

*Towards equitable and secure access to land and natural resources for family farmers in the Mekong region*



## ***Thematic Study***

***October 2017***

# **The Recognition of Customary Tenure in Cambodia**



***Mekong Region Land Governance***

# Thematic Study

Written by Jeremy Ironside

This thematic study presents a country-level overview of customary tenure arrangements in Cambodia. It examines the extent of customary tenure in the country, the degree to which customary tenure is recognized both legally and in practice, and explores key opportunities for better recognition.

Reviewed by:

Christian Castellanet, Natalia Scurrah, MRLG

For more information, contact:

Jeremy Ironside, consultant: <ironsidejeremy@gmail.com>

Natalia Scurrah, MRLG: <nscurrah@gmail.com>

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Photo cover credit (left to right): 'Villager making bamboo fish traps' by Jeremy Ironside; 'Encroached reserved land in a titled communal land in northwest Cambodia' by Dominik Wellmann; 'Planting rice mixed with other crops in upland shifting cultivation agriculture field' by Jeremy Ironside. All photos licensed under [CC BY-NC-ND 4.0](https://creativecommons.org/licenses/by-nc-nd/4.0/).

# Table of contents

<b>List of Acronyms</b>	ii
<b>Executive Summary</b>	iv
<b>Introduction</b>	1
<b>The Extent of Customary Tenure in Cambodia</b>	3
Customary tenure in agricultural areas	3
Customary communal lands	4
<b>Recognition of Customary Tenure in the Legal System</b>	7
Communal land titling for indigenous communities	10
Recognition of customary rights over forest areas	13
Recognition of customary tenure in protected areas	17
<b>The Impact of Land Policies and Private Land Titling on Groups who rely on Customary Tenure</b>	18
Impacts of land titling policies	18
The erosion of customary tenure systems	20
<b>Conflict Resolution and Grievance Mechanisms</b>	23
<b>Opportunities for Improving Customary Tenure Recognition</b>	24
<b>Recommendations for Policy Influence</b>	27
<b>Strengthening Multi-Stakeholder Alliances, Community Rights and Representation</b>	32
<b>Conclusion</b>	34
<b>References</b>	35
<b>Annexes</b>	40
<b>List of Figures</b>	
Figure 1. Map of Cambodia showing provincial boundaries	v
Figure 2. Geographical distribution of Indigenous groups in Cambodia	5
Figure 3. Beng trees planted in Lurn Kren village’s communally titled land	29
Figure 4. Maps of Snoul Wildlife Sanctuary showing extent of forest clearing	48

# List of Acronyms

ADHOC	Cambodian Human Rights Development Association
Anon	Anonymous
CAC	Cambodian Agricultural Census
CCHR	Cambodian Center for Human Rights
CF	Community Forestry
CHRAC	Cambodian Human Rights Action Committee
CIDA	Canadian International Development Agency
CLT	Communal Land Title
COHCHR	Cambodian Office of the High Commissioner for Human Rights
CPA	Community Protected Area
D&D	Decentralization and Deconcentration
ELC	Economic Land Concession
FA	Forestry Administration
FAO	Food and Agriculture Organization of the United Nations
FUNCINPEC	Front Uni National pour un Cambodge Indépendant, Neutre, Pacifique, et Coopératif
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
EIA	Environmental Impact Assessment
HAGL	Hoang Anh Gai Lai Company
ICCA	Indigenous and Community Conserved Areas
IP	Indigenous Peoples
IPAC	Indigenous Peoples Association of Cambodia
LICADHO	Cambodian League for the Promotion and Defense of Human Rights
MAFF	Ministry of Agriculture, Forestry and Fisheries
MLMUPC	Ministry of Land Management, Urban Planning and Construction
MoE	Ministry of Environment
MoEF	Ministry of Economy and Finance

Mol	Ministry of Interior
MRD	Ministry of Rural Development
MRLG	Mekong Regional Land Governance project
NA	National Assembly
NALDR	National Authority for Land Dispute Resolution
NGO	Non-Governmental Organization
NIS	National Institute of Statistics
NSDP	National Strategic Development Plan
NTFP	Non-Timber Forest Products
ODC	Open Development Cambodia
RECOFTC	The Centre for People and Forests
RGC	Royal Government of Cambodia
SLC	Social Land Concessions
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
US	United States
VGGT	Voluntary Guidelines on the Governance of Tenure

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# Executive Summary

This study explores the importance of customary tenure for rural Cambodians with the aim of strengthening its recognition. It begins with an overview of the extent of customary arrangements in the country, and their significance for the livelihoods and wellbeing of rural communities. Throughout Cambodia's lowland and upland areas, local rules, institutions and practices have long governed access, use and management over a wide range of land, forests and fisheries resources. The diversity of common resources under customary management leads to a complex array of rights and right-holders. These customary arrangements provide important legitimacy behind community claims to land and natural resources.

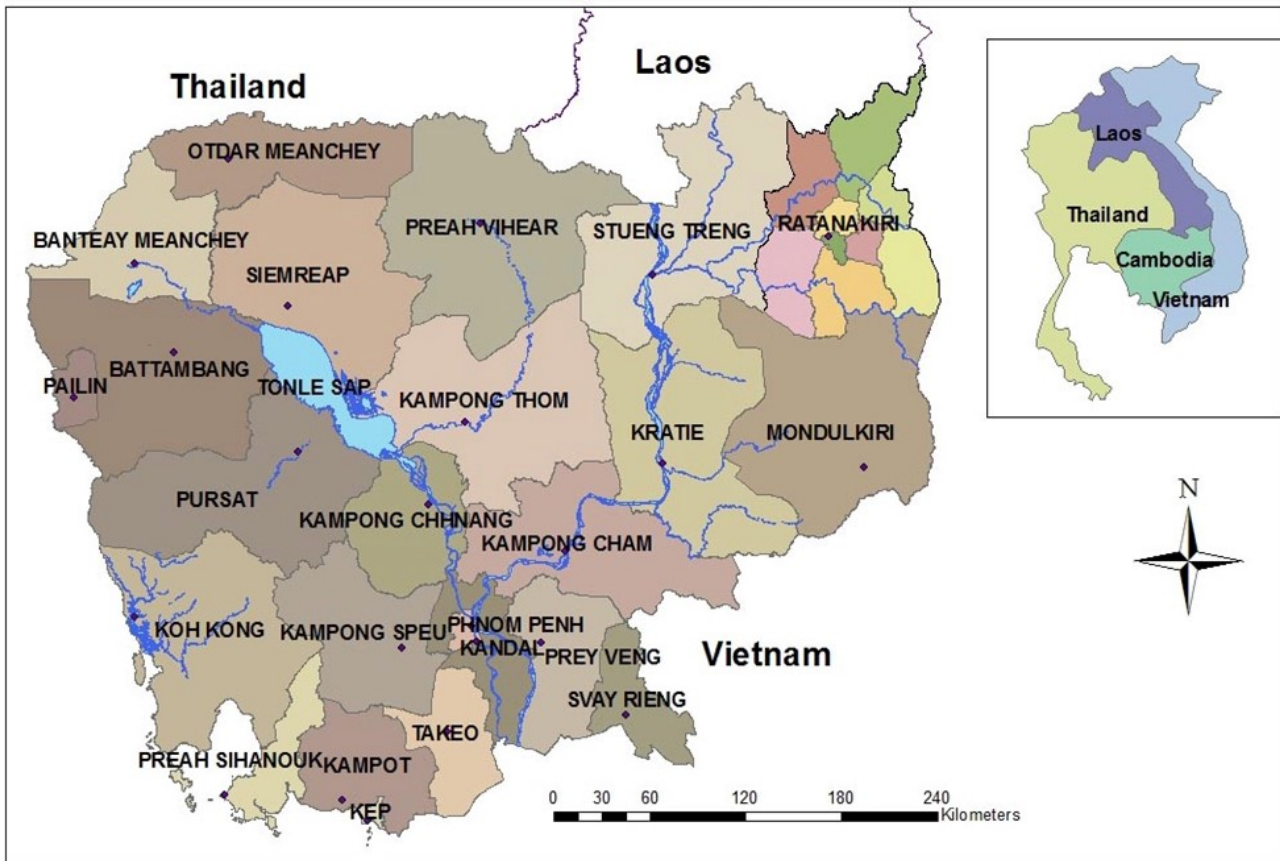
Cambodian law provides some accommodation of customary practices. For example, legal provisions allow for community managed forests and protected areas and communal land titling for indigenous minority communities. However, at the same time, laws governing the allocation of land for concessions allow limited protection for customary users. In this sense, customary arrangements exist in dynamic tension with state laws and policies. State laws are increasingly replacing and restricting customary arrangements, but at the community level formal laws are also often 'customized' or locally interpreted to fit the informal norms at this level.

This tension points to some of the challenges in implementing the legal framework in support of customary tenure. These challenges include market driven land policies such as private land titling and economic land concessions. State policies and management systems have tended to atomize what are otherwise integrated management practices, thus alienating important resources from customary users. This is seen, for example, in the way private land titling provides strengthened tenure security over agricultural and residential land, but ignores the communal rights to forests, grazing lands, spirit areas, fisheries, etc. which have always provided a buffer and supplement to agricultural production. In addition, processes for achieving formal rights over these common resources become overly complicated and controlled by resource managers who know little of the local context and needs.

Exploring the impacts of economic land concessions further shows that policies and institutions created to resolve the competition with customary users for land and resources, in practice subordinate the claims made by smaller land users to claims made by more powerful business interests. Alienating local communities from land and resources they rely on results in overexploitation, resource degradation and impoverished livelihoods. Mechanisms, both formal and informal, for settling land disputes are also generally inadequate.

The study concludes by exploring opportunities to increase the recognition and protection of customary tenure in Cambodia, and makes recommendations for policy engagement and the strengthening of alliances, community rights and representation. Opportunities include ensuring land reclaimed from poorly managed or non-functioning land concessions is returned to customary users, and that relevant new legislation such as the Environmental Code support new approaches for strengthening customary management. The decentralization of government functions and strengthening of local/customary institutions could provide further opportunities to increase the management authority of local communities over land and natural resources, with the state maintaining an oversight role. Dialogue between different levels about the separation of management authority could lead to a diverse array of tenure arrangements for both livelihood security and sustainable management. Other recommendations include simplifying and accelerating communal land titling, strengthening grievance and conflict resolution processes, and exploring new forms of community and co-management of forest resources.

At the community level, it is important to raise the awareness of customary users' rights and strengthen their representation. Communities also need support to make use of their customary land and resources. This support and greater recognition would demonstrate the important role customary practices can play in strengthening management, allowing communities to adapt to new contexts, and in providing the foundation for customary users to make an important contribution to Cambodia's future development.



**Figure 1.** Map of Cambodia showing provincial boundaries

Source: Jeremy Ironside





# Introduction

The Mekong Region Land Governance (MRLG) project aims to contribute to the design of appropriate land policies and practices, which support poverty reduction and security of tenure for family farmers. MRLG commissioned this study to document and exchange information on the recognition of customary tenure, and to develop national strategies with governments on this topic.

For this discussion, customary tenure is broadly defined as the local rules, institutions and practices governing the access, use and management of land, forests and fisheries which have, over time and use, gained social legitimacy and become embedded in the fabric of a society (Palmer et al., 2009). Access and management of land and resources is regulated by local level institutions that are based on cultural norms (Knight, 2010). Customary tenure arrangements particularly operate where state institutions and administration are weak to allow equitable access, provide justice and resolve local conflicts.

In Cambodia, these local arrangements operate with the general acceptance of community members and local level government staff. Cambodian customs include both individual and communal tenure arrangements over residential areas, lowland rice fields, shifting cultivation and fallow lands, grazing areas, fruit trees and gardens, areas for short- and long-term cash crops, sacred areas, cemeteries, forest areas for the collection of non-timber forest products (NTFPs), watershed areas and water bodies for fishing and the collection of aquatic resources. Based on this definition, customary tenure arrangements extend over large parts of Cambodia, in both the uplands and the lowlands.

To understand how customary tenure arrangements interact with state law, it is important to recognize the traditional ways politics functions in Cambodia based on long held customs of rule (Scurrah and Hirsch, 2015). Informal patron-client relationships shape the way laws and policies are actually implemented on the ground. The gap between policy and implementation means that some laws are implemented or partially implemented, while others are neglected. This gives rise to a kind of plurality of state law and customary norms and institutions that are often in conflict. Through this lens, it is easier to make sense of the way formal land management processes are hybridized and 'customized' in rural Cambodia. Of course, local interpretations and applications of national laws are not always socially legitimate, nor strictly "legal". Nevertheless, this legal ambiguity means a variety of arrangements governing land use, management and ownership in Cambodia operate in a dynamic tension. Despite efforts by the state to centralize land management, traditional forms of land use and management continue to provide important legitimacy for community claims to land and natural resources.

Customary arrangements continue because they provide the vital functions of ensuring livelihood security and access to resources, preventing and resolving conflicts, providing low cost mechanisms for land transfers, allowing for the adaptation of legal changes to the local context, etc. Cambodia's rural population has always relied on a variety of land, forest and water resources. From the point of view of customary users, state management systems atomize what are otherwise integrated customary management systems and alienate important resources. Private land titling, for example, provides strengthened tenure security over agricultural and residential land, but ignores the communal rights to forests and grazing lands that have always supplemented agricultural production. Processes for achieving rights over these commons resources become overly complicated and controlled by resource managers who know little about the local context and needs.

The key problem resulting from this competition between formal and customary management systems is the resulting lack of management over land and natural resources. The importance of recognizing customary tenure, therefore, is in ensuring the sound management of Cambodia's natural resources for the benefit of millions of rural – and many urban – Cambodians who depend on them, while also allowing customary users to play a constructive role in the country's future development.

This thematic study is based on a review of relevant literature and interviews carried out with key informants from government, the donor community, non-governmental organizations (NGOs), indigenous peoples' networks, researchers and land experts (see Annex 3 for a list of interviews carried out). Interviews were semi-structured and followed a checklist of questions (see Annex 4). Topics discussed followed the particular expertise of those interviewed and issues considered relevant to that. Missing are discussions with customary land users themselves. In this sense, the study provides a preliminary identification of opportunities for enhancing recognition of customary tenure in Cambodia. Future activities need to include and be driven by the views and priorities of customary land users.

The study has five main sections. The first section outlines the extent of customary tenure arrangements in Cambodia, and its significance to the livelihoods and wellbeing of rural communities. This is followed by a discussion of the recognition of customary tenure in the Cambodian legal system, and the challenges confronted in the implementation of legal provisions. The third section examines the impacts of market driven land policies on vulnerable customary users, particularly the granting of economic land concessions and private land titling. Mechanisms – both formal and informal – for settling land disputes are also briefly examined. The final part of the paper explores key opportunities to increase the recognition and protection of customary tenure in Cambodia and lays out recommendations for policy influence and for strengthening alliances, community rights and representation.

## The Extent of Customary Tenure in Cambodia

### Customary tenure in agricultural areas

Traditional tenure systems in Cambodia are similar to usufruct rights. Rights have always been recognized to use a piece of land and benefit from its outputs (Williams, 1999). Traditionally, the family that cleared and brought a piece of land into production was able to claim possession rights (*paukeas*) over that land, following the concept of 'land acquisition by the plough'. This local recognition of exclusive rights (usufruct, management and transfer rights) based on continuous and peaceful use, still determines land distribution throughout large areas of rural Cambodia. Cambodian land law, and the land titling processes which emanate from it, is also based on this recognition of *paukeas* rights. As noted in the introduction, this hybridization of customary and legal processes is a key element of land and natural resource management practices in the country.<sup>1</sup>

As a result of efforts in systematic land titling in recent years, between 46% and 58% of the landowning population in Cambodia now have a land title.<sup>2</sup> The government estimates that over 3.5 million titles have been issued as part of both systematic and sporadic land titling processes (RGCa, 2014).<sup>3</sup> In areas where systematic titling has not yet reached, typically the more valuable land around markets and along roads may have a formal title while informal ownership arrangements remain for land of lesser value away from these areas. Systematic land titling has now reached the more remote provinces of Ratanakiri, Mondulhiri and Preah Vihear, though to date only in the urban centres. The estimated total number of land parcels in Cambodia is upwards of ten million (Trzcinski and Upham, 2014).<sup>4</sup> Full coverage of formal land titles is likely to take at least 15-20 years (Diepart and Sem, 2015).

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<sup>1</sup> For more discussion about the history of land tenure in Cambodia, see Annex 1.

<sup>2</sup> The first figure is derived from the number of titles issued, the number of families with titles and the average number of titles per family. The second figure is based on estimating the number of land parcels in Cambodia compared with the number of titles issued. The average number of titles per family issued as part of systematic land titling is 3.4 and 1.6 for titles issued under Directive 01 programme (See Annex 1).

<sup>3</sup> According to government figures, by the end of July 2014, 550,000 titles were issued through the Directive 01 land titling programme (see Annex 1), more than 2.4 million titles have been issued as part of the MLMUPC systematic land titling programme, and more than 600,000 titles have been issued as part of sporadic land titling (RGC, 2014a).

<sup>4</sup> Out of Cambodia's total land area of 18 million ha, 6.5 million ha or 37% is considered agricultural land, including 2.5 million ha of lowland rice land (COHCHR, 2012). Of the 2,129,149 household agricultural holdings in 2013, 90% had between one and three parcels of land (NIS, 2015).

## Customary communal lands

### Forest areas

Forests have always been important in Cambodian culture.<sup>5</sup> Villages throughout the country have survived by harvesting NTFPs from forest areas regarded as communal (Anon, 2013). In describing the relationship between the Khmer ethnic group (around 90% of the country's population) and forests, Swift and Cock (2014) point out that traditional management systems shape how the Khmer make sense of the natural world, claim their tenure rights over forest areas, and help to preserve forests in the face of deforestation by concessions and logging. Khmer forest management systems include: shifting cultivation, spirit forests/zones, resin tapping, timber harvesting, foraging, and opportunistic collection (Swift and Cock, 2014).

The 2013 Cambodian Agricultural Census (CAC) found that 39% of the 2.1 million households with agricultural holdings are engaged in forest related activities including gathering firewood, harvesting bamboo, charcoal production, and cutting sandalwood and other forest timber.<sup>6</sup> Nearly half of all agricultural households in the Tonle Sap Lake Zone, the Coastal Zone and the Plateau and Mountainous Zone areas rely on nearby forests to supplement economic activity (NIS, 2015).<sup>7</sup> Firewood gathering and/or bamboo harvesting is carried out by 97% of households, and 34% of households collect wild fruits and other edibles (NIS, 2015). Provinces with more than 50,000 agricultural households that collect firewood and bamboo include Prey Veng (105,731 households as well as 47,168 that gather wild fruits and other edibles), Kampong Cham, Kampong Thom, Siem Reap, Kampong Speu, Tbong Khmum, Kampot and Takeo. Takeo, Kampong Cham and Siem Reap provinces had the largest number of households engaged in handicraft production such as basket and mat weaving (NIS, 2015).

Resin tapping is also a significant forest management system. Resin trees are dispersed naturally throughout the forest, and are held as customary property by the tapper (Swift and Cock, 2014). Khmer people from Prey Veng, Takeo, Kompong Speu, Kompong Chhnang, Pursat, Kompong Thom, Siem Reap and Kratie all practice resin tapping (Swift and Cock, 2014). Indigenous groups (see Figure 2) also tap resin in Ratanakiri, Mondulhiri, Preah Vihear, Stung Treng as well as several of the provinces mentioned above.<sup>8</sup> Many Khmer and indigenous villages also conduct annual ceremonies for their village guardian spirit and many other spirits associated with trees, forests, and other objects or places (Swift and Cock, 2014).

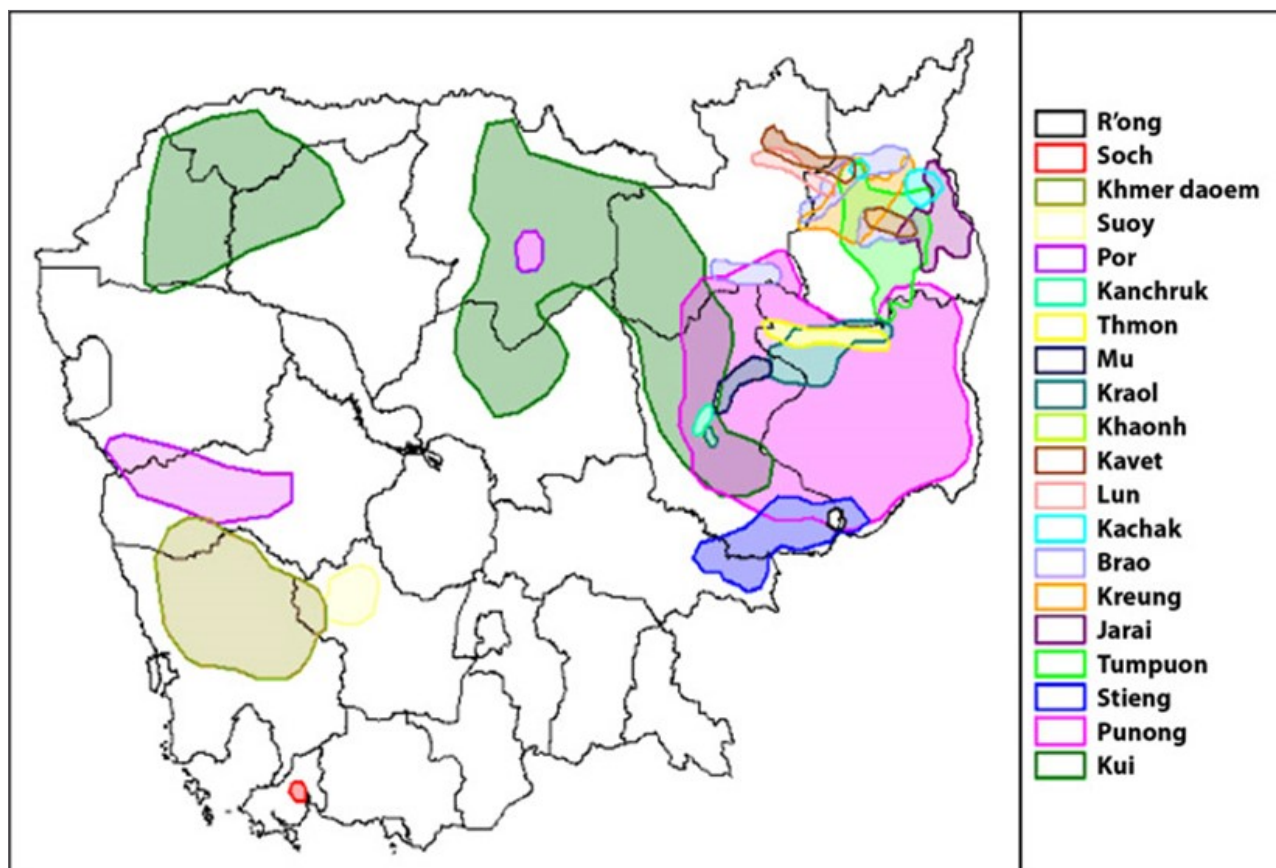
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<sup>5</sup> Cambodia's forest area has decreased from 73% of the total land area (13 million ha) in 1962, to 47.7% in 2014. For the first time the percentage of non-forest ground cover (48.4%) is larger than that of forest cover (ODC, 2016).

<sup>6</sup> The CAC surveyed 8.5 million people, or around 63% of the total population of the country.

<sup>7</sup> In the Tonle Sap Lake Zone, 45% of households made use of forest resources, 43% in the Coastal Zone and 42% in the Plateau and Mountainous Zone. Some extremely remote areas in some provinces were not reached by census enumerators, which may explain lower percentages for the Plateau and Mountainous Zone.

<sup>8</sup> Indigenous ethnic groups make up between 1-2% of Cambodia's population, though precise population figures are not known.



**Figure 2.** Geographical Distribution of Indigenous Groups in Cambodia

Source: NGO Forum on Cambodia<sup>9</sup>

## Fisheries

In large parts of Cambodia customary rights over common resources are closely tied to the rising and falling water levels of rivers and lakes, with fishing playing a significant role in the livelihoods of thousands of Cambodian households.<sup>10</sup> The CAC, for example, found that a total of 525,952 households (out of the 2.6 million covered by the census) engage in fishing and aquaculture, primarily for home consumption (NIS, 2015).<sup>11</sup> This activity is usually combined with crop cultivation and/or raising livestock and poultry (NIS, 2015). Provinces with more than 50,000 households engaged in fishing include Prey Veng (82,000 households), Siem Reap, Takeo, Svay Rieng and Kampot. In flooded areas possession or ownership rights might apply to land while it is not flooded, but when flooded it becomes a commons fishing resource or even (in the past) a private fishing lot. Ponds and streams are also subject to customary arrangements depending on the season.

<sup>9</sup> The Khmer Daoem ethnic group is more accurately represented as Chong (see Ironside, 2005).

<sup>10</sup> About 10% of Cambodia's surface area, or 1.8 million hectares, supports fresh water capture fisheries. About two thirds of this area is seasonally inundated.

<sup>11</sup> Millions of Cambodians also rely, often daily, on the wild capture fisheries in the country.

## **Grazing areas**

Other customary arrangements include the management of grazing areas and higher areas maintained for cattle in times of floods. The CAC reports an estimated 3.2 million cattle throughout the country, with an average of three head per household (NIS, 2015). Kampong Speu province has the largest number of cattle (364,000) followed by Takeo (336,000) and Prey Veng (311,000). In addition a total of 519,000 buffalo were reported, including Svay Rieng (105,000), Pursat (61,000) and Kampong Thom (52,000) (NIS, 2015).

## **Areas for ceremonies and community use**

Khmer lowland villages also make use of community land for meetings, ceremonies, funerals, fairs, etc. These can be around two hectares in size and are known as *sala jortien*. Because the 2001 Land Law only allows communal ownership of agricultural and residential land for indigenous communities, there is a danger that these areas will be registered during systematic land titling under an individual owner such as the commune or village chief. Trusting communal village areas to one leader can lead to the leader's family eventually claiming this land for themselves.

In indigenous areas, customary arrangements have always revolved around maintaining a spiritual link with the land and forests. Elders have always held ceremonies for these spirits, including those considered to inhabit particular sacred sites. As explained by indigenous youth representatives, this is the basis for the ongoing well-being of the village (Interview 7 2015).

## **Areas used for shifting cultivation**

In the uplands, large areas of the better soils have traditionally been used by indigenous and Khmer communities for shifting cultivation.<sup>12</sup> Indigenous groups predominate in the Northeast (Ratanakiri, Mondulakiri, parts of Stung Treng, Preah Vihear, Kampong Thom, Kratie and Tbong Khmum), but are also found in the Southwest (Pursat, Koh Kong, Kampong Speu) and the Northwest (Battambang, Banteay Meanchey and Oddar Meanchey) (see Figure 2). Shifting cultivation by Khmer upland farmers has been carried out in Kampong Thom, Pursat, Kampong Speu, and in several other provinces where Khmer populations live in upland areas on forest edges, often in close association with indigenous groups. Ethnic Lao people in Stung Treng and Ratanakiri Provinces also traditionally carry out communal land use practices including shifting cultivation, following their close association with indigenous groups.<sup>13</sup> These customary practices are extremely important for Lao and indigenous minority groups.

The diversity of land, forests, rivers, lakes and other common resources under customary management, leads to a complex array of rights and right-holders. Because of this there is a need to recognize diverse tenure arrangements over resources for both livelihood security and sustainable management. The following section explores the recognition given to these customary arrangements in Cambodian law and explores some of the challenges customary users face in attaining formal security over their customary land and resources.

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<sup>12</sup> A number of pre-civil war anthropological researchers including Gabrielle Martel, Marie Alexandrine Martin and Jean Delvert, documented shifting cultivation practices among Khmer groups (Swift and Cock, 2014). Marie Martin's research was with indigenous groups which had become Khmerized (Ironsides, 2005).

<sup>13</sup> The 2008 census identified 11,324 Lao mother tongue speakers in Ratanakiri (or 7.5% of the provincial population) and 1,725 Lao speakers in Stung Treng Province. These figures, however, are likely an underestimation.

## Recognition of Customary Tenure in the Legal System

### ***The Cambodian Constitution and 2001 Land Law***

Article 44 of the Cambodian Constitution confers the right to both individual and collective land ownership. However, as mentioned previously, large areas of land in rural Cambodia remain unsurveyed and untitled, and “the State is the owner of all land that is not legally privately or collectively owned or possessed under the Land Law of 2001” (Article 3, 2005 Sub-decree on State Land Management). This includes, land, rivers, streams, lakes, forests, natural resources and economic and cultural centres (Article 58 of the Cambodian Constitution).

Rights of ownership over untitled land property can be recognized by claiming possession rights, or through state allocation of land as titles or as grants of use and management rights for fixed periods. Both land titling and fixed term grants have proved slow and technically challenging for local communities. Under Article 30 of the 2001 Land Law, Cambodian citizens have the right to request individual land title following five years of peaceful possession.<sup>14</sup> Of importance for customary tenure is Article 7 of the 2001 Land Law, which does not recognize pre-1979 claims of ownership of immovable property. This means claiming ownership is by way of proving five years of uncontested possession in the post-1979 period.

Under the 2001 Land Law, collective land ownership is available to Indigenous Communities (ICs) through the issuing of communal land titles (see section ‘Communal land title for indigenous people’ below). Monastery land can also be issued a collective title registered in the name of the pagoda. Collective land titles for ICs and monastery land are based on traditional land uses.

The state can only allocate ‘state-private land’ for private or collective ownership.<sup>15</sup> ‘State-public land’ can be reclassified as ‘state-private land’ if it no longer serves “public interest” (Article 16, 2001 Land Law). The process by which state public land is assessed as no longer having a public interest has received some criticism for its lack of transparency. The reclassification of ‘state public’ to ‘state private’ land has allowed the allocation of large areas for concessions and in the process has dispossessed many customary users.

### ***The Cambodian Civil Code***

Article 131 of the 2011 Cambodian Civil Code accommodates real rights recognized under customary rules, and Article 306 recognizes ownership and other real rights of ethnic minority groups and other communities.<sup>16</sup>

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<sup>14</sup> Article 30 of the 2001 Land Law defines possession as “peaceful, uncontested possession of immovable property” no less than five years prior to the promulgation of this law.

<sup>15</sup> Except in cases where state public land (in the form of burial and spirit forests and reserve areas) may be allocated to indigenous communities as part of communal land titling.

<sup>16</sup> Real rights are rights over things. Article 131 of the Civil Code states “A real right permitted under customary law shall be valid ... to the extent that it does not conflict with the provisions of this Code and special law.” Article 306 states “Ownership and other real rights of the state, Buddhist temples, minority ethnic groups and other communities shall be subject to the provisions of the Civil Code, except where otherwise provided by special law or custom.”

## ***Land Policy ‘White Paper’***

Cambodia’s Land Policy, known as the ‘Land White Paper’, also pays attention to “respecting custom, culture and preserving cultural heritage and history” (MLMUPC, 2014: 6). However, this refers mainly to the traditions and cultures of Cambodia’s indigenous groups. The White Paper also refers to existing legislation such as Article 15 of the Forestry Law (2002) which requires forest concessions not to interfere with customary use rights on land property of indigenous communities registered with the state, or with customary access and user rights practiced by communities residing within, or adjacent to forest concessions (MLMUPC, 2014). It also acknowledges challenges when indigenous communities’ lands have not been identified and registered as collective communal title and where the customary forest use has not been clearly determined (MLMUPC, 2014: 11). Indigenous communities are also able to continue to use and enjoy the benefits of land which is not part of the communal land title, such as forest land for non-timber products, land for water sources etc., following their customs and traditions (MLMUPC, 2014). In cases of illegal occupation of state land, the government may tolerate landless and vulnerable poor families and allow an appropriate size of land for livelihoods based on the actual case (MLMUPC, 2014).

## ***Sub-decree on State Land Management (2005)***

State land mapping processes do not specifically recognize customary rights. To deal with customary claims during state land identification, Article 7 (j) of the 2005 Sub-decree on State Land Management calls on the Ministry of Land Management, Urban Planning and Construction (MLMUPC) to issue detailed guidelines to make “the general public and relevant traditional heads of indigenous communities aware of state land identification and mapping in their locality” (RGC 2005a). The public and indigenous communities must be given the opportunity to comment on the District/Khan State Land Working Group report, which provides an outline of state land in the particular area. The government will allow a postponement of state land registration in cases where indigenous customary authorities argue that the land claimed by the Government is under their collective use (MLMUPC, 2014). Similarly, for systematic land registration, the 2002 Sub-decree on the Procedures to establish Cadastral Index Map and Land Register instructs the Provincial Governor to include two trustees (elders) of the local people as members of an Administrative Commission for the Adjudication area (Article 3).

## ***Sub-decree on Classification and Registration of Permanent Forest Estate (2005)***

Forest classification processes also do not specifically recognize customary rights. In the process of classifying and registering forest areas, the 2005 Sub-decree on Procedure Establishment Classification and Registration of Permanent Forest Estate allows 90 days for communities to file written complaints concerning the creation of the permanent forest reserve (Article 4), and requires the Forestry Administration to “facilitate and consult with local authorities, local communities or concerned entities” (Article 10) (RGC, 2005b). This follows Articles 7 (3) and 11 of the 2002 Forestry Law, which calls for the demarcation of the forest estate to be carried out with community involvement (Ewers et al., 2007). However, classification of ‘forest’ areas, which are not specifically defined, overlap with land areas covered under the Land Law and the Environmental Protection and Natural Resources Management Law (Guttal, 2006). This means there is a general confusion over the types of lands that can be legally given away for private investment, brought into land markets, and those that should be preserved and used as a public good (Guttal, 2006). It is not clear whether this is the result of poor legal coordination, or to enable ad hoc decision making and unregulated allocation and exploitation of lands and forests by companies and the powerful (Guttal, 2006).



## ***Sub-decrees on Economic Land Concessions (2005) and Social Land Concessions (2003)***

There is also no specific recognition of customary claims in the 2005 Sub-decree on Economic Land Concessions. Article 4 requires prospective economic land concessions (ELC) to carry out an environmental and social impact assessment, prohibits involuntary resettlement of lawful landholders, and requires public consultations with territorial authorities and local residents (RGC, 2005c). These provisions, however, have only been superficially implemented.<sup>17</sup> Customary tenure is also little considered in the Sub-decree on Social Land Concessions beyond requiring a social and environmental impact assessment (Article 9) and giving preferential treatment to an applicant who has lived in the area for some time (Article 11) (RGC, 2003).

## ***Sub-decree on Environmental Impact Assessment (1999)***

The 1999 Sub-decree on Environment Impact Assessment (EIA) makes no mention of the need to consult with local communities. A proposed draft EIA Law to replace the existing Sub-decree seeks higher standards for assessing development project impacts, including strengthening public consultation and assessing impacts on local communities. However, the passing of this legislation has been delayed while a more comprehensive Environmental Code is completed (see section on 'Improved Policy Opportunities for Customary Tenure Recognition'). Article 30 of the draft EIA Law requires consultation to, among other things, identify areas of cultural and social significance. Article 31 further requires a focus on issues raised by women and the most vulnerable. Assessments for resettlement also require "that compensation for lost assets is fair, suitable and acceptable as equivalent to the market price" (Article 32). Assets are undefined but presumably could include customary land and resources. Article 24 is the only article which specifically addresses customary rights and only in regard to impacts in areas where ethnic minority groups live, calling for "strong heed and special considerations" to "avoid negative impact on the custom, tradition, culture, livelihood, and the property of the ethnic minority groups". NGOs, however, have raised concerns that the present draft of this law allows projects to go ahead if there is still disagreement with local groups after a "free, prior and informed consent" process (Muyhong and Baliga, 2015).

## ***Sub-decree on Organization and Function of the Cadastral Commission (2002)***

A further reference to the recognition of customary tenure, but which has generally not been made use of to strengthen customary claims, is the 2002 Sub-decree on Organization and Functioning of the Cadastral Commission. This commission is tasked with resolving disputes over untitled land. Article 5 allows for including representatives of village authorities and/or local elder trustees to join as ad hoc members of the District/Khan Cadastral Commission. Interestingly, Article 6 states "disputes conciliation shall be conducted following customary rules along with cadastral techniques."

## ***Legislation related to decentralization***

Other legislation such as the Organic Law (2008 – on Administrative Management of the Capital, Provinces, Municipalities, Districts and Khans) and the 2001 Law on Commune/Sangkat Administrative Management, both enshrine the principle of decentralization and mandate sub-national levels to prepare management plans and protect land and natural resources. The Organic Law also mandates the sub-national councils to mediate local land conflicts. While there may be opportunities to use these laws to promote customary rights and management, the powers of both of them over customary resources appear weak.

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<sup>17</sup> For example, from 1999 to 2003 no projects in Cambodia conducted the required EIAs, and from 2004 to 2011 only 110 out of around 2,000 projects conducted EIAs (Shuldeb, 2015).

## Communal land titling for indigenous communities

As mentioned, the 2001 Land Law recognizes Indigenous Communities<sup>18</sup> and their right to claim a communal land title (CLT) over their customary lands, albeit with some significant exclusions as explained below. Article 23 recognizes the management of land according to traditional customs, even prior to titling, and Article 25 allows for the communal titling of lands where indigenous communities carry out traditional agriculture. Communal landowners have “all of the rights and protections of ownership as are enjoyed by private owners” (Article 26).<sup>19</sup> This includes the right of transfer, if the community so decides. However, land classified as ‘state public land’ that is included in the title cannot be transferred (e.g. burial grounds, spirit forests and reserved land<sup>20</sup>).

Traditional authorities are given the responsibility for exercising the community’s ownership rights according to their customs (Article 26). The community is also required to allocate an “adequate share of land” to a community member who wishes to leave the community, “for the purposes of facilitating the cultural, economic and social evolution of members” (Article 27). From this, communal land titling, in the eyes of some government officials, is a temporary measure to allow indigenous communities to evolve and slowly assimilate into mainstream society.

A 2009 Sub-decree on Indigenous Communal Land Registration specifies the lands eligible for inclusion in a CLT and outlines the procedures for registration and titling. Land eligible includes residential land, agricultural land, fallow or ‘reserve’ land used for shifting cultivation, spirit forests and burial grounds (Article 6). Importantly, forestland, which is classified ‘state public land’, cannot be included in communal titles. Moreover, spirit forests and burial grounds, which are also classified as state public land, are limited to seven hectares each.

Therefore, communal land titling in Cambodia is different from the Indigenous Peoples’ Rights Act in the Philippines, which allows for indigenous communities collective title to all their customary lands and forests. The Sub-decree also differs slightly from the Land Law, which recognizes indigenous communities as the traditional owners of their land. In the Sub-decree communal land is an allocation of state land. Again, this differs from international agreements such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Voluntary Guidelines on the Governance of Tenure (VGGT), which recognize customary indigenous land and resources as legally legitimate rights not requiring land allocations by the state.

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<sup>18</sup> Indigenous communities are defined as “a group of people... whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use” (Land Law, Article 23).

<sup>19</sup> According to the Ministry of Interior, there are 455 communities in Cambodia with a certain percentage of indigenous groups. MLMUPC maintains the practice of only granting collective land titles to villagers that have at least 60% indigenous population (Rock, 2017a).

<sup>20</sup> In the more recent cases of issuing a communal land titles, the Cambodian Government has classified the entire “reserved” land of the community as ‘state private land’ (Rock, 2017b).

## **Recognition of shifting cultivation**

The recognition given to communal land in the 2001 Land Law is the result of consultations carried out with indigenous communities in 1999 (Ironside et al., 2015). At the time, community leaders argued that communal land was necessary to allow for shifting cultivation to ensure food security in their communities. Leaders pointed out that communal land management is an essential part of the mobility required to enable forest and soil fertility regeneration, which in turn permits the proper functioning of the shifting cultivation system. The livelihood argument is therefore the basis of recognition of shifting cultivation in other laws ratified since the Land Law, and is also the basis for allowing communal land titling for indigenous communities in the Land Law.

In addition to the Land Law, the 2002 Forest Law also includes provisions recognizing shifting cultivation. Article 25 of the Land Law states, “The lands of indigenous communities include not only lands actually cultivated but also... reserved [land] necessary for the shifting of cultivation which is required by the agricultural methods they currently practice and which are recognized by the administrative authorities.” Article 37 of the Forest Law allows for shifting cultivation on “land property of indigenous community which is registered with the state”, and inside a community forest if this is part of the management plan.<sup>21</sup> Shifting cultivation is prohibited in natural intact forest. Forestland reserved for shifting cultivation must be identified by a sub-decree and reclassified from public to private state land. Article 24 of the Law on Protected Areas prohibits shifting cultivation in the core zone and conservation zone, implying that it is permitted in community and sustainable use zones.

However, restricting communal land titling to indigenous communities means Khmer and Lao communities are not able to apply. This is incongruous given that non-indigenous communities also rely on communal forests, grazing land and fisheries, and practice shifting cultivation in certain areas. Khmer and Lao shifting cultivators should therefore also be able to apply for a CLT. A development partner informant also explained that, had German development aid continued to support MLMUPC, GIZ would have focused on amending the 2001 Land Law to allow communal titling of forest areas and for non-indigenous groups (Interview 18, 2015).

## **Difficulties in achieving a communal land title**

Despite the legal recognition of indigenous communities’ collective land rights, the process of obtaining CLTs is complicated and slow, and implementation has been weak. Many indigenous villages throughout Cambodia have lost large areas of their land to various forms of encroachment, land selling, etc. while waiting for a CLT. The 2009 Sub-decree outlines a three-stage process for obtaining communal titles which involves; 1) official confirmation of a community’s indigeneity by the Ministry of Rural Development (MRD); 2) registration of the community as a legal entity with the Ministry of Interior (MoI); and 3) approval of the community’s land-management regulations, surveying, demarcation and titling of land by the MLMUPC. In addition, re-classification of areas from public to private state land requires approvals from the Ministry of Agriculture and Forestry (MAF) or the Ministry of Environment (MoE).

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<sup>21</sup> Article 11 of the 2003 Community Forestry Sub-decree also states that “CF Community may continue to practice traditional swidden agriculture (shifting cultivation) during specific periods of time as determined in the Community Forest Management Plan...”

Given the technical difficulties of preparing and submitting documents at each stage of the process, no community has been able to complete the registration process on their own. Success is dependent on strong communities, support from the local authorities, donors and NGOs and also the effectiveness of partners' activities.<sup>22</sup> RECOFTC representatives noted that one reason communal land titling takes so long is because it involves at least three different ministries and the process can get held-up in any of these ministries. They estimated the process for community forestry to be faster than CLTs, with agreement (excluding management planning) taking around 6 months (see section 'Recognition of Customary Rights Over Forests Areas'). An indigenous NGO informant, however, felt the communal land titling process is now able to proceed more quickly. Hold ups have included disputes with companies and NGOs waiting for sufficient funds to arrive (Interview 11, 2015).

For the first phase, an MRD official estimated they could register 20-30 indigenous communities per year if there was sufficient donor support. The Department of Ethnic Minorities within MRD, which is the agency responsible for the registration, has a budget of 10,000 USD per year for carrying out official visits, but around 50,000 USD is needed.<sup>23</sup> In total 119 communities have been registered as indigenous by the MRD to date (Thy and Hindley, 2017).

For the second stage, involving registration of the community as a legal entity able to hold a communal title, an official from Mol reported that if there is sufficient donor funding, it is possible to approve between 20-40 legal entities per year.<sup>24</sup> They also noted implementation has improved considerably since the 2009 Sub-decree was issued. To date 102 communities have been recognized as legal entities (Thy and Hindley, 2017). Officials from Mol noted that insufficient funds and poor coordination were the biggest hindrances.

Most informants said the main delay is the final stage of surveying and demarcating the land and issuing the title by the MLMUPC. Here, human resources and budget are lacking. According to a former advisor, the price has been set by the MLMUPC at 30,000 USD per communal title.<sup>25</sup> An official from Mol commented that communities waiting for a title after they have established their legal entity can lose up to 50% of their land. The process can be further delayed in provinces where the authorities are not supportive. Granting an ELC is a lot quicker because funds are available. Limited funds for approving a CLT means the work is not prioritized by the ministries involved.

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<sup>22</sup> An informant explained that a former Commune Chief in Keo Seima District, Monduliri Province, blocked a village from requesting a communal title (Interview 7, 2015). He also allowed outsiders to cut trees, including resin trees, in another village's communally titled land. Outsiders have also encroached onto this village's reserve land area (see front cover photo). A court case is being supported by a public interest law firm to try get this titled land returned.

<sup>23</sup> It costs 700-1000 USD for a 3-5 day mission.

<sup>24</sup> Per diems, travel, etc. for Mol officials to visit the communities are around 1000-2000 USD per community. Two visits are normally required which cost around 700-800 USD per visit.

<sup>25</sup> The cost of issuing a CLT is not mentioned in the 2012 Joint Prakas on Provision of the Public Services Delivered. It seems a former CIDA funded project within the MLMUPC which supported communal land titling in 5 villages in Monduliri was responsible for setting this price. A senior MLMUPC official said the state has allocated 300,000 USD per year for CLT. This is the reason why the government has agreed to issuing 10 titles per year.

As of early 2017, 54 applications have been submitted to the MLMUPC, 47 of these have been accepted and 24 are in process (Thy and Hindley, 2017).<sup>26</sup> However, only 14 communal land titles have been issued so far (Thy and Hindley, 2017).<sup>27</sup> According to a MLMUPC official, applications that have not been accepted are because the areas communities are requesting are too large, or due to unresolved land conflicts. Part of the problem is that when a community submits a map of their proposed communal title, they cannot know what overlaps there might be with state allocations to ELCs or other land uses. The other problem is that MLMUPC officials regard applications for 1,000 ha or more per community, or 10 ha per family, as too large to allocate.

Even after CLTs have been issued communities face difficulties protecting their land. Several titled communities have faced problems with encroachment. Indigenous communities lack legal awareness and committee members often do not understand their roles. NGOs also often do not have the skills necessary to provide assistance to communities to deal with the land pressures they face. Cases of community regulations not being respected turns other villages off the idea of communal titling. Representatives of an indigenous NGO commented that all villages want their land secured but they see a lot of steps involved and often do not see the advantage in pursuing it.

Despite these problems, indigenous representatives appreciated the legal provisions allowing indigenous communities to obtain communal land title (Interview 7, 2015). Titles signifying ownership can be used by indigenous communities to defend their rights, even if their land is being encroached on. This, they said, is much better than not having anything.

## Recognition of customary rights over forest areas

Article 2 of the 2002 Forestry Law “ensures customary user rights of forest products & by-products for local communities.” Article 40 recognizes “traditional user rights for... the collection of NTFPs, the use of timber for local construction and use, grazing, [and] the right to barter or sell sustainably managed forest by-products.”<sup>28</sup> There is no definition of “customary use” in the Forestry Law. However, the 2003 Community Forestry Sub-decree defines it as “the use of forest resources by local communities in a sustainable manner for subsistence purposes as described in Article 40 of the Forestry Law” (Article 5).

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<sup>26</sup> According to the latest available data, a total of 166 indigenous communities are involved in the CLT process.

<sup>27</sup> Nine of these titles are made up of 773 parcels for around 700 households and around 8400 ha of land titled.

<sup>28</sup> The concept of customary is also included in the definitions of community and local community in the Forestry Law. A community is defined as “A group of people living in one or more villages ... interested in social, culture, custom and economic issues in using sustainable natural resources within or nearby their area for their subsistence and livelihood improvement.” Similarly a local community is defined as a “community, tribe or a group of people whose home residence is inside or nearby the State forest and having their custom, religious belief and culture that depend on forest products and byproducts for their subsistence”.

Under the 2003 Community Forestry Sub-decree, the Forestry Administration (FA) may grant community forests to a local community or organized group of people living within or near the forest area and who depend upon it for subsistence and traditional use. Article 42 states that the FA has the duty to identify “clear boundaries of appropriate areas based on the capacity of forest resources and the need to ensure customary user rights of local communities”. However, community forests (CF) are defined under the Forestry Law as areas of state forests that are conditionally granted to communities for a limited time period (15 years, renewable). CFs are awarded through an eight-step process that includes mapping, forming a committee, developing internal rules, community forest regulations and management plans. CFs are thus a form of delegated management that awards conditional user rights, not a permanent right based on the recognition of pre-existing customary land rights.

Moreover, there is a major discrepancy between the concept of a community forest outlined in the Forestry Law and the Community Forestry Sub-decree. In Article 42 of the Forestry Law, CF is a way to ensure customary user rights of local communities, while the Community Forestry Sub-decree and subsequent documents see it primarily as a forest plantation established on degraded land (Ewers et al., 2007). Article 45 of the Forestry Law also gives recognition to “religious forest of local communities... as protection forest serving religious, cultural or conservation purposes.”<sup>29</sup> Despite this consideration afforded to traditional use rights in the Forestry Law, an informant pointed out these provisions have never been used to stop an Economic Land Concession from being granted (Interview 19, 2015).

CF areas range from six hectares upwards. Some CFs in Preah Vihear, Stung Treng, Kratie and Kampong Thom provinces are 2,000 ha in size, however, most average around 1,000 ha. An unpublished 2015 FA report states that 485 CFs currently cover 410,025 ha (FA, 2015). This gives an average of 845 ha per CF. The FA’s policy goal of establishing 1,000 CFs over two million ha by 2029 implies an average of 2,000 ha per CF. NGO staff working on community forestry felt the government is strongly committed to reaching this target (Interview 13, 2015).<sup>30</sup>

Some CFs involve more than one village under one agreement. This is termed a partnership forest. The first approved CF in Cambodia involved three villages. However, areas that include several villages are not proportionally larger. These partnership forests also require more inter-commune level coordination.

### ***Difficulties in recognizing community forests***

In completing the eight steps to obtain a CF agreement, communities face difficulties with written documentation and with fitting local knowledge into scientific frameworks. The need for scale mapping adds another technical challenge, even for supporting NGOs. The protracted process required to establish CFs has often worn down the energy of communities wanting to continue traditional management practices (Swift and Cock, 2014).

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<sup>29</sup> In the case of culturally or spiritually significant areas, a MoE official said it might be possible to establish a community managed protection forest for smaller areas, or some kind of co-management arrangement for larger areas (Interview 1, 2015).

<sup>30</sup> RECOFTC has been working in 15 provinces to establish over 200 CFs.

Technical difficulties and a general lack of awareness amongst villagers of the threats they face has led to problems of CFs not being officially recognized at the central level before a company arrives to lay claim to these areas of land. Several early community forests (such as the 3,000 ha CF in Som Thom Commune in Ratanakiri province) have now been cleared and taken over by companies. An NGO representative working on CF stressed the importance of working with the central level to ensure these areas are officially recognized, i.e. on a map.

Furthermore, while the Forestry Law links potential CF areas with customary user rights, there is no specific link between the customary rights mentioned in the Forestry Law and the siting of CF areas in the 2003 Community Forestry Sub-decree. One problem pointed out was that the concept of “customary” has not been defined clearly and it can include almost anyone who uses forest resources. Distant villages may customarily collect forest resources during particular seasons, for example. This leads to contested claims and overuse. This means that unless a local community has a CF agreement with the FA, it cannot prevent outsiders from entering their customary forest areas.

Even with an agreement, the view of forests as open to anyone means it is very difficult for CF members to deal with encroachment by non-members. NGO staff noted that CF members and non-members often do not know about laws or local regulations, people just want to use the forest. To deal with this problem they felt it necessary to strengthen CF committees (Interview 13, 2015).

So, while CF areas may overlap with customary land, there is nothing to ensure the customary rights of the proximate community will be recognized. In some cases the customary forest area may have been allocated to a company, or it is situated within the boundaries of another commune. This causes jurisdictional problems as the commune authorities say they have no authority to regulate activities in another commune. In these cases communities are often asked to give up their claim over their customary areas and establish a CF inside the commune where their village is located. In other cases, the FA may decide not to allocate a particular forest area as a community forest, even if a community claims customary rights.

Swift and Cock (2014) also point out that there is little connection between community forestry as supported by government policy and traditional Khmer forest management systems, with limited state agency interest in experimenting with how to incorporate these traditional systems within formalized community forestry. For example, forests used by local residents to tap resin trees can be called traditional community forestry, with local residents protecting areas where their resin trees are located (Swift and Cock, 2014). The protection of spirit forest areas is another example of traditional management for forest preservation that could be harnessed (Swift and Cock, 2014).

Traditional forest management systems often require extensive areas, while community forests tend to be smaller areas. This stands in stark contrast to the allocation of far larger areas for logging concessions or ELCs (Swift and Cock, 2014). Swift and Cock (2014) argue that CF ‘islands’ will not allow for traditional management systems beyond perhaps being used by the poorest community members. For many Cambodians, access to forests is still considered an innate right and traditional forest management systems constitute a claim of a different order than that recognized in government policy (Swift and Cock, 2014).

As such, the conventional model of community forestry is more of a “limited privilege” from the government rather than an “inherent cultural and economic right” (Swift and Cock, 2014: 18). An Independent Forest Sector review in 2004 reinforced this view when it found that most CF areas are in degraded forest, and the best forest areas are most often allocated for ELCs (Diepart and Sem, 2015).

Despite the significant potential of co-management arrangements for managing forests and fisheries, to date they have not resulted in significant benefits to local communities (Diepart and Sem, 2015). The FA’s technical approach involving conventional scientific forest management planning centered on timber production is often at odds with communities’ interest in NTFP collection. The dialogue needed for clarifying responsibilities between the FA and communities has also been neglected (Diepart and Sem, 2015). These co-management arrangements, therefore, are often skewed in favour of the state agencies which maintain prerogatives to commercially exploit timber, collect penalties in cases of illegal activities and ultimately decide on whether to extend the agreement or not (Diepart and Sem, 2015). Article 28 of the 2003 Community Forestry Sub-decree also allows for the termination of a CF Agreement prior to the expiration date following non-compliance or serious violation of the terms and conditions in the agreement, or for another purpose that purports to provide greater public benefit to the Kingdom of Cambodia.

One example of communities’ powerlessness to enforce their own regulations and Cambodian law is the requirement to hand over confiscated logging equipment collected by community patrols to the FA. Community patrols often find that they confiscate the same equipment again and again. Communities suspect the FA makes income from fining criminals and then releasing their equipment back to them. Some communities have now begun to burn confiscated equipment. However, many would like to contribute reward funds into a community bank. This needs to be looked at more seriously.

A further issue is that no CF in Cambodia is older than 15 years and so the renewal process is as yet untested.<sup>31</sup> This means that the long-term tenure security of CF is not yet known. However, NGO representatives felt the CF mechanism provides reasonably secure long-term tenure, with the only difficulty being the initial approval process at the central level. Once this is complete, renewals are handled at the Cantonement (Khan) level, which they anticipate will be more straightforward (Interview 13, 2014).<sup>32</sup> Dwyer and Sokphea (2016: 6) also argue that community forestry “has played an important, if imperfect, role” in enhancing local tenure in a context where communal land titling and concession regulation have both failed for various reasons.

Despite the difficulties therefore, NGO representatives assess the existing CF legislative framework to be adequate for recognizing customary rights over forest areas, with no need for further legislation (Interview 13, 2015). Indigenous communities, they said, could apply for both a communal title and a community forest, but identifying these different areas requires proper land use planning. At present, there is no official provision for land use planning in Cambodia and therefore no established process for coordinating communal land titling with community forestry establishment. The lack of a comprehensive process for local level participatory land use planning hinders community efforts to have their traditional areas recognized.

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<sup>31</sup> The first CF approval was issued in 2007 in Siem Reap, with several more approvals granted in Kampong Thom in 2009.

<sup>32</sup> The Cantonement (Khan) of the FA is roughly equivalent to the provincial level.



## Recognition of customary tenure in protected areas

Article 22 of the 2008 Protected Areas Law recognizes and secures access to traditional uses, local customs, beliefs, and religions of local communities and indigenous ethnic minority groups residing within and adjacent to protected areas.<sup>33</sup>

Article 11 of the 2008 Law on Protected Areas stipulates that Protected Areas are to be divided into four management zoning systems,<sup>34</sup> one of which is a “community zone” where customary land of indigenous minorities and local communities is recognized and which can be registered through application with the MLMUPC (Ngo and Lay, 2016).

Furthermore, family scale customary use rights to natural resources is allowed within “sustainable use” and “conservation” zones following MoE guidelines (Article 22). Article 25 gives the MoE the authority to allocate parts of the “sustainable use” zone to local communities as a community protected area (CPA).<sup>35</sup> Once a zoning is completed and a management structure has been set up, usage rights can be ratified through the signing of a Prime Ministerial sub-decree.

Despite the legal recognition of customary tenure and traditional land use in Protected Areas, zonation has proceeded slowly. Only three (out of a total of around 45 Protected Areas in Cambodia) have so far gained official zoning through a sub-decree, with the support of NGOs.

Although CPAs in the sustainable use zones are a formalization of access rights to traditional uses of natural resources, there is no reference to customary practices when allocating a CPA and not all areas of traditional uses can be designated as CPAs. However, an official from MoE felt that CPA management rules do come from customary arrangements (Interview 1, 2015). According to the official, the government’s support for community based natural resource management is based on the recognition of the value of customary forest management systems.

While some CPAs cover large areas – such as the 10,000 ha O Tung CPA in Kok Lak Commune, Veunsai District, Ratanakiri – many others are similar in size to community forests. In 2015 there were 129 CPAs covering an area of 180,000 ha in various stages of the approval process. This gives an average of 1,395 ha per community, or around six hectares per participating family. Like CFs, no CPA is older than 15 years so none has as yet been renewed. As with community forests, Article 25 of the Protected Areas Law gives the MoE the authority to revoke the CPA agreement prior to the 15-year period if the community acts in contravention of the terms of the agreement and management plan.

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<sup>33</sup> Traditional use is defined in the Annex of the Protected Area Law as “collection of naturally-dead woods, by-products for traditional medicines, vegetables and fruits, and legal hunting to meet only the occasional needs of the family.”

<sup>34</sup> These are: core zone, conservation zone, sustainable use zone and community zone.

<sup>35</sup> CPAs follow a similar approval process to the community forestry process, except the MoE handles their approval.

# The Impact of Land Policies and Private Land Titling on Groups who rely on Customary Tenure

### Impacts of land titling policies

The land reforms of the past 15 years have aimed at making land available for large investors, creating land markets, and formalizing land by means of titling (see Annex 1). The drive for private land titling reflects a convergence of expectations – from large donors that this will lead to more equitable growth by increasing economic opportunities through tenure security, and from the government that it allows for centralized control of land registration and facilitates the collection of land taxes (Diepart and Sem, 2015). A key argument for private land titling is that functioning markets will transfer land to the most efficient uses (Trzcinski and Upham, 2014). The inherent contradiction is that while economic liberalism and land markets may promote investment and economic growth, this may not necessarily “respect the needs of the poor” (Muller, 2012: 2).

Given the power dynamics at play, the result of these market oriented policies has been uncontrolled land markets and large allocations of land to companies. Meanwhile, securing land and resource rights for smallholder farmers and marginalized communities has proceeded at a much slower pace.

Systematic land titling has been able to deliver large amounts of land titles in relatively short periods of time. However, systematic titling to date has been concentrated in lowland areas with fewer conflicts – that is, where customary tenure arrangements have generally been adequate in dealing with land ownership and distribution issues (Diepart, 2015; Dwyer, 2015). In these lowland areas, private land titling has not significantly changed tenure security over farmland. In contrast those with greatest tenure insecurity, such as households affected by infrastructure and concession development, have often not received the land titles they need (Scurrah and Hirsch, 2015; Dwyer, 2015; Grimsditch et al., 2012).

Particularly in upland areas, the issuing of ELCs to private investors, coupled with mass migration of lowland Cambodians, has significantly increased tenure insecurity for already marginalized groups. Powerful officials, business interests and migrants have easily dispossessed indigenous minorities in these areas of their customary lands. Ironically, one of the policy justifications for allocating ELCs has been to control farmers who encroach on ‘state land’ (Diepart and Sem, 2015).<sup>36</sup> In this way the legal framework has favoured companies’ activities at the expense of local people. Security for the powerful, in many cases, has increased the tenure insecurity of the powerless (Trzcinski and Upham, 2014).

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<sup>36</sup> This is in spite of the fact that no comprehensive state land mapping and classification has been carried out to define the actual extent and boundaries of state land.

The Directive 01 land titling programme was intended to resolve the problem of land conflicts between ELCs and existing land users. While it resulted in large numbers of households getting a title to their land, the rapidity with which it was carried out meant the process was open to abuse. For example, opportunists cleared forest as a means to lay claims to land prior to the arrival of the land titling teams (Anon, 2013; see Annex 1). In indigenous areas, titling of communal land was not offered as part of Directive 01 and many indigenous communities were forced into accepting private titles, even though many were in the process of obtaining a communal title. Private titles issued within communal areas resulted in a break down of indigenous community cohesion (see Annex 1 for further discussion on the Directive 01 land titling programme).

A further problem resulting from private land titling policies is that it simplifies complex local patterns of land use and management into western concepts of ownership (Trzcinski and Upham, 2014). This results in multiple users and their rights being excluded by a single private entity (Trzcinski and Upham, 2014).

An NGO informant commented that allowing titles only for agricultural land is like confining people to cages (Interview 15, 2015). Private land titling, allocations for concessions and land markets have ignored the security of access that vulnerable and marginalized Cambodians require over common resources. Resources collected by local people provide employment for all members of the family, young and old, compared to working as labourers for a concession company, where only the able bodied can get employment (Interview 15, 2015). By allowing for shared use, customary arrangements facilitate a degree of equitable access to resources. Excluding users from these resources has led to landlessness, land concentration and land insecurity (Diepart and Sem, 2015). Therefore, recognition is needed of the diversity of livelihood activities of different user groups over time and space and of the need to accommodate a complex array of use and access rights.

Even with systematic and Directive 01 land titling programmes, tenure security for the poor remains tenuous. Around 25% of households in Cambodia now have less than 0.5 ha of land, which is insufficient for food security (Diepart and Sem, 2015). Distress sales are another common way in which smallholders are dispossessed from their land, whether they have private title or not. Around 75% of all land sales have resulted from health reasons, household expenditure requirements and to pay off debt (Diepart and Sem, 2015). The extreme poor have experienced significantly slower 'poverty reduction' than the less poor and the better off (Diepart and Sem, 2015).

Land insecurity, in turn, exacerbates food insecurity. Around 16% of households (331,000 households) reported experiencing food insecurity during the previous 12 months, with 24% experiencing food insecurity for more than three months (NIS, 2015). The Plateau and Mountainous Zone have the largest number of food insecure households lasting more than three months (28%), followed by households in the Plains Zone (25%) (NIS, 2015).<sup>37</sup> Food insecurity means that the very poor are less able to take advantage of improved infrastructure and other assistance to increase agricultural productivity (Diepart and Sem, 2015), resulting in a widening differentiation of income and land ownership between socio-economic groups.

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<sup>37</sup> As well as not reaching the most remote villages, responses from women in the CAC are also likely to be underrepresented (NIS, 2015). This means these figures are likely to be higher than is reported. Main causes of food insecurity included low crop yields, crop damage due to heavy rain, drought, pests and other natural calamities, the high cost of food and illness (ibid).

Indigenous representatives noted that women have traditionally collected resources such as firewood, forest vegetables, fruit, and mushrooms (Interview 7, 2015). Greater tenure security over customary land and resources would not only protect indigenous communities' land and forests, but would particularly benefit women and ultimately the whole household. Forest clearing in indigenous areas has led to difficulties in collecting firewood and has also caused the water table to drop, resulting in problems for collecting water, which women also traditionally carry out. Indigenous representatives also felt that accommodating these multiple uses through improved tenure security would mean young women would migrate less out of the village and would maintain their traditions and help their families. If they have no options in their village they will end up in factories the same as young Khmer women, they said. It is important to note that indigenous customary tenure systems afford women equal rights to use the village land (Ironsides, 2012).

## The erosion of customary tenure systems

The breakdown of community cohesion and outside pressure is resulting in a crisis of customary land and forest management throughout Cambodia. Several respondents mentioned the problem of centralized decision making over land resulting in a lack of authority of both local elders and sub-national government officials to protect people's rights and manage conflicts. Local authorities, for example, often tell villages who are in disputes with large concession companies that they have to petition the Prime Minister because only he has the authority to intervene. So while the authority of the traditional leaders is being eroded, state authorities are also unable to resolve conflicts. One consequence of centralized state control is that state land and resources are seen as unmanaged and open for exploitation.

Another factor leading to the erosion of customary tenure practices is the increasing pressure on communal areas as a result of ongoing land privatization. The Phea Phimex concession in Kampong Chhnang and Pursat provinces, for example, put enormous pressure on the local forest resources. In the past, Ansar Chombok village in Krokor district, Pursat province, earned income from collecting wild fruits and other products from their communal forest area and selling these along the Phnom Penh – Pursat Road (Road 5). Communities in this district living along Road 5 could earn between 500-1,000 USD per month over a 2-3 month period collecting Kuy fruit from the forest and selling it on the roadside (Interview 15, 2015). People also collected rattan, broom grass and firewood for sale. The Phea Phimex concession, however, turned these former forest areas into around 30,000 ha of cassava fields and Ansar Chombok community members became low paid contract labourers. After Ansar Chombok lost their forest, they sought other land for a community forest. What was offered was forest land near to and even overlapping with lowland areas which were already claimed by families for future rice fields.

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) states:

*Policies for allocation of tenure rights should be consistent with broader social, economic and environmental objectives. Local communities that have traditionally used the land, fisheries and forests should receive due consideration in the reallocation of tenure rights.... policies should ensure that the allocation of tenure rights does not threaten the livelihoods of people by depriving them of their legitimate access to these resources (par. 8.7).*

It is important to consider whether the transformation of communities from self-sufficient sellers of sustainable forest products to becoming low paid wage labourers, and the conversion of forestland to cassava plantations for biofuel that mainly benefits a wealthy family, is in the national interest and increasing the well-being of Cambodians.

A related problem is that customary use of large areas of land/forest such as for cattle grazing, resin tapping or honey collection is not accounted for when land is classified only into state or private categories. One major impact of a land concession is often that communities are forced to give up cattle raising. The 'leopard skin' policy, which suggests that pockets of local peoples' land can be accommodated within a surrounding concession, has often been promoted as a way to mitigate conflicts. Unfortunately this does not address the power dynamics involved when a large number of smaller users are dependent on a larger land user for access to land for grazing.

In the modernizing discourse prevalent in contemporary Cambodia, customary use implies something that is 'stuck in the past'. Outsiders get the impression that those who follow customary practices are backward and uneducated. In turn, farming people devalue their own knowledge and capacity to incorporate modern techniques and management based on their traditions. This allows state technicians to argue that traditional communities are not able to manage their land and forests.

Perhaps one conclusion from this is that customary rights seem to be seen as a secondary right. Outsiders, for example, have often told indigenous communities that "as you are not ethnic Khmer, you do not have any right to the land" and "the government will take the land away from you without any compensation so it is better for you to sell it before they do" (Ironsides, 2012).<sup>38</sup> The lack of clear tenure rights has led to the illegal selling of community land by community members often with the encouragement of local authorities. Cases abound of villagers selling their land for 50-100 USD/ha, which has then quickly risen in value.

Villagers have tried to resist encroachment and the expropriation of their lands as best they can. Protests have been met with promises by authorities to resolve conflicts, often with little result. There are few cases of local communities or individuals successfully contesting and overturning the actions of better-resourced and more powerful actors in dispossessing them of their land. Agreements brokered with the help of legal and human rights organizations have often not been followed up or communities have been forced to accept less than adequate compromises.

The secondary status of customary land rights in indigenous areas is highlighted by the fact that only five communal land titles have been issued in Ratanakiri province since 2003 (covering 5,234 ha), compared to roughly 120,000 ha allocated to concession companies (much of which is indigenous communities' customary lands). The missed opportunity to register indigenous communities' land as communal during the Directive 01 land titling programme further highlights the lack of priority given to indigenous communities' land rights (ADHOC, 2015).<sup>39</sup>

In summary, the take-over of previously locally managed resources by the state has led to a change, in many areas, from at least some management of commons resources to little, if any, management. Provisions such as Article 23 of the Land Law allowing indigenous groups to "continue to manage their community and immovable property according to their traditional customs", have never been implemented. Lack of tenure rights has created incentives for local people to destroy forest areas in order to lay claims to resources and pre-empt company claims. In the process, institutions for managing the commons break down.

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<sup>38</sup> In 2010, an indigenous government official in Ratanakiri also claimed that some government staff tell communities they do not have any right to manage their land and they should sell it before the state takes it (Ironsides, 2012).

<sup>39</sup> MLMUPC Instruction #020 ordered titling of collective indigenous land under Directive 01 to be postponed and implemented later under the 2009 sub-decree on registration of indigenous community land framework (Grimsditch and Schoenberger, 2015).

Cambodia has already lived through the failure of the forest concession system, which was supposed to resolve the anarchy in the forestry sector in the 1990s. More recently, the land concessions system promoted to drive agricultural development has been called into question. It could be argued that no viable model of state management of natural resources in Cambodia has been any better than customary forms of management.

Whether customary tenure systems could result in more sustainable and inclusive economic development than the state management models which have sought to replace them, deserves consideration. This raises the question of how customary institutions for governing land and resources are evolving and adapting to changing contexts, and what supportive policy is needed to strengthen their role and function.

# Conflict Resolution and Grievance Mechanisms

Various formal mechanisms for settling land disputes – such as Commune Councils, the Cadastral Commission, the Administrative Commission, the National Authority for Land Dispute Resolution (NALDR), and the courts – are largely not able to resolve disputes to the satisfaction of local land users (CCHR, 2013). The court system is commonly seen as favouring the more powerful and well-connected parties. Another problem is that once a case goes to the Cadastral Commission and NALDR, people are told to wait and not take further action while investigations are underway.<sup>40</sup> However, this only prolongs the process with no, or an unsatisfactory resolution. An NGO informant compared navigating the land dispute resolution process in Cambodia to a fish net: people face obstacles every which way they turn (Interview 15, 2015).

The fact that conflict resolution mechanisms are weak and at times, partisan, increases the difficulties for the poor, as it is nearly impossible for small farmers to defend their interests against larger landowners within existing legal processes (Trzcinski and Upham, 2014; Chan and Acharya, 2002). It is crucial that the judicial system and other conflict resolution systems function in an open and transparent way.

Traditional forms of conflict resolution in Cambodia have always depended on calling on the support of powerful patrons. Those most able to secure this support are better able to make use of legal, political and patronage processes to defend their land rights. Rural farmers and poorer urban residents have fewer options to call on patrons and therefore are the most vulnerable to having their claims to land overridden.

In indigenous areas, community elders have traditionally dealt with intra and inter-village conflicts in the interests of maintaining community harmony. This community harmony is key to communities holding onto their customary land (Backstrom et al., 2006). Women appreciate being able to resolve conflicts in their own communities and language, where they receive support from their extended families (Backstrom et al., 2006). Research in Ratanakiri also found that in general villagers avoid the courts because of the fees and bribes required, and also because people believe that in the courts “the person who is in the wrong wins and the person who is in the right loses” (Ironsides, 2012: 191). Villagers know they do not have the funds for the informal fees necessary for a favourable outcome. Court processes often seek to arbitrate, rather than making a legal ruling on the case. Court rulings can also be appealed, meaning the more powerful are always better resourced to be able to continue the case in higher courts.

The inability of traditional systems of conflict resolution to deal with disputes involving powerful government officials and private business people means that some thought is required about the adaptations needed if customary institutions are to be able to deal with new circumstances. For indigenous villagers to be able to assert their rights, communities also need support so that they are aware of their rights and the communal land titling process needs to be sped up.

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<sup>40</sup> In the Lor Peang case, for example, the Ministry of Justice asked villagers to stop activities against the company while it investigated but the company continued to build a gate to block villagers’ access to the land. This is a long running dispute between local villagers in Kompong Tralach District, Kompong Chhnang Province and KDC Company, which claims 500 ha of land. KDC is owned by the wife of the Mines and Energy Minister.

# Opportunities for Improving Customary Tenure Recognition

## ELC cancellation

A key initiative that presents an opportunity to push for the recognition of customary tenure is the process of redistributing land following a May 2012 moratorium on granting new ELCs. The moratorium led to the establishment of an inter-ministerial committee to review existing concessions, with the aim of cancelling concessions in breach of their contracts or of the law (Chan, 2015).<sup>41</sup> Following this, MoE and MAFF apparently cancelled or downsized over 40 ELCs, and released another 231,000 ha between January and March 2015 (Chan, 2015).

The number of concessions in MoE managed areas has reduced from 123 to 84 and the maximum period for concessions has also been reduced to 50 years (ADHOC, 2015). This raises the possibility of returning some land to local communities. However, ensuring the proper redistribution of one million hectares of cancelled concession land is a considerable challenge. A MoE Notification Letter (*Sor Chor Nor*) states that the cancelled concession land will be reinstated as part of the conservation estate. Some of this could conceivably be in the form of Community Protected Areas (CPAs) in recognition of customary rights.

There has also been some discussion within MoE and MAFF about redistributing some of this land as social land concessions (SLCs), but details of this are not clear. A vision is therefore needed of who and how land reclaimed from ELCs should be managed. A MoE official pointed out that it is important to learn from the mistakes made when forest concessions were cancelled and there were no mechanisms established for local control. There was a similar situation following the cancellation of fishing lots.

## Environmental Code

A potentially important policy process is the development of an Environmental Code, led by MoE, which is intended to provide a coordinated framework for sustainable development and green growth strategies. As part of this, a restructuring of jurisdictional responsibilities among government institutions involved in environmental management has been implemented.<sup>42</sup>

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<sup>41</sup> This did not affect ELCs that had received permits in principle from the government before the moratorium (ADHOC, 2015). At least 33 ELCs were approved after the moratorium was announced (ibid). Most of the canceled ELCs were never developed, or only cleared the trees. It seems only dormant concessions were targeted for review and cancellation, while avoiding contested ones. According to ADHOC, three additional concessions were handed back voluntarily, including two allocated to Try Pheap inside Virachey National Park. More recently, two carbon concessions were also cancelled. Given the cancellation of some concessions and the approval of new ones, it is hard to know the impact of this review process.

<sup>42</sup> In May 2016 the MoE handed over the ELCs under its management to MAFF. MAFF, in return, handed over to MoE land such as protected forest areas to be included in the conservation estate. There are also reports of significant changes in the structure of the Forest and Fisheries Administrations.



While reform of one sort or another has been underway since the early 1990s, these reforms could be significant because the Environmental Code will embed the newly developed EIA Law (see section 'Recognition of Customary Tenure in the Legal System'), outlining stronger provisions for community rights, including recognition of customary tenure for compensation claims.

The present draft Code also contains provisions for local communities in protected areas to establish Collaborative Management Protection Zones. Communities would receive a Collaborative Management Communal Title, which in theory would give protection to communities against encroachment, and provide rights to reside in and benefit from the sustainable use of natural resources according to an approved Collaborative Management Plan. This could also conceivably open up recognition of the role of customary tenure institutions in watershed and landscape level management. Watershed management is increasingly important given irrigation schemes and impacts from climate change. Communities could play a positive role, including potentially receiving payments for watershed services, etc.

## **Government promulgation of the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT)**

Raising the awareness of government officials of international agreements that Cambodia is a party to, such as the VGGT, would also be strategic. After initial coolness, the MLMUPC has acknowledged the usefulness of the VGGT in guiding better land governance. This means there is now more openness for NGOs to introduce the VGGT to other agencies and to the sub-national level. However, there are few NGO and government staff who understand the VGGT and how they could be implemented.

Mol and MoE officials, for example, acknowledged their usefulness as best practice guidelines when they were provided copies, but they had not heard of them until then. Without ongoing German development assistance to the MLMUPC it is unclear what technical and financial support will be available to encourage the Ministry to apply the VGGT principles beyond just recognizing them.

The voluntary nature of these principles is also a key weakness according to some NGO informants (Interview 7, 2015). One person compared the VGGT principles to international agreements such as UNDRIP which the government has signed but not shown any commitment to implementing. He felt the government only recognizes national law and is not proactive in respecting international agreements. A key issue for the relevance of the VGGTs is how to apply them to protect local communities' access to common resources that are under the most threat from land commodification and large-scale land concessions.

## **Building connections with key stakeholders**

To achieve the above policy actions it is necessary to build links with decision makers and supporters. Possible allies in recognizing customary tenure include the National Assembly Commission 1 (Human Rights and Complaints) and perhaps also Commission 3 (Economics, Planning, Investment, Agriculture, Rural Development and Environment), MoE, MRD, Development Partners, the United Nations (e.g. UNDP, COHCHR), NGOs and indigenous representatives.

A National Assembly representative commented on the centralized nature of decision-making around land issues, focused on the Prime Minister and his close advisors. As well as attempting to influence this group, building support for recognizing customary land rights could also focus on Provincial Governors and MLMUPC, and secondarily, Mol, Cadastral Commissions, NALDR and the judicial system. A Mol officer suggested external organizations could help to facilitate and support collective work planning, given the need for inter-ministerial coordination on customary tenure issues, including activities like communal land titling.

Provincial government staff could also be useful allies as many understand the issues and work with local communities. Government officers who have most contact with indigenous communities, including from the central level, tend to express the strongest support for communal land titling. These people could help to support greater recognition.

A key issue highlighted during this study is the need to build greater trust between communities and government officials. On the one hand, local people complain about powerful actors grabbing their land in collusion with government officials. On the other hand, government authorities see local people as forest destroyers and say they are not capable of managing their land and resources. Representatives of an indigenous NGO noted that their attempts at explaining indigenous peoples' management practices to local authorities when they are in the field with them have had mixed results.

# Recommendations for Policy Influence

## Decentralize land management

Local level authorities can play a key role in recognizing local customs and in bridging these with the requirements of state law. Devolution of authority to those who better understand local customary practices would help to adapt central policies to the local context.

Action research activities in collaboration with commune councils could help to raise awareness and recognition of customary land rights. Several issues need to be addressed, including strengthening interim protections for indigenous communities' land, clear boundary demarcation between concession and community land, greater transparency and follow up of complaints registered through the local authority structure. To carry out action research processes, government, non-government and community level technicians could provide support to communes and communities.

The possibility of applying interim protection once a community has registered as indigenous with the MRD could be explored as part of an action research process in some pilot villages that require special protective measures. In this sense there is a need to strengthen both customary and formal systems. Action research activities could also look at greater coordination between communal land titling and CF/CPA processes in one or more communities to simplify and speed up the approval processes. Another potential pilot activity could look at developing an effective methodology for converting private titles handed out as part of the Directive 01 titling programme into a communal title,<sup>43</sup> and how to accommodate private land inside communal land more generally.

To avoid pilots being seen as government projects, they would need to be based on community requests and be locally managed as much as possible. Small grants could be considered to allow for this local level management.

## Simplify and accelerate the communal land titling process

Discussions need to be held among organizations involved in communal land titling to identify bottlenecks and develop recommendations to relevant ministries for simplifying and speeding up the process. This could include a strengthened role for commune and district authorities to issue local level recognition of indigenous community claims and to establish mechanisms, in conjunction with local communities, to resolve land conflicts associated with these claims. Consideration could also be given to an approval process at the provincial level, which could be overseen by MLMUPC but devolve more decision making authority to provincial and lower levels. The development of a method for incorporating communal land titling into the systematic land titling and state land mapping processes is also needed.

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<sup>43</sup> Several communities (Kanat Thom and Malick in Ratanakiri, Bongkhan Pol in Preah Vihear) have wanted to convert their private titles into a communal title.

Recommendations could also be put forward for amending the Land Law to allow communal land titling for non-indigenous communities over areas which they customarily use and manage including grazing areas, communal forest areas, ponds and waterways, areas used for community ceremonies, etc.

In addition, given the significant delays in processing applications for a communal title, Development Partners could discuss with the MLMUPC about the support required to accelerate communal land titling. Given that at least 166 communities are at various stages in the titling process, speeding up the development of internal rules, land demarcation and titling does seem feasible. This could include, for example, indigenous organizations working with communities to better prepare them for the land titling process. Attention is also required in strengthening the capacity of NGO facilitators and indigenous communities to ensure communities are prepared to use and defend their land once it is titled.<sup>44</sup>

### **Strengthen customary tenure recognition in the reallocation of cancelled concessions**

Discussions are needed with decision makers about mechanisms for the reallocation of cancelled concession land through the Decentralization and Deconcentration (D&D) process.

One suggestion was to turn over cancelled ELCs to community management as 5,000-10,000 ha units for a range of uses, including timber and fuelwood production. The 2004 Forest Sector Review failed to outline provisions for developing a sustainable supply of timber.<sup>45</sup> To date timber has been coming from the clearing of concession areas and illegal logging. Even though it might be unfair to suggest to communities that they replant forests that have been cleared for future timber harvesting, this does offer a way to get former ELC land under community management.

One small example of the potential for communities to plant for their and the country's future timber needs comes from Leurn Kren village, Ratanakiri, where a forward thinking village chief planted beng (*Azelia cochinchinensis*) around the village's communally titled land (see Figure 3).

Local communities should also be assisted to reclaim CFs and CPAs which have been cleared by companies and then abandoned. Discussion with the relevant ministries could be carried out to ensure that as much as possible of the cancelled concession land recognizes customary claims and is turned over to communities as CFs and CPAs, or as co-managed forest areas.

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<sup>44</sup> The Minister of MLMUPC, H.E. Chear Sophara, in his handover ceremony on April 16 2016, stated "I promise to work for everyone who demands more speed and transparency, to register land for indigenous people, to stop illegal management on state land and the violation of villagers' land, and to find justice" (Odom and Narim, 2016).

<sup>45</sup> There are only two concessions growing timber in the country: Grandis Timber in the Aural area and Wusichan in Mondulkiri.



**Figure 3.** Beng trees planted along pathways within Leurn Kren village's communally titled land

Source: Jeremy Ironside

### **Develop functioning conflict resolution and grievance mechanisms**

There is a need to look at strengthening accountability and the functioning of existing complaints and conflict resolution mechanisms. The community complaint against Vietnamese rubber company Hoang Anh Gia Lai (HAGL) in Ratanakiri can offer some lessons in developing a grievance mechanism process (see Work, 2016); however, work is needed to figure out how this might be scaled up and also localized. The Viet Nam Rubber Group has instituted a grievance mechanism process and although little progress has been made in addressing communities' grievances, lessons from existing cases (e.g. HAGL, the case against Mitr Phol sugar company in Oddar Meanchey, etc.) can be used to strengthen processes and follow up. Lessons from grievance mechanism processes through the National Assembly can also be used.

To strengthen recognition of customary tenure in the court/legal system, discussion could be carried out with the Ministry of Justice about accepting customary conflict resolution practices for improved access to justice. There are supporters of alternative dispute resolution systems within the Ministry, and customary conflict resolution could help to reduce the work of government agencies. As part of this, discussion is needed about recognizing customary leaders' conflict resolution roles by the court system. This could include strengthening their role in mechanisms such as the Cadastral Commission, state land and forest identification processes, and as members of the Administrative Commission for systematic land titling.

### **Strengthen the recognition of Indigenous and Community Conserved Areas (ICCAs)**

Building recognition of ICCAs could be promoted to protect forests. This would involve allowing communities to continue their traditional management of areas which they consider sacred or important for historical and cultural reasons, for example, allowing community (or co-managed) control over spirit forest areas larger than the seven hectares allowed for in communal titles. Technically these areas could be considered CFs, CPAs, or collaboratively managed communal areas.

Some attention could also be given to exploring the implementation of provisions in the Forestry Law recognizing religious forests. This could also support communal tenure arrangements for non-indigenous communities.<sup>46</sup> Effort is also needed to develop and pilot provincial level agreements (such as the one which has been functioning since 1997 to allow the community management of Yeak Loam Lake in Ratanakiri Province). This would support both a simplified process of recognition of traditional rules and management and a basic co-management agreement with commune/district/provincial authorities to allow this to function.

This implies promoting a discussion about the role of local communities and their customary rights in conservation and protected area management in general. Working with the MoE Heritage Department to propose new areas for conservation of natural or cultural heritage managed at the provincial level could also open up avenues for the recognition of customary tenure.

### **Expansion of community management of forest areas**

Dialogue between the government and communities could also look at tenure and management rights for larger areas of forest. The idea of expanding the concept of CF to establish commune level forestry management, for example, was raised as a strategy in the World Bank's 2005 independent forest sector review. As part of the decentralization process, commune councils could become co-management partners with local communities for forest areas that involve more than one village. This is now happening with Partnership Forests, which are now commonly part of both the CF and CPA processes. Possibilities for delineating areas managed at the local level such as grazing areas could be explored as part of state land mapping.

### **Advocate for inclusive development as outlined in the National Strategic Development Plan 2014-2018**

For stronger recognition of customary tenure, policy discussions could aim to better articulate the concept of inclusive development as outlined in the National Strategic Development Plan 2014-2018 (NSDP). Guidelines such as the VGGTs could provide some guidance. An NGO informant commented that small farmers are crucial for Cambodia to achieve middle-income status

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<sup>46</sup> Article 45 of the Forestry Law mandates MAFF to “recognise the religious forest of local communities, ... as Protection Forest serving religious, cultural or conservation purposes. It is prohibited to harvest any spirit trees, thus they ... shall be identified in a Community Forest Management Plan.” Despite their wide existence, very few spirit forest areas have been recognized by this procedure (Swift and Cock, 2014).

and they need to be included in the development process. If they leave agriculture there will simply not be enough jobs to absorb them (Interview 10, 2015).

As part of the process to define, develop and implement policies for inclusive development, the costs and benefits of converting large areas of forest and land from food production to large-scale land concessions for non-food monocrops should be assessed. Studies could be supported to look at the customary use and management of forest areas and natural resources, as well as their potential for improvement, and compare this with the conversion of natural forest and fallow areas for plantations.

### **Support training on international guidelines such as the VGGT**

As discussed in the previous section, capacity building of government partners, NGO and community representatives on the content and use of the VGGT could be promoted to guide policy development and best practice for the recognition of customary tenure.

# Strengthening Multi-stakeholder Alliances, Community Rights and Representation

## Strengthening indigenous communities' representation

Support could be considered to build indigenous representation. This is needed at the national level for discussion with the government. Government officials say they need to negotiate with representatives who have a mandate from their communities and who are recognized by the local authorities. At the moment few or no indigenous organizations attend the government/development partner Land Technical Working Group meetings. Indigenous people also need positions in the government, and indigenous focal people or advisors are needed to work with the different ministries on indigenous issues.

Existing efforts in building indigenous representation include the Indigenous Peoples Association of Cambodia (IPAC), the Cambodian IP Alliance, and networks coordinated by the Highlanders Association in Ratanakiri.<sup>47</sup> Convening provincial and national alliances of villages with a legal entity could also be explored. These village representatives are recognized by the government and have a mandate to represent their communities. This could also include collaborating with communities who have or are developing CFs and CPAs. Such alliances could support other communities embarking on land formalization processes and become a structure for discussing with provincial and national level policy makers about customary land rights.

Indigenous organizations and networks also need to strengthen their communication and capabilities to engage with the media. For example, publicizing through video and local media the official documents which are issued during the communal land titling process and village congresses where a village's legal entity status is presented could strengthen indigenous communities' tenure security.

## Encourage coordination between indigenous and farmers' organizations

Coordination between indigenous and farmer networks is also needed. This could allow exchange of ideas and experiences, provide a united voice, and create a grassroots movement that could push for greater recognition of customary arrangements. This should not be seen as an NGO project, but as a bottom-up action research process. Links could be built with networks such as the Prey Lang Network, the Community Peace-building Network, the Phnom Kouk Network, the Action Research team (supported by Focus on the Global South), the Cross Sector Network, Farmer and Nature Net, etc. The Mosaic project operates a kind of action research process in Prey Lang and the Phnom Aural areas and these areas could be considered for pilots and networking around customary land rights. Farmers' Associations could potentially also be included to build alliances for the recognition of customary tenure.

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<sup>47</sup> IPAC plans to elect representatives from 15 provinces that will be recognized by the commune authorities. The Cambodia IP Alliance is made up of indigenous organizations.



## Community empowerment

### *Documentation of customary arrangements by local communities*

Documentation by village youth, under the guidance of elders, of customary land and forest management and how this is changing would help build understanding of the need for supportive policy. Exchanges could also be carried out between communities as a basis for grassroots networking and a bottom up movement that could press for policy change. A similar process was carried out as part of attempts to improve the forest concession system and consult about the Community Forestry Sub-decree.

### *Capacity building at the community level*

Videos and study tours could be promoted to inform how people in other places have tried to strengthen their customary tenure rights. Community networking could assist with this. Exchanges with neighbouring countries, involving both community representatives and government officials, could also allow for learning about best practices and models.

Efforts are needed to ensure vulnerable groups such as women, youth and elders are included in decision-making on land and natural resource governance. Indigenous youth to date have not been involved in communal land titling activities. Women also find it difficult to play an active role in land and other related issues in their communities. There is a need to strengthen women's capacity, especially to communicate with outsiders, and indigenous youths' capacity to assist their communities.

Research could also look at how key people active on land rights issues could be supported, and what has been useful for building grassroots networking and advocacy. It is also important to ensure that community committee members get the support they need to carry out their roles. Often their own communities do not value their work. This requires a good understanding by those who work with communities of internal dynamics and the changes underway in customary tenure arrangements. Capacity strengthening in many cases requires rebuilding internal consensus, recognizing different views and most importantly supporting community members with less voice and authority who often depend most on local resources and customary arrangements. In many cases NGO staff also need capacity support to be able to facilitate these kinds of processes.

### *Strengthening the use of communal land and natural resources*

Considerable work is needed to support the productive use of customary and communally titled land and resources and provide employment, particularly for younger community members. Part of this is developing community financing. An informant suggested piloting community financing arrangements in two communes with the aim of creating a system to suit the needs of local farmers (Interview 10, 2015). Questions, he suggested, could be asked about why commune development funds are used for infrastructure when land and mining concessions are issued on condition that they improve local infrastructure. Commune funds could be better used to establish community level financing. This could also link with developing provincial and district cooperative banks.

# Conclusion

The ideal to date, supported and promoted by development partners, has been to strengthen good governance and improve the fair implementation of the law. Good governance has been the core of the Government's Rectangular Strategy for a number of years. A key part of strengthening governance and the rule of law could be developing a common sense process for recognizing customary tenure and ensuring local communities' role in managing land and forests.

The recognition of customary tenure hinges on having the authority to decide on land and natural resource management at the local level. In the context of the Decentralization and Deconcentration (D&D) policy framework, there is a need, therefore, to more clearly define the roles of the province, district and commune in land and forest governance and devolve greater powers to lower administrative levels. Central level policy discussions need to consider the authority that will be allowed at this local level, including to customary users themselves, and the oversight role the central level will retain. Recognition and support of customary management of land and natural resources by commune and district authorities could significantly strengthen communal land titling and customary tenure recognition processes. Recognition of customary tenure is fundamentally a discussion about the roles and responsibilities of different levels of government. In contrast, however, informants in this study have highlighted a trend towards centralization of land management decision-making.

In addition, attempts are often made to codify and 'formalize' customary forms of management to fit state management models. Customary tenure should instead be recognized according to its own logic and be allowed to operate and evolve according to customary norms. This highlights the importance of developing good models of customary management to demonstrate its potential for reducing conflicts, promoting equitable and sustainable resource management and improving livelihoods.

A change in attitude towards greater acceptance of customary management is happening, but it will take time. Continued dialogue between local communities and decision makers is needed to build understanding of local peoples' natural resource management practices. This is what led to the inclusion of provisions for community involvement in the Protected Areas Law and it will be important for the successful implementation of the Environment Code.

Strengthening tenure security for Cambodia's rural population requires better understanding of what existed in the past, how this is changing and what is needed for the future. In Cambodia, the insecurity resulting from the unclear tenure status of customary users and unclear boundaries of state land is leading to greater competition and exploitation of land and resources. Waiting indefinitely for formal registration to be completed without developing immediate or interim measures to protect customary tenure will result in further resource degradation and a deepening of poverty for the most vulnerable members of Cambodian society.

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## Annexes

### Annex 1. Historical Background

Cambodia has been described as “*a country of forests, rivers and rice fields*” (Williams, 1999). Rice farming, fishing and collecting natural resources have been key sources of food and materials for subsistence since time immemorial. Throughout recorded history property rights in Cambodia have stressed social relationships. As noted by Chandler:

“... the notion of inalienable ownership of land, as distinct from land use, does not seem to have developed in traditional Cambodia. Land left fallow for three years reverted to state control. The king, theoretically at least, was the lord of all the land in the kingdom, which meant that he could reward people with the right to use it. Many of the... inscriptions from the Angkorian period dealt with complicated quarrels about access to land resources” (Chandler, 1993: pp. 16-7).

These inscriptions show that tenth century Cambodia had a functioning system of land management and dispute resolution. Under the King, this was controlled by non-royal lords who were often not important officials. It seems that the right to land and the protection of royal law extended to the most humble of free men in Cambodian society (Ricklefs, 1967).

For many centuries, therefore, the traditional system was based on usufruct rights – the right to use a piece of land and benefit from its outputs. “Villagers had private [use] rights on their arable lands and enjoyed free access to forests, streams, rivers and lakes which were regarded as common property and often extended beyond village boundaries” (Williams, 1999).

#### The introduction of private property by the French

Private land ownership was introduced by the French through the Land Act of 1884 (Thion, 1993), with the intention of creating “more stable production, control over the peasants and the possibility to sell 'free' land for large-scale plantations” (Greve, 1993: 6). With the introduction of land titles and a department of cadastre by the French, land property rights began to change from a possession right (*paukeas*) to an ownership right (*kamaset*) (Diepart and Sem, 2015). The primary purpose for establishing private property was to guarantee the investment of French settlers (Thion, 1993). This allowed the establishment of some large-scale plantations (Greve, 1993), which is the basis of the concession system prevalent in Cambodia today. However, French attempts to consolidate their expropriation of Cambodian customary land through legislation were widely resisted, especially by the elites, and land reform was consequently not fully implemented until 1912 (Williams, 1999).

#### Post-independence

By independence, in 1953, the Cambodian elite had embraced private property as an acceptable form of investment and store of wealth. However, given the resistance shown to tax collection – for example the beating to death of a French official trying to collect taxes in Kampong Cham in 1915 – the rural masses were likely not as supportive of the concept (Williams, 1999).



The Khmer Rouge (1975-1979)<sup>48</sup> period destroyed the administrative and institutional infrastructure that had underpinned the post-colonial land market. This included the abolishment of private property and the imposition of state land ownership. Cambodian society is still struggling with this upheaval of social spatial relations. After the collectivization of the Khmer Rouge period, claims to ownership of residential land in urban areas such as Phnom Penh were based on occupancy. This led to evictions of 'squatters' for villas and government office buildings. In the countryside production was organized in solidarity groups and collective ownership by the state was retained. By the mid 1980's this collective state ownership model was being overwhelmed by a return to pre-KR tenure arrangements.

### Restoration of private property after 1989

In 1989, a government summit acknowledged the failure of collectivism and opened Cambodia's markets to the world. After this summit the state of Cambodia began re-issuing the suite of private rights in real estate devised by the French. These included ownership rights in residential land for plots less than 2,000 square meters, possession rights in cultivated land for plots of less than 5 ha, and concession rights in plantation land for plots larger than 5 ha (William, 1999). These rights were available to Cambodian citizens who had used and cultivated their land continuously for at least one year before promulgation of these policies. Ownership rights to Cambodian citizens then occupying houses or dwellings in Phnom Penh were also issued in 1989 to quell growing unrest in the streets (Williams, 1999).

Initially reforms returned to a relatively equitable allocation of land which predominated in pre-Khmer Rouge times, though perhaps distorted by a more neoclassical social formation focused on the nuclear family (Williams, 1999). Allocation of the collective land was on the basis of family labour capacity designed to incentivize the production of much needed rice (Williams, 1999). In principle everyone who could work got land, though it is not known how many people actually managed to get back their original holdings as land distribution did not follow pre-existing ownership patterns. In many cases pre-Khmer Rouge productivity had been compromised because the hydrology had been severely modified by Khmer Rouge canal and reservoir building and mismanagement. Some farmers were not happy with the quality and amount of land they received, and with the bias shown towards families and neighbours of village chiefs and against women headed households (many with husbands still away fighting the Khmer Rouge) (Williams, 1999).

In areas of the country inhabited by indigenous communities, the denial of pre-1979 land rights caused significant hardship. Disruption of indigenous property regimes profoundly disrupted inter- and intra community relationships. When the Khmer Rouge fell on January 7, 1979, in perhaps the majority of cases, villages were not located on their traditional lands.<sup>49</sup> The whole of the Bunong population of Monduliri Province, for example, was relocated to Koh Niek to grow lowland rice. During the 1980s and early 1990s villagers were adjusting and re-establishing themselves on their traditional territories. Ongoing fighting with the Khmer Rouge also meant that some villages were moved onto other villages' land to be closer to roads and settlements, both for protection and to prevent them allying with the enemy. These displacements have been a major cause of continuing disputes over land and boundaries, and competition between villages to sell disputed land to outsiders.

<sup>48</sup> The Khmer Rouge controlled the Northeast of the country (Ratanakiri, Monduliri, Stung Treng and Kratie) from 1970-1979.

<sup>49</sup> Even though the Khmer Rouge were ousted from power in 1979, ongoing guerilla warfare meant the more remote parts of the country did not achieve peace until 1998. Khmer Rouge control was maintained in Pailin, Samlaut, Anlong Veng also until 1998.

In addition, provincial governors awarded land to government staff to keep them at work. During this period populations were sparse enough and numbers of officials and outsiders were small enough to accommodate these allocations and grabbing of land.

The 1992 Land Law formally recognized the reintroduction of private use rights which by then had become the de-facto tenure system, largely based on customary 'land for the tiller' arrangements. Possession rights were also allowed for up to five ha of forestland if the claimants cleared it (Williams, 1999).<sup>50</sup> In areas inhabited by indigenous communities who practiced shifting cultivation, this had a serious impact on villagers trying to protect their fallow (secondary forest) lands. Indigenous communities could not claim ownership of these areas because their customary claims were not recognized and they also had to rely on post-1979 5-year possession rights. As mentioned, many communities were also no longer occupying their traditional land. The imposition of administrative boundaries, which often disregarded traditional boundaries, added another layer of confusion and contest. This scenario of no clear rights to land set the context for the beginning of land privatization in indigenous areas in the early 1990s. Denying customary claims and providing the incentive to anyone who wished to stake a claim, are important factors explaining the loss of land in indigenous communities.

### The 2001 Land Law

The 2001 Land Law outlined some significant changes to the prevailing customary tenure arrangements including: provisions to formally register land ownership through systematic and sporadic land registration; legal recognition given to communal land use by indigenous communities; abolishing the ability to claim possession rights to land by clearing and claiming forest land; establishing a framework for the granting of ELCs and social land concessions (SLCs).

The 2001 law was partly born out of demands for pro-poor land reform, which the Asian Development Bank imposed as conditionality on a loan for agricultural development. This was a time when the Cambodian Government was receptive to outside influence as it sought to regain legitimacy after the 1997 fighting, which saw the *Front uni national pour un Cambodge indépendant, neutre, pacifique, et coopératif* (FUNCINPEC) Prime Minister ousted from power. The import of (neo-) liberal ideas through western donors, in influencing the development of the Land Law, as well as other elements of Cambodia's market orientation, has been significant (Muller, 2012). It was the World Bank, for example, that suggested bringing large-scale land investments into the Cambodian countryside (Diepart and Sem, 2015). This explains the emphasis in the Land Law on neo-liberal concepts of formalization of land holdings to encourage land markets and agricultural investment as part of a general commercialization of Cambodian agriculture (see Trzcinski and Upham, 2014).

Simply put, the 2001 Land Law reflects an outsider driven agenda for land administration for agricultural development, when in the years before 2001 the vast majority of Cambodia's rural population were engaged in largely subsistence agriculture to deal with acute food insecurity. Trzcinski and Upham (2014: 29) ask what might have happened if Cambodia had chosen to "reject, politely, the wholesale introduction of foreign technical and legal expertise and attempted ... to apply foreign experience selectively and with deference to whatever social and normative systems were (and probably still are) maintaining whatever degree of order and stability exists in Cambodian land practice." Clearly one lesson from this is that "undertaking grand schemes without a clear understanding of the local context and consideration for the entrenched interests of implementing actors is decidedly risky business" (Trzcinski and Upham, 2014: 22).

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<sup>50</sup> After five years of uncontested possession formal ownership could be applied.

## Economic Land Concessions

The provisions to allow ELCs to be allocated state private land for agro-industrial development has perhaps been the biggest single impact of the 2001 Land Law. The framework for allocating ELCs was further defined in a 2005 Sub-decree on Economic Land Concessions. Though it is difficult to arrive at an accurate figure of the area allocated to concessions, from a consolidation of Open Development Cambodia and LICADHO data sets, 2,547,718 ha of land had been granted as ELCs by the end of 2012 (Diepart, 2015). Taking into account 271 contracts that have subsequently been cancelled, LICADHO estimates 2.1 million hectares of land now under land concession agreements (Diepart, 2015).<sup>51</sup> This allocation of concessions has predominantly been in upland areas customarily used for shifting cultivation, animal grazing and forest collection.

Despite the existence of a relatively strong legal framework for regulating ELCs, including the need for consultation with local communities, requirements for the completion of environmental impact assessments (EIA), restriction on size to 10,000 ha, periodic review, etc., ELCs have had serious negative impacts on people and the environment (Grimsditch and Schoenberger, 2015). Legal provisions regulating ELCs have been largely ignored. Until very recently there had been little review of existing concessions, and new concessions have continued to be illegally granted over forested areas and indigenous land (COHCHR, 2007). Several companies exceed the legal 10,000 ha limit and illegal logging in forest areas surrounding the concession has been widespread.<sup>52</sup> Numerous examples exist of consultation only with local government authorities and never with communities, cursory EIAs, destruction of community burial and spirit forest areas, denial of legal land rights, conflict and intimidation by police and military personnel employed as company guards (CHRAC, 2009 and 2010; Global Witness, 2009; COHCHR, 2004 and 2007).

## Directive 01 and attempts to deal with land conflicts caused by ELCs

The Directive 01 land titling programme was announced in the run up to the 2013 national elections as a comprehensive attempt to address tenure insecurity resulting from the occupation of state land in the Cambodian uplands. Initially, the Directive 01 programme intended to expedite the systematic issuance of private land titles to thousands of people who found themselves inside concession areas.<sup>53</sup> However, six weeks after the announcement of the programme, the Council of Ministers (Letter 666 SCN, 26 June 2012) extended the scheme to include forest concessions, protected areas, and forest rehabilitation areas. Later, all types of forest were included. Titles were issued in some cases in community forestry areas and in social land concessions (Diepart and Sem, 2015). The mechanism to provide private ownership of untitled state land was through donation, following Article 83 of the 2001 Land Law (Diepart and Sem, 2015).<sup>54</sup>

<sup>51</sup> A 2015 government report combined the figures of ELCs issued by MAFF and MoE for the first time. A total of 1,934,896 ha of ELCs were granted to a total of 230 companies, of which 122 companies received licenses from MAFF, while 133 received licenses from the MoE (ODC, 2015).

<sup>52</sup> Companies get around this by registering several concessions that actually have the same owner or director, and often the same office address (COHCHR, 2007). These owners and directors include many of the most powerful political and business leaders in the country.

<sup>53</sup> The formal name is Directive 01BB: Measures Reinforcing and Increasing the Efficiency of the Management of Economic Land Concessions.

<sup>54</sup> Article 83 stipulates “the state may only donate immovable property to natural persons and for social reasons in order to allow them to reside or carry out subsistence farming.”

The adjudication process included legitimate customary claimants and a small army of people who cleared forest areas in an attempt to gain possession rights. According to government statistics, the Directive 01 programme resulted in surveying 710,000 parcels and issuing 550,000 titles,<sup>55</sup> which included redistributing 360,000 ha from 129 ELC companies, nearly 230,000 ha from 16 forest concession companies, and 510,000 ha of state and forest land (RGC, 2014a). Thirty percent of land excised from state land came from un-categorized forest areas, with only 25% coming from ELCs (Diepart and Sem, 2015).

In indigenous areas, a study found that 26 of the 79 villages surveyed in Ratanakiri were at varying stages of registering for communal land titles when the Directive 01 campaign began (Rabe, 2013). These villages were forced to choose between receiving private land titles or waiting indefinitely for a communal title. Rabe (2013) found that land privatization had increased land loss in several villages as companies denied access to the newly titled landowners whose lands were surrounded by company lands, and then forced villagers to sell this land to them. Many villagers reported that their communities, including those part way through the communal land titling registration process, were “broken” as a result the Directive 01 private land titling campaign (Rabe, 2013).

The Directive 01 programme resulted in many families with increased tenure security as a result of their individual titles. However, there were also several reports of local authorities or powerful people titling significant areas of land for themselves, people having their land areas reduced, surveyors refusing to measure areas of land, titles being withheld or never completed, ‘owners’ with a title but no land and companies not respecting land ownership even after titles were issued (Anon, 2013). In many cases this policy to improve land security and reduce land conflicts actually increased land insecurity and in some cases led to land loss. Increasing insecurity is not a strong base for customary users to build livelihood improvements or to be able to adapt their practices to deal with rapid change.

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<sup>55</sup> The MLMUPC website reported that 610,000 land titles were issued (ADHOC 2015).

## Annex 2. The disjuncture between law and customary practices

### Formal versus informal land transfers

Drafters of the 2001 Land Law decided to adopt the Australian Torrens system requiring that all legally titled land, and subsequent transfers of that land, be registered with the MLMUPC in a central land registry (Trzcinski and Upham, 2014).<sup>56</sup> In contrast, and partly in acknowledgement of prevailing customary arrangements, draft versions of the Civil Code (written after the Land Law), called for recognition of ownership as soon as a land transaction takes place, eliminating the need to register the transfer. After some internal debate between 2007 and 2011, the 2011 Civil Code (Article 135) was finally amended to fit with the Torrens system, albeit with greater powers for judges to allow for various forms of possession and use to determine ownership (Trzcinski and Upham, 2014).

A key issue is the cost of registering a transfer of land ownership in the central registry. The fee paid to MLMUPC depends on the size of the plot and on informal charges. There is also a 4% transfer tax on the land value paid to the Ministry of Economy and Finance (MoEF). Informal payments are generally significantly more than the official fees. The 4% tax is high by international standards, and this tax plus informal payments are only affordable by owners of higher value properties. People also find it difficult to travel to the province or the district, possibly several times, to pay the fees and deal with the paperwork.

Instead of paying high fees to MLMUPC and MoEF, large numbers of Cambodians prefer to use pre-existing customs. Following provisions dating back to the 1920 Civil Code, the commune has traditionally been the authority that recognizes local land rights, in some cases simply through the landholder knowing the commune chief. From 1925-1975, land tenure was mostly via possession rights that by law were documented and transferred simply and inexpensively at the commune level. To this day the great majority of the poor, even those with a land title, seek out the commune to recognize a transfer of land. To save costs and also in recognition of the customary role of the commune authorities in guaranteeing local ownership arrangements, the commune chief will be asked to sign on the back of the title which is then handed over to the new owner. Legally, the commune authorities and sometimes the village chief act as witnesses of the land transaction. A fee of around 50-200 USD, depending on the value of the property, is paid to the commune chief.

This 'informal' system has persisted in rural areas both because it is affordable for local people and it has social legitimacy. Moreover, because systematic land titling has to date largely been implemented in areas that are already tenure secure, buyers and sellers do not feel the need to register the transaction (Trzcinski and Upham, 2014). This system was described by a government informant as "within the law but not fully under it", and as "half legal" but upheld by customs (Interview 1, 2015). The persistence of these practices in Cambodia's rural heartland points to the useful function they play for millions of rural Cambodians.

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<sup>56</sup> The need to register land transfers essentially means the MLMUPC is issuing a new title to the new owner. Article 65 of the Land Law states: The transfer of ownership can be enforceable against third parties only if the contract of sale of immovable property is made in writing in the authentic form drawn up by the competent authority and registered with the Cadastral Registry Unit. The contract of sale itself is not a sufficient legal requirement for the transfer of the ownership of the subject matter.

Reducing the level of fees charged for updating the land registry to make it more pro-poor and maintaining the registration system up to date could provide a solution. However, an informant felt this would be resisted by MLMUPC because the government has become business oriented with different ministries protecting their own interests and generating as much income as they can (Interview 17, 2015).

A 2014 evaluation of the Finnish Government's support to MLMUPC reports that 75% of land transfers are not officially registered (Ewers, 2015).<sup>57</sup> Displeasure was noted with the (land transfer) registration tax, particularly for non-cash transactions to children in the form of inheritance, inability of poor farmers to pay for land administration, difficulties in travelling several times to the province, and the fact that in 90% of cases subsequent transfers are verified by the village or commune chief (Ewers, 2014). The Torrens system's effectiveness depends on the registry remaining updated (Ewers, 2014). In essence, the legal framework overrides rather than acknowledges or works with established customary arrangements, because what people have done traditionally contravenes the 2001 Land Law and the 2011 Civil Code.

This may appear to be a minor problem compared to the significant achievement of 3 million titles issued. However, in an attempt to collect the vast amount of tax owing from informal transfers of titled (and also untitled) lands, a Council of Ministers *Sor Chor Nor* (Notification Letter) dated 2 February 2016 ordered sub-national authorities to stop verifying transfers. It also instructed present owners of titled or untitled land that was transferred informally in the past to pay the unpaid transfer tax within six months. It is unclear how effective this has been, or what will happen to the millions who rely on customary commune level arrangements for their tenure security if they have not complied and are told they are illegal occupants. A very large number of land titles issued are already outside the system because of informal transfers, and the number is increasing constantly.<sup>58</sup> Because of this situation the number of people with a valid (legal) land title is largely unknown.

The result is that much like during the French and Sihanouk periods, the majority of formally registered land transfers are in Phnom Penh and Kandal provinces. The land registry system is tending toward a situation in which only about 15% of all parcels will have accurate ownership information. The systematic registration process was supposed to provide clear tenure rights for every landowner in the country. However, an informant speculated that what could happen is that over a 25 year period the land registration system will go back to the pre-Khmer Rouge arrangements (Interview 17, 2015). The longer the land registry is not updated, the harder it will be to align the central land ownership register with on the ground reality.

A related problem is land sub-division, where a land title-holder sells off a portion of their land. The commune chief is also asked to verify this sale and a new title is generally not made. The piece that is sold, however, still remains on the original title. This presents risks for poor local and indigenous people who do not understand the system, for example, in cases when the former owner passes the title to his/her offspring, who may then claim ownership of the full piece of land represented on the title. In another scenario, the titled owner may sell the majority of the land and the buyer, who becomes the 'majority' owner, may ask to hold the title. Also, if an outsider buys a portion of the titled land from an indigenous person, the outsider may ask to hold the title arguing that the indigenous person's land tenure will not be questioned within their own community.

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<sup>57</sup> The World Bank's completion report for its support to MLMUPC estimated it to be 85% (World Bank, 2011: 85).

<sup>58</sup> As an indication of the scale of the problem, experts conservatively estimate that at least half and more likely three quarters of properties which had titles in 2005 would not be considered valid land titles in 2015.

At the very least, recognition is needed of the prevalence of this two-tier system of land ownership and the risks that not officially registering land sales poses to millions of landowners.

The income to MLMUPC for registering land transfers led one informant to describe systematic land titling as a process for drawing people into the system (Interview 17, 2015). The cost of a systematic land title is relatively low in Cambodia at around 20 USD for issuing the title. There is some payment of informal fees but generally this is not a major problem. People are interested in getting a 'hard title' for land security and to get access to credit. However, once people are drawn in, the land administration system stands to make substantial income for recording subsequent land transfers. For example, in 2014, the Cambodian Government "had a revenue from the registration of transactions (subsequent registration) of over 35 million US\$", and "the Government of Cambodia and in particular the Ministry of Finance have recognized that land registration and titling can be a revenue generating activity" (Rock et al. 2015: 51).<sup>59</sup>

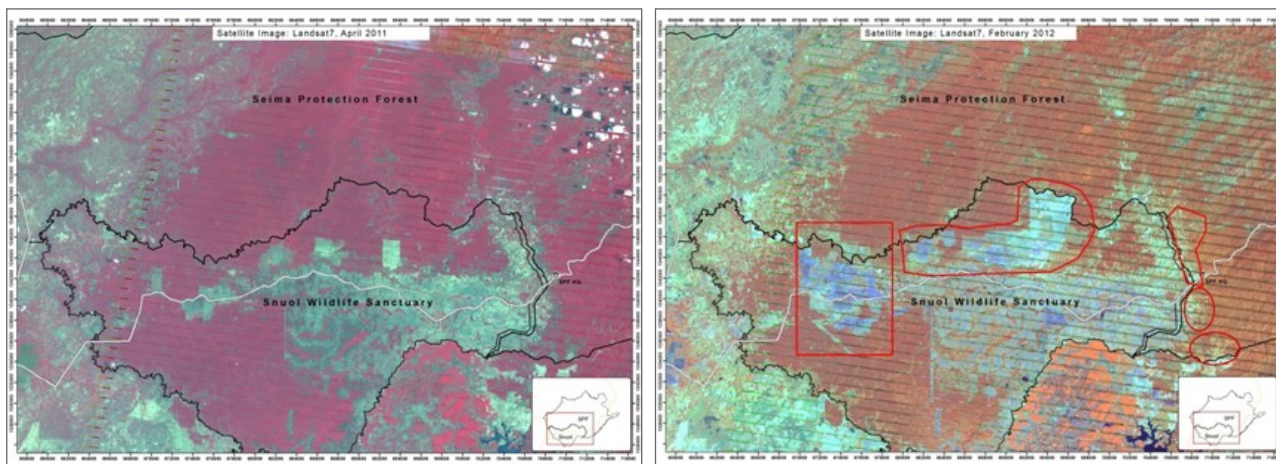
### **The law versus customary uses of forest areas**

The clearing and claiming of forestland highlights another disjuncture between the Land Law and customary practices. When land was decollectivized in 1987 people were allowed to claim the land they were using. People expanded their landholdings by clearing forests. This practice was permitted in the 1992 Land Law. Although the 2001 Land Law made this practice illegal,<sup>60</sup> local authorities widely allowed it to continue, following requests from community members facing livelihood insecurity. A MoE staff informed that local authorities often viewed the use of cleared land as a temporary right until the state developed a management plan or need for these areas (Interview 1, 2015). Significant forest areas have also been cleared by opportunistic land brokers who have hired people to clear land so they can sell it.

This leniency by the local authorities has resulted in significant areas of forest being cleared. For example, around 10,000 ha of Snoul Wildlife Sanctuary situated in Keo Seima District, Mondulkiri, was cleared (see Figure 4). The clearing and claiming of forestland was given renewed legitimacy by the Directive 01 land titling programme. This has added to the significant problem of the perverse incentives to clear land to prove use. There are several cases of families and communities protecting forest areas, including their shifting cultivation fallows, but then losing this land because they didn't clear and use it. During the Directive 01 land titling programme, those who cleared forest areas were rewarded, and because only cultivated fields were allowed to be titled, families and communities lost claims to secondary forest fallow areas they had been protecting. This rewarding of people who had illegally cleared forest areas continues to have an adverse impact on those depending on the forest as a commons resource.

<sup>59</sup> This does not include informal fees paid. Rock et al. (2015) further point out that so far Cambodia only collects land tax in urban areas, namely Phnom Penh, Siem Reap, Sihanoukville and Battambang.

<sup>60</sup> Article 29 of the Land Law states that "Any beginning of occupation for possession shall cease when this law comes into effect", meaning that possession rights could no longer be claimed by clearing new forest land.



**Figure 4.** Maps of Snoul Wildlife Sanctuary, Mondulkiri Province, in 2011 and 2012 respectively, showing extent of forest clearing in one year. Clearing was by concession companies for rubber, opportunistic 'patrons' paying labourers to clear forest land and small migrant farmers to plant cassava.

Source: Wildlife Conservation Society



### Annex 3. List of Contributors for the Study

Government		
Interview 1	General Department of Administration For Nature Conservation and Protection	Ministry of Environment
Interview 2	National Council for Green Growth	Ministry of Environment
Interview 3	Dept. of Municipal, District and Commune Administration	Ministry of Interior
Interview 4	Department of Associations and Political Party Affairs.	Ministry of Interior
Interview 5	Ethnic Minority Development Dept.	Ministry of Rural Development
Interview 6	Representative	National Assembly
NGOs		
Interview 7 (3 people)	Staff	Indigenous NGO
Interview 8	Staff	Indigenous NGO
Interview 9	Staff	International NGO
Interview 10	Staff	Cambodian NGO
Interview 11	Staff	Indigenous NGO
Interview 12		Former indigenous land titling consultant
Interview 13 (3 people)	Staff	International NGO
Interview 14	Staff	International NGO
Interview 15 (2 people)	Staff	International NGO
Interview 16	Consultant to the MoE	Long term Cambodia expert
Development Partners		
Interview 17 (2 people)	Staff	Development partner
Interview 18	Staff	Development partner
Researchers		
Interview 19	Researcher	Long term Cambodia land rights expert
Interview 20	Researcher/Advisor	
Interview 21	Researcher	

## Annex 4. Checklist of Questions

### Objectives:

- Understand the situation of CT, problems and opportunities for legal recognition
- Engage with key decision makers (esp. governments) – to understand their perspective
- Initial recommendations for the road map/action plan and alliances

### 1. Understanding/ describing the situation of customary tenure

#### 1A) Historical background and context

#### 1B) Customary tenure on the ground/in practice

- What is the extent of customary tenure in the country (% of farmers, lands)
- Who are the main customary right holders and what forms of tenure are there?
- What differences are there between ethnic groups in different regions?
- How does customary tenure affect women, youth, vulnerable and traditionally marginalized groups in society? How does obtaining secure tenure rights impact livelihoods?
- What are the problems of customary tenure systems and how are these eroding?
- What conflict resolution and grievance mechanisms are in place?
- How does non-formalized customary tenure defend its land against land concessions and other forms of encroachment?
- Are there any success stories of communities defending and maintaining their customary tenure arrangements

#### 1C) In the government/ institutional/ legal system

- Is customary tenure mentioned in the law? For what context, under which definition?
- What types of customary rights, responsibilities and restrictions exist in the law?
- Who are the right holders in law?
- What legal provisions are there for the recognition of swidden agriculture
- What community forestry tenure arrangements exist?
- What are the methods and processes for customary rights recognition and what are the technical requirements to identify the right?
- What are the main difficulties in the recognition process?

#### 1D) What are the main opportunities for improved CT recognition in the future?

- How can existing policies for recognition of CT be better implemented?
- What opportunities are there in new legal/policy frameworks?
- What other major initiatives could be tapped and/or what alliances could be formed?
- What international conferences, intergovernmental negotiations, etc. are relevant?
- What opportunities exist in the government recognizing the Voluntary Guidelines on the Governance of Tenure (VGGT)?

## 2. Engaging with key decision makers

- Who are they?
- What are their perceptions and perspectives on customary tenure, including cultural aspects?
- What do they see as valuable, useful in customary systems?
- What are their buy-in/interests, what do they see as areas for engagement?

## 3. Action plan and alliances

- Recommendations for effective policy influence?
- What advocacy messages would be most effective?
- What multi-stakeholder alliances are important to develop?
- What capacity building for alliances/networks on customary tenure should be considered?
- What opportunities/pathways are there for community empowerment?

**The Mekong Region Land Governance (MRLG) Project** aims to contribute to the design of appropriate land policies and practices in the Mekong Region. It responds to national priorities in terms of reducing poverty, improving tenure security, increasing economic development, and supporting family farmers, so that they can be secure and make good decisions on land use and land management.

The Mekong Region Land Governance is a project of the Government of Switzerland, through the Swiss Agency for Development and Cooperation (SDC), with co-financing from the German Federal Ministry for Economic Cooperation and Development (BMZ) and the Government of Luxembourg. The MRLG project is implemented by Land Equity International (LEI) in partnership with Groupe de Recherches et d'Echanges Technologiques (GRET) and supported by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ). For more information on MRLG, please visit [www.mrlg.org](http://www.mrlg.org).

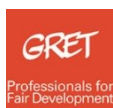
The **MRLG Thematic Study series** examines major themes related to land tenure in the Mekong Region. It is aligned with strategic priorities of MRLG and is intended as background document for all relevant MRLG partners. As such, the series consists of a synthesis of existing references in a particular theme, which can be complemented with additional enquiries and studies. The production of Thematic Study is usually undertaken at the initiative of MRLG but we also accommodate proposals originating from outside the programme.

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