of writing.

Despite these positive initiatives, it must be noted that mechanisms and legal frameworks in use at present remain overall inadequate in terms of protecting and promoting human rights and fundamental freedoms, including those of expression. Control over supposedly independent institutions remains tight, including cases of lawyers being forbidden from speaking to the media without permission from the Director of the Bar Association.<sup>42</sup>

Of serious concern is the projected Law on NGOs (NGOs Law), which may lead to greater control by the State over the activities of such organisations, including those working towards the protection of human rights in Cambodia. For instance, the draft NGOs Law places restrictions on the types of engagement, scope and area of work, as well as funding sources, of NGOs. The division of NGOs into ‘Government NGOs or NGOs supporting the Government’ (GONGO) and ‘NGOs’ is a further threat to the independence of these organisations.<sup>43</sup>

## **Conclusion**

Large Scale Land Acquisition for agribusiness development in Cambodia has increased rapidly from 2009 to 2013, during which time more than 1.6 million ha of land have reportedly been converted to private State land for agricultural investments. Investment trends show a drive towards transforming Cambodia’s farm and forestland into monoculture plantations by both domestic and foreign investors. However, the actual utilisation

of many of these concessions remains unclear.

Despite receiving significant revenue for national economic development, it appears that Cambodia is not yet ready for development of the agribusiness sector. At present, existing legal and technical frameworks are limited, making it difficult to manage this windfall revenue.

Deforestation and subsequent expansion of permanent low-land monocultures have severely disrupted agro-ecosystem stability and affected landscape-wide environmental stability and resilience, resulting in large-scale loss of wildlife and the destruction of natural habitats.

Lack of information on investment trends and key financiers from State Ministries is also a significant obstacle in terms of research on the agribusiness sector in Cambodia. This includes lack of information on the total area of land converted, and of this, the proportion of agricultural, permanent crop and pasture areas.<sup>44</sup>

Recognition and protection of local communities’ rights to land remain inadequate, and land titles are held by less than 12% of the population. Indigenous peoples’ land rights are particularly poorly protected under existing legislation and administrative procedures for land title acquisition.

People living within existing and project concession areas remain generally ignorant of basic information about the concessions and their purpose, pointing to a systematic failure by relevant institutions to inform the public about such projects and their potential impacts. Furthermore, private companies are coveting land which should be protected from investments, including protected areas and indigenous peoples’ lands.

Hundreds of communities across Cambodia have expressed their concerns



over the fact that they have been denied their rights to land. As a consequence of their protests, many are facing forced evictions. In most cases, the authorities have failed to comply with legal requirements concerning evictions and resettlement, both of which continue to occur illegally. Lack of freedom of expression and assembly continues to hamper human rights advocacy and expression by both communities and human rights defenders, as well as legal practitioners.

International human rights standards on business and human rights have yet to be implemented in the context of Cambodia, and CSR programmes remain largely voluntary and designed by the private sector with little consultation with, or genuine choices and alternatives offered to, affected local communities.

### **Recommendations**

Cambodia still needs to strengthen its land and natural resource management, and better enforce human rights protections and promotion, if it wishes to align itself with other ASEAN countries. Some recommendations to this end are made below:

- 1) Agricultural investment needs to be accompanied with information-sharing and consultations with local communities. Such information should include at least, but not only, land transfer trends, investment trends, key financiers, main markets, company details and so forth.
- 2) Appropriate schemes also need to be developed to engage smallholders in ways that respect their rights to manage their small-scale agricultural activities and access markets more easily.
- 3) Land Use Planning should be carried out throughout the country, and spatial planning data made available for access by the public. Sub-provincial authorities should allocate land and natural resources based on use (such as agricultural or residential) and allocate Social Land Concessions to support family-based plantations, as this will in turn sustain local livelihoods, land tenure security and food security.
- 4) Areas should be allocated for sustainable use of natural resources by local communities distinct from investment locations.
- 5) The implementation of national legal frameworks needs to be strengthened and better monitored. This includes the Cambodian Constitutional Law of 1993, the Sub-decree on Economic Land Concession of 2005, the Land Law of 2001, the Law on Environmental Protection of 1996, the Sub-decree on Social Land Concession and the Forestry Law of 2005, among others (see Annex).
- 6) The implementation of international human rights instruments adopted by the RGC – UDHR, ICCPR, ICESCR, UNDRIP and ICERD – needs to be better enforced and monitored. Of particular importance for indigenous peoples is the need for State recognition and respect in practice of UNDRIP and ICERD.
- 7) Further active commitment to and involvement of Cambodia in ASEAN's human rights mechanisms is necessary, including the AICHR, ACWC, ACMW and implementation of the ASEAN Declaration of Human Rights.
- 8) Continued and expanded cooperation with the Global Green Growth Institute (GGGI) and other institutions

should be encouraged to enhance and ensure inclusive, equitable, coherent and balanced sustainable development in Cambodia's National Strategic Plan on Green Growth 2013-2030 to mitigate and adapt to climate change.

- 9) Strengthened accountability mechanisms for the private sector need to be developed as well as rigorous implementation of the EIA law, the Law on Agricultural Land and the Law on Access to Information.
- 10) The agribusiness sector should be prioritised for the enhancement of Cambodia's green economy and sustainable development *but* with adequate consideration given to food security, water security, energy security, clean production, a zero water product life cycle, and sustainable consumption and production.

11) Commitment on the part of the RGC towards achieving Cambodia's Millennium Development Goals (MDGs) must be strengthened.

12) National green growth implementation should be supported by integrating the green growth paradigm into the four dimensions of Cambodia's sustainable development (i.e. economy, environment, society and culture) and balancing the development of the four pillars with each other in a coherent, sustainable and rights-based manner.

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RESOURCE	WEBSITE
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Investment Guide-Cambodia	<a href="http://www.investmentincambodia.com">www.investmentincambodia.com</a>
Invest in Cambodia “Israel Cambodia.com”	<a href="http://www.israel-cambodia.com">www.israel-cambodia.com</a>
DFDL (largest legal firm in Cambodia)	<a href="http://www.dfdlmekong.com">www.dfdlmekong.com</a>
Ministry of Commerce	<a href="http://www.moc.gov.kh">www.moc.gov.kh</a>
Council for Development of Cambodia	<a href="http://www.cambodiainvestment.gov.kh">www.cambodiainvestment.gov.kh</a>
International Business Chamber of Cambodia	<a href="http://www.ibccambodia.com">www.ibccambodia.com</a>
The NGO-Forum on Cambodia	<a href="http://www.ngoforum.org.kh">www.ngoforum.org.kh</a>
Business & Human Rights Resources Centre	<a href="http://www.business-humanrights.org">www.business-humanrights.org</a>
Mong Reththy Group company	<a href="http://www.mongreththy.com">www.mongreththy.com</a>
Global Witness	<a href="http://www.globalwitness.org">www.globalwitness.org</a>

## Annex: Selected Cambodian laws and regulations applicable to agribusiness investments

### Laws on land

- Land law
- Concession law
- Sub-decree on state land management
- Sub-decree on Economic Land Concession
- Sub-decree on rules and procedures on classification of state public properties and public entities
- Join Prakas on determination of competence of the court and cadastral commission regarding land disputes

### Laws on forestry

- Forestry law
- Sub-decree on forest concession management
- Sub-decree on procedure establishment classification and registration of permanent forest estate
- Sub-decree on community forestry management

### Law on water resources

- Law on management of water resources in Cambodia

### Laws on investment

- Law on the investment of the Kingdom of Cambodia
- Law on amendment to the law on investment of the kingdom of Cambodia

## Endnotes

<sup>1</sup> Blas 2010.

<sup>2</sup> A total of 314 investment companies were recorded in the NGO-Forum on Cambodia database in 2012.

<sup>3</sup> *Business and Human Rights Resource Centre: Cambodia*. Statistics on ELCs differ based on source (Cambodian League for the Promotion and Protection of Human Rights (Licadho), ADHOC, CCHR and NGO-Forum on Cambodia) but are all approximately within the figure of 2 million ha or slightly above.

<sup>4</sup> According to statistics from the MAFF on 8<sup>th</sup> June 2012, the total number of ELCs was of 117 over a land area of just 1,181,522 ha.

<sup>5</sup> Ros 2012.

<sup>6</sup> See [www.asean.fta.govt.nz](http://www.asean.fta.govt.nz)

<sup>7</sup> For instance, the Land Law 2001 and Sub-decree N°146 on Economic Land Concession of 27<sup>th</sup> December 2005.

<sup>8</sup> Examples include an oil palm plantation in Sihanoukville of 11,000 ha and Green Sea Agriculture's total concession area of 100, 852 ha.

<sup>9</sup> Two of Y.L.P's companies are in Koh Kong province, two in Kg Speu province and three in Oddar Meanchey province.

<sup>10</sup> *Clean Sugar Campaign: The Concessions*.

<sup>11</sup> These are: one palm oil company in Sihanoukville, Green Sea Agriculture in Stung Treng, Reththy Kiri Seyma in Kratie and Keo Seyma district, Mondulkiri province and Reththy Kiri Sakor in Stung Hav district, Sihanoukville.

<sup>12</sup> See [www.mongreththy.com](http://www.mongreththy.com)

<sup>13</sup> Pheapimex operates in two locations, Pursat (138,963 ha) and Kg Chhnang (176,065 ha).

<sup>14</sup> Wuzhishan LS Group holds 199,999 ha of land in principle for its operations, of which 10,000 ha have been approved for preliminary testing. However, in July 2005, over 16,000 ha had already been planted.

<sup>15</sup> See

<http://www.elc.maff.gov.kh/km/images/en.png>

<sup>16</sup> These companies are: Heng Nong (6,688 ha), Heng Yue (8,959 ha), Heng Rui (9,119 ha), Rui Heng (8,841 ha) and Lan Feng (9,015 ha), located in the province of Preah Vihear and producing sugarcane and acacia.

<sup>17</sup> Kirirm (35,000 ha), Phnom Boukkor (140,000 ha), Kep (5,000 ha), Ream (150,000 ha), Botum Sakor (171,250 ha), Phnom Kolen (37,500 ha) and Vireak Chey (332,500 ha).

<sup>18</sup> Phnom Oral (253,750 ha), Peam Krasaob (23,750 ha), Phnom Samkos (333,750 ha), Roneam Dounsam (178,750 ha), Kolen Prom Teb (402,500 ha), Beong Pae (242,500 ha), Lumpath (250,000 ha), Phnom Prech (222,500 ha), Phnom Lamlea (47,500 ha) and Snoul (75,000 ha).

<sup>19</sup> See ASEAN Affairs 2011.

<sup>20</sup> See

[http://www.mongreththy.com/index.php?page=mong\\_reththy\\_invest](http://www.mongreththy.com/index.php?page=mong_reththy_invest)

<sup>21</sup> See <http://www.lypgroup.com/index.php>

<sup>22</sup> See <http://www.mongreththy.com>

<sup>23</sup> One ELC is located in Memut district, Kampong Cham province (4,400 ha) and the other in Oyadav district, Ratanakiri province (6,324 ha).

<sup>24</sup> See <http://www.mensarun.com.kh>

<sup>25</sup> See

<http://www.moc.gov.kh/Graphs/StatisticGraphs.aspx?MenuID=48#3>

<sup>26</sup> Information available on key financiers relates to the textile and clothing industry only.

<sup>27</sup> See for instance, the websites of LICADHO, ADHOC, CCHR, CHRAC, CLEC and NGO-FORUM as well as website

<http://www.boycottbloodsugar.net/>

<sup>28</sup> See <http://www.investincambodia.com/>; ASEAN Affairs 2011.

<sup>29</sup> Hong Anh: 9,785 ha; Jing Zhong Tai: 9,936 ha; Fu Sheng Hai: 7,079 ha; Try Pheap: 9,707 ha.

<sup>30</sup> Pacific Lotus Join-Stock: 9,014 ha; Pacific Pearl: 9,614 ha; Pacific Grand: 9,656 ha; Pacific Prize: 9,773 ha.

<sup>31</sup> See [www.ngoforum.org.kh](http://www.ngoforum.org.kh)

<sup>32</sup> Ros 2012.

<sup>33</sup> See

[http://www.mongreththy.com/index.php?page=Green\\_Sea\\_Agriculture](http://www.mongreththy.com/index.php?page=Green_Sea_Agriculture).

<sup>34</sup> Blas 2010.

<sup>35</sup> Most of these land conflicts have resulted from the overlap of the ELC with communities' lands.

<sup>36</sup> Indigenous Rights Active Network 2010.

<sup>37</sup> See Brickell 2013.

<sup>38</sup> See Global Witness 2013.

<sup>39</sup> Phnom Penh Post, 5<sup>th</sup> February 2013; Phnom Penh Post, 26<sup>th</sup> March 2013. And see <http://www.business-humanrights.org/Links/Repository/1018069>

<sup>40</sup> Cambodian Human Rights and Development Association 2012.

<sup>41</sup> Ibid.

<sup>42</sup> This was stipulated in a letter from the Cambodian Bar Association in February 2013, as well as statements made by the Minister of Information H.E Khieu Kanharith.

<sup>43</sup> This distinction was visible during an event of the ASEAN Peoples' Forum (APF) in November 2012 in Phnom Penh, where NGOs divided into two groups (GONGOs and Civil Society NGOs) to submit their concerns to the Chairs of ASEAN and of the AICHR.

<sup>44</sup> Figures for total agricultural land are available from the World Bank for 2006 to 2009, but not available for 2009 to 2013.



# National Updates on Agribusiness Large Scale Land Acquisitions in Southeast Asia

## Brief #7 of 8: Democratic Republic of Timor-Leste

By Sophie Chao



Source: Australia Timor-Leste Friendship Network 2009

### Introduction

Timor-Leste entered the international community eleven years ago as the 'poorest country in Asia'.<sup>1</sup> Since the vote for independence in 1999, significant donor support combined with a surge in petroleum receipts have created new opportunities and challenges for the country's recovering economy.

However, Timor-Leste remains a post-conflict state with a largely subsistence-

based population and faces numerous development challenges. These include 'major infrastructure bottlenecks, a serious shortage of skilled manpower, and a business environment that is still in its nascent stage of development'.<sup>2</sup> Rapid population growth is also affecting the country's fragile economy, political processes and agricultural systems.

Aside from gas and petroleum exports, Timor-Leste has a minimal tradable sector and despite notable growth since 2007,

private investment in the non-oil sector remains low.<sup>3</sup> Agribusiness, although figuring in the Government's National Strategic Development Plan, is less of a priority than other sectors such as infrastructure and public services.

Overall, Timor-Leste remains an overwhelmingly subsistence economy with the lowest levels of agricultural productivity (around 25%) of anywhere in Southeast Asia, scarce use of intensive forms of cultivation, and minimal implementation of institutional arrangements required for more advanced agriculture and agribusiness.<sup>4</sup>

Up-to-date data on agribusiness expansion are scarce and difficult to come by,<sup>5</sup> but available sources suggest that the scale and impact of land acquisition is far smaller than that taking place in other countries of Southeast Asia. MoUs for large-scale agribusiness investments in the scale of tens of thousands of hectares in the last few years have been met with significant resistance and none appear to have been implemented to any significant scale to date.<sup>6</sup>

#### Country facts

Area: 14,874 km<sup>2</sup>  
Bordering countries: Indonesia  
Population: 1,143,667  
Main ethnic groups: Austronesian (Malayo-Polynesian), Papuan, small Chinese minority  
Agricultural workforce (% of pop): 64%  
Main exports: oil, coffee, sandalwood, marble  
Main imports: foodstuffs, gasoline, kerosene, machinery

Socio-political, historical and geographical factors have contributed to the minimal presence of large-scale agriculture in Timor-Leste. Prior to occupation, Timor-Leste was characterised by a relative

absence of State-like structures of governance and intermittent inter-clan warfare and conflict. Under Portuguese rule, Timor-Leste remained a neglected trading post until the late 19<sup>th</sup> century, when sandalwood and coffee exports increased, largely produced from land appropriated by Portuguese planters from Timorese communities. However, the country remained largely underdeveloped and based on a barter economy.<sup>7</sup>

During both the Portuguese and Indonesian periods, only a small proportion of the land was used for intensive agricultural purposes and less than 5% of land in the country appears to have ever been registered or alienated from customary tenure.<sup>8</sup> Protracted conflict, displacement and forced relocation have further prohibited the development of large-scale agriculture, as well as certain environmental limitations, such as the unavailability of water sources and aquifers, long dry seasons, mountainous relief and absence of fertile volcanic soils as in other areas in the region.<sup>9</sup>

'East Timor appears to have been too mountainous, too resistant to outside influences and too firmly based on traditional networks for any program to transform agriculture and develop a plantation system to have the effect that similar programs had on other colonial societies.'

Fitzpatrick D 2002 *Land Claims in East Timor*. Canberra. p.35.

That being said, the National Strategic Development Plan, along with a number of reforms to investment and land laws, will certainly play a role in shaping the agribusiness sector, should it develop on a substantial scale in Timor-Leste. Most importantly, land tenure and mechanisms of land allocation to investors will need to be clarified and systematised in order to ensure equitable outcomes for rural



communities, in line with the customary land tenure systems that remain highly active throughout much of Timor-Leste.

In the light of the minimal presence and impact of agribusiness in Timor-Leste to date, the remainder of this briefing will summarise existing trends in government policies for agribusiness and agribusiness projects to date. It will then examine and assess land tenure, land acquisition processes and related legal reforms underway in Timor-Leste, with the aim of highlighting their strengths and weaknesses, and providing recommendations as to how these need to be improved, enhanced or better implemented for rights-based agribusiness to develop, should this happen in the future.

### **National trends in Large Scale Land Acquisitions**

#### *Government policies and targets for agribusiness expansion*

Although around 70% of Timor-Leste's work force is dependent on subsistence agriculture, in 2012, the government was investing less than 2% of its national budget in its agricultural sector.<sup>10</sup> Timor-Leste's poverty levels remain very high, with around 41% of the population living below the national poverty line.<sup>11</sup>

Since independence in 2002, the development strategy of the government of Timor-Leste has centred on diversification of the economy beyond dependence on petroleum imports through agricultural and large scale infrastructural development.<sup>12</sup> Boosting export growth is seen as essential to support overall economic growth and employment generation.<sup>13</sup>

The government of Timor-Leste projects that by 2015, a National Planning Framework will be in place to steer the direction of sustainable economic growth

and development from the national level to the *sucos* (village) level, while at the same time conserving Timor-Leste's biodiversity and natural environment.<sup>14</sup>

Implementation of national policies for the agribusiness and agriculture sector will be led by the Timor-Leste Agricultural Advisory Council. In 2005, an Agribusiness Directorate was set up to guide policy and planning to develop agriculture in identified priority areas. The responsibility of the Directorate was increased with the recent reorganisation of the Ministry of Agriculture, Forestry and Fisheries (MAFF) to include the business aspects of industrial crops, field crops and tree crops.<sup>15</sup>

'The cash crop sector has great potential to contribute to rural development through the creation of value adding agribusinesses in areas such as on-farm extraction of coconut oil and on-farm coffee processing using improved pulping machines.

To realise this potential, farmers in the sector will be targeted with specialist financial advice and marketing assistance. It will also be important to resolve land ownership issues and use the agriculture zoning process to identify areas best suited to particular plantation crops.'

*Timor-Leste National Strategic Development Plan 2011- 2030.*

Agribusiness is identified in the Timor-Leste National Strategic Development Plan 2011 – 2030 as likely to be 'a large feature of rural private sector development', with services including market research, market matching, business planning, policy and advocacy, training and technical assistance, technology and product development and financial mechanisms. Long-term public private partnerships for the provision of strategic extension campaigns will be developed for the production of cash crops such as coffee, candlenut, coconut, cocoa,

black pepper, cashews, hazelnut, ginger, cloves, groundnuts and mung beans.<sup>16</sup>

However, to date yields and technical expertise in agribusiness are lacking. Strategies to boost the agribusiness sector will include providing subsidies, training and expert advice to farmers to 'ensure that the expansion of the cash crops sector over the next 20 years contributes to Timor-Leste's goal of food security and creates jobs in rural areas.' From 2021 to 2030, the private sector, including agriculture, is projected to be the primary source of growth in incomes and employment in rural areas of Timor-Leste.<sup>17</sup>

Market research will be undertaken to identify high quality niche products to be grown in Timor-Leste and exported with a unique Timorese brand. A strategy will then be developed to promote production and export of these niche products to high-value markets, with at least four niche products expected to be exported by 2020.<sup>18</sup>

The government of Timor-Leste's Instituto de Apoio ao Desenvolvimento Empresarial (IADE) has also established Business Development Centres in Baucau, Dili, Maliana, Maubisse, Suai, Lospalos and Oe-Cusse Ambeno which will be extended to all districts, offering services to the agribusiness sector among others, and partnerships with vocational training centres.<sup>19</sup>

#### *Gross areas allocated to agribusiness*

There are no official or disaggregated figures available for the gross areas of land allocated to agribusiness in recent years. According to a comprehensive study carried out in 2009, about 47,000 hectares of land had been alienated in Timor-Leste (about 3% of the country) at the time<sup>20</sup> but this figure does not disaggregate agribusiness-driven land use from other uses.

According to data from the Ministry of Agriculture and Forestry in 2010, maize was grown on an area of 71,340 ha in 2009, rice on 38,998 ha, coconut on 14,623 ha, cassava on 10,757 ha, sweet potato on 4,807 ha, candlenut on 3,266 ha, soybean on 1,532 ha, peanuts on 3,255 ha and potatoes on 766 ha.<sup>21</sup> These figures, however, do not differentiate smallholder production from large-scale company-driven production. Sources suggest that only minimal private sector investment in agricultural intensification has actually occurred, covering a total of no more than several hundred hectares.<sup>22</sup>

Recent sources also suggest that coffee, Timor-Leste's leading non-oil export is produced over an estimated area of 53,816 ha.<sup>23</sup> Grown by about 67,000 households in 2009 (or around 30% of the total population), coffee is seen as having the greatest potential for increasing export earnings by a projected \$45 million per year.<sup>24</sup> The main coffee-producing districts are Aileu, Ainaro, Bobonaro, Ermera, Liquiçá, and Manufahi, with Ermera accounting for half of the total crop area.<sup>25</sup>

Commercial demand for grains and pulses as exports is also increasing, but these are grown on a significantly smaller scale than coffee, with most production for domestic consumption and the rest sold on the domestic market.<sup>26</sup>

#### *Main export markets or main imports*

Key agricultural commodities currently produced in Timor-Leste are rice, corn, cassava (manioc), sweet potatoes, soybeans, cabbage, mangoes, bananas and vanilla. The main exports are in oil, followed by coffee, sandalwood and marble, with a potential for vanilla exports. Key imports are food, gasoline, kerosene and machinery.<sup>27</sup>

The US, Germany, and Indonesia are the major destination markets for Timor-Leste's non-oil exports. In terms of regional shares, the European Union (EU) share in Timor-Leste's exports amounts to around 26% and the ASEAN share is about 18%. Indonesia is by far the main source of Timor-Leste's imports with a share of around 47% since 2004. Australia and Singapore are the second and third most important sources of Timor-Leste's imports. Four ASEAN countries - Indonesia, Singapore, Thailand, and Vietnam - combined account for more than two-thirds of Timor-Leste's imports.<sup>28</sup>

However, export competitiveness and growth in Timor-Leste have been restrained by skills deficit and a relatively non-business conducive environment. For instance, business start-up in Timor-Leste is a complex and time consuming process. Contract enforcement capacity of the government is weak, and there is limited use of contracts in the first place. Furthermore, access to finance is restricted by lack of information on borrowers and weaknesses in the current legal structure to provide protections and obligations on borrowers and lenders.<sup>29</sup>

Agro-processing technologies in particular are most outdated and inefficient, although there some technologies are now being used to assist farmers and *suco* Extension Officers, which are projected to be replicated nationwide for coffee, horticulture and other crops.<sup>30</sup> Another limiting factor relates to the lack of formal property rights (see below), which has been seen as an important constraint to investor and land owner engagement towards better shared outcomes in investments.<sup>31</sup>

#### *Key companies or conglomerates*

Very little information is available on the companies and conglomerates running

agribusiness enterprises in Timor-Leste. A total of 50 domestic agribusiness operators are to be found in the Peace Dividend Trust Timor-Leste business database ([www.buildingmarkets.org](http://www.buildingmarkets.org)) but some of these are not yet active.

Sources suggest that agribusiness companies currently operating in Timor-Leste are largely domestic, with a few foreign companies in the coffee sector. Coffee production is dominated by four domestic companies - Timor Corporation Ltd, CCT, ELSAA Café Ltd and Timor Global Ltd - which account for 90% of coffee exports.<sup>32</sup> Firms involved in buying and exporting mungbean are Leo Atsabe Ltd, Maliana, BURAS HAUBUR, Maliana and COMICO Ltd, Covalima. Candlenhut is primarily grown by ACELDA Ltd.<sup>33</sup>

#### **Case study: GT Leste Biotech**

In an MOU signed in January 2008 with Indonesian-based company GT Leste Biotech, former Minister Sabino agreed to hand over 100,000 ha of Timor-Leste's agricultural land to be developed as a sugarcane plantation. Announcement of the MoU attracted widespread condemnation over the social and environmental impacts of the project on local communities. The sugarcane monoculture was denounced as a threat to East Timor's biodiversity and water resources, the MoU seen as a 'give-away' of land by corrupt government officials, and the threat to the country's food security highlighted (Anderson 2008). Human rights advocates warned of the risk of forced evictions and displacement that could result if the project went ahead, and legal experts stated that the MoU 'failed to meet either Timor-Leste's domestic law or international law obligations' (Centre on Housing Rights and Evictions (nd); 2008). It is unclear whether the project has moved forward since the MoU, with most sources suggesting it has not been implemented to date.

Data from 2005 – 2008 indicate that a number of large-scale agribusiness MoUs and LoIs have been signed by the government of Timor-Leste with various foreign investors. These include an LoI with a Malaysian investor group for export-oriented palm oil production over 30,000 ha; an MOU for a coconut processing operation also for export;<sup>34</sup> an MoU between the Timor-Leste Minister of Agriculture and Fisheries and Indonesian company GT Leste Biotech for a \$100 million, 100,000 ha sugar cane plantation, sugar plant, ethanol plant and power generation facility (see box above); an MoU between the Secretary of State for Energy Policy and South Korean company Komor Enterprise Ltd to develop 100,000 ha of corn and jatropha for agrofuel export; and an MoU between the Secretary of State for Energy Policy and Norwegian company Jacobsen Elektro for a jatropha curcas oil extraction facility and power plant.<sup>35</sup> However, no further information has been made available on these large-scale land contracts and sources suggest that they have not been implemented beyond the most preliminary stages to date.

It is interesting to note that, apart from the MoUs above, the leasing of land and the use of contracts are not prominent features in agribusiness in Timor-Leste. Few private sector companies are reported to have invested directly in the modernisation of agriculture by leasing and rehabilitating land, or initiating contract farming.<sup>36</sup> Transactions are often negotiated between producers and buyers at the time of sale. Personal relationships remain an important, but not decisive, element in these negotiations.

*Basic information about investment trends and/or key financiers*

With one of the most liberal trade policy regimes in the world, Timor-Leste seeks to support the country's economic development needs by maintaining low

import prices, encouraging technology transfers and minimising anti-export bias.<sup>37</sup>

The government of Timor-Leste introduced the country's first Foreign Direct Investment law (Law No. 5/2005) and its regulations (Decree No. 6/2005) in 2005, which provide economic incentives such as tax holidays and import duty exemptions on capital goods and raw materials to be used in new investments.<sup>38</sup>

As a Least Developed Country (LDC), Timor-Leste continues to receive preferential tariff treatment from major markets. ASEAN membership is being sought by Timor-Leste as a next step towards greater international economic integration, and a possible stepping stone towards World Trade Organisation membership.<sup>39</sup>

'Synergies between foreign and domestic investors will multiply the benefits of targeted investment promotion. Timor-Leste's potential for linkages and spillovers, especially in agribusiness and tourism, is substantial, and can be best realized through sector development strategies.'

USAID 2005 *Investment Opportunity Assessment for Timor-Leste*.

However, Timor-Leste still ranks among the lowest countries in the world according to most international measures of business environment and global competitiveness.<sup>40</sup> The institutional structure for developing and coordinating trade policy in Timor-Leste is still in its embryonic stage given capacity constraints and other more immediate priorities, such as infrastructural reconstruction across the country.

Timor-Leste's trade integration is heavily biased to the import side and there is very limited trade integration on the export side.

As expected with post-conflict economic reconstruction, most of the expansion has been in the non-tradable sectors, with tradable sectors like manufacturing and agriculture having received relatively less investment.<sup>41</sup>

Reliable data on FDI flows are not readily available or sufficiently disaggregated at present. According to the foreign investment and export promotion agency, TradeInvest Timor-Leste (TITL), the total value of FDI certificates issued to private investors between 2006 and 2009 was around USD\$408 million, with a concentration of 'intended' investment in construction, tourism, transportation, property development, wholesale/retail trade, and agriculture/agribusiness (including coffee). Actual FDI outside the oil and gas sector remains comparatively low.<sup>42</sup>

In terms of regional and international financing and support, The World Bank's Justice for the Poor (J4P) programme was established in 2008 to support analytical and advisory work linked to the development agenda of the government of Timor-Leste and the World Bank's country programme, including in the agribusiness sector.<sup>43</sup>

A USAID-funded project – Building Agribusiness Capacity in East Timor (BACET) – was initiated in 2008 to provide three agricultural institutions with operational knowledge of how agribusinesses are established, managed and sustained. The project is being implemented by Land O'Lakes, a US-based food and agriculture cooperative, together with the Ministry of Agriculture, Forestry and Fisheries (MAFF).<sup>44</sup>

An AUSAID-funded project, Seeds of Life is being carried out in collaboration between the Timor-Leste Ministry of Agriculture and Fisheries (MAF) and the government of Australia with the goal of improved food security through increased

productivity of major food crops.<sup>45</sup> Support from the Asian Development Bank through its Country Operations Business Plan in Timor-Leste for 2011-2013, remains largely focused on basic infrastructure development.<sup>46</sup>

## Land rights and land acquisition

### *Customary land tenure in Timor-Leste*

Under Portuguese colonial administration, very limited recognition was given to community land rights. In its later stages, the administration did grant preferential rights to the families of *liurai* (or kings, above the level of *suco* leaders) who had usually pledged loyalty to the colonial government, but this was often at the expense of community holdings.<sup>47</sup> Indonesian law during the occupation included notional recognition of community land (commonly referred to as *tanah ulayat*), but very little was ever legally recognised as such.<sup>48</sup>

During the final century of Portuguese colonisation, the period of Japanese occupation during World War II, and especially the quarter century of Indonesian occupation, significant numbers of East Timorese experienced displacement from their ancestral lands as a result of State co-optation or strategic relocation.<sup>49</sup>

Following Timor-Leste's vote for independence in 1999, an estimated 83% of the population was displaced as a result of militia-perpetrated violence, and the majority of land and property records were destroyed.<sup>50</sup> An outbreak of violence in 2006–07, resulting in part from unresolved land and property disputes, led to the displacement (or re-displacement) of a further 10% of the population.

This turbulent history has resulted in confusion over land and property ownership in Timor-Leste, and overlaps

and unclear primary given to customary rights, colonial Portuguese land titles, Indonesian titles and non-traditional long-term land occupation.

However to this day, customary social organisation and associated land tenures continue to feature strongly throughout rural Timor-Leste<sup>51</sup> where an estimated 97% of land is held and managed under various forms of customary tenure. Land constitutes both an ancestral legacy and the primary source of income for the majority of the population outside urban and peri-urban areas.<sup>52</sup>

Timor-Leste is home to both patrilineal and matrilineal customary land-tenure systems, with matrilineal systems common in Bobonaro, Cova Lima, Manatutu, and Manufahi districts, and patrilineal systems predominating in the remaining districts. Communal ownership of areas used for food-crop cultivation and around water points is widespread but most customary groups also have inheritable individual or family use rights to land such as residential, garden, and plantation plots.<sup>53</sup>

Ritualised prohibitions to access and use (referred to as *tara bandu*) are maintained on some areas of land. Land use is allocated by community leaders and the sale of land to outsiders is generally not permitted however land inheritance and use are subject to various exceptions and negotiations.<sup>54</sup>

While customary rights are recognised in the Constitution so long as they do not contradict the Constitution and legislation that regulates them,<sup>55</sup> very little of the 97% of customarily held land has been titled. There is no formal title system for communal land although the draft land law provides a framework for its establishment (see below). Communities have no formal right to forestland<sup>56</sup> and there is no overarching legal framework for forests in Timor-Leste to date.<sup>57</sup>

#### Timor-Leste socio-political organisation

'Formal socio-political organisation in Timor-Leste comprises the national level, the 13 districts, and the 65 sub-districts. As the country has not yet decentralised, the administrators of the districts and sub-districts are officials of the central government. Below this, as outlined in Law 3/2009 on *Community Leaderships and their Election*, there are 'community leadership structures' associated with the 442 official *sucos* (villages characterised by dispersed settlement patterns). The *suco* level 'community leaderships structures', headed by *chefes de suco*, are not technically part of the state administrative system, despite the fact that two rounds of local elections have been held since independence to elect *concelhos de suco* (*suco* councils). *Sucos* are themselves comprised of multiple (perhaps seven or eight) *aldeias* (hamlets), each of which comprise a number of *uma kain* (households or extended families), which have their own entitlements to land, sometimes through membership in *uma knua* (lineage/descent) groups spread throughout the *aldeias*. Notwithstanding their semi-formal status, the *sucos* constitute a fundamental level of socio-political organisation in Timor-Leste.'

Chamber of Commerce and Industry of Timor-Leste 2011 *Agribusiness investment in Timor-Leste: Supporting win-win outcomes*.

#### Land-related legal developments

A number of important initiatives have been undertaken in recent years to address the lack of a formal land administration and legislation in Timor-Leste but progress has been slow and difficult. The passage of the draft Land Law in 2013 has been stated as a priority by the government of Timor-Leste.<sup>58</sup>

In 2005, the government of Timor-Leste, with the support of USAID, launched a land registration programme (Ita Nia Rai



or ‘Our Land’) in district centres and peri-urban areas, which has led to the registration of over 10,000 claims in seven districts.<sup>59</sup> However, the programme does not extend the vast majority of customary rural lands in the country.

In 2008, a *Technical Framework for a Transitional Land Law for East Timor* was developed with the assistance of USAID. Based on this document the Minister of Justice established a Land Law Working Group which prepared policy options for the development of a land law.

In March 2010, the Council of Ministers approved three laws on land: the Land Law, the Expropriation Law and the Real Estate Financing Fund.<sup>60</sup> The three draft laws were considered and discussed by Parliament for nearly two years. In the meantime, the Council of Ministers enacted controversial Decree-Law No. 27/2011 (see box below) on the Regime for Regularisation of Ownership of Immovable Property in Undisputed Cases as an interim measure to allow titling of undisputed land. After being passed by Parliament in February 2012 (in the midst of sustained civil society protest) the three draft laws were sent to the then President to decide whether to promulgate or veto them. On 20<sup>th</sup> March 2012, former President Jose Ramos-Horta returned the three laws to Parliament, noting that he would not sign them without a number of amendments. The President raised the following principal concerns among others:<sup>61</sup>

Land law:

- Lack of consensus in civil society over the law
- Too much discretion and power given to the State to claim land
- Weak definition of what land can be taken by the State in the ‘public interest’
- Unclear system for compensation of holders of prior rights who do not get titles, including foreigners

- Potential conflict of interest by including the Land and Property Directorate in the Cadastral Commission
- Inappropriate cut-off date for prior adverse possession
- Unclear definition and protection for community property rights

Expropriations Law:

- No definition of the ‘public interest’
- Open to abuse of expropriation powers to serve private interests
- Expropriation should only be used in exceptional cases
- Unclear if State can lease or sell expropriated land

**Controversy over Decree-Law No. 27/2011 on the Regime for Regularisation of Ownership of Immovable Property in Undisputed Cases**

Decree-Law No. 27/2011, enacted by the Council of Ministers as an interim measure to resolve outstanding or overlapping land claims, gives land ownership certificates to Timorese citizens where there is no land dispute based on the data registered by Ita Nia Rai programme. Timorese civil society organisations protested against the passing of this Decree, noting that all Decree-Laws about land must be under the framework land law needed to be approved by Parliament before approval. They questioned the Ministry of Justice’s intent of distributing certificates hastily, without resolving outstanding disputed cases first. They also noted that data from the Ita Nia Rai programme is not accurate or sufficiently encompassing to act as the basis for certification allocation, particularly since these certificates would apply only to individual and small-group landowners, and not to customary land, as this is beyond the purview of the Ita Nia Rai programme to date.

La’o Hamutuk 2012a *Can distributing Effective Registration Certificates resolve the land problem?* 9<sup>th</sup> January 2012.

In her report to the UN General Assembly following her mission to Timor-Leste in May 2012, the UN Special Rapporteur on extreme poverty and human rights welcomed the President's decision to veto the laws and send them back to Parliament for additional appraisal, and recommended that the international human rights legal framework relevant to evictions be better reflected in the new land laws.<sup>62</sup>

#### *Challenges and opportunities in the draft Land Law*

The current lack of formal property rights is an important constraint to investment and export growth, and to adequate regulation of land tenure and acquisition processes in Timor-Leste.<sup>63</sup> The draft Land Law has the potential establish a legal framework for the recognition and awarding of first ownership rights to land in Timor-Leste, thereby providing protections in a growing property and land market.<sup>64</sup>

The current draft land law contains three basic principles for assigning ownership titles: (i) 'acceptance of primary previous rights', (ii) 'acknowledgement of possession as the basis for assigning ownership rights'; and (iii) 'due compensation in cases of duplicity of rights'.<sup>65</sup> The law would grant titles to undisputed land, initiate a specific system for resolving land disputes outside civilian courts, and offer formal recognition of plots claimed by villages as 'communal land' - a category of ownership with long roots, but no formal legal basis, in Timor-Leste.<sup>66</sup>

However, a number of concerns have been raised concerning the draft Land Law, which no doubt prompted the decision of the former President to veto it in its current form. First, the draft Land Law uses a very broad definition of State which includes all land under State possession, all land without an identified owner, all properties

identified in 2003 by the State as abandoned and all land once used by the Portuguese or Indonesian administrations. While community lands are referred to in Chapter V, it is difficult to say whether these would also fall under State land, given the almost all-encompassing nature of the definition of State land in the draft law.

Second, while the law sets up a framework of 'community protection zones' that would allow self-defined communities to play a role in regulating land use and acquisition in areas deemed to be of communal ownership, the strength of such claims is weak, private individuals and the State retain the right to claim private property within such zones and the detail of defining and regulating such zones is left to subsidiary legislation.<sup>67</sup>

Third, while the draft Land Law includes provisions intended to facilitate engagement between investors and community members and safeguard the 'common interests of local communities', its clauses on property rights are largely focused on urban and peri-urban areas, and there has been little focus on expanding land registration in rural areas, the likely targets for agribusiness investment.

Chapter V of the draft Land Law is of particular relevance to rural communities as it establishes a system of community property and community protection zones. In a community protection zone, land can be held by East Timorese citizens or the state, subject to State obligations to ensure that customary practices are participatory, non-discriminatory and respect gender equality; promote environmental and socio-cultural sustainability; protect the community from real estate speculation; and ensure that economic activity benefits the local community and protects its access to natural resources.<sup>68</sup>

Chapter V on community land is promising in that it may facilitate the demarcation of community protection zones and areas of community property and thereby provide a basis for protecting community property from the possibility of land grabbing. Importantly for investors and communities alike the law may establish a framework regulating a range of aspects related to engagement between investors and communities, including consultation obligations; the granting of third-party use rights; social, environmental, and natural resource management considerations; and dispute resolution.<sup>69</sup>

Whilst a largely positive legal development, it must be noted that Clause 26(2) on Community Representation of the draft Land Law has been singled out as of some concern. The Clause states that:

In the case of economic activities performed by third parties in community properties, the State shall assist the community in the negotiations and ensure compliance with the terms of the agreement entered between the parties.

This clause can be read to preclude respect for the right to give or withhold the Free, Prior and Informed Consent of local communities, the right of veto and the right to compensation, as well as obligations on the State to develop benefit-sharing mechanisms. Questions have also been raised as to how community lands are defined and recorded, and whether land will be assumed to be State land where and until communities have sufficient capacity to submit a formal claim to this land.<sup>70</sup>

In a positive move towards recognising the need for consultation and negotiation prior to agribusiness development, in 2011, the Chamber of Commerce and Industry of Timor-Leste, in collaboration with international experts, investors and government partners, developed guidelines

for investors contemplating agribusiness engagement in Timor-Leste, and for rural local communities (see box below).

These include information about local conditions (government processes, the conduct of agriculture itself and how our rural communities are organised), recommendations for successful engagement between agribusiness investors and community members, and the importance of consultation and informed decision making, evaluation and risk management, communication and extension, benefit distribution and dispute management.<sup>71</sup>

**Key elements of the Timor-Leste Chamber of Commerce and Industry guidelines for agribusiness investors and local communities**

- Appreciation of local social organisation, customary land tenure, cultural identity and norms, and conflict resolution mechanisms
- Detailed consultations at the *suco* level  
Full community participation in consultations, including of women
- Contract signing and transparency
- Social and environmental impact assessments
- Equitable benefit-sharing arrangements
- Particular attention to local food security and livelihoods
- Fair and direct payment

Chamber of Commerce and Industry of Timor-Leste 2011a *Agribusiness investment in Timor-Leste: Supporting win-win outcomes*; Chamber of Commerce and Industry of Timor-Leste 2011b *Working with Agribusiness Investors in Timor-Leste: Guidelines for Community Members*.

*Land grabbing and land conflicts*

A history of displacement, overlapping titles, and lack of legal clarity over land has contributed to land-related disputes in Timor-Leste.<sup>72</sup> In rural areas, certain

groups may claim overarching stewardship of rights to agricultural farm lands, and these claims may be contested by other groups who ‘opened’ or ‘tamed’ the land by clearing the site. While most of the displaced have now returned to their communities or been resettled, many of the property disputes stemming from or aggravated by the crisis remain unresolved.<sup>73</sup>

While no significant land conflicts resulting from private sector activities in rural areas have been reported to date in Timor-Leste, uncertainty over land rights has been identified as one of the most likely triggers of future disputes.<sup>74</sup> There are concerns about the lack of legal clarity concerning which land the government of Timor-Leste could potentially grant to investors, and perceived ‘plans to accelerate development of State land, including through resettlement of families and expropriation.’<sup>75</sup> The experience of other subsistence-dominated states in the region, according to some studies, suggests that endeavours to establish large-scale agribusiness projects without the agreement of community members is highly likely to be faced with substantial local resistance.<sup>76</sup>

‘Establishing a clear, predictable land tenure system is essential for Timor-Leste’s development as it will provide a means to resolve disputes without violence and set a sturdy foundation for economic growth.’

U.S. Ambassador to Timor-Leste, Judith Fergin.  
USAID, January 2013.

There is reportedly widespread support among rural communities for land titling in Timor-Leste, and many express a clear preference for local and traditional authorities in resolving land and property related disputes. While substantial minorities reportedly state that disputes are best resolved through the police or sub-

district authorities, it is important to point out that sub-district authorities have also usually played the role of ritual leaders in Timor-Leste, and thus it is difficult to discern on which basis communities perceive and approach them.<sup>77</sup>

With regards to remedy, though there has been substantial progress since independence, the reach of Timor-Leste’s formal justice system is still limited. The nation has just four courts (located in Dili, Baucau, Cova Lima, and Oecusse), and backlogs prevent virtually all but the most serious criminal offenses from being heard in the formal court system. Given the limitations of the formal justice system, non-State systems are likely to remain a central feature of conflict resolution in Timor-Leste in at least the near future.<sup>78</sup>

While mediation by customary leaders based on customary law and tenure remains the primary mechanism of conflict resolution, a capable and accountable judiciary will need to be enhanced for remedy to be adequately provided in cases of conflict and disputes resulting from private sector investment in agribusiness and other ventures in Timor-Leste. Concomitantly, the strengthening or better legal recognition of existing customary conflict resolution mechanisms will be of significant importance.<sup>79</sup> Using existing local judicial structures strategically, fostering greater national and local level participation in developing and administering the justice sector, and using local systems to introduce modern legal principles and progressive human rights values will also be essential.<sup>80</sup>

### **The human rights perspective**

In 2003, Timor-Leste acceded to the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and its Optional Protocol 2, the Convention on the Rights of the Child, the Convention on the

Elimination of Discrimination against Women (CEDAW) and its Optional Protocol, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

No human rights abuses have been raised to UN human rights bodies to date in relation to private sector activities or agribusiness. However, the issue of land disputes and recommendations for better human rights recognition have been noted on a number of occasions by inter alia the Office of the High Commissioner for Human Rights, the Office of the Provedor for Human Rights and Justice, the UN Special Rapporteur on extreme poverty and human rights, as well as in Timor-Leste's Universal Periodic Review 2012.

'The struggles of nation-building and development cannot be an excuse to displace and destroy the homes of people living in poverty, who are entitled to protection against forced evictions and arbitrary interference in their home and privacy. Where justifiable in the most exceptional circumstances, evictions must meet the strict requirements set down in the basic principles and guidelines on development-based evictions and displacement.'

UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, 24<sup>th</sup> May 2012.

In a summary prepared by the Office of the High Commissioner for Human Rights in 2011, the Joint Submission by Office of the Provedor for Human Rights and Justice and concerned NGOs noted that land disputes are increasing and access to adequate shelter continues to be of concern. Recommendations were made for conduct public hearings to approve the Land Title Law.<sup>81</sup>

In a compilation prepared by the Office of the High Commissioner for Human Rights in the same year, concerns were raised over the lack of appropriate regulations concerning the ownership of land, with recommendations that Timor-Leste ensure that 'ongoing efforts to regulate the ownership of land result in equitable land allocations and help to alleviate poverty'.<sup>82</sup> Food insecurity was also highlighted as a major concern, particularly in rural areas.<sup>83</sup>

In May 2012, the UN Special Rapporteur on extreme poverty and human rights noted the complex situation of land titling in Timor-Leste and the fact that large number of families dwell on land to which they do not hold a legal title, or which is claimed by several parties or the State. She pointed out that the use of eviction practices 'is in clear violation of its human rights obligation'. She stated that a preliminary review of the recently adopted laws raises concerns about the compliance of several aspects of the laws with international human rights standards and obligations, including with respect to the participation of civil society in the discussions.<sup>84</sup>

## **Recommendations**

Agribusiness remains at an embryonic stage in Timor-Leste, where post-conflict infrastructural reconstruction and the development of a formal land administration and legislation remain priority areas of concern. While economic and environmental factors may deter investments, emerging government policies suggest that potential is seen in the agribusiness sector to enhance national economic development, food security and rural employment.

The question is how current legal reforms can ensure that this sector develops in a rights-based way. The effectiveness of the government's current efforts to pass a transitional land law, and the extent to



which these steps are taken in cooperation with communities, will help to shape the future of land and property access, private sector investment and stability in Timor-Leste.<sup>85</sup>

The way in which agribusiness will develop, if it does, will require the development and adequate implementation of land laws that respect and protect the rights of individuals and communities, takes into consideration customary laws and tenures, and requires that principles and rights under international law be respected by both investors and the State.

‘There is an urgent need for legal certainty relating to ownership of rural land, mechanisms for investors to seek access to rural land, and safeguards relating to food and livelihoods security in rural districts.’

The World Bank 2010 *Policy Options for Regulating Community Property and Community Protection Zones in Timor-Leste*.

Developing such laws has proven a protracted and challenging process for a State emerging from decades of conflict, and a formal land administration and law has yet to be implemented. However, this can be read positively – putting the time and thought into developing adequate laws, rather than rushing legislative reform, is likely to lead to better outcomes and implementation, so long as ill-regulated large-scale investments do not precede them.

In a country where food consumption, income and security depend on control of and access to land, the new land tenure legislation raises difficult questions for the government, not least, what reparations it should make for the wrongs of prior colonial regimes, and how it will enforce the rule of law.<sup>86</sup> There is great uncertainty about the capacity of the Timor-Leste State to administer a titling program covering the entire country<sup>87</sup> and to monitor and

regulate land acquisitions. The support of international agencies and donors to the government in land titling, and to regulate and monitor land acquisitions, appears critical in the short and medium terms.

One policy option for ensuring social and environmental compliance in relation to large-scale investments is for the government of Timor-Leste to require mandatory accreditation with an international voluntary industry certification scheme. This could be a means of ensuring conformity with internationally recognised principles of good practice in the short term, while the State of Timor-Leste goes about the more protracted process of developing its own monitoring and enforcement capacity.<sup>88</sup>

Timor-Leste will also need to establish a credible and effective judiciary as well as other legally enforceable mechanism for resolving disputes over land, which will be particularly critical if the scale and duration of land allocations to private investors increase. Failing to develop such mechanisms, and failing to better recognise or enhance existing customary modes of conflict resolution, could plant the seeds of wider disputes in the future.<sup>89</sup> Obligations on the State and on private investors to engage in wide and transparent consultation with local communities prior to agribusiness development will also be essential, particularly given the fact that a majority of customary land remains untitled, and is likely to remain so at least the near future.<sup>90</sup>

The draft Land Law requires further amendments<sup>91</sup> to make the above aspects legally enforceable, and its legitimacy and effectiveness will depend on the extent to which the law is developed in a participatory and inclusive manner with Timorese civil society. The setting up of an independent Land Commission to gazette community areas, in consultation with the communities, could create a



starting point of what is inside or outside community areas.<sup>92</sup> Key to this will be government engagement with local communities to better protect the rights of communities and access to land held under customary tenure.<sup>93</sup>

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<sup>1</sup>UNDP 2002.

<sup>2</sup>The World Bank 2011.

<sup>3</sup>IMF 2009:4-5.

<sup>4</sup>Rod Nixon, personal communication.

<sup>5</sup>While sources in Tetum may be more widely available, it is a limitation of this briefing that only sources in English could be consulted.

<sup>6</sup>Chamber of Commerce and Industry of Timor-Leste 2011a. It can be surmised that these contracts may have had more to do with the national elections in 2007 and the political networking interests of new government members, than actual realisation of their terms (Rod Nixon pers. comm., 2<sup>nd</sup> April 2013.)

<sup>7</sup>Government of the Democratic Republic of Timor-Leste 2005.

<sup>8</sup>The World Bank 2011.

<sup>9</sup>Rod Nixon pers. comm., 2<sup>nd</sup> April 2013.

<sup>10</sup>Zhang 2012.

<sup>11</sup>The World Bank 2011.

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<sup>14</sup>Democratic Republic of Timor-Leste (nd) *Timor-Leste National Strategic Development Plan 2011- 2030*.

<sup>15</sup>Jarvis 2008.

<sup>16</sup>Democratic Republic of Timor-Leste (nd) *Timor-Leste National Strategic Development Plan 2011- 2030*.

<sup>17</sup>Ibid.

<sup>18</sup>Ibid.

<sup>19</sup>Ibid.

<sup>20</sup>Rod Nixon pers. comm., 23<sup>rd</sup> March 2013.

<sup>21</sup>Government of Timor-Leste 2010.

<sup>22</sup>The World Bank 2011.

<sup>23</sup>MAF Timor-Leste 2009.

<sup>24</sup>The World Bank 2011.

<sup>25</sup>Groshong 2011.

<sup>26</sup>The World Bank 2011.

<sup>27</sup>CIA 2013.

<sup>28</sup>The World Bank 2011.

<sup>29</sup>Ibid.

<sup>30</sup>Ibid.

<sup>31</sup>Ibid.

<sup>32</sup>MAF Timor-Leste 2009.

<sup>33</sup>MAFF 2007.

<sup>34</sup>USAID 2005.

<sup>35</sup>La'o Hamutuk 2008a; 2008b.

<sup>36</sup>Nixon 2009.

<sup>37</sup>The World Bank 2011.

<sup>38</sup>The World Bank 2011. The foreign investment and export promotion agency, designated as TradeInvest Timor-Leste (TITL)



under Decree 7/2005, has the duty ‘to promote, coordinate, facilitate, register, and follow-up on foreign investment and exports, as well as centralize the necessary administrative procedures for authorizing and registering foreign investments within the framework of laws, incentives and benefits provided in the Foreign Investment Law.’

<sup>39</sup>Ibid.

<sup>40</sup>WEF 2010.

<sup>41</sup>Ibid.

<sup>42</sup>Ibid.

<sup>43</sup>See

<http://web.worldbank.org/WBSITE/EXTERN/AL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,contentMDK:22062225~menuPK:6472833~pagePK:210058~piPK:210062~theSitePK:3282787,00.html>.

<sup>44</sup>USAID 2008.

<sup>45</sup>Fargher & Edmeades 2012.

<sup>46</sup>ADB 2011; ADB 2013.

<sup>47</sup>International Crisis Group 2010.

<sup>48</sup>Indonesian records of land in seven districts outside Dili suggest that only 7.4% of the land was classified as customary (Fitzpatrick 2002:35).

<sup>49</sup>Fitzpatrick 2009.

<sup>50</sup>Ibid.

<sup>51</sup>Nixon 2007.

<sup>52</sup>J4P 2010.

<sup>53</sup>Fitzpatrick et al 2008.

<sup>54</sup>MyatThu et al 2007.

<sup>55</sup>USAID (nd).

<sup>56</sup>Fitzpatrick et al 2008.

<sup>57</sup>A National Forestry Policy was developed by the government in 2007 and served as the basis for the development of a Draft Forest Management Decree, which has not yet passed.

<sup>58</sup>Piaskowy 2013.

<sup>59</sup>IRIN 2011. For more on the Ita Nia Rai programme see [www.itaniarai.tl](http://www.itaniarai.tl).

<sup>60</sup>This briefing will examine the former two laws only.

<sup>61</sup>La’o Hamutuk 2012b.

<sup>62</sup>International Crisis Group 2010.

<sup>63</sup>Nixon 2009.

<sup>64</sup>International Crisis Group 2010.

<sup>65</sup>*Draft Land Law*. Final version from Council of Ministers – non official translation.

<sup>66</sup>IRIN 2011.

<sup>67</sup>International Crisis Group 2010.

<sup>68</sup>The World Bank 2010.

<sup>69</sup>Chamber of Commerce and Industry of Timor-Leste 2011a.

<sup>70</sup>Dominic Elson pers. comm., 25<sup>th</sup> March 2013.

<sup>71</sup>Chamber of Commerce and Industry of Timor-Leste 2011a; 2011b.

<sup>72</sup>See *inter alia* Fitzpatrick 2002; IRIN 2009; Harrington 2007.

<sup>73</sup>Justice for the Poor 2010.

<sup>74</sup>Brady & Timberman 2006.

<sup>75</sup>International Crisis Group 2010.

<sup>76</sup>Chamber of Commerce and Industry of Timor-Leste 2011a.

<sup>77</sup>Justice for the Poor 2010.

<sup>78</sup>Chamber of Commerce and Industry of Timor-Leste 2011a; Graydon 2005; Hohe 2003; Means 2002.

<sup>79</sup>Butterworth & Dale 2011.

<sup>80</sup>Chopra et al 2011:119-158.

<sup>81</sup>United Nations 2011.

<sup>82</sup>United Nations 2011b.

<sup>83</sup>Ibid.

<sup>84</sup>United Nations 2012.

<sup>85</sup>Justice for the Poor 2010.

<sup>86</sup>International Crisis Group 2010.

<sup>87</sup>Justice for the Poor 2010.

<sup>88</sup>Chamber of Commerce and Industry of Timor-Leste 2011a.

<sup>89</sup>International Crisis Group 2010.

<sup>90</sup>Ibid.

<sup>91</sup>For detailed policy recommendations on Chapter V of the draft Land Law see The World Bank 2010.

<sup>92</sup>Dominic Elson pers. comm., 25<sup>th</sup> March 2013.

<sup>93</sup>International Crisis Group 2010.



# National Updates on Agribusiness Large Scale Land Acquisitions in Southeast Asia

## Brief #8 of 8: Union of Burma

By Sophie Chao



Source: [www.5starmyanmar.com](http://www.5starmyanmar.com)

### Introduction

Emerging from five decades of military dictatorship, civil turmoil and economic isolation, Burma has lately come to the attention of international investors keen to draw profits from the country's vast natural resources which include fertile land, minerals, oil, natural gas and timber.<sup>1</sup> Frequently touted as Asia's next economic

tiger, Burma's new quasi-civilian government raises the prospect of fundamental reforms in national politics and economics for the first time in many decades, but the reform process is still in its very early stages, and significant challenges of implementation lie ahead.<sup>2</sup>

While oil, gas and coal mining, hydropower projects and logging have featured most prominently to date in terms of investments in Myanmar, agribusiness has emerged at the forefront of recent government development policies.<sup>3</sup> The political transformations that Burma is undergoing could be a golden opportunity for the country to engage in agribusiness to achieve economic growth with sustainable and rights-based outcomes.<sup>4</sup>

However, a growing body of literature and studies suggests that Burma has instead become the 'latest flashpoint in an alarming trend' of global land grabs.<sup>5</sup> Sources suggest that the land and resource rights of local communities are being undermined by legal reforms that seek to liberalize foreign direct investment and place all lands under the ownership of the State, with little indication that strengthened legal protections for the rights of communities will follow.

With its resource-rich but volatile border regions already plagued by decades of civil war, inequitable natural resource exploitation and the dispossession of rural communities in Burma as a result of ill-regulate agribusiness expansion could become the next trigger of heightened

socio-economic turmoil rather than of national development and welfare.

#### Country facts

Area: 676,578 km<sup>2</sup>  
Bordering countries: Bangladesh, China, India, Laos, Thailand  
Population: 54,584,650  
Main ethnic groups: Burman 68%, Shan 9%, Karen 7%, Rakhine 4%, Chinese 3%, Indian 2%, Mon 2%, other 5%  
Agricultural workforce (% of pop): 70%  
Main exports: natural gas, wood products, pulses, beans, fish, rice, clothing, gems  
Main imports: fabric, petroleum products, fertilizer, plastics, machinery, transport equipment, cement, construction materials, crude oil, food products, edible oil

### National trends in Large Scale Land Acquisitions

#### *Government policies and targets for agribusiness expansion*

Constituting the largest country on the Southeast Asian mainland, Burma's extensive river valleys, mountainous watersheds and rich soils have stimulated a spate of agribusiness investments and land speculation since the mid-2000s. Currently, Burma's economic growth draws largely from exploiting its natural resources (gas, gems, wood), agriculture (legumes, cereals) and fisheries.<sup>6</sup> Agro-based industries, including of bio-fuels, are considered as of high potential not only for import substitution but also for export promotion.<sup>7</sup>

Agriculture accounts for about 36% of gross domestic product, employs 70% of the workforce and provides 25% to 30% of exports by value. As a result, the government prioritizes the agribusiness

sector and rural development as drivers of growth and broad-based development.<sup>8</sup>

Agricultural production and growth is the government's top development priority for poverty alleviation in 2014 – 2015 and part of Strategic Priority 1 of the UN Strategic Framework for Burma in 2012-2015.<sup>9</sup> In 2013, the Asian Development Bank<sup>10</sup> and the World Bank approved fresh loans for Burma to aid the social and economic development of the country, with agricultural development featuring as a key strategy for economic growth.<sup>11</sup>

Notably, the Ministry of Agriculture and Irrigation's (MoAI) 30-year Master Plan for the Agriculture Sector (2000-01 to 2030-31) aims to convert 10 million acres of 'wasteland' for private industrial agricultural production, with rubber, oil palm, paddy, pulses, and sugarcane for export being particularly encouraged. Government 'crop campaigns' are also underway, with oil palm promoted in Tanintharyi Region, a nationwide jatropha campaign (which targets 0.5 million acres per state and region, for a national total of 8 million acres), rubber for the Chinese export market, and biofuels, including cassava and sugarcane.<sup>12</sup>

#### *Gross areas allocated to agribusiness*

According to a study published by the Environmental Law Institute in Washington D.C., 'while exact information remains difficult to obtain, over the last 20 years, several hundred thousand hectares across Myanmar have been allocated to hundreds of companies and converted into a variety of cash crop plantations'<sup>13</sup> such as sugarcane, rubber, palm oil, corn, rice, wheat, pulses, jatropha and cassava.<sup>14</sup>

By 2011, 204 national companies had been allocated nearly 2 million acres (around 810,000 hectares) of private agricultural concessions, with Tanintharyi Region and

Kachin State accounting for over half of these concessions.<sup>15</sup> This figure does not include concessions not recorded by the government or areas not under government control, such as the Wa-controlled areas. It is reported that only 20-30% of this area has been planted, with evidence suggesting that companies clear the land for profit and then speculate its value by holding the land and not planting crops.<sup>16</sup>

Looking forwards, a further 6 million hectares have been earmarked for agricultural commercialization, notably of rubber and oil palm plantations. Tanintharyi Region has been targeted in the last decade by oil palm development, with over 1 million acres already granted to Myanmar companies, many with informal foreign investment backing. Cassava and sugarcane are also being encouraged by the government as biofuel feed, such as Yuzana's 200,000 acre cassava concession in Kachin State's Hugaung Valley, designed for export to China's domestic biofuel market.

*Basic information about investment trends and/or key financiers*

'In many ways it [Burma] is well-positioned to provide enormous investment opportunities. The fact that there has been so little investment in the past means the potential returns are very high.'

Nobel Prize-winning economist Joseph Stiglitz quoted in Sargent 2012 'Myanmar's economic promise faces pitfalls' in *The Myanmar Times*, 5<sup>th</sup> March 2012.

Formerly characterized by direct seizure by army units and government departments, large-scale land acquisition is reportedly now frequently undertaken by army-owned domestic companies, joint ventures and other economically and politically powerful operations, often with connections to the military.<sup>17</sup>

New land laws and policies to encourage foreign investment and open up the country to global markets are being developed, and Burma is being advertised as 'the final land frontier of Asia'<sup>18</sup> with its lands up for sale to foreign investors.<sup>19</sup> In 2012, it was portrayed by global investor guru Jim Rogers as 'probably the best investment opportunity in the world right now'.<sup>20</sup> Other sources, however, are more doubtful of the potential for sustainable and ethical investment in Burma, citing among other risks, continuing human rights abuses, lack of regulatory and legal protections, and child and forced labor.<sup>21</sup>

Prior to the current land reforms, foreign investors could not rent land concessions and joint ventures with the government were a costly and politically risky undertaking. Today, virtually all FDI in Myanmar comes from other Asian countries, notably Thailand, China, Taiwan, Hong Kong, Singapore, India, Malaysia, Vietnam and South Korea<sup>22</sup> with particular focus on the production and processing of palm oil and rubber.<sup>23</sup>

Very few concessions are 100% foreign-owned and nearly all agricultural concessions in the country to date are formally run by Myanmar companies, with the notable exception of China's opium crop substitution programme which finances many of the rubber concessions in northern Myanmar.<sup>24</sup> The Vietnamese government has also recently purchased a 120,000 acre rubber concession in southern Rakhine State.

Current national agricultural policies aim to increase the export of crops to increase foreign exchange revenue by granting agricultural concessions to foreign companies and domestic companies with political connections or affiliations. The situation is set to change further in favor of foreign investors with the passing of two new land laws and the current push by the

new government for foreign direct investment in the agricultural sector.

The Vacant, Fallow, and Virgin Land Law (or VFV Law) legally allows the government's Central Land Management Committee to reallocate smallholder farms to private companies. The Farmland Law states that land can be legally bought, sold and transferred on a land market with land use titles. Both these laws together allow for foreign investors to purchase land use titles, pending the details of the foreign investment law, and for Burmese companies that have been granted or purchased land from local authorities to receive land use titles, which then could be sold to other investors, including to foreign companies.

The Foreign Investment Law (FIL), approved in November 2012, contains some measures to regulate foreign investment to the advantage of domestic companies but also significant liberalisation measures to encourage a new phase of FDI into the country.<sup>25</sup> FDI land use rights are granted up to a total of 70 years, which contravenes the new Vacant, Fallow and Virgin Land Law, which stipulates a maximum of 30-year leases for agribusiness. Moreover, the FIL allows foreign investors more than a 70-year lease if they get permission from the central government, provided the land in question is in the less developed areas of the country that lack communication, and that the project promotes Burma's overall economic development.<sup>26</sup>

### **Problems with land acquisition**

#### *Lack of recognition of rights to land*

Land ownership in Burma has been vague since the 1960s when most of the land was nationalized during the socialist reign of Ne Win. The former autocratic regime in Burma saw routine confiscation of land, displacement and cropping enforced by the

government and backed by the military, with little recourse to protest for local communities.<sup>27</sup> Today, the Burmese State retains ownership of all land in the country and whatever rights over land that are accorded are exclusively leasehold rights, user rights, or rights to cultivate a certain land parcel subject to the approval of local government bodies that are appointed by the central government.<sup>28</sup>

Nearly three quarters of Burma's population (or 40 million people) live in rural areas and depend directly on farmland and forests for their livelihoods. Yet land tenure rights are very weak in a country where the State claims ownership over all land and natural resources and where most rural communities have no formal land title for their customary agricultural lands.<sup>29</sup>

'The conflict in the north of Myanmar, like so many around the world, has its roots in land and resource rights — including community forest rights. The leadership of previous governments guiding Myanmar started a race to sell off our natural resources, and our livelihoods have become collateral damage in the process. As our country opens up to the outside world, we need to stay focused on reducing poverty, not increasing it.'

Maung Maung Than, project coordinator for RECOFTC - The Center for People and Forests in Democratic Voice of Burma 2013  
*Burma latest flashpoint in 'global land grabbing' epidemic.* 11<sup>th</sup> February 2013.

The current reform period has given political space for these communities to voice their collective opposition to this dispossession. Civil society protests against agribusiness-driven large scale land acquisitions are on the rise. For instance, Burmese land-rights activists organised an event in opposition to the

government-sponsored agribusiness fair, the '2<sup>nd</sup> Commercial Farm Asia', held in Yangon on 11<sup>th</sup> – 12<sup>th</sup> October 2012, intended to showcase Burma as Asia's last frontier for agricultural investment.<sup>30</sup> Those attending included land rights lawyers, social activists, 88 Generation student activists, farmers' representatives and ethnic political party leaders, to discuss land grabs in Burma. They drafted a letter of solidarity for those present at the protest gathering, and a letter of global solidarity with 100 signatories, which were presented to the organisers of the fair.<sup>31</sup>

But with land acquisition by domestic and foreign private companies on the rise, and laws being passed that only further undermine communities' rights to land and natural resources, it appears that this trend of land grabbing and expropriation of resources is set to continue, albeit featuring potentially different actors.

On-going civil war, poor land governance, farmers' debts and domestic and foreign land grabs are among the reasons why at least one-quarter of all farmers in government-controlled areas in Myanmar are now landless, with some studies showing upwards of 50% in some rural areas. One-third of Myanmar's 47 million rural residents are landless laborers, while others struggle to hold onto their farms through funds borrowed from the informal market.<sup>32</sup> In such areas, about half of household farms are under 5 acres, which is below minimum subsistence levels. Landlessness is therefore a serious and growing problem throughout Myanmar, with million of Burmese having been or standing to be dispossessed of land under current laws and policies.

The government, with help from UN agencies, is beginning a national land titling programme to turn land into capital and formalize land use rights. While this presents a solution to some – especially urban land holders – land titling presents

huge challenges and tenure insecurity for rural farmers, especially in the uplands and ethnic borderlands, as the government does not formally recognize traditional upland swidden cultivation (*taungya*).<sup>33</sup>

Since many farmers do not possess formal land titles they are susceptible to being classified as squatters. The loss of cultivation rights is likely to exacerbate rural landlessness, poverty and associated problems, such as rapid rural – urban migration and environmental degradation, all of which jeopardize local and national food security.

While the government has said it intends to put farmers at the forefront of its economic reforms, it is reported that residents in most rural areas have yet to feel the impact of the political changes and fear that the new land policies will not protect them from having their land taken with limited compensation by tycoons or investors with political connections, in a repetition of the land confiscations they are all too familiar with.<sup>34</sup>

#### *Legal reforms further undermine tenure security*

Critics of recent law reforms in relation to land and investments in Burma have noted that the legal framework is not only failing to keep pace but actually retrograding in terms of the land tenure security provided to local communities. It has been suggested that these reforms mean farmers and the urban poor are possibly even more vulnerable to possible loss of land and displacement and dispossession than they had been under the previous regime.<sup>35</sup>

In 2012, President Thein Sein signed two new laws, the Farmland Law and the Vacant, Fallow, and Virgin Land Management Law, that will serve as the legal framework for the country's land reform. Under these laws, the State remains the ultimate owner of all land.



Farmers are allowed to cultivate but only in accordance with the government's prescriptions. Second, farmers can now transfer or mortgage their land to repay their loans. This measure offers new avenues for farmers to raise credit and continue their agricultural activities. Third, the new laws established a Central Farmland Management Body that is in charge of ensuring compliance with the new regulations and is largely independent of the judicial system. This body can transfer or revoke the right to work farmland, and provide land evaluation for various purposes. It operates under the auspices of the Ministry of Agriculture and Irrigation and has subsidiaries extending from the region/state to village levels.

According to land activists and experts, the new land laws contain several fundamental weaknesses. Drafted largely behind closed doors, they were submitted to the parliament in mid-2011 by the Ministry of Agriculture and Irrigation, and passed through the legislature in March 2012 after several rounds of amendments. Under the new laws, farmers still lack land tenure security and are subject to the government's crop prescriptions and production quotas.

Furthermore, once the new councils are operational all persons with usage rights to farmland will be obligated to apply for authorization to continue to work it. In other words, even people with tenure over land today may lose it tomorrow through a process of review and scrutiny of existing holdings that will enable the state not only to identify those areas of land over which it has uncontested possession, but also those areas of land over which farmers' claims are tenuous, or might be contested through the fabrication of alternative documentary claims and the use of various illegal coercive methods.<sup>36</sup> In addition, the Farmland Law lacks checks and balances, since disputes must be settled by

government-created farm management bodies, not in the courts.<sup>37</sup>

In short, far from reducing the prospects of land grabbing, the Farmland Law and the Vacant, Fallow, and Virgin Land Management Law appear to open the door to confiscation of agricultural land on any pretext associated with a state project or the 'national interest'. They not guarantee the rights of farmland users to cultivate and sell their products for fair prices, much less to own the land they use and manage.

Finally, the Special Economic Zone (SEZ) Law and Foreign Investment Law that are currently finalized, along with ASEAN-ADB regional infrastructure development plans, may end up creating new incentives and drivers for land grabbing and further compound the dispossession of local communities from their lands and resources,<sup>38</sup> particularly as large-scale investment projects are focused on the resource-rich but conflict-ridden borderlands, also home to already poor and often persecuted ethnic minority groups.<sup>39</sup>

#### *Land grabbing and land conflicts*

'The acquisition of land for agribusiness is expected to become one of the biggest threats to local access to land and to people's livelihoods as the country's new land laws, government promotion of private industrial agriculture and the Foreign Investment Law (FIL) all take effect.'

Buchanan et al 2013 *Developing Disparity - Regional Investment in Burma's Borderlands*. Transnational Institute. P.41.

In a written statement of September 2011 session, the Asian Legal Resource Centre alerted the Human Rights Council to the dangers posed to the rights of people in Myanmar by the convergence of military, business and administrative interests in



new projects which lead to the displacement of smallholders and rural communities from their farms and homes.<sup>40</sup> It noted that the majority of over 1,700 complaints that the newly established national human rights commission received in the first six months of its operations concerned land grabbing cases.

In August 2012, the National Democratic Force (NDF) established a commission as part of its Farmers' Affairs Committee to identify farmland ownership disputes and has received over 4,000 complaints of land grabs and dispossession since its formation.<sup>41</sup> In July 2012, a bill was passed to establish a Land Acquisition Investigation Commission to improve the government's handling of land grabs. After a few months, more than 2,000 cases had been received.<sup>42</sup>

The Burmese media is also overwhelmed with reports of people being forced out of their houses or losing agricultural land to state-backed projects, sometimes being offered paltry compensation, sometimes nothing.<sup>43</sup> People who refuse to move when forced out by land grabbers may risk prosecution and jail, as well as threats and intimidation.

'The convergence of the military, government agents and business is an enormously dangerous development, as can be seen in the increasingly grave problem of land-grabbing.'

Oral Statement to the 19<sup>th</sup> Session of the UN Human Rights Council from the Asian Legal Resource Centre, 21<sup>st</sup> March 2012.

Severe (and sometimes fatal) land conflicts are beginning to emerge as rural communities seek to reclaim land taken from them without their consent and allocated to private companies. Whilst most of these relate to hydroelectric, gas

and oil mining and pipelines and infrastructural projects,<sup>44</sup> cases of agribusiness-related land conflicts are on the rise.

In 2010, farmers in the northern state of Kachin protested against the destruction of their forest and livelihoods by Yazuna Company, a cassava, sugarcane and jatropha plantation whose owner Htay Myint is widely regarded as a close friend of former dictator Snr-Gen Than Shwe.<sup>45</sup> The communities drove away company bulldozers, pulled out seedlings and refused to relocate from their homes. They also filed written complaints to the local authorities and the International Labour Organisation after being forcibly evicted, but with little effect. In July 2010, the Kachin Supreme Court in Myitkina opened a case on behalf of the 148 evicted farmers, and while compensation payment was imposed on the company, only some farmers were eligible to receive it.<sup>46</sup>

In another more recent conflict (February 2012), police in southwest Burma shot and wounded at least nine farmers who were among hundreds trying to take back land they say was confiscated by a private company, Orchard Agriculture and Animal Husbandry Co., without compensation or consent being sought.<sup>47</sup>

### *Rights of smallholders*

In a bid to boost production for export, the government is routinely allocating smallholder land to private companies in agricultural land contracts often negotiated with regional and local military authorities and leading to land confiscation and displacement of local farmers. Under the VFV Law, the government's Central Land Management Committee holds the right to reallocate smallholder farms (both upland shifting *taungya* land and lowlands without official land title) to private companies. As very few farmers have official land title certificates from the

Settlement and Land Records Dept. (SLRD), most farmers now have no formal land use rights.

While Burma's small-scale tenant farmers do not actually officially own the land they have worked on for generations, the administratively complex and corruption-fraught process to get title to their land as stipulated under the Farmland Law and the Vacant, Fallow and Virgin Lands Management Law puts peasant farmers' land tenure security at serious risk.

The Farmland Law states that land can be legally bought, sold and transferred on a land market with land use titles. While farmers have engaged in (informal) land transactions for generations, the major difference under the Farmland Law is that anyone without an official land use title has no rights anymore to use the land. Land use titles will be issued by the SLRD, but it is expected to take decades to title all the land in the country, with no provisions made in the meantime to secure communities' rights and access to their land.

Moreover, it will be impossible to title shifting *taungya*, which means that the uplands - now labeled 'wastelands' or 'fallow lands' - have no land tenure security under these two new land laws. Therefore ethnic upland areas are under the greatest threat.<sup>48</sup>

Concerns have also been raised over the transparency and freedom of new contract farming agreements. Field investigations reveal that farmers do not always fully understand their contractual agreements with agribusinesses, and that the obligations and risks often fall disproportionately to the contract farmers rather than the investors.<sup>49</sup> Finally, frustrations over lost employment and benefit-sharing opportunities have been expressed where Chinese investors import

unskilled labor from China to work in large-scale plantations.<sup>50</sup>

#### *Environmental impacts of expansion*

Agribusiness and other large-scale land conversions have led to an unprecedented rate of deforestation across Burma in the last twenty years. Dense forest cover, for example, has declined precipitously, from 45.6% of the land in 1990 to just 19.9% in 2010,<sup>51</sup> making Burma's deforestation rate one of the highest in the world.<sup>52</sup>

The loss of forest and grassland areas and the transformation of a self-reliant diversified agriculture to large scale monocrop plantations places areas of high biodiversity at serious risk. Logging for land conversion to plantations has also been shown to be directly responsible for floods, soil erosion, landslides, sedimentation build-up behind dams, river siltation, increased dry season water, stunted farm productivity and declining topsoil fertility.<sup>53</sup>

The environmental impacts of agribusiness expansion are most starkly exemplified by the Yazuna concession in Kachin State. In this concession, which is located inside the world's largest tiger reserve (Hukawng Valley Tiger Reserve), animal corridors have been destroyed, rivers clogged with felled trees and detritus, and no forest is left standing.<sup>54</sup>

Although Burma has a number of laws and regulations designed to protect the environment, few of these are efficiently enforced. For instance, the new Environmental Impact Assessment law is limited in scope, while the institutional and governance context is not conducive to ensuring that any EIA meets international standards.<sup>55</sup> Protected forests sometimes become mapped within other land use concessions, especially for industrial agriculture.<sup>56</sup> There are also few laws that adequately address issues such as air and water pollution.<sup>57</sup>

## Human rights framework as it applies to agri-businesses

In a number of speeches, Burma's President, Thein Sein<sup>58</sup> and Aung San Suu Kyi<sup>59</sup> have welcomed responsible investment that respects workers' rights, which does not harm the environment, and which is supportive of democracy and human rights. However, no specific obligations have to date been placed by the government on agri-businesses to comply with human rights requirements under international law.

While documented human rights abuses have tended to focus largely on ethnic conflicts which escalated in 2011 in northern Burma, civil and political rights infringements by the government and corporations are beginning to be documented in the agribusiness sector, including arbitrary arrests and detentions, land confiscation, forced internal displacement, lack of consultation, harassment of human rights defenders and lack of access to remedy. Direct complicity in these human rights abuses is at play when companies engage security forces for the protection of their assets.

**Land rights:** Land targeted for agribusiness development is often already under cultivation by small-scale subsistence farmers, many from ethnic minority groups that have long occupied the areas. These communities sometimes find their lands confiscated and are sometimes forced work on the farms and plantations for minimal or no pay.<sup>60</sup> Procedures for land acquisition are reported to lack transparency, accountability and an adequate regulatory framework for compensation.<sup>61</sup>

Central committees determine whether land is unused, a particular concern for farmers practicing the traditional *taungya* form of shifting upland cultivation in

which crops are rotated with some fields left fallow for certain periods of time.<sup>62</sup>

**Right to food:** The lack of formal land tenure and use rights – which does not appear to be secured by the two new land laws – may threaten the livelihoods and food security of smallholders in upland areas.<sup>63</sup> The conflict between State and customary laws and practices in land management, and lack of legal recognition of the latter, may create the conditions for farmers to be dispossessed of their lands, and therefore their source of subsistence, particularly in upland ethnic regions.

**Right to remedy:** The 2008 Constitution requires the government to 'enact necessary laws to protect the rights of the peasants and to obtain equitable value of agricultural produce', providing a normative justification for rights claims by rural villagers.<sup>64</sup> Myanmar's recent policy changes also contain language that could increase opportunities for redress. For instance, the 2012 Farmland Law confirms that 'farmer organization[s]' can legally organize, which provides a potential opportunity for local collective action.<sup>65</sup> The Farmland Law also provides for a rather poorly-defined grievance mechanism for individuals whose farmland has been requisitioned.<sup>66</sup>

However, the new land laws fail to take into account traditional land conflict resolution, implemented and mediated at the community level according to local customs and by traditional leaders. In some areas, local authorities implement a system that incorporates traditional land tenure practices into a regional registration system;<sup>67</sup> communities may rely heavily on such existing frameworks to mediate property disputes. In this context of multiple authorities and competing land protection praxes, individuals and communities face uncertainty as to how they can protect their land in a way that will be recognised vis-à-vis external actors.

**Judiciary:** The Farmland Law and VFV Law preclude any role for the judiciary, ensuring that administrators and government ministers have the final say on all matters of importance concerning the occupation and usage of agricultural land.<sup>68</sup> At the same time, it is reported that systemic levels of corruption within the judiciary severely impede victims from accessing remedies or compensation related to the infringements they experience. The lack of easily accessible mechanisms for access to justice are further compounded with an inability on the part of most rural communities to afford, and be informed of, formal legal remedies.<sup>69</sup>

**Consultation:** While the FIL lists classes of ‘restricted or prohibited business’, which require specific approval of the Myanmar Investment Commission (including projects, which may negatively affect public health, the environment, or the cultural rights of ethnic minorities)<sup>70</sup> there is no procedure for project-affected communities to participate in the selection of members of the Commission.<sup>71</sup> The authority to hold hearings is not even listed as one of the Commission’s powers.<sup>72</sup> It appears that no provisions are made for participation of local communities in the development and implementation of agribusiness projects in existing laws, meaning that there are no clear safeguards for their rights, or legal protections for their right to exercise Free, Prior and Informed Consent.

**Forced migration/internal displacement:** Land confiscation without prior consultation, compensation and/or notification has led to reported instances of forced internal displacement.<sup>73</sup> In some cases, villagers have been forced of necessity to relocate due to the destruction of livelihoods and environmental degradation in or near project sites.<sup>74</sup>

**Child and forced labor:** Myanmar has not ratified ILO standards on the use of child labor and there is widespread violation of these standards in the agricultural or farming industries.<sup>75</sup> Forced labor is also reportedly a phenomenon to be found across many different sectors in Myanmar, for products including bamboo, beans, palm, physic nuts, rice, rubber, sesame, sugarcane and sunflowers.

With regards to workers’ rights, Burma until recently did not allow independent trade unions, and workers’ rights have been routinely violated. A new labour law is now in place<sup>76</sup> which prohibits forced labor and guarantees the rights of citizens, but is reportedly only infrequently implemented. Instances of abuse of workers’ rights include extended working hours, low wages with few benefits, sexual harassment of female workers and employment discrimination on ethnic grounds.<sup>77</sup>

#### *Burma’s international human rights obligations*

Burma has acceded certain international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (in 1997), the Convention on the Rights of the Child (in 1991), the Optional Protocol on the Convention on the Rights of the Child (in 2012) and the Convention on the Rights of Persons with Disabilities (in 2011). Burma is also a party to ILO Convention No. 29 on Forced or Compulsory Labor (1955) and voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples in 2007. Burma was one of the first nations to adopt the United Nations Declaration on Human Rights in 1948.

Burma’s ratification of the ASEAN Charter on in July 2008 raised controversy among member nations because of its much criticized human rights record and

(at the time) ongoing detention of opposition leader Aung San Suu Kyi.<sup>78</sup> Despite notable progress in terms of certain rights, such as freedom of expression and association, concerns over the human rights situation today in Burma continue to be expressed by civil society and United Nations bodies and representatives, including the Special Rapporteur on the situation of human rights in Myanmar in relation to ‘violations of land and housing rights, in particular regarding the impact of infrastructure projects, natural resource exploitation and associated land confiscations and grabbing’.<sup>79</sup>

‘Given the wave of privatizations in 2011 and the expected increase in foreign investment, together with the new Government’s plans to accelerate economic development, the Special Rapporteur fears an increase in land confiscations, development-induced displacement and other violations of economic, social and cultural rights. The private companies involved also have a responsibility not to be complicit in human rights abuses.’

United Nations 2012d *Progress report of the Special Rapporteur on the situation of human rights in Myanmar*, Tomás Ojea Quintana. 7<sup>th</sup> March 2012.

Furthermore, concerns have also been voiced that the Constitution of 2008, by granting the Defence Forces complete autonomy and supremacy over the civilian government, limits the full sovereign powers of the civilian government and precludes any oversight over the military. This means Burma as a State is unable to comply with its *erga omnes*<sup>80</sup> or absolute obligations under customary international law, or as a signatory to multilateral treaties.<sup>81</sup>

In addition, the Constitution provides only for the recognition of obligations that arise from ‘treaties or agreements which before the commencement of this Constitution have been in operation between the Government of the Union of Myanmar and the Government of other State.’ In other words, the Constitution only allows for recognition of obligations arising out of bilateral, rather than multilateral, treaties.<sup>82</sup>

#### *Recent legal developments which strengthen or weaken rights*

Myanmar’s land is currently governed by a patchwork of overlapping, and sometimes contradictory, land laws. Recent laws passed by the Government provide some clarity in the law relating to individual land and property rights, but retain substantial government authority to expropriate land. The lack of protections for communities’ rights to land has been highlighted on a number of occasions by civil society in relation to the Farmland Law, the VFV and the FIL.

On a positive note, government and parliamentary officials in recent national dialogues with civil society have recognized the need to conduct land reforms in a more inclusive and sustainable fashion through responsible agricultural investment.<sup>83</sup> President Thein Sein stated in a televised speech on 19<sup>th</sup> June 2012 that Burma needs to have coherent land use and management policies in order to improve rural living conditions and ensure food security and job creation for the population outside of major cities. The president singled out uncertainty about land use rights and land speculation as two major hurdles that need to be addressed.<sup>84</sup>

The government has also acknowledged weaknesses in the Farmland Law and intends to review the law in relation to land dispute adjudication and rights of



local residents to manage and use their farmlands.<sup>85</sup>

International support is also expected to encourage the strengthening of land and tenure rights in Burma. In February 2012, USAID's Land Tenure and Property Rights Division initiated an assessment of tenure issues with the intent of helping the Government of Burma assess tenure and property rights challenges and identify potential opportunities for addressing them. The aim will be to promote legal reforms that both respect citizens' rights and 'will be an essential step for reducing and mitigating conflicts and promoting economic growth.'<sup>86</sup>

Finally, the formation in September 2012 of a new National Human Rights Commission is an important step towards the promotion and protection of human rights in Burma, and is already being actively used by civil society to raise cases of agribusiness-related land acquisition that fails to respect human rights.<sup>87</sup>

### **Recommendations**

There is much speculation over where Burma is headed in terms of development, investment opportunities and human rights.<sup>88</sup> With agribusiness expansion on the rise, the question remains as to whom most will benefit from these investments in the short and long term, and what this implies for Burma's political and economic trajectory and its largely rural population.<sup>89</sup>

Land reform is urgent and steps taken by the government to this end may usher in a new era of possibility for Burma's beleaguered citizenry.<sup>90</sup> Much will depend in the types of investment undertaken, the laws that regulate them and their implementation and the overall quality of governance in the concerned areas.<sup>91</sup>

Arguably, the new wave of foreign investment, including the active engagement of Western corporations and donors, can play a pivotal role in Burma's transition. A brighter future rests on the transparent, representative and accountable decision-making by the Burmese government and people on governing and sharing the benefits of their land, water and resources.<sup>92</sup>

The government of Burma has a huge task ahead, and in some ways it could be said that Burma's political reforms have outpaced its economic reforms. Economic reforms have tended to be developed in a piecemeal manner that reflects the drawn out deliberations on new legislation as well as pressures from various political and economic interests.<sup>93</sup> Some sources warn that the hectic pace of legal reform is resulting in inconsistent policies, inconsistent draft legislation and ad hoc decision-making.<sup>94</sup>

In terms of legal reform, it is critical that the government adopt laws and policies that support smallholder farmers' livelihoods, such as legal recognition of and respect for customary rights and institutions, as well as recognition of upland shifting cultivation as a formal land use category.<sup>95</sup> Smallholder farmers, landless people, and land-poor households have fundamental rights to land and food that need immediate attention and protection under the law.<sup>96</sup>

The ALRC has recommended that the government suspend implementation of the Farmland Law and begin a meaningful process of engaging with members of the public at all levels and in all parts of the country, with landholders, land users and legal and technical experts, among others, to get the widest and most comprehensive range of views on how genuinely to protect public interests.



One outcome of this process would be that the law would have be redrafted to guarantee the livelihood rights and food rights of occupiers and cultivators of land, and these should be clearly and explicitly expressed in the law, and procedures and structural arrangements spelled out to protect them, based on what lessons are learned from the consultative process. The ALRC has also called for the government to ensure that whatever form the revised law takes, cases decided under it are subject to judicial review.<sup>97</sup> Transparent guidelines regarding land compensation are also necessary.

Finally, foreign governments and aid agencies can play a useful role in helping Myanmar figure out how to address land disputes. Fellow ASEAN countries in which the State owns the land can also provide examples of lessons learned and experiences for how they have sought to resolve land tenure and land rights issues in the context of agribusiness expansion.

Burma's future depends in large measure on stewardship of its natural resources and greater inclusiveness of its citizens in the benefits from resource exploitation.<sup>98</sup> Burma's challenge is in achieving sustainable and equitable development in the face of entrenched vested interests.<sup>99</sup>

In the context of agribusiness and other industries, the extent to which legislators and officials are able to address land reforms and tackle land disputes will be one of the most important tests for the new reformist government.<sup>100</sup> It remains to be seen whether Burma will prioritise the security of property rights of investors over those of its impoverished population in the pursuit of economic development, as some precedents may suggest.<sup>101</sup> The growing voice of Burmese civil society will testify as to whether these reforms are seen to support sustainable development and genuinely secure rural communities' rights.

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## Endnotes

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<sup>64</sup>2008 Constitution of the Republic of the Union of Myanmar, Chapter 1, Article 23.

<sup>65</sup>The Republic of the Union of Myanmar President Office 2012 'Designating the Date of Coming into Force of Farm Land Law', Chapter 13, Article 113, Notification No 62/2012.

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<sup>67</sup>For example, the Karen National Union has developed a Land Policy (2009) and attempts to implement it in areas under its influence (see Karen National Union 2012).

<sup>68</sup>Asian Human Rights Commission 2012.

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<sup>70</sup>The Foreign Investment Law, Chapter 2, Art 4(a) No. 21/2012.

The law does not refer to 'ethnic minorities', but to 'National Races'. This term appears throughout Myanmar's Constitution but is not defined. Context reveals that it refers to all identifiable ethnic groups within Myanmar. See Constitution of the Republic of the Union of Myanmar 2008.

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<sup>78</sup>Arendshorst 2009.

<sup>79</sup>See inter alia Human Rights Watch 2013; Burma Partnership 2013; United Nations 2011; United Nations 2012b, 2012c, 2012d.

<sup>80</sup>The *erga omnes* doctrine refers to the absolute legal obligations of states towards the international community.

<sup>81</sup>Global Justice Center 2012.

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<sup>86</sup>Pearce 2013; USAID 2012.

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An oil palm estate foreign worker washing up after work at a FELDA (The Federal Land Development Authority) plantation in Pahang, Malaysia (2007). Photo: Sze Ning.