

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



## ***Thematic Study***

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# **The Recognition of Customary Tenure in Lao PDR**



***Mekong Region Land Governance***

# Thematic Study

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This thematic study presents a country-level overview of customary tenure arrangements in Lao PDR. It examines key changes that have impacted on these arrangements, the extent of customary tenure in the country, the degree to which customary tenure is recognized both legally and in practice, and explores opportunities for better recognition.

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# List of Acronyms

ADB	Asian Development Bank
AEC	Asian Economic Community
ASEAN	Association of South East Asian Nations
CSR	Corporate Social Responsibility
DAFO	District Agriculture & Forestry Office
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
FALUPAM	Forest and Agricultural Land Use Planning, Allocation and Management
FAO	Food and Agriculture Organization
FLEGT	Forest Law Enforcement Governance and Trade
FPIC	Free, Prior and Informed Consent
FSC	Forest Stewardship Council
GoL	Government of Lao PDR
HAGL	Hoang Anh Gai Lai Company
NU-IRDP	Integrated Rural Development Programme in the Poverty Regions of Lao PDR
KFW	Kreditanstalt für Wiederaufbau (German Reconstruction Credit Institute)
ICBF	Integrated Conservation of Forests and Biodiversity
IFC	International Finance Corporation
Indufor	Independent International Forestry Consulting Group
IR	International Rivers
IRD	Institut de Recherche pour le Developpement
Lao PDR	Lao Peoples Democratic Republic
LIWG	Land Information Working Group
LCA	Lao Census of Agriculture
LFA	Land and Forest Allocation programme
LIFE	Land Learning Initiatives for Food Security Enhancement programme
LIWG	Land Information Working Group
LMDP	Land Management Decentralisation Project
LMRED	Land Management and Rural Economic Development
LSC	Land Survey Certificate
LSSWG	Land Sub-sector Working Group
MAF	Ministry of Agriculture and Forestry
MoH	Ministry of Health
MoJ	Ministry of Justice

MoNRE	Ministry of Natural Resources and Environment
MPI	Ministry of Planning and Investment
MRLG	Mekong Regional Land Governance Project
NAFRI	National Agriculture and Forestry Research Institute
NERI	National Economic Research Institute (now the National Institute for Economic Research)
NGO	Non-governmental Organization
NLMA	National Land Management Authority
NNT	Nakai-Nam Theun National Protected Area
NPA	Non-Profit Association
NSEDP	National Socio-Economic Development Plan
NUDP	Northern Upland Development Programme
NTFP	Non-Timber Forest Products
PLUP	Participatory Land Use Planning
PM	Prime Minister
PPA	Participatory Poverty Assessment
RECOFTC	The Centre for People and Forests
REDD+	Reducing Emissions from Deforestation and Forest Degradation
SDGs	Sustainable Development Goals
SUFORD-SU	Sustainable Forestry for Rural Development – Scaling up
TABI	The Agro-Biodiversity Initiative
UN	United Nations
UNICEF	United Nations Children's Emergency Fund
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security
VFMA	Village Forest Management Agreement
VFMP	Village Forest Management Plan
VRG	Vietnam Rubber Group
VUF	Village Use Forests

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# Executive Summary

This thematic study examines the prevalence and importance of customary tenure in Lao PDR and explores opportunities for strengthening its recognition. Customary tenure covers a wide range of land types and resources, and provides livelihood security for a majority of the Lao rural population. It is particularly important for vulnerable sectors of the population, most notably ethnic minorities, women, the poor and landless, who rely on continued access to upland areas, communal forests, grazing land and fishing areas.

Over centuries, Lao people have adapted their livelihood and cultural practices to diverse ecological contexts. Customary arrangements reflect these complex human-ecological relationships. These adaptations have resulted in a great diversity of livelihood strategies and explain the traditional “subsistence affluence” of villagers throughout the country (Chamberlain, 2008:19). People did not think of themselves as poor. This highlights the importance of understanding livelihood systems and the customary practices on which they are built.

This study begins with a broad overview of customary tenure arrangements in Lao PDR, followed by a discussion of key policy changes over the past 30 years that have impacted on these arrangements. Forest and land allocation, village consolidation and market oriented policies aimed at turning land into capital have all undermined customary tenure systems and depicted small farmers as poor and unproductive, partly because the non-monetary value of their productive activities are not accounted for. Poverty reduction solutions proposed by the government and development partners often focus on ‘modernizing’ and transforming subsistence rural farmers into market-oriented agribusiness producers. These have resulted in multiple impacts on culture, livelihoods and customary practices. A more balanced approach, this study argues, would be greater legal recognition of customary land rights to ensure livelihood security while rural populations adapt to changes based on what they know.

An examination of the legal recognition of customary tenure over land and forests in Lao law shows some acceptance of this but provisions are generally weak and poorly implemented. This means rural communities struggle to have their customary rights respected. Some of the difficulties in defending legal rights include impediments faced by customary users in negotiating Lao legal and political systems, a lack of awareness by communities of their legal rights, inadequate conflict resolution mechanisms and unclear legal and political support for communal/collective land titling.<sup>1</sup> Despite the challenges, there have been some cases of communities effectively defending their customary land and it is important to learn from these experiences.

The final section presents key opportunities for strengthening the recognition of customary tenure in policy and practice. One important aspect of this is demonstrating the importance of customary management for achieving Lao PDR’s development goals of enhancing livelihoods and reducing poverty, while also contributing to sustainable resource management and forest protection. This includes using field based evidence and case studies to engage in dialogues about the actual benefits and impacts of present land policies promoting large-scale monocultures. Other recommendations include working with the government to ensure that customary tenure is adequately

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<sup>1</sup> The 2017 Resolution of the Party’s Central Committee on Land Management and Development recognizes “collective” land use rights. However, the more common term ‘communal land’ is used in this report.

recognized and protected in revisions to the Land Law and Forestry Law; strengthening the legal status and implementation support for land use plans, village forest management plans, communal/collective land titles and other mechanisms of recognition to ensure customary land claims are respected by companies when land concessions are reviewed and allocated; developing and implementing adequate grievance mechanisms that include legal support to communities; and promoting dialogue with farmers about shifting cultivation systems. At the community level it is also important to build legal awareness of land rights, and to identify options for incorporating local knowledge and customary management systems into development processes.

Finally, this study argues that to better deal with the integrated nature of upland land use and livelihoods, a landscape wide perspective that incorporates multiple strategies and allows for management flexibility, would help in developing better coordination of land management policies and practices. This entails approaches that devolve land use and management decisions to lower levels, especially the village level.





Figure 1. Map of Lao PDR

Source: Chamberlain (2008)



# 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 thematic 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 land, forests and fisheries that have, over time and use, gained social legitimacy and become embedded in the fabric of a society (Palmer et al., 2009). Although customary rules are often not written down, they are generally adhered to by local community members. Customary tenure exists amongst all ethnic groups throughout rural Lao PDR. It guides the use and management of a range of land types including: residential areas, lowland paddy, shifting cultivation and fallow areas, grazing areas, areas for orchards and gardens, short and long-term cash cropping land, sacred areas, cemeteries, forest areas and water bodies. Customary tenure arrangements apply to land types managed collectively and held privately by individual households or families.

This study is based on a review of relevant documents and interviews carried out with a range of stakeholders working on land issues in Lao PDR (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 the recognition of customary tenure in Lao PDR. However, future activities need to include and be driven by the views and priorities of customary land users.

The study consists of seven main sections. It begins with a broad overview of customary tenure practices among ethnic groups in Lao PDR. This is followed by a discussion of some of the changes underway in customary tenure systems resulting from various policies introduced over the last 30 years, and the impacts of these changes on vulnerable populations. The third section examines the extent of customary tenure and land formalization in the country. The recognition of customary tenure in Lao law is then explored, followed by a discussion of some of the difficulties faced in defending these legal rights. The final two sections explore opportunities for improving the recognition of customary tenure and outline recommendations for policy influence and community empowerment.

Annex 1 outlines key historical and more contemporary transitions in land relations that have shaped customary tenure in contemporary Lao PDR, while Annex 2 examines efforts to date to pilot communal land titling. Annex 3 and 4 provide information on the research scope and interviews.

# Customary Practices of Ethnic Groups in Lao PDR

Lao PDR officially recognizes 49 ethnic groups and 160 sub-groups. Chamberlain (2001), however, identifies over 230 ethnic groups or sub groups, pointing out that despite the geographic proximity between groups, the social and historical space may span thousands and even tens of thousands of years of independent cultural development. This ethnolinguistic diversity is broadly separated into four groupings. The Lao-Tai (Tai-Kadai) groups inhabit the lowlands and cultivate paddy rice. The Austroasiatic (Mon-Khmer), Hmong-Mien, and Tibeto-Burman groups make up about a third of the country's population and live in upland areas where they have traditionally practiced shifting cultivation (Chamberlain, 2001). The non Lao-Tai groups generally occupy the more remote mountainous regions, and constitute the majority of the population in ten of the 18 provinces in the country (Mann and Luangkhhot, 2008). The 2,291 villages classified as poor are mostly in these remote, mountainous areas (Rock et al., 2015).<sup>2</sup>

Customary arrangements reflect complex interrelationships between ecological and cultural systems. Along with the cultural diversity, there is also staggering agro-ecological diversity with over 13,600 varieties of rice, and a large variety of non-rice crops (Chamberlain, 2001). A poverty assessment carried out in 2000 in 43 districts and 84 villages throughout the country found this human and biological diversity was largely intact but increasingly under threat (Chamberlain, 2001).

The interrelations between culture and the environment are best understood holistically (Chamberlain, 2001). Changes in the external environment have multiple impacts on culture, livelihoods and customary practices. A holistic perspective also helps to understand the customary organization of the village or community as operating systemically, rather than as aggregates of separate individuals or families. For an individual who is part of this system, land tenure and property ownership is understood mainly in terms of their relationship to their extended family or clan, to their village and to their ethnic group, and concepts of district, province and state may only be loosely understood (Chamberlain, 2001).

Cultural factors and adaptations to local topography, climate, soil, forest type, etc. means that different ethnic groups may practice the same land tenure rights in one region, and these same groups may carry out different practices in another area (Chamberlain, 2001). There are also differences in cultural and social practices between sub-groups of the same ethnic group (Mann and Luangkhhot, 2008). Adaptation to the significant changes that have been underway over the past few decades makes it difficult to distinguish what is 'traditional' and what is not. This highlights the flexibility inherent in customary systems and the problems encountered when trying to determine what is 'typical' of any single ethnic group (Mann and Luangkhhot, 2008). It also explains the difficulties in fully describing the diverse customary practices that have evolved according to local conditions amongst the ethnic groups in Lao PDR.

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<sup>2</sup> One third of the population in upland areas is still below the poverty line, compared with about one fifth of the population in lowland areas (18.8%) (UN, 2015). See Annex 1 for a discussion on poverty in Lao PDR.

Despite state induced changes in land tenure and property ownership, customary practices still regulate relationships between men and women, households, and between ethnic groups (Mann and Luangkhot, 2008). Customary management of land and resources is determined through inheritance, marriage, labour, care for elders and other social relations (Mann and Luangkhot, 2008). In lowland areas, paddy land, residential land, and home gardens are transferred on marriage, death or divorce (Mann and Luangkhot, 2008). Among all ethnic groups, household and clan heads or village elders still play a significant role in resolving conflicts.

Although arrangements vary, it is common among all ethnic groups that customary authorities manage unassigned land and resources as common property (USAID, 2013). This allows flexibility according to the changing needs of different families. Communal areas include grazing land, forest and fishing areas, sacred forests, burial areas, and upland shifting cultivation land, including fallow areas. Forest areas are used for different purposes, often by several communities.

## Lao lowland customary land use

For the Lao-Tai groups which have historically inhabited the Mekong valley basins, the King traditionally owned the land and village customary rules governed its use (Ducourtieux et al., 2005).<sup>3</sup> Occupants had exclusive usufruct rights and were able to claim unoccupied land based on the principle of 'land for the tiller'. If the land became abandoned after a period of time, depending on its type, the user would lose all rights (Ducourtieux et al., 2005).

The Lao lowland ethnic group is matrilineal, meaning the husband moves in with his wife's family upon marriage (USAID, 2013). Generally, the youngest daughter stays in her parents' home after she is married to care for them in their old age. She then inherits the family house, and other parcels and moveable property is divided evenly among the other children (USAID, 2013).

## Ethnic minority groups

For a majority of upland ethnic groups nearly all economic production and decision-making is imbued with a religious component (Chamberlain, 2001).<sup>4</sup> Nature spirits control the weather and agricultural productivity and earth spirits guard the local territory (Chamberlain, 2008). Spirits are associated with particular places or locations, others are associated with the village and the household (Mann and Luangkhot, 2008). Buffaloes and rice varieties are also considered to have a spirit (Chamberlain, 2001). Spiritual dimensions regulate land access and use, and the groups' relationship to ancestral territory (Mann and Luangkhot, 2008). Rituals ensure balance between the spirit and material worlds which ensures the community's well-being (Chamberlain, 2008).

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<sup>3</sup> Estimates of the Lao ethnic group's share of the population vary from 30% to 60% (MRGI, 2007).

<sup>4</sup> Upland groups are animists, with the exception of the Mien and the Moun, who are Taoists (Chamberlain, 2001).

## **The Hmong**

The Hmong, which comprise approximately 9% of the population, are patrilocal and patrilineal (Lao Bureau of Statistics/MPI, 2015). They function according to clans (*seng*), the spirit of which protects clan members, their lives and property (Mann and Luangkhot, 2008). Hmong clans determine the boundaries of land and property rights, which are kept within the clan (Mann and Luangkhot, 2008). They also protect the role of men as transmitters or interlocutors of those rights (Mann and Luangkhot, 2008). As Hmong groups have migrated closer to urban centers and Lao-Tai villages, they have tended to move away from patrilineal traditions (USAID, 2013).

Typically settling in the highest upland areas, Hmong have had a reputation for preferring pioneer forms of shifting cultivation, and to be hard working and assertive in acquiring land and property (Mann and Luangkhot, 2008). Their religious and social structures are less related to the ecosystem and more autocratic, allowing for flexibility in the face of external changes, such as in the past relocating entire villages as part of their pioneer shifting cultivation practices (Chamberlain, 2008).

## **Austroasiatic (Mon-Khmer) groups**

Austroasiatic groups make up approximately 23% of the population, but 30% of farm households (MAF, 2014). They are considered bilocal with the married couple alternating between the wife and husband's parents' house before eventually forming their own household (Mann and Luangkhot, 2008). Shifting cultivation and accompanying rituals are the foundation of these groups' culture, and they have been described as being "a part of" rather than "apart from" the surrounding ecosystem (Chamberlain, 2008:61).

For the Khmu<sup>5</sup> (11% of the total population) as for other Austroasiatic groups, land belongs to the spirits and permission to use it is required at each step. Ritual ceremonies require considerable expenditures of livestock and rice for rice wine (Chamberlain, 2008). Even when villagers face hardship they continue to perform traditional cultural and religious practices and have shown that ceremonial responsibilities are not readily amenable to change (Chamberlain, 2008).

Khmu relationship to the spirits regulates communal ownership and use of land and resources. Under the guidance of the elders, villagers are generally free to use resources in their territory and traditionally negotiate amongst themselves over which areas to use for shifting cultivation. Households retain use rights to these areas during production (Mann and Luangkhot, 2008). Collective land use allows the family to adapt to changing circumstances, for example, allowing expansion or reduction of the cultivated area according to household size (Mann and Luangkhot, 2008). In times of shortages, rice may be borrowed from clan members or kin. Labour has also been traditionally exchanged on a reciprocal basis during busy times. This maximizes productivity, especially in shifting cultivation communities where labour is often limited. Because of the ritual nature of shifting cultivation amongst Austroasiatic groups, the government's prohibition of it and programmes to relocate populations to the lowlands has often led to socio-cultural dislocation and poverty, and impacts to the ecology of the local area (Chamberlain, 2001).

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<sup>5</sup> The Khmu are the largest minority group in the country comprising 11% of the population (Mann and Luangkhot, 2008)



Table 1 below gives an indication of the diverse mix of livelihood activities customarily practiced by rural Laotians. This diversity of livelihood strategies explains the “subsistence affluence” of villagers throughout the country who have traditionally been able to live outside the monetized economy (Chamberlain, 2008:19). People did not think of themselves as poor, and poverty, following its conventional definition, has never been “an original condition for the peoples of Laos” (Chamberlain, 2001: 40). This highlights the importance of understanding the farming systems and the customary practices on which these are built (Chamberlain, 2001).

**Table 1. Customary livelihood strategies**

Land use/ livelihood activity*	Comments
Agriculture for home consumption and sale	Lowland rice (wet and dry season), upland rice, vegetable gardens, other crops including coffee, cassava, bananas, papaya, pineapples, pepper, fruit trees, tea, soy beans, mung beans, corn, sugar cane, peanuts, rubber, mak kachiap (rosella).
Domestic livestock	cows, buffaloes, pigs, poultry, goats.
Crops grown in the upland shifting cultivation field	squash, calabash, gourds, corn, Chinese cabbage, yams, taro, sweet potato, other tubers, watermelon, Lao melon, sesame, job's tears, pigeon pea, peppers, chili, long bean, lablab bean, cucumbers, egg-plants, onions, garlic, galingal, ginger, basil, lemongrass, sugar cane, tobacco, cotton, hemp, kanaf, kapok, bananas, papaya, mango, limes, pomello, jackfruit, coconut, starfruit, mark yam (gooseberry), several varieties of bamboo.
Forest products for home consumption and sale	mushrooms, honey, forest vegetables, fruit, broom grass, palm hearts, bamboo shoots, rattan, bamboo grubs, eaglewood, tea, malva nuts, wild tubers (important during rice shortages), condiments and medicinal products (cardamom, malva nuts, etc.), fibre and bark products (khem grass, paper mulberry bark (Broussonetia), etc.), inputs for the chemical and perfume industries (benzoin, peukmeuak, resins and oleoresins (damar and dipterocarpaceae resin), lamxay, etc.), medicinal plants, etc.
Wildlife	wild pig, rodents, squirrels, barking deer, mouse deer, wild chickens, other birds, monitor lizards, other reptiles, etc.
Aquatic resources	fish, frogs, crabs, snails, shrimps (aquatic resources are particularly important for the poor with few livestock and who can't afford to buy meat).
Handicrafts	Various
Labouring	as available

\*The particular mix of livelihood activities will differ according to the local resources.

Source: Chamberlain (2001); MAF (2014); Ling et al. (2016).

## **Traditional concepts of territory**

An important distinction can be made between the Lao Tai and Hmong, and the Austroasiatic groups in terms of customary political organization (Dommen et al, 2017). Prior to 1975, the Lao Tai and the Hmong had a political hierarchy and stratified social structure. Nobility, which presided over several communities or villages, owned the land and had the right to request services from commoners. The Hmong also maintained a social organization with a king and sub-chiefs. Clan heads managed village level affairs but the larger social organization was able to be mobilized for military purposes.

The Austroasiatic groups, on the other hand, were led by a traditional village leader and had no political structure beyond the village. Communities traditionally respected and recognized the use zones and resource claims of their neighbours (Siedel et al., 2007). This demonstrates the importance of the village over the ethnic group for land and property rights and as a social, political and economic unit. The village institution mediates the relationship of its members to natural resources (Mann and Luangkhot, 2008). This partially explains the ability of the Hmong to defend their interests, and the difficulty for the Austroasiatic groups to unite in larger groupings.

# Changes in Customary Tenure Systems

Over the past 30 or more years, customary tenure systems have come under significant pressure from a number of policy initiatives including the land and forest allocation programme (LFA), compulsory resettlement and village relocation, the promotion of cash cropping, commercial plantations and agribusiness development through large-scale land concessions and contract farming (Kenney-Lazar, 2015a; see also Annex 1)<sup>6</sup>. These have contributed to decreased access to land and natural resources and food insecurity. Local communities have often lacked knowledge and understanding about their new “land rights” and responsibilities under these policy initiatives (Mann and Luangkhot, 2008). Frequent changes in legislation and multiple overlaps and interpretations of laws have further served to undermine both customary and statutory systems (Mann and Luangkhot, 2008).

The LFA programme was originally intended to secure village land and forest resources through land use planning in order to counter illegal logging by provincial and district actors (Chamberlain, 2001). LFA delineated village boundaries, zoned land into forest, agricultural and other land uses, and formally allocated agricultural land at the plot level to village households through the issuing three-year temporary land-use certificates (TLUCs). LFA also facilitated the taxation of farmers (Ducourtieux et al., 2005)<sup>7</sup>.

Unfortunately, the original intention of FLA became diluted by adding to it a programme to reduce shifting cultivation, as well as village relocation and consolidation (Chamberlain, 2001). Formalizing agricultural land use rights in upland areas became a matter of separating agricultural from forest land, with portions of the latter slated for protection. To manage forest resources, land use was ‘stabilized’ by turning shifting cultivation areas into controlled reserves. The programme’s objectives thus became the sustainable management and use of natural resources (particularly forests), reduction and elimination of shifting cultivation, and the promotion of commercial cash crop production (Chamberlain, 2001). The Ministry of Agriculture and Forestry (MAF) became the agency responsible for implementing the National Programme for Shifting Cultivation Stabilization. However, local officials did not implement the LFA uniformly across the country, leading to further complications.

One outcome of the LFA is that it led to lowlanders clearing forests in the uplands to gain temporary land use certificates, while upland villagers moved their shifting cultivation areas to more remote lands away from sanction by officials in order to produce enough rice (Chamberlain, 2001). Along with a resulting shortage of swidden land for cultivation, the requirement to limit fallow periods to three years did not allow for adequate soil and forest rejuvenation, resulting in reduced yields and erosion (Chamberlain, 2001). LFA, therefore, strengthened tenure security for wealthier lowland paddy farmers, but significantly reduced access to land for upland shifting cultivators since much of their fallow lands became classified as state forest land (Ducourtieux et al., 2005).

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<sup>6</sup> Other factors impacting on customary tenure systems include powerful actors buying/fencing/holding agriculture land areas for future development, as well as farmers selling their land to town dwellers for speculation (MPI, 2015).

<sup>7</sup> Increased revenue from property taxes resulted in an income in 2001 of 2 million USD (Ducourtieux et al., 2005).

The village consolidation policy, formalized by Party Directive 09 (2004),<sup>8</sup> has also severely impacted on upland communities and disrupted customary tenure systems. This policy, which called for resettling remote communities into consolidated village clusters, was intended to increase villagers' access to health, education and other services to alleviate poverty and accelerate economic development (Chamberlain, 2008; Mann and Luangkhot, 2008).<sup>9</sup> Before the moratoria on concessions was announced in the late 2000s (see Annex 1), this policy was widely used by provinces and districts to authorize concessions to turn land into capital to speed up national development, and to resettle villages (Mann and Luangkhot, 2008).

While LFA and village consolidation may have had good intentions, they resulted in the opposite of what was intended (Chamberlain, 2008). Policies to prevent illegal logging and preserve forests actually harmed ecosystems (Chamberlain, 2008). Rice shortages left villagers with no alternatives other than traditional coping strategies such as harvesting wild tubers, or overexploiting forest resources (Chamberlain, 2001).<sup>10</sup> Relocation also created trauma, and high incidences of disease and mortality were reported (Hirsch and Scurrah, 2015; Chamberlain, 2008). It also resulted in two or more ethnic groups inhabiting the same village, and in these scenarios the Lao-Tai groups are almost always found to be better off than any of the others, and Hmong-Mien are almost always better off than Austroasiatic groups (Chamberlain, 2001).<sup>11</sup> The poorest groups in the lowlands are often those that have been resettled from the mountain regions (IWGIA, 2015).

Replacement of customary systems also reduces communities' willingness to take responsibility for land management or participate in land use planning in the new resettlement areas. Abandoned areas are left empty, allowing illegal logging or the conversion of forest land to rubber plantations by outside interests (Chamberlain, 2008). Government agencies such as the District Agriculture and Forestry Office (DAFO) have not been able to ensure the same land management oversight as local villagers under customary systems (Mann and Luangkhot, 2008).

Reduced access to land and resources in turn transforms community cooperation to competition. This has resulted in the family, rather than the clan or village becoming the unit of focus (Mann and Luangkhot, 2008). Reducing community cooperation has also weakened social safety nets which supported more vulnerable community members (Mann and Luangkhot, 2008). Simply put, many villages perceived land allocation as "less fair and less efficient than traditional land use practice" (Mann and Luangkhot, 2008:45).

Customary tenure systems are further disrupted when people abandon their traditional religious values and appreciation of natural systems, and engage in competition for scarce forest products and wildlife (Chamberlain, 2008). Cultural checks and balances and ecologically sound livelihoods

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<sup>8</sup> Directive 09 defines a village in mountainous areas as more than 200 people, in lowland areas as more than 500 people, and in urban areas as more than 1,000 people. Two to three adjacent villages are merged into one. Village clusters (*kum-ban*) are then formed by merging five to seven villages into one administrative unit. This can include up to 21 villages clustered into one *kum-ban* and its merged administration (*kum-ban patthana*) for technical services consolidation (Mann and Luangkhot, 2008).

<sup>9</sup> Nearly 900 villages have been resettled to date. This constitutes around 10% of villages in Lao PDR, and 19% of upland villages (MAF, 2014). The government proposes to undertake resettlement of over 300 more villages in the future (MAF, 2014).

<sup>10</sup> Villages that had been relocated from the uplands to lowlands in Louang Namtha and Sekong provinces produced considerably less rice and high levels of morbidity and wasting amongst children were reported (Kenney-Lazar, 2015a).

<sup>11</sup> This is partly because lowland Lao are often appointed as village heads and the village is asked to adopt Lao culture and agriculture, and learn Lao language (Insouvanh, 2010).



are replaced by high risk, ecologically destructive alternatives (Chamberlain, 2008). Village land zoning has often not accounted for traditional land use and has caused serious confusion among ethnic groups and local authorities over who has rights over what (Mann and Luangkhot, 2008). When a village is relocated or assimilated, key aspects of customary land management and knowledge are lost and elders' roles in regulating land use become meaningless.

Alternatives offered have generally not been successful. Land provided to families for paddy cultivation has often not been able to be cultivated due to poor soils or lack of water (Chamberlain, 2001). Participatory poverty assessments (PPA) have shown that villagers are not adverse to change, prioritizing access to land and assistance with livestock raising, irrigation for paddy expansion, cash cropping, roads, water supply, hospitals, agricultural extension services and education (Chamberlain, 2001 and 2008).

Programmes such as land titling that could assist communities to strengthen tenure security over their customary lands have also been slow to expand to rural areas. A land titling programme that began in 1997 with World Bank and AusAID support, focused on urban and peri-urban lowland areas, partly because World Bank safeguard policies meant delays and complications if titling was to be undertaken in communities that fit the World Bank's definition of indigenous peoples (Rock et al., 2015). In the absence of titling, particularly in upland areas, land holdings have instead been formalized through land concession agreements the government has made with domestic and foreign investors for agribusiness and plantations, hydropower and mining (see Annex 1). The allocation of land concessions which accelerated in the mid-2000s, have come into conflict with customary uses of village production land, forest, fisheries and grazing areas, reducing access to land and natural resources and contributing to food insecurity.

A further significant change over the last 20 years is increased monetization of village economies. Families now hire other villagers instead of the customary practice of sharing labour. This is particularly the case in resettled villages (Mann and Luangkhot, 2008). Land shortages and higher land prices also reduce communities' willingness to cooperate and share land (Mann and Luangkhot, 2008).

Increasingly, land is viewed as a commodity and used as collateral for loans or to sell. Sometimes it is the only source of funds for families. Land shortage forces resettled households to find land to buy and or rent.<sup>12</sup> Mann and Luangkhot (2008) found that richer households bought land and poorer households rented it and paid the land tax. To prevent tenants from claiming the land by using tax documents as evidence, landowners regularly changed tenants. This meant poor resettled villagers often had to find new land to cultivate each year.

Rapid price increases also tended to price out even the more prosperous resettled villagers from the land market (Mann and Luangkhot, 2008). Land sales have been occurring both with tax documents and TLUCs, even if they had expired, and without documentation (Mann and Luangkhot, 2008). Village chiefs and witnesses have been used to validate claims over land without documentation. In some cases, this has allowed the secret selling of a neighbour's land, even in villages which have not been relocated (Mann and Luangkhot, 2008). This penalizes vulnerable members of ethnic groups who are less familiar with the functioning of land markets.

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<sup>12</sup> For example, out of 65 Austroasiatic villages in the 2006 PPA, only 19 were cultivating more than an average of one hectare per household. Only seven out of 28 villages cultivating lowland rice averaged more than one hectare per household (Chamberlain, 2008).

In recent years, the predominance of contract farming has also contributed to tenure insecurity. In one case in Savannakhet Province, company representatives (in the presence of government officials) encouraged farmers to borrow 20 million kip (2,500 USD) from the government's Policy Bank to plant cassava.<sup>13</sup> For a fee of 50% of these funds, the company assisted farmers to prepare cassava fields and provided seedlings, promising to buy the cassava. Farmers were told they would be able to pay back the loan within two to three years. However, poor yields meant farmers were unable to pay back their debt. A government study of this case notes that "farmers were exploited badly and in-debt while the firm was not responsible for damages" (NERI, 2014; 6).<sup>14</sup>

This demonstrates poorer farmers' vulnerability to losing their land through engaging in high-risk agricultural practices such as relying on a single cash crop rather than diverse livelihood activities. In the expectation of making a lot of money from cassava, families often stop growing rice or harvesting non-timber forest products (NTFPs). Falling prices of cash crops such as rubber, for example, has pushed farmers into debt and forced them to sell their land in northern Lao PDR (Vonvisouk and Dwyer, 2017; Kenny-Lazar, 2015a). Better off farmers, on the other hand, are able to benefit most from increased commercialization of land and agricultural production through contract farming and other arrangements. They are also able to claim a larger share of the customary land and have more influence over decisions about contract farming arrangements. Given the boom and bust cycle of cash crops, contract farming arrangements would be much more manageable for poorer farmers if other traditional livelihood activities were also maintained.

Cash cropping is further transforming customary social systems, including livelihoods and economic arrangements. There are many cases of contract farming creating intra-village conflicts (Interview 10, 2015). Even government studies are questioning whether many forms of contract farming are environmentally sustainable, concluding they "may not outweigh the economic costs to the country" (NERI, 2014: 11). Perhaps in recognition of this there has been a recent shift in approach in the uplands by the government to emphasize food security (Kenny-Lazar, 2013).

### **The importance of customary tenure for marginalized groups, women and youth**

Despite the changes described above, in the absence of other forms of tenure security, customary tenure continues to be the basis of livelihood security and culture for a majority of the Lao rural population. Customary land is particularly important for vulnerable sectors of the population, most notably ethnic minorities, women and the poor. Communal forests, grazing land and fisheries provide an important social safety net because they ensure access to critical resources for all members of a community. This is particularly the case for women, who play significant roles in agriculture. Traditionally, women manage the marketing of agricultural products and livestock, and more recently 81% of rural women contribute to agricultural export (Russell et al., 2015).

Resettlement, loss of traditional lands to concessions, land and forest allocation or prohibitions around shifting cultivation, have disproportionately impacted ethnic women who end up having to

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<sup>13</sup> It may only cost around 5 million kip to cultivate and prepare the cassava cuttings (Interview 10, 2015).

<sup>14</sup> In other contract farming arrangements, villagers in Louang Namtha complained bitterly about a Chinese rubber company taking 70% of all profits, while villagers provided land and labour (Chamberlain, 2008). This arrangement was promoted by the district government to alleviate poverty. These same terms were also found in Oudomxay Province (Chamberlain, 2008).

work more for less (Chamberlain, 2001). The restriction to three-year fallow periods for shifting cultivation, for example, resulted in weedier, less productive fields, which increased women's workload.<sup>15</sup> Women from Austroasiatic groups are found to be the most vulnerable to disruptions in shifting cultivation systems because their social structures are so intimately attached to this form of land use (Chamberlain, 2008).

Coping strategies to compensate for reductions in rice production such as selling livestock, over-harvesting of forest products and wildlife, and becoming wage labourers, have also increased the vulnerability of some groups through loss of savings, loss of hedging or back-up systems, and loss of dignity and cultural pride (Chamberlain, 2001). A study in Savannakhet Province highlights the dependence on livestock and forest resources as key buffers for rural people in times of food shortage, thus confirming the importance of customary tenure for securing livelihoods of marginalized communities (Russell et al., 2015). The study compares a village that still has access to forests, with two villages that have lost their forest areas to concession companies. It shows that households in the village with forest could, in times of trouble, sell their livestock and maintain their income for 3.6 years (Russell et al., 2015). In the two 'concession villages', households are more reliant on cash income, mainly wage labour, and the sale of livestock only provided 12-14 months of income (Russell et al., 2015). The concession villages were more reliant on natural resources for cash income, while the village with forest relied on resources for non-cash purposes. In the context of climate change, forests for sustenance and income are less affected by drought or other extreme weather events than relying solely on agricultural crops (Russell et al., 2015).

Other studies have shown that women are less able to find paid off-farm work than men because they do not have time or the social networks needed (Kenney-Lazar, 2015a). Given that poverty is more common in the uplands, ethnic rural women clearly experience the greatest marginalization and poverty (IWGIA, 2015). Landless households constitute another vulnerable group which heavily depends on continued access to customary land and resources, particularly communal land and forests. Sources differ on the total number of landless households in the country, ranging from around 1% (MAF, 2014) to 15% (UN, 2012).<sup>16</sup>

Loss of traditional land and forests has also affected young people from poor households who are not able to attend school because their labour is needed to secure food for the family (Chamberlain, 2008). This particularly affects ethnic minority students who face the extra challenge of learning in a second language. More young people are leaving their communities to find work in the cities and in Thailand.<sup>17</sup> However, limited education means they are vulnerable to various forms of exploitation and generally only able to find low paid labouring work. The departure of the young from rural villages contributes to the disintegration of the village as a social, cultural and economic entity (Chamberlain, 2001). While many return, out-migration of rural youth is an important consideration in future efforts to strengthen customary tenure systems.

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<sup>15</sup> The 2006 PPA found that reduction in soil fertility and weed problems related to land allocation and resettlement increased women's work load by up to 600% (Chamberlain, 2008). LFA also led to decreases in yields from shifting cultivation of over 60% (Chamberlain, 2008).

<sup>16</sup> The number of landless households tripled from 16,000 in 1999 to 46,000 in 2011 (MAF, 2014). Causal factors include population growth, increasing pressure on agricultural land, the loss of land to concessions, the threat of unexploded ordnance limiting agricultural expansion, and tenure insecurity leading to vulnerability and land loss (UN, 2012).

<sup>17</sup> In Lahu Shi village, Louang Namtha Province, the population reduced from 245 to 122 as a result of disease following relocation. The village did not sell things in the market because they were ashamed of their ability to speak Lao, and fifteen young girls from this village had left to become prostitutes in neighbouring areas such as Viengphoukha (Chamberlain, 2008).

Important links have also been noted between land tenure insecurity and food insecurity (Kenney-Lazar, 2015a). Statistical analyses have demonstrated a link between malnourished children and households with less than two hectares of arable land, and between ethnic groups with lower levels of land ownership and food insecurity (Kenney-Lazar, 2015a). Despite impressive increases in economic growth in Lao PDR over the past decade, the rate of stunting among children under five has remained at 44.5% (National Nutrition Committee, 2015; MoH, 2016).<sup>18</sup>

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<sup>18</sup> A UNICEF/EU survey in 2015 revealed stunted rates of 51% in the North, 38% in the Centre, and 47% in the South of Lao PDR (MoH, 2016)



## The Extent of Customary Tenure and Land Formalization Processes

Although Lao PDR is often thought of as a land abundant country with a small population, agricultural land makes up only 10.3% of the total land area (USAID, 2013).<sup>19</sup> Rural Laotians use most of the country's land for cultivation, foraging, and raising livestock (Kenney-Lazar, 2015a). The government has tried to determine the extent of customary land as part of land reform efforts since the 1990s, but it is impossible to know exactly how much land is held under customary tenure arrangements (Kenney-Lazar, 2015a).

The first attempt at clarifying customary land rights was the LFA programme. Following land allocation, TLUCs for individual plots were distributed for agriculture and degraded forestland (USAID, 2013).<sup>20</sup> By 2006, when the programme ended, LFA had taken place in around 50% of villages in Lao PDR (MAF, 2014).<sup>21</sup> Over 330,000 households (about half of all rural households) received TLUCs (USAID, 2013).<sup>22</sup> Budget constraints, however, slowed implementation and TLUCs have now all expired (USAID, 2013).

Land titling has been a further attempt to clarify customary land claims but to date has mainly focused on urban and peri-urban areas. From 1996 to 2009 around 650,000 parcels were registered across 11 provinces (Rock et al., 2015). Since 2010, due to limited national budget, only an additional 156,000 parcels have been registered, still mainly in urban areas, national development project zones, or as part of sporadic registration (Rock et al., 2015). By November 2014, around 806,000 land titles had been issued (Rock et al., 2015).

In rural areas *ad hoc* sporadic land titling has taken place for the better-off who need a title and can afford the higher cost of titling a single parcel (Kenney-Lazar, 2015a; Rock et al., 2015).<sup>23</sup> However, based on a narrow definition of a 'land holding', official statistics indicate that a further 5 million ha or 2.6 million plots still need to be titled (Dwyer et al., 2014). Given that official estimates of land parcels are likely to be less than what rural villagers actually use, the area to be titled could be considerably larger (Dwyer et al., 2014). Rural people often prefer not to declare

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<sup>19</sup> MoNRE plans to allocate 19% (44,992km<sup>2</sup>) of the total land area for agriculture.

<sup>20</sup> A TLUC could be converted to a permanent land-use right over time; however the law provided no clear mechanism for this.

<sup>21</sup> The MAF *Forest Strategy to the Year 2020* states that by 2005, FLA had been carried out in 7,130 villages throughout the country (Kenney-Lazar, 2015a).

<sup>22</sup> Land allocation has been implemented in a high proportion of villages in the Northern provinces of Xayabury (97%), Oudomxay (94%) and Louang Namtha (73%), and the Central provinces of Borikmxay (89%), Bokeo (82%) and Vientiane Province (71%) (MAF, 2014).

<sup>23</sup> Rock et al. (2015) report that the title fee per parcel is 30,000 kip (3.75 USD) in urban areas and 15,000 kip (1.87 USD) in rural areas. This is in addition to a survey fee charged by the square metre. For an average rural household in mountainous areas with a house plot of 1000m<sup>2</sup> and two agricultural plots of 4,000m<sup>2</sup> and 1,000m<sup>2</sup>, the total cost of surveying and issuing the title is around 220,000 kip (27.5 USD). For titling in plateau and lowland areas the cost can easily double. In addition, depending on local district regulations, "admin fees" are charged for the land registration and issuing of titles. Further costs are incurred for boundary markers, which are required for construction land and smaller agricultural plots (Rock et al., 2015).

their land to avoid paying taxes and penalties for defying government policies to eradicate shifting cultivation (Kenney-Lazar, 2015a). Rock et al. (2015) estimate the total number of plots in the country yet to be registered at 4.2 million, based on credible estimates that assume an average of 1000 parcels per village in urban and peri-urban villages, and an average of 300 parcels in rural villages.<sup>24</sup>

Estimates also vary on the number of people practicing, and the area used for, shifting cultivation. In 1989, before major land and forest allocation, the government estimated 1.5 million people to be involved. More recent government figures of the land area used for shifting cultivation range from 500,000 ha (2005) to 80,000 ha (2010). These figures tend to be lower than those of independent researchers.

Johansson and Eklind (1996) report that around 40% of the population practiced shifting cultivation, while statistics from 2000 estimated 25% of the rural population (150,000 households) to be involved, covering 80% of the upland agricultural land when fallow land was included (Higashi, 2009). Kenney-Lazar (2013) estimates the shifting cultivation area to range from 1.4 to 2.5 million ha and to involve 1-1.9 million people. According to the 2010/11 Lao Census of Agriculture, upland rice (presumably from shifting cultivation) makes up 22% (215,000 ha) of the total of 987,000 ha of planted rice (MAF, 2014).<sup>25</sup> Estimates using remote sensing data offer estimates ranging from 4,864,000 ha (1994) to 6,500,000 ha (2009) with 943,000 people dependent on shifting cultivation in 2009 (Kenney-Lazar, 2013).

Estimating customary grazing and forest land areas is equally difficult. Seventy nine percent of farm households with large livestock rely on natural pasture (MAF, 2014); however, grazing land often comprises multiple use areas. The number of large livestock (buffaloes and cows) compared to the limited amount of natural or planted grasslands, suggests the majority of livestock nutrition comes from grassy vegetation in forestlands managed under customary arrangements (Russell et al., 2015). Smallholders produce over 95% of all livestock (Russell et al., 2015).<sup>26</sup>

For forest areas, most villages in Lao PDR have access to village/community forests, which include production/use forests, protection forests (water resources, riverside and roadside forests), conservation forests (spirit and cemetery forests) (MAF, 2014). As well as contributing to household food security and income, NTFPs collected in communal forest areas are particularly important during the lean months preceding the harvest and during drought years, providing insurance for rural households (Russell et al., 2015). In 2009, a rural Lao family on average consumed USD 280 worth of NTFPs per year (MAF, 2014). This is significant given per capita GDP in 2009 was USD 880. In 2010, the total value of NTFPs was estimated to be 510 USD million or nearly 10% of GDP (Russell et al., 2015).<sup>27</sup> Reliance on wild meat as a source of protein

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<sup>24</sup> According to the 2015 census, Lao PDR has 8,507 villages, down from 10,052 in 2005. This includes 1,469 (17%) villages considered urban (Lao Statistics Bureau/MPI, 2015).

<sup>25</sup> Collection inaccuracies need to be taken into account for this census data, especially in remote upland areas where families are either not able or prefer not to reveal the full extent of their shifting cultivation practices (Kenney-Lazar, 2013).

<sup>26</sup> Nine out of 10 rural households keep livestock (Russell et al., 2015). Rising prices have increased the livestock component of agricultural GDP over the past 10 years accounting for 30% of annual household cash incomes in the country and 50% in the uplands (Russell et al., 2015).

<sup>27</sup> This included 383 million USD (75%) for subsistence use and 127 USD million (25%) for cash income.

is also high with up to 20% of some groups' meat coming from the wild (Russell et al., 2015). Households with the highest rates of malnutrition are the most reliant on wild food and their own rice production (Russell et al., 2015). This highlights the importance of secure tenure over communal land and forest areas, particularly for the poorest members of Lao society.

The above shows the extent and range of land types and resources managed under customary arrangements in Lao PDR. More difficult to determine is the extent of customary land that overlaps with state land and concessions, and users' security of access.

## The Recognition of Customary Tenure in Lao Law

The Constitution (amended in 2015) defines Lao PDR as a multi-ethnic country and enshrines equality and the right of all ethnic groups to protect and promote customs and traditions (Article, 8). Following Article 17 of the Constitution and Article 3 of the 2003 Land Law, land and natural resources belong to the national community and are managed by the state, with the right to devolve user rights to individuals, families, state and economic organizations. Importantly, the recently approved Resolution of the Party's Central Committee on Land Management and Development (herein referred to as the Party Resolution on Land (Aug 2017) proclaims, "the state must continue to recognize and protect land use rights held by individuals, entities, collectives and the customary land rights of the people.."

Articles 16 and 17 of the Constitution, as well as a range of legal instruments, mandate the state to protect property rights, which include possession, use, usufruct, disposition and inheritance.<sup>28</sup> This raises a key issue at the heart of recognizing customary tenure: the tension between the constitutional rights of Lao citizens to use, transfer and inherit land, and the state's right to manage it (Hirsch and Scurrah, 2015). As discussed in previous sections, the state can grant individuals and organizations short-term (three year) use rights in the form of Land Certificates (2003 Land Law, Article 18 and 48), or permanent use rights in the form of a land title (2003 Land Law, Article 49).

A MoNRE Ministerial Direction on Land Registration and Land Titling (No. 6036/MoNRE, 2014) recognizes the "traditional right to use" land occupied in a continuous manner for a long time (Articles 2.1, 1.4), with validation from the village chief and neighbours. Ministerial Instructions on Adjudications Pertaining to Land Use and Occupation for Land Registration and Titling (No. 564/NLMA, 2007) provide for the recognition of land ownership rights following testimony from the Village Chief and at least four neighbouring landowners. Article 26 of Decree 88 on the Implementation of the Land Law (2008) also recognizes customary land-use rights including those of the village community. However, the fact that so many villages in Lao PDR have been resettled since 1975 means the recognition of customary tenure rights based on long time occupation is complicated. There have been internal government debates about the length of occupancy and how this affects land claims, but no legal guidelines have been issued regarding this.<sup>29</sup>

For the recognition of customary communal land rights, MoNRE Direction No. 3036 (2014) distinguishes between collective land (*din luam mu*) or land belonging to a group of people within a "collective, production unit, or association", from communal land (*din xoum xon*) which is "commonly owned by a village or ethnic group." The term "communal land" is often applied in the context of "traditional" (MD No. 6036, 2014) or "customary" land-use rights by entire communities (draft Land Law, 2015). Collective land is also defined in Article 3 of PM Decree No. 88 on the implementation of the Land Law (2008) as "land that the state has granted the right to collectively use by villages, organizations and state organizations, as specified in Article 59 of the Land Law." Collective/communal land is also defined in Ministerial Instruction 564/NLMA (2007) on

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<sup>28</sup> Under Article 17 of the Constitution (2015) "The state protects property rights (rights to process, use, usufruct, dispose) and inheritance rights of individuals, legal entities and organizations in accordance with the law. The land, materials, water, air, forest, non-timber forest products, aquatic animals, wild animals and other natural resources shall be under ownership of the national community in which the state is the representative and is charged with concentrated and uniform management throughout the country in accordance with the law."

<sup>29</sup> Source: Ministerial Technical Meeting, Rusamy Hotel, 21-22 March 2013, based on National Assembly Agreement No. 022/NA, 6 March 2013.

Adjudication of Land Occupation Right for Issue of Land Title, as land belonging to cooperatives and communal organizations or village lands commonly used by groups of people or ethnic groups in a village.

The Party Resolution on Land (Aug 2017) officially adopts the term ‘collective’ land or land use right. MoNRE has explained that the approval committee decided to discard the term ‘communal land’ in favour of ‘collective land’ but that it would retain the same meaning as ‘communal land’. However, no definition of collective land or collective rights is provided in the Party Resolution on Land, and there is no mention if collective land is eligible for titles. Nevertheless, it is expected that this will be detailed in the new Land Law, now under revision.

According to the draft Land Law (July 2015), communal land titles include the right to protect, use, usufruct and inheritance but not the right to transfer, e.g. by sale, exchange, handover or bestowal (Article 39, draft Land Law). Eligible land for a communal title, as described in Ministerial Direction 6036/MoNRE (2014), includes village use forests, communal tree plantation areas, agricultural land, ponds, grazing land, cemeteries and ceremonial grounds, sacred or spiritual forests as well as reserved land for future use and allocation. Communal titles may be issued to one or several villages when larger areas are managed jointly (Article 1.3 and 14).<sup>30</sup> There is still much uncertainty about what the detailed content of the new Land Law will be, or when it might be passed.

Legislation also protects the rights and interests of farmers (Article 4, Agricultural Law 1998), including the right to “transfer and succeed to [ownership rights in respect of] agricultural activities” (Article 10). The Decree on State Land Lease or Concession also states that “Agricultural land for growing rice or annual crops must be preserved for the farmers” (No. 135/PM, 2009, Article 43). Customary rights are normally recognized over private land through evidence of use and occupation, such as a land survey certificate (LSC) or a land tax receipt and/or through verification by neighbours.<sup>31</sup> In lowland areas, there are few cases of people being dispossessed of their paddy areas, or if villagers lose them it is more possible to negotiate their return (Interview 11, 2015). In upland areas, the payment of land tax means a *de facto* official acceptance of rights even over shifting cultivation fields.

Rights to compensation provide further legal recognition of customary tenure rights. In Lao PDR, compensation for involuntary acquisition of customary land and other assets has mainly been determined on a case-by-case basis, with investors and local authorities playing a key role in determining how local forms of tenure are interpreted and the compensation amount. A main reason for this is that many government officials have considered Decree 192 (2005) on Compensation and Resettlement of People Affected by Development Projects, as being cumbersome and expensive for developers. This decree was a condition of World Bank financing for the Nam Theun 2 hydropower project and led the government to adopt international resettlement and compensation standards. For example, Article 5 of Decree 192 considers all individuals and entities residing or making a living within the area as project affected persons and eligible for compensation, including people not living in but with land and buildings in the project

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<sup>30</sup> A communal/collective title seems also possible for a hamlet (sub-village), or ethnic group associations (Rock et al., 2015).

<sup>31</sup> Ministerial Instructions on Adjudications Pertaining to Land Use and Occupation for Land Registration and Titling (No. 564/NLMA, 2007, 4.5) state that “the Adjudication Unit will consider the evidences about the land parcel as: LSC, Agricultural Land Certificate with the Certificate of the Development [of the land parcel], the Land Tax Declaration, the receipt from the payment of the Land Tax.”



area. Compensation is required to be paid for loss of use rights plus loss of assets at replacement cost (Article 6). In particular, the requirement to compensate (and to ensure affected persons are not worse-off) applies to affected persons who do not have a legal TLUC or other proof of land-use right. Replacement land is to be provided with secured land titles and certificates and host communities are also to be compensated (Article 10). Cultural practices and beliefs are to be taken into account (Article 11) and effective grievance mechanisms are required to be established (Article 13).

Over the past ten years, implementation of Decree 192 has been patchy. Prime Ministerial Decree 84, issued in April 2016, is supposed to address inconsistencies in the implementation of compensation, but suggests a lowering of standards. Among these is the requirement for documentary proof of land use rights in order to qualify for compensation.

## The recognition of customary tenure over forest areas

Customary use rights of forests are recognized in the Order on Customary Rights and the Use of Forest Resource (1995), the Order on Traditional Uses of Forests (No. 0054, 1996), the 2007 Forestry Law and in a number of ministerial instructions and directives.

Article 2 of the Order on Traditional Uses of Forests (1996), defines customary rights as “those rights and obligations held by an individual, a group or a community which have their root in custom... generally not written, customary rights are nonetheless true rights that exist on their own merit. Thus they have the force of law according to the land and legal doctrine of most, if not all, states.” Article 3 of the same 1996 Order, and Article 2 of the 1995 Order on Customary Rights and Use of Resource further clarify that customary practices are constant and regular over time (at least one generation of 20 years), are general and widespread within the group or community, and are seen by the individual, group, or community as creating rights and obligations among themselves.

Order 1995 and the MAF Order No. 0054 (1996) outline permitted customary uses of forests, forest land and forest products without the need to obtain a permit from MAF. Rights inside village forests areas include: harvesting products for the community's needs as specified in a Village Forest Management Contract, sustainably harvest abundant products for sale, obtain with the consent of the village committee a plot for shifting cultivation set aside for that purpose and a plot of forest land (2-5 hectares) for forestry purposes, hunt non-protected animals and fish by legal means, form a user group for the harvesting and selling of non-wood products, and prevent outsiders from harvesting products (Customary Rights, 1995, Article 9). Customary use rights outside village forest areas can apply for fishing and hunting by legal means, obtaining a plot for shifting cultivation, tree plantation or other allowed activity, gathering forest products not protected by law for community use or for sale (Customary Rights, 1995, Article 10). Villagers are also exempt from natural resource taxes (Order No. 0054/MAF, 1996). This Order also allows for harvesting resources specified in district forest management contracts for sale (Schneider, 2013).

The Forestry Law (2007) uses the term “customary utilization” which follows earlier legal definitions of long-term use of forest and forest products (Article 42). It also categorizes the forest landscape into production, protection and conservation areas.<sup>32</sup> Customary use in each of these

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<sup>32</sup> Protection Forests protect soil quality and water resources, and prevent soil erosion. Conservation Forests preserve biodiversity, forest ecosystems and other sites of natural, historical and cultural significance. Production Forests, both natural and planted, are for timber and forest-product harvesting activities (USAID, 2013).

categories is applied on a case-by-case basis (USAID, 2013). NTFP collection by villagers in “controlled use zones” within protection and conservation forests, and limited utilization rights in production forests in line with agreed forest management plans, is permitted provided these rights are registered as an encumbrance on state land (Rock et al., 2015). However, Article 7 of Decree No. 88/PM (2008) specifies that protection and conservation forest areas cannot be titled (SUFORD, 2015). The Forestry Law nevertheless allows classifying these areas as village protection and conservation forests (Schneider, 2013).

Forestland under village management is classified as “Village Use Forests” (VUFs), which since the 1990s have been allocated as part of FLA, and later, participatory land use planning (PLUP). Village use forest is considered production forest. Current legislation appears to allow the issuance of communal/collective titles in production forest areas. Article 90 of the Forestry Law (2007) allows for the allocation of rights to use state forest and forestland areas to village administration authorities for long term sustainable use according to a management plan. Village administration authorities in turn are able to allocate land to community members. The management and use of the VUF is the responsibility of village administration authorities who are able to allocate land to community members (The REDD Desk, 2013). Article 82 of the Forest Law outlines the rights and duties of the Village Administrative Authorities over protection, conservation (e.g. sacred and cemetery forests) and production forest areas, including issuing regulations on customary use of village forests (Article 108). Further possibilities are under discussion to strengthen land and resource tenure under village management by institutionalizing the Village Forest Management Plan (VFMP) through a signed agreement between the village authorities and district government resulting in a Village Forest Management Agreement (VFMA).

In practice, forest governance continues to be highly centralized, with the state claiming ownership of nearly all forestland, with inadequate recognition of customary tenure rights (Forest Trends, 2014). A Village Forestry and Non-Timber Forest Products Division established in 2012 within the Department of Forestry is responsible for overseeing village and communal forest areas, including preparing the VFMP with the village authorities.

Some organizations are exploring possibilities for securing community forest areas through communal land titling. To inform this work in production forest areas SUFORD has conducted research into customary forest management. The Integrated Conservation of Forests and Biodiversity (ICBF) project, supported by KFW, supports village participatory land use planning inside national and provincial protected areas and will explore the possibility of communal land titling based on these plans. A precedent has been set for this work following titling inside a protected area in Bokeo Province.

## **The recognition of customary tenure through land use planning**

Land use planning is the main official process that has been used to strengthen village tenure security in Lao PDR. To delineate village agricultural and forestland, and control shifting cultivation, the government aims to implement land-use planning over the whole country. Official recognition of land use planning dates back to the early 1990s, and PLUP was approved by MAF and the National Land Management Authority (NLMA) in a common manual (MAF and NLMA, 2010).

While a land use plan may not have the same legal strength as a land title, an informant felt that for some customary areas, land use planning may offer better tenure security in the long run and over larger parcels of village land. LUPs and subsequent VFMPs may also allow a variety of customary land and resource use rights over areas that cannot be titled, such as protection and conservation forest (Interview 9, 2015).

This informant also explained that the advantage of a land use plan in the absence of titling is that at the local level official laws and regulations are barely, if at all, followed (Interview 9, 2015). Laws and regulations also contradict, which means they are often impractical for clarifying land use and control. The practical nature of land use planning and the delineation of land uses can be more effective than discussions about improving policy. The period of monitoring the land use plan before final approval also allows for negotiation and adjustments. The involvement of the district officials from the Department of Natural Resources and Environment further provides some protection of village land use against outsider encroachment. Because of this, the informant argued, land use planning is the basis of all other land and tenure security related activities in Lao PDR (Interview 9, 2015).

Organizations that work on PLUP also feel that recognition – and to a certain extent formalization, following recognition by the provincial governor – of existing land use rights is an important strategic reason for focusing on land use planning. Gaining official recognition of the village boundary as part of the process is considered important for communities when outside companies arrive. Maps and management regulations that have been officially recognized by the district and provincial authorities, can help villagers to negotiate.

Others, however, consider that the security from land use planning on its own is not strong enough to protect village land from being appropriated by companies. Government officials commonly say to villagers who refuse company requests for land, that if they owned the land they should be able to show proof of ownership. This means, according to some, that communities need communal land titles (Interview 10, 2015).

PLUP, therefore, serves multiple objectives: as the village's land and forest allocation plan, as the base for land registration and titling, and for management planning of forest areas (SUFORD, 2015). PLUP is the mechanism by which customary use rights will be practiced in accordance with a designed plan (Article 42 of the Forestry Law). For this reason, many people argue that strengthening the legal status of land use plans would be the most effective means of securing village level land rights in Lao PDR.

The Forest and Agricultural Land Use Planning, Allocation and Management (FALUPAM) methodology has been developed by The Agro-Biodiversity Initiative (TABI) and adopted by other organizations. It attempts to simplify classifying forest zones and define village agricultural land more widely to better accommodate uses such as forest harvesting and livestock grazing, and longer upland agricultural fallow periods than the typical three-plot rotation (Dwyer and Dajvongsa, 2017). Following village meetings to explain the process, a baseline survey documents present land use. Neighbouring villages are consulted to delineate the boundary. An implementing organization estimated that the FALUPAM process takes around 8-10 months per village. In cases of boundary conflicts it has taken two years (Interview 10, 2015). The time taken allows for building community understanding of the value of land and ensures participation. In this way land use planning becomes a method for information dissemination and community strengthening.

In summary, using land use planning and communal land titling to strengthen the recognition of customary tenure highlights the need to focus on a landscape approach and the multiple land use strategies that are part of the wider agro-ecosystem. The use of the land and forest allocation programme to identify customary land and remaining lands for concessions has resulted in islands of community land amongst large areas of concessions. To get away from this island approach, an informant suggested avoiding the simple categorization of the forest landscape into the three categories recognized in Lao law (Interview 9, 2015). Government officers are often most interested to classify as much land as possible as protection forest and restrict forest use by

villagers, to satisfy the government's objective of keeping 70% forest land area in the country. These classification systems have been developed by foresters and assume the eradication of shifting cultivation (Mann and Luangkhhot, 2008). It is also difficult to zone these areas accurately. Instead as a preliminary measure, TABI tries to classify forest areas as multiple use areas reflecting the complex patterns and varieties of land uses within the landscape.

To deal with and recognize the integrated nature of livelihoods and management practices in upland areas, therefore, more thought is needed on how land use planning can better integrate forest and agricultural land, and for interdisciplinary research on existing upland agriculture systems (Chamberlain, 2008). The current forest classification system does not reflect actual land use at the village level, nor does it take into account communities' knowledge of land types, management systems, or differing soil and environmental conditions (Mann and Luangkhhot, 2008). Better reflection of current land use and management practices and understanding and incorporation of local knowledge is needed.

## Coordinating land use planning and communal land titling

Better integration of agricultural and forestry land use and management and developing a landscape wide perspective could be assisted by coordinating land use planning and communal/collective land titling processes. This would also improve the efficiency of the land use planning and communal land titling processes. The SUFORD-SU Programme has proposed combining the surveying and demarcation done as part of village forest management planning with communal land registration (SUFORD, 2015). Draft guidelines have been developed based on existing legislation aimed at integrating village forest management (managed by the Department of Forestry), land use planning (managed by the Department of Land Planning and Development) and land allocation and land registration (managed by the Department of Land Administration). The idea is to conduct part of the registration process, such as collecting necessary data, during land use planning so that registration and titling can proceed directly after approval and completion of PLUP (SUFORD, 2015). This means, for example, conducting land surveys during land use planning with the technology and accuracy required for cadastral surveys (SUFORD, 2015). This coordination could save human and financial resources and reduce overlapping mapping, management planning and titling activities (SUFORD, 2015).<sup>33</sup> It would also provide security for upland users and provide a basis for collaborative management between local authorities and customary land users.

Another reason for coordinating land use planning and communal titling processes is that some officials are asking about titling shifting cultivation lands, claiming that this is not 'modern' agriculture. These officials fear that recognition of agroforestry areas may provide support for shifting cultivation. This highlights the need, according to informants, for good land use planning and robust dialogue before the titling process (Interview 5, 2015).

## The (non)recognition of shifting cultivation

All ethnic groups in Lao PDR practice shifting cultivation (Kenney-Lazar, 2015a). However, the government views it to be a major cause of deforestation, soil degradation and erosion and considers it a backward, unproductive and inefficient form of agriculture that hinders national economic development (Kenny-Lazar, 2013; Mann and Luangkhhot, 2008).

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<sup>33</sup> StarFire (SF30-49) GPS (which GIZ uses) would meet the required accuracy for titling. Orthophoto adjudication is also an option. Rock et al. (2015) also propose lower degrees of accuracy for larger communal areas.

The policy since 1975 to eradicate shifting cultivation stems from a lack of understanding of upland communities' livelihoods and land uses, combined with an interest in controlling upland forest and resources.<sup>34</sup> Given that around 70% of the land area of the country has a slope of more than 20 degrees and around 30% of the population lives in these upland areas, the policy focus on forest preservation has neglected the land and livelihood needs of a significant percentage of the country's population (USAID 2013). Despite the policy to replace shifting cultivation with lowland rice, cash crops or plantations, it continues to be practiced throughout the country, particularly in the poorest districts.

The aim to reduce shifting cultivation is stated in the Forestry Law of 1996, the Agriculture Law (1998) and the Background Document on the National Poverty Eradication Programme (2003) (Mann and Luangkhot, 2008). Article 11 of the Agriculture Law outlines the policy of promoting fixed cultivation and to ultimately stop 'slash and burn' agriculture. Article 14 also states that land unused for more than three years will be reclaimed.

As part of TABI's FALUPAM process described earlier, shifting cultivation areas are not classified as forest but as bush fallow areas. Villagers are not asked to identify these areas directly, which would lead villagers to underreport their shifting cultivation land in front of government officials. Instead, identifying these areas follows a process of deduction. Villagers are asked the forest areas which have never been cleared, then grassland and grazing areas, lowland farming areas, residential areas, etc. The shifting cultivation/bush fallow areas are those left over once all other land uses have been identified. In this way, the FALUPAM process both helps the government to regulate and monitor shifting cultivation, which is a main motivation for the government to carry out land use planning, and provides a kind of *de facto* recognition of its existence, once the plans and maps have been approved (Interview 9, 2015). This approach has helped to create more acceptance of shifting cultivation and longer rotations (Dwyer and Dajvongsa, 2017).<sup>35</sup> However, these land use planning processes also have to negotiate a delicate balance between the government's desire to achieve 70% forest land area, and allowing for local livelihoods through the zoning of areas for shifting cultivation.

SUFORD has also been doing work on recognizing shifting cultivation in production forest. Reducing Emissions from Deforestation and Forest Degradation (REDD+) readiness activities being implemented by Indufor also opens up possibilities for the recognition of community forestry and shifting cultivation.

Nevertheless, the ongoing prejudice against shifting cultivation makes it difficult to openly discuss improving these systems or to recommend extension programmes. A report by the French Research Institution for Development (IRD) looking at cropping patterns, soil erosion and water management in the Houay Pano catchment, Louang Prabang Province,<sup>36</sup> found that eight-year fallows were enough to restore soil fertility and provided the same watershed protection function as mature forest (Pierret et al., 2011). Confirming what upland farmers have been saying, the

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<sup>34</sup> Government officials commonly equate shifting cultivation with environmental destruction based on the actions of pioneer shifting cultivators, such as the Hmong. Even sustainable forms have been characterized by the destructive practices of a single group (Chamberlain, 2001).

<sup>35</sup> In Savannakhet, population increase means 8-year fallows are generally no longer possible and 3-4 year rotations are more common. Many villages have also lost land to Vietnam Rubber Group plantations (Interview 10, 2015).

<sup>36</sup> This study was carried out in association with government partners and the International Water Management Institute.



study suggests shifting cultivation may be less damaging to soil health than previously thought. Under low land pressure, and even under increasing pressure, shifting cultivation is still better at preserving soil conditions than alternative land uses (Pierret et al., 2011).

A further study used topographical maps and Landsat images from 1943, 1976, 1989, and 2001 to examine forest cover and human settlement in Nakai-Nam Theun (NNT) National Protected Area in Khammouane and Bolikhamxay provinces. Despite shifting cultivators inhabiting this area for hundreds of years, it retained more than 95% forest cover until the early 1970s (Robichaud et al., 2009). Following the war the government encouraged agricultural expansion, and forest cover declined 0.5% per year until the 1980s. Forest cover then increased by 0.3% per year into the 2000s, even while human population grew and as forest declined nationally at 1.7% per year (Robichaud et al., 2009). The study also showed the stability of the number and location of villages in NNT (despite the upheavals during the war), meaning shifting cultivators are not nomadic as they are often portrayed. The extent of cleared forest remained almost entirely within a shifting cultivation–forest mosaic, the boundaries of which date back at least to the 1960s. The report recommends a better understanding of shifting cultivation systems and argues that alternatives should be proven before attempting to reduce shifting cultivation areas (Robichaud et al., 2009).

Given ongoing poverty in upland areas, there is now a de-emphasis of the policy to eradicate shifting cultivation (Kenny-Lazar, 2013). Upland rice production is now being collected in national statistics and there is more open discussion about production methods and tax payments. Higashi (2015) also reports that Pak Beng District authorities in Oudomxay Province agreed to allow land reclassification to accommodate eight-year rotations as part of joint watershed forest management efforts. According to one informant, however, the discussion about shifting cultivation is much more open in the North, partly because in the South there are more concessions and demand for land for plantation agriculture (Interview 10, 2015).<sup>37</sup>

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<sup>37</sup> For example, despite a moratoria on eucalyptus and rubber concessions (see Annex 1), the Japanese company Oji has 25,000 ha of acacia and eucalyptus planted, a concession for 50,000 ha, and a contract for another 30,000 ha. Vietnamese rubber companies have planted 70,000 ha of rubber but have a contract to plant another 50,000 ha. Stora Enso has an agreement for 35,000 ha and is also looking for more land to plant eucalyptus. Some of these agreements apparently predate the moratoria on concession expansion (Informant 11, 2015).

# Difficulties in the Recognition of Customary Tenure

Despite the existence of legal provisions recognizing of customary land rights in Lao PDR, many of these rights go unprotected, are ignored, and abused in practice (Kenney-Lazar, 2015a). Some factors hindering the recognition and protection of customary tenure, and efforts to address them, are outlined below.

### Limited awareness of land rights

At the community level, limited awareness of land rights means it is difficult for local people to exercise their rights. Awareness raising is needed of the legal provisions to protect and secure village land and customary tenure, including the possibility of obtaining communal/collective titles.

There has been some effort over the past few years to disseminate Lao law, particularly in ethnic villages.<sup>38</sup> The intention is to raise villagers' awareness of their legal rights to allow them to protect their land and resources, or at least negotiate better agreements with companies and others seeking to acquire village land. Communities often receive contradictory information and advice about their land rights and responsibilities. Local authorities also often do not fully understand policies and legislation, or how to apply them (Mann and Luangkhot, 2008). Legal education is an important example of working with the government to strengthen communities to deal with land issues.

A lack of awareness of their rights also means women struggle to have their customary land rights recognized, even during land titling processes (Interview 3, 2015). Studies carried out by the Lao Women's Union have shown that even though women are the owners of the land by inheritance, their names do not appear on the title. Property acquired during marriage also does not always include the name of the wife on the title (dual registration). Women commonly entrust their son or husband to handle the paperwork during the titling process. Even if a woman has her name on the title, limited understanding can mean she can still lose her land. Awareness raising is thus needed to ensure women who have inherited their land by custom actually get their name on the title.

Building legal awareness of community rights is a sensitive issue in Lao PDR. An NGO informant noted greater difficulty faced by organizations working on land in the South compared to the North. Southern provinces seem to be more reticent about NGOs working on land. The informant noted that authorities in Oudomxay province requested support from NGOs over the problem of chemical use in Chinese banana plantations. Requests for support by government authorities are far less common in southern provinces (Interview 10, 2015).

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<sup>38</sup> Legal education activities include the Clinics for Legal Education (CLE) programme (linked with the University of Laos' Faculty of Law in collaboration with CARE, SODA, Green Community Alliance, CCL and Land Information Working Group (LIWG); the Land Learning Initiative for Food Security Enhancement (LIFE) training on land related topics to local community, government, NGO and private sector actors using a training of trainers model (implemented by Village Focus International (VFI) in partnership with the LIWG Secretariat and member organizations; the Integrated Rural Development Programme in the Poverty Regions of Laos (NU-IRDP) radio and video campaigns; and a legal calendar featuring key elements of Lao law coordinated by LIWG. Some organizations have also been establishing community legal focal people to provide advice to villagers about their legal rights.

A further difficulty is that communities struggle to have their voice heard. This is linked with a general lack of downward accountability. An informant pointed out that because of this, communities in Lao PDR are unable to call civil society organizations to account. This can lead to dangers of NGOs/non-profit associations (NPAs) deciding what is in the best interests of communities and a lack of community control over activities carried out 'on their behalf' (Interview 17, 2015).

### Impediments to communal land titling

Although there is legislation to support communal/collective land registration and titling in Lao PDR,<sup>39</sup> this legal support remains incomplete and unclear. The long delay in approving the Party Resolution on Land (Land Policy) and now the Land Law has led to ambiguity and stalled progress. Provincial government officials have often expressed hesitation to move forward with communal land titling without greater clarity in the legal framework.

Moreover, there is as yet no agreed standard procedure for registering and adjudicating communal/collective land areas, or an approved title format (Rock et al., 2015). GIZ has drafted implementation guidelines and these are being discussed and reviewed in the Focal Group on Communal Land Titling of the Land Sub-sector Working Group. How communal/collective land will be defined, what areas and how much land will be titled is still being worked out.

To date, communal land has only been registered in a few pilot locations with the assistance of donors and NGOs (see Annex 2 for examples of formalized collective land in Lao PDR). These pilots have been small and have required careful facilitation to convince some government partners. As shown by these examples, communal titling does not follow the model in Cambodia where all eligible land belonging to a particular village is included in a single title. In Lao PDR, communal titling is connected to land use on a particular plot (following the logic of village land use zoning under PLUP). This means that separate titles are issued for agricultural land, village use forest areas, burial and spirit forests, etc.<sup>40</sup> Given the variable quality of land use plans carried out throughout the country, often a review and sometimes redoing the land use plan is needed before the titling process.

A plot-by-plot approach to communal titling, especially when not done as part of a systematic titling effort, can be time consuming, costly and often results in limited coverage (Ling and Scurrah, 2017). There is also a general lack of support for mapping, planning and titling.<sup>41</sup> It has been argued that a simple boundary demarcation of the village territory would be a more effective way to formalize village tenure, including communal agricultural and forest land (Lao Consulting Group, 2002; Ling, 2017; Ling and Scurrah, 2017). Land identified in a LUP that is neither state nor private land would become managed by the village within its boundaries. LUPs should at least serve as an interim measure for legally recognizing and protecting village land, until all individual and communal plots within the village boundary can be surveyed and titled (Ling, 2017;

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<sup>39</sup> The four key legal documents are: Ministerial Instruction 564/NLMA (2007); Ministerial Direction 6036/MONRE (2014); Decree 88/PM (2008) on the Implementation of the Land Law; and the Resolution of the Party's Central Committee on Land Management and Development (2017).

<sup>40</sup> A key policy discussion underway is which of these communally titled areas may be in the future divisible, and allow for a change of land use, and which areas should remain indivisible.

<sup>41</sup> For example, an official in the Department of Land Use Planning (MoNRE) explained that land use planning has been carried out in 55% of Lao PDR's over 8,000 villages, but there was considerable work still to complete the process in all villages. Data from provincial level processes also has to be reconciled with national level data (Interview 4, 2015).

Ling and Scurrah, 2017). However as mentioned, LUPs have been shown not to have sufficient legal strength to protect village land from encroachment by companies and other actors.

While collectives are identified as a type of rights holder under the Party Resolution on Land, questions remains as to how much land the government is willing to give to collectives/communities and what protections and rights collective right holders will have in practice. In Lao PDR, the state is likely to maintain considerable discretion in how collective/communal land is recognized and managed.

A member of a development partner organization suggested the government might allow communal/collective land titling as a compromise with donors and their support for poverty reduction (Interview 5, 2015). He said the government is more interested in private titling for revenue generation (through taxes and fees) and business generation (turning land into capital), as well as in identifying state land for possible allocation to concessions. The government's unofficial view is that communal titling takes away its ability to strike deals with companies (Interview 5, 2015). Communal land is also likely to be taxation exempt and rights to use communal land cannot be bought or sold, further reinforcing the notion that communal land is a resource taken out of the economic system. Another common concern among some government officials is that communal land titles may give too much power to village level authorities, and open up opportunities for abuse. Village land management committees or customary leaders/representatives chosen by the village could help to limit the power of village authorities.

A key issue for the future uptake of communal/collective land titling, therefore, is the extent the government sees it as supporting at least some of its policy priorities. The 8th National Socio-Economic Development Plan (2016-2020) focuses on quality production as also outlined in the Sustainable Development Goals (SDGs). Demonstrating that communally managed land and forests provide secure livelihoods and promote sustainable use of resources will be important in building political support for communal titling. By ensuring tenure security for smallholders and promoting the sustainability, cultural diversity and inclusive socioeconomic development, robust well-managed customary tenure systems can play a critical role in achieving the SDGs.

### Conflict resolution mechanisms

A further impediment to customary tenure recognition is the limited effectiveness of land dispute resolution mechanisms. The judiciary is not considered to be independent (IWGIA, 2015) and the legal system in general has not been able to adequately deal with increasing social conflict caused by land acquisitions for various development projects. High-profile cases dating back several years remain unresolved, with national and provincial authorities unable to arrive at suitable conclusions (IWGIA, 2015). The legal system is also seen as a basis for negotiation rather than for implementation of the law (Hirsch and Scurrah, 2015).

All villages have a government-established Village Dispute Resolution Committee intended to deal with local conflicts. However, as pointed out by an advisor, neither these committees nor the District Department of Justice are very effective (Interview 8, 2015).<sup>42</sup> Other avenues for resolving conflicts include submitting complaints to the National Assembly. In some cases this has been effective.

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<sup>42</sup> The Ministry of Justice also has an economic dispute resolution office, however, this is not for disputes over land.

New channels for conflict resolution are also being attempted such as a grievance mechanism established by the Viet Nam Rubber Group (VRG), which operates plantations in Savannakhet and Champassak provinces. This was established to deflect criticism following a Global Witness (2013) report alleging VRG involvement in illegal logging and trade, violation of communities' traditional and human rights, and conversion of high value forests to plantations in Cambodia and Lao PDR. As a result, the Forest Stewardship Council (FSC) cancelled VRG's certification (FSC, "Global Witness V. VRG case", 2015). VRG, however, has not shown a genuine interest in addressing villagers' grievances (Interview 7, 2015).

There have also been attempts to submit a community complaint to the World Bank's private sector arm, the International Finance Corporation (IFC), against the Vietnamese Company Hoang Anh Gia Lai (HAGL) over the loss of land.<sup>43</sup> HAGL operates rubber concessions in Laos' southern provinces of Attapeu and Xekong. However, submitting a complaint has not been possible as NGOs faced difficulty in accessing the affected communities.

### Community resistance to land concessions and encroachment

Because of the power dynamics at the core of land disputes in Lao PDR, effective protection of customary land requires linking with higher-level political actors. This helps to lessen power imbalances and allows communities to exploit structural opportunities. It also highlights the need for good community strategizing and unity (Kenney-Lazar, 2015b). Ethnic minority groups, however, are generally less able to call on political support to resist attempts to dispossess them (Kenney-Lazar, 2015b).<sup>44</sup>

Submissions to the National Assembly and the use of political connections have resulted in some success in stopping land clearing and redrawing concession boundaries (Kenney-Lazar, 2015b). However, these processes take time and success depends on community connections and follow-up of petitions by National Assembly members. Most attempts are only partly successful, achieving delays and reductions in the land area acquired by the company. As well as organizing petitions, communities have cut down or destroyed rubber/plantation trees in protest, and withheld cooperation with the companies and the government (IWGIA, 2015).<sup>45</sup>

Kenney-Lazar (2015b) argues that in Lao PDR the defence of land must be carried out through rather than in confrontation with the state, and at the local level opportunities for dissent against land encroachment often depend on the degree that local officials support villagers' customary claims. Local officials sometimes choose not to accommodate a company's request for land because of limited land availability (Kenney-Lazar, 2015b). Legally, investments require the consent of the village leadership, who are part of the government (Kenney-Lazar, 2015b). However, it is often difficult for the village chief to exercise authority against powerful companies, which have been given permission at central or provincial level to seek land for a concession. Free, Prior and Informed Consent (FPIC) procedures are seldom used by companies.

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<sup>43</sup> This followed a complaint made to IFC's accountability mechanism by communities in Ratanakiri Province, Cambodia. HAGL borrowed funds for its rubber development from Dragon Capital, which had obtained a 26 million USD loan from the IFC (see Work, 2016).

<sup>44</sup> Apart from the Hmong, there are few representatives of ethnic groups holding higher positions in the government. This makes it harder for ethnic groups to have a voice in land disputes. Out of total of 149 National Assembly legislators in the 8<sup>th</sup> Legislature elected in 2016, only around 21 come from the Austroasiatic, Hmong-Mien, and Tibeto-Burman groups (Interview 16, 2016).

<sup>45</sup> For a recent case in Sekong Province see - <http://www.rfa.org/english/news/laos/lao-authorities-arrested-in-11-year-old-land-dispute-in-sekong-province-08012017155944.html>



Unclear boundaries between state and village land, and unclear processes by which village land is re-classified from 'productive' to 'unproductive' to meet concession requirements also causes confusion (Mann and Luangkhot, 2008). Concession companies have at times funded FLA processes in order to have the land zoned and classified to meet their requirements (Kenney-Lazar, 2015b; Barney, 2008).

### **Examples of 'successful' legal support and community resistance**

A case in Salavan Province described by an informant is perhaps an example of successful legal support to a community threatened by a land concession. A key factor was the village's strong culture of resistance dating back to the war period. The informant stressed that village solidarity was critical in ensuring they did not give in to pressure once the dispute resolution started to have an impact. The community also received good support from the local authorities. The informant explained that personal connections with a local official allowed him to explain the context of the conflict and the law to this official. There was also support from the National Land Management Authority (NLMA)<sup>46</sup>. An NGO provided strong community support and the case was broadcast on local radio (Interview 8, 2015). In the end the community was able to overturn plans to develop a concession and get their land back from the company.

The informant stressed the importance of not making public, more than is necessary, the results or details of sensitive cases. If this becomes well known, people involved may lose the space to continue their work in the future. Legal support can work, but it requires having the trust of the government and local communities. The key, according to the informant, is to ensure the views of all people are respected, to solve problems constructively and internally without public scandal or disgrace, and to avoid using 'hot' pressure. If people are disrespected, they can become aggravated with unpredictable results, including undoing the hard work of coming to a resolution. Trust on all sides is required to ensure open dialogue and agreement. Also important is developing good legal arguments. Informed communities can use these arguments in the courts and in negotiation with companies.

Communities taking land cases to the courts can be the best strategy, and is important to set precedents and ensure that legal provisions are respected and enacted, the informant observed. This helps to increase communities' legal understanding and strengthens access to justice. Representing communities in these cases, however, can be difficult for lawyers. In addition, there are few lawyers in the country who choose to take up public interest law or take on sensitive land cases in support of communities. This work can put lawyers' and law students' careers at risk, even if the case is successfully resolved in the communities' favour.

The informant also explained that even if customary land cases make it to the courts, customary rights are not well defended in the legal process (Interview 8, 2015). Even individuals with land titles face difficulty in defending their legitimate rights. As a result, some villagers have questioned the tenure security which a land title can provide (Mann and Luangkhot, 2008).

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<sup>46</sup> The NLMA was created in 2004 to take charge of all issues related to land management and administration, particularly the regulation of concessions (Kenney-Lazar, 2015b). Following restructuring, the NLMA was subsumed within the Department for Land Use Planning and Development within MoNRE.

The Olam/Outspan case in Paksong District, Champassak Province has been cited as a case of successful resolution, even though it has received some criticism. It highlights the limits of 'village power' and the difficult decisions they often have to make. The coffee concession covers around 800 ha and villagers complained about the bulldozing of their crops on over 200 ha. Villagers were informally using more land than this but could not claim it as they had not been paying land taxes. The Champassak provincial compensation committee sided with the villagers and ordered the company to pay USD 390,000. In response, the company offered 1 million USD (the \$390,000, plus \$150,000 for year 1, \$50,000 for years 2-4 and \$30,000/year for the rest of the 30-year concession) if the villagers gave up their claims. The villagers refused saying they wanted their land back.

In the end, villagers had to accept the return of approximately 280 ha (with individual titles) and compensation for the value of their assets that were bulldozed. However, they were not compensated for their traditional land and forest areas (around 600 ha) including rotational fallow fields. A key factor in this process was the support communities received from local and international NGOs (Interview 7, 2015).



**Figure 2. A Paksong coffee plantation**

Source: [http://doa.go.th/pibai/pibai/n18/v\\_10-nov/ceaksong.html](http://doa.go.th/pibai/pibai/n18/v_10-nov/ceaksong.html)

In conclusion, individual and political connections have a significant impact on the outcomes of land disputes in Lao PDR. Key factors of success include: informed communities committed to defending their legitimate rights, local government officials committed to supporting communities, legal support to villagers to advise on land rights and options, a strong NGO that understands how to carry out advocacy with local villages, and the strategic use of media.

# Opportunities for Improving Customary Tenure Recognition

## Engaging in the debate over concessions

One avenue for stronger recognition of customary land tenure in Lao PDR is to better understand the process of decision making over concessions between the different governance levels (national, provincial, district). A provincial government official was reported as saying, for example, that national/provincial political dynamics are the biggest issue in the country, with a vast gap between central level policies and provincial and district level implementation. Understanding these political dynamics helps in developing appropriate support activities.

There is some potential in supporting central level collection of information about concessions allocated at the provincial level to improve transparency. Making land deals more transparent could help villagers to protect their tenure rights. The central government began collecting concession information because it faced several conflicts between communities and concession companies, but it had limited data about the extent of the concessions in the provinces. Government officials are aware of the impacts of large-scale land concessions on the tenure security of smallholders, resulting in loss of land, food insecurity and poor nutrition (MPI, 2015).<sup>47</sup> Some in the government have argued that if concessions hurt people then contract farming could be a better option.

From this, engaging in debates about the costs and benefits of land concessions and what might be the alternatives is important. The push-pull nature of the promotion and then regulation of concessions in the country indicates both a range of views and some reticence about the concession model. There have been three moratoria on allocating concessions, following nationwide outcries over several concession-related injustices and rapid national deforestation (Russell et al., 2015; See Annex 1 for further details).

The moratorium on concessions for eucalyptus and rubber, which is still in effect, could also be an opportunity to promote fuller consideration of the importance of ecosystem services, rural livelihoods, and climate adaptation within decision-making processes (Russell et al., 2015). In other words, it is important to build on current discussions and develop alternative models, using the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) and other regulatory instruments of land investments that recognize customary tenure and promote communities' roles in the development process. At present there are few examples of regulations being properly implemented or model investments to follow. Commentators stress the great difficulty in regulating concessions in this environment. There are also few examples of communities being supported to implement their own alternative land uses. The moratorium provides opportunities to develop alternatives that support diverse, productive smallholder farming systems instead of monocultures, and arrangements that give smallholders more control over the terms of production.

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<sup>47</sup> There is also growing concern of the problem of large amounts of poor quality food being imported from Vietnam, China and Thailand without inspection, and rural farmers consuming this poor quality food because it is much cheaper. Rural people are selling wildlife or fish to buy low quality food and household necessities.

## Strengthening recognition of customary law

It could also be useful to build on a UNDP/Ministry of Justice Customary Law project which sought to develop a modality for the effective co-existence of formal, semi-formal (implemented by village authorities and village mediation) and customary law (UNDP, 2011).<sup>48</sup> This intended to support customary law in resolving conflicts and providing justice. Some of the findings pointed to the different perspectives between formal and customary law of rights and obligations, and the erosion of customary legal systems due to government policies and market forces (UNDP, 2011). Recommendations included: a clearer integration of customary norms within the national legal framework; improved education for outsiders of customary practices; official recognition of vital community rituals, assets and practices; delineating or delegating jurisdiction or creating hybrid bodies, akin to the village dispute resolution system; and promoting “change through culture” (UNDP, 2011). This validation and recognition of customary law and institutions opens up space to strengthen ethnic groups and their leaders’ voices.

## Best practice models

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

Building awareness and acceptance of the VGGT within the Lao government could assist with strengthening recognition of customary tenure. The inclusion of provisions for the recognition of customary tenure in the Party Resolution on Land and draft Land Law, suggests the drafters took into account VGGT principles. NGOs used the wording of VGGT articles on customary tenure, expropriation and resolving disputes (Articles 9, 16, and 21 respectively) when drafting recommendations for the earlier National Land Policy in 2014, which later became the Party Resolution on Land. This provided technical legal guidance on issues which were widely debated. However, an NGO representative felt that since then there has been little further discussion of the VGGT (Interview 7, 2015).

A Lao Women’s Union representative also suggested that guidelines like the VGGT can provide international examples when preparing information booklets for women and can be used in meetings to raise issues. It is important, she said, to know the current international standards (Interview 3, 2015). It was also noted that the VGGT could assist in dealing with titling gaps (i.e. the differences between formal and informal property rights) because they look at how property is formally conceived and what it is practically. This helps to make concepts of property applicable and relevant (Interview 17, 2015). The key issue, though, is how to implement them.

Another informant felt that now that MoNRE has accepted the Lao version of the VGGT it is easier for NGOs to present and discuss them at the village level, including the concept of FPIC. This person suggested a feedback mechanism so that MoNRE and NGOs working on land policy are informed about village level awareness-raising activities (Interview 15, 2015).

### *Corporate Social Responsibility*

Discussions on corporate social responsibility (CSR), the ASEAN Social Economic Blueprint, the VGGT, etc. highlight a general push for investments to pay attention to social and environmental issues, including safeguarding peoples’ livelihoods and customary tenure. Private companies can set good examples for securing customary tenure through CSR, social and environmental standard

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<sup>48</sup> This entailed researching customary law among the 49 ethnic groups of the country.

obligations and benefit sharing models, to ensure regulations are followed, and to pressure the government for improvements. Many companies such as the Viet Nam Rubber Group wield significant influence and have close ties to government authorities (Kenney-Lazar, 2015a). This means that improvements in company standards for community consultation and recognition of customary tenure on the ground could feed directly into policy discussion. However, raising the benchmark through CSR is challenging in the Lao context where there is a general lack of accountability, lack of an enabling policy environment that encourages adoption of common best practice standards, and a lack of resources and capacity for implementing and enforcing safeguards and CSR approaches.

## Engaging in forest policy discussions

In 2014, Lao PDR formally began engagement in the European Union's (EU) Forest Law Enforcement Governance and Trade (FLEGT) process. When completed, this agreement will give Lao timber products preferential treatment in the EU market. An important aspect is the required multi-stakeholder process, which creates opportunities for local organizations to participate (IWGIA, 2015), and potentially could allow for stronger recognition of customary rights to forest. A network of 20 interested NPAs has been established. The creation of the "Timber Legality Definition" can also allow space for considering the use of forests, and expanding the rights of forest-dependent communities (IWGIA, 2015). This FLEGT-related work is expected to influence the revision of the Forestry Law, which has been underway.

Payment for Environmental Services (PES) and REDD+ initiatives also offer potential for recognizing customary tenure through the requirement of social and environmental safeguards. However, a formal system for addressing safeguards is not yet in place (The REDD Desk, 2013). As part of supporting PES and REDD+ related activities, the World Bank and Finnish government funded the 'Scaling-Up Participatory Sustainable Forest Management Project', which implemented FPIC in over 300 villages in four provinces in the north of the country (IWGIA, 2015). At the moment, though, there is no legal basis for FPIC. A previous attempt to implement it from 2011 to 2012 under a bilateral REDD+ project involving a local NPA and GIZ was taken over by the Lao Front for National Construction (IWGIA, 2015).

Another interesting forestry initiative involves expanding the area under Forest Stewardship Council (FSC) certification. Certification requires community engagement and other safeguards. At present almost 83,000 hectares of production forest has been FSC certified in Lao PDR. The relevance of certification was seen when Vietnam Rubber Group had its certification cancelled after a FSC investigation. For reinstatement, VRG was required to fully compensate stakeholders, among other measures (FSC, "Global Witness V. VRG case", 2015). Given this indirectly recognizes customary rights, it could be an avenue for strengthening recognition.

The problem with all these processes, however, is the widespread illegal logging which has been occurring in the country, particularly in conjunction with clearing forest areas for development projects (see Smirnov, 2015). A recent ban and a reduction of timber exports perhaps offers some hope of a change of practices.



## Engaging stakeholders and building alliances

Key actors relevant for recognizing customary tenure include: MoNRE (especially the Land Administration and Land Use Planning Departments, and the Land Law Drafting Committee), MAF (especially the Department of Agricultural Land Management) and the National Assembly. Other important though more peripheral government bodies include, Ministry of Planning and Investment (especially the National Economic Research Institute - NERI), the Ministry of Culture, the Ministry of Justice, the Mass Organizations (Lao Women and Youth Unions and the Front for National Construction), the National Agriculture and Forestry Research Institute (NAFRI), the Lao Bar Association, and relevant faculties at the National University of Laos.

The Land Sub-sector Working Group (LSSWG), the Land Information Working Group (LIWG), international NGOs, and NPAs working on land issues are also important. A unique aspect of the LSSWG is that LIWG represents NGOs/NPAs as a co-chair. As a multi-stakeholder forum that feeds into national decision-making processes, the LSSWG is crucial for the current discussion.

While perhaps not politically powerful, alliances for strengthening customary rights could be built with government organizations working on women's empowerment, including the Women's Parliamentary Caucus. Discussions with this Caucus about recognizing women's roles in protecting and managing customary land would raise awareness of the issues. Informants pointed out the importance of including champions within the National Assembly because of its increasing influence and because it is seen as progressive and dynamic. Discussions with the relevant National Assembly Commissions, the Ethnic Affairs Department and provincial representatives could be productive. However, the fact that key active National Assembly members have been moved from their former positions also makes it difficult for them to work on land issues.

# Recommendations for Policy Influence

### ***Build dialogue between the government and stakeholders***

Ongoing dialogue is needed between the government (MoNRE, MAF and National Assembly) and organizations and projects working on customary land (LIWG, VFI, GIZ, FAO, MRLG, LIFE and others). This could be part of the LSSWG focal groups, or through other platforms. This dialogue should also include the voice of customary users themselves through representative structures such as possibly the Lao Farmers Union. Relevant issues for dialogue include: the procedure to finalize and ratify revisions of legislation (Land Law, Forestry Law); developing implementation guidelines for registering and titling communal/collective land; adoption and implementation of the VGGT; promotion of tenure security for smallholders as part of the SDGs; extending the moratoria on land concessions; developing FPIC procedures; etc.

To inform these discussions, guidelines could be prepared on the recognition of customary tenure based on existing legislation, similar to SUFORD's draft guidelines for the communal land titling of village use forests.

### ***Provincial level dialogue on recognizing customary tenure and law***

Provincial level workshops could be considered to facilitate a dialogue between government officials, National Assembly members, farmers associations, community representatives, and the private sector. Similar topics to those listed above could be discussed (implementation of relevant legislation, the SDGs, VGGT, etc.).

A further objective would be to clarify the roles and responsibilities of the provincial, district and village levels for the administration and recognition of customary tenure. Outlining clear tasks at these different levels would help to secure village tenure, strengthen the role of customary leaders, regulate land concessions, and restrict re-classification of communal and individual land for allocation to concessions. These discussions could also define the rights and responsibilities of local communities in monitoring illegal activities and in settling inter-village encroachment disputes with customary law, etc. Pilot activities could also seek to recognize and integrate customary law into formal law. This would aim to reduce the number of community level land disputes which local authorities are called on to resolve. The potential of communal land management options to avoid or reduce conflicts both within and between villages could also be explored.

### ***Review legislative consultation processes***

A process of reflection could be carried out on the consultation that has occurred for the Land Policy/Party Resolution on Land and Land Law. This could include new alliances such as with the Lao Women's and Youth Unions, the National Assembly's Department of Ethnic Affairs, to understand the extent to which government agencies, NPAs and communities were consulted, and the degree to which concerns of women, youth and ethnic groups were incorporated into the drafting process. Does, for example, the Party Resolution on Land (2017) and the draft Land Law recognize and reflect other government agency policies such as the Women's Union's five-year plan (2016-2020) to increase inclusivity? Mass organizations could be supported to collect data about the extent to which the concerns of their constituents have been accommodated in legislation drafts. This could provide lessons for future legislative processes and help to develop a strategy on how to do this.

Dissemination of key sections of the Party Resolution on Land and draft Land Law through community legal education activities could also be used for discussion and feedback. Feedback could be useful for making recommendations to the draft Land Law and for future legislation and Ministerial Directives. Consultation processes should be documented.

### ***Carry out study tours to neighbouring countries***

Study tours to neighbouring countries or in the broader Asian region could be organized to learn about different legal and practical approaches for recognizing customary tenure. For example, lessons could be learned from Myanmar's public consultation process in the development of the National Land Policy or from the Vietnam's experience with revisions of the Land and Forestry Laws. Field visits could also look at procedures for registering and titling communal or ancestral lands. Studying how different countries recognize or formalize customary land, including both titling and non-titling approaches, could greatly assist with conceptual discussions, implementation, etc.<sup>49</sup>

### ***Incorporate customary tenure in discussions and reviews of land concessions***

As part of present activities aimed at regulating concessions, discussions within LSSWG working groups and with relevant government agencies and National Assembly representatives could include recognizing customary tenure in concession delineation and monitoring protocols and requiring the establishment of functioning grievance mechanisms, especially at the local level, when approving any investment. Support could be considered for developing external concession monitoring and evaluation as part of strengthening implementation of government policy.

It is also important to define clearly what constitutes a quality investment and what might be the alternatives. In assessing the actual benefits of concessions, along with the impacts on customary users, the environmental impact of monocultures (use of pesticides, herbicides, fertilizer, etc.) needs to be better understood.

Customary tenure issues also need to be incorporated into discussions about CSR models, especially to ensure investors pay attention to food security and poverty reduction. To adequately address community concerns, CSR initiatives should allow genuine consultations, proper representation and community voice, and appropriate support to enable communities to participate and defend their interests.

### ***Strengthen national grievance mechanisms and conflict resolution processes***

Linked to the above, clear procedures are needed to deal with an increasing number of land disputes and community complaints. Lessons from existing grievance mechanisms, including through MoJ, MAF, National Assembly, private companies, etc. could be used to develop fair, equitable, and accessible processes, and ensure follow up. Supporting the training of specialized land conflict mediators, strengthening the capacity of Village Dispute Resolution Committees, and developing approaches for mediating between formal and customary law could also be considered.

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<sup>49</sup>This could follow on from study tours for senior government staff, National Assembly members and Vice-ministers from MPI, MAF and MoNRE to Viet Nam, Thailand and Brazil in 2013 to look at community forest management.

### **Promote the VGGT**

Significant awareness raising is needed at national and lower levels of government about strengthening land governance through international guidelines such as the VGGT. The private sector is also a key target group.

### **Promote land formalization processes which build on customary rights**

Pilot activities with provincial and district level land departments to recognize customary tenure could also be supported. Pilot communal land titling activities, for example, could explore ways to simplify procedures for registration and titling, including how to deal with potential future changes in land use. This should include transparency and accountability mechanisms and close monitoring of progress.

Support could also be considered for developing strategies for the effective coordination of land use planning with land titling. This would mean harmonizing processes between different government departments, and ensuring land use planning processes can be utilized in registration without a need to do surveying and demarcation twice (SUFORD, 2015).

This could also include supporting TABI's call to recognize forests as multifunctional landscapes to reflect the variety of land uses, particularly where agriculture and forestry areas overlap such as shifting cultivation areas. As well as addressing the need for land use planning that reflects the reality on the ground, it promotes devolving land use decisions to the lowest possible level. Given TABI and MRLG are both funded by the Swiss government, collaboration could be considered to advocate for harmonized land use planning approaches and for the official adoption of FALUPAM.

### **Promote dialogue about shifting cultivation and customary forest management**

Despite the sensitivity of the issue, a discussion is needed with the government about shifting cultivation. IRD (Pierret et al., 2011) and other studies can be used as technical evidence of the potential sustainability of shifting cultivation systems. This can be compared with the vast 'moonscapes' of monoculture corn, which now cover large areas of northern Vietnam and can be clearly seen in satellite images. Corn was promoted in northern Vietnam as an alternative to shifting cultivation (Interview 9, 2015).

Joint dialogue and action could also be developed to strengthen existing upland village land uses and livelihoods instead of resettlement. Demonstrating a correlation between customary management and forest cover could be informative.<sup>50</sup> Pilot joint monitoring of mutually agreed management practices could also be carried out to demonstrate the potential environmental and social benefits of a more open approach to shifting cultivation and greater recognition of customary forest management.

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<sup>50</sup> This could build on Japan International Cooperation Agency's work understanding the links between forest cover and NTFPs.

## Advocacy messages

### *The role of customary tenure in poverty reduction*

Given the government's goal to exit from least developed country status, it is important to demonstrate the poverty reduction potential of securing customary tenure, especially amongst upland ethnic groups. As discussed in this study, NTFPs collected in communal forest areas contribute significantly to household food security and income, and are particularly important during lean months. Work could include compiling existing studies on the income from NTFPs throughout the country.<sup>51</sup> A more sophisticated treatment of poverty, its causes and its reduction is also needed, including a fuller analysis of 'new poverty' (see Annex 1).

### *Promote implementation of the Sustainable Development Goals (SDGs)*

Following the SDG on Agriculture, Lao Agriculture Policy 2016-2020 promotes clean and safe agriculture and NTFP production. By 2020, the Agriculture Policy aims to produce 30% organic food products and 40% clean products (pesticide free) from smallholder farmers. It also promotes securing land for smallholders. The government's plans for the implementation of the SDGs and the Agriculture Policy could be further explored.

### *Promote ethnic diversity*

It is also important to more clearly define what is meant by Lao PDR as a 'multi-ethnic' society. Ethnographic research by Chamberlain and others (Chamberlain 2001 and 2008; Mann and Luangkhot 2008; UNDP, 2011) about cultures and customary management systems can be used to inform these discussions and promote the value of ethnic diversity and indigenous knowledge.

Also important is the need to confront ethnic difference. This includes building an environment where people are able to explain their cultural practices to outsiders, and where outsiders are able to understand and appreciate other cultural perspectives. Cultural difference and ethnic diversity needs to be promoted as a treasure and an important part of the country's future rather than as a problem.

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<sup>51</sup> Sample studies have been done by the National Statistics Centre funded by UNICEF and the UN as part of developing a Food and Nutrition Strategy and stakeholder mapping in 2015 (MoH, 2016).



# Community Empowerment

### ***Strengthen legal support in key cases of land disputes***

Legal casework support is needed so that communities involved in land disputes are able to defend their customary land rights. One example of non-confrontational support that could be built on is the Olam/Outspan case in Paksong District, though this case has received some criticism (see section 'Examples of 'successful' legal support and community resistance'). Also needed are programmes for young lawyers to build interest and capacity in land-related public interest law. Young lawyers can play an important role in disseminating the law and in supporting cases. Efforts are needed to make practical use of the law.

### ***Develop case studies of effective protection and use of customary lands***

Scaling up examples of local level protection and use of customary land is also needed. Study tours between villages could look at how village land use plans and communal land titles are being implemented, and to study good customary land use and management practices. Alternatives to the current reliance on large-scale agriculture are needed. Diverse land use approaches need to be promoted to demonstrate the important role smallholder farmers can make in agricultural production.

### ***Promote legal education and strengthen local capacity***

Villagers need support to make improved land use decisions based on local knowledge. Support could be considered to strengthen legal education, particularly to develop communication strategies to allow for understanding of education materials by women and elders, and allow for two-way dialogue.

Legal education messages could include making effective use of existing documentation such as land use plans, village boundary delineation, tax receipts, temporary land use certificates, etc. to defend communal customary land. Raising awareness of the role of the village chief in approving a concession can also encourage transparent village decision-making. Also needed is promoting greater understanding of contracts and agreements with outside companies.

### ***Support communities to document their customary practices***

Supporting village youth, under the guidance of elders, to document their customs can help to build their awareness of both customary and national law. This could include developing better understanding of women's land rights amongst the different ethnic groups. Strengthening local tenure and cultural identity including community conservation of key cultural areas could also be considered.

### ***Promote dialogue with customary users***

There is also a need to strengthen downward accountability. Efforts should be made, perhaps linking with the Lao Farmers' Network, to create a dialogue with farmers about their needs for customary tenure recognition. This dialogue could be extended to ensure NGOs/NPAs have established platforms for dialogue with farmers and communities. Ultimately development organizations need to create a bridge to support dialogue between the government and local people for customary tenure recognition. Communities and their representatives need support to be able to express their views and interests.

## Conclusion

This study has highlighted the complex cultural/ethnic dynamics at the heart of customary land use in Lao PDR and the need to accommodate these diverse cultural arrangements. It has also explored some of the problems which can result when outside prescriptions for land and livelihood change do not take account of the cultural foundation on which land management and livelihoods are built. In this sense the recognition of customary tenure can provide a first step in building a development process which is driven by local people themselves, is based on what they know and can do, and allows for understanding between villagers, government authorities and development agents.

Developing a better understanding of the interrelationships between land, resources and culture is critical to support local people to adapt to change in culturally appropriate ways. The introduction of the market economy, land and forest allocation, resettlement programmes, reductions in land and rice yields all have had major impacts on how ethnic groups organize themselves and make sense of their world. Clearly people have made use of their cultural knowledge and acumen to deal with these major upheavals and peoples' relationship to their land is crucial in shaping how they adapt. A key lesson, therefore, is that supporting local peoples' links with their land can allow adaptation and change based on peoples' own knowledge and customs.

There is also a need to more clearly define what is culturally sensitive and equitable economic growth (Chamberlain, 2001). This implies redefining parameters for assessing well-being and poverty, revisiting concepts of agricultural development to embrace smallholder production systems, diversity and sustainability, perhaps in conversation with different ethnic groups about some of their own cultural practices. Instead of development being defined by outsiders, there is a need to base development on peoples' own criteria and cultural realities. The recognition of customary tenure, in this sense, implies a different starting point in building well-being and 'progress'. Strengthening the recognition of customary land tenure in essence means promoting local development and approaches – i.e. keeping land local (Focus, 2014).

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# Annexes

## Annex 1. Historical Overview of Land and Forest Issues in Lao PDR

### Historical context

At various periods in history Lao PDR consisted of four kingdoms – Xieng Dong Xieng Thong (Louang Prabang), Xieng Khoang (Meuang Phouan), Vientiane (Sikhottabong), and Champassak (Chamberlain, 2001). Social and cultural characteristics from these past kingdoms are to a certain extent retained. Historically, the upper Mekong valley basins of Vientiane and Louang Prabang have been practicing wet-rice agriculture in bunded irrigated fields since at least the thirteenth century (Chamberlain, 2001). Most of the ethnic Tai populations up until the fifteenth century were located along these rivers in the north. Historical records suggest a Tai population of well over a million in the intramontane northern valleys of the country (Chamberlain, 2001).

For much of the nineteenth century, before French colonization in 1893, the Lao Kingdom was a vassal of Siam, during a period when the Vietnamese and Siamese empires were competing for control of the Indochinese Peninsula. One key result of this was the forcible relocation of Lao people to Siamese territory on the west bank of the Mekong, ostensibly to ensure the Lao could not provide food, supplies or labour to any Vietnamese invasion force (Chamberlain, 1996). It is estimated that the population in 1900 was only 470,000 with five times that number of ethnic Lao living on the west bank of the Mekong. As a result of Lao political weakness, large areas of the country were left depopulated during this period. This allowed Hmong, Mien, Yao and other Sino-Tibetan groups to occupy elevated areas in the north of the country from the early to mid-nineteenth century.

War during the 1960s and 70s was particularly devastating. Large numbers of people had to flee their villages in the late 1960s during the bombing of the Ho Chi Minh Trail and their villages were destroyed. Beginning in 1973 villagers began to rebuild. In many cases they were unable to remain in their old village sites and had to move to new sites, usually nearby (Chamberlain, 2001).

With the founding of the Lao PDR in December 1975, land ownership was transferred from the King to the people, represented by the State (Ducourtieux et al., 2005). Land collectivization was initiated in some eastern provinces during almost 20 years of war, and this became national policy after 1975. Collective farming was an attempt to redistribute access to agricultural land and increase productivity (USAID, 2013). Land was effectively 'owned' by the village (Ducourtieux et al., 2005). Almost 4,000 co-operatives were established between 1976 and 1986 (Ducourtieux et al., 2005), with the degree of collectivization varying according to local political pressure. By the mid-1980s only about 40% of farmers remained as cooperative members (USAID, 2013). The difficulties in organizing work collectively and redistributing the harvests eventually led to a decrease in rice production, with widespread passive farmer resistance and low public investment.

Partly because of this, in 1986 the Lao Revolutionary Party began to promote a 'socialist market economy' through the New Economic Mechanism. Cooperatives were abandoned and land was returned to its former owners. This proved difficult because formal land documentation and accurate ownership histories were destroyed after the war (USAID, 2013). A framework for a free-market oriented land policy was developed and private ownership and free enterprise under single-party rule became the new economic and political principles.

Originally, titles certifying land ownership were established with the creation of a Land Book and kept in force under the Royal Order - Law No. 135, 1958 (World Bank, 1996).<sup>52</sup> These titles were supported by cadastral plans and maps for Vientiane, Pakse, Savannakhet and Louang Prabang (World Bank, 1996). Establishing and maintaining these cadastral systems could not be sustained and were eventually abandoned after 1975 (World Bank, 1996). Under state ownership, after 1975, land use rights were informally recognized and a process of administering and recording transactions of those rights was developed. By 1996 land use rights had legal standing and registration of transactions was required by law (World Bank, 1996). This system was not in place uniformly in all areas of the country and where it was in place, it was not fully used (World Bank, 1996).

### Land issues in Lao PDR

Lao PDR's GDP growth has averaged around 7% since 2001 (World Bank, 2017). Over half the country's wealth is produced from agricultural land, forests, water and hydropower, and mineral resources (USAID, 2013), and these resources are being heavily exploited to achieve these levels of growth. In 2013, the mining and electricity sectors made up 18% of the country's economic output, but only employed around 22,000 people (World Bank, 2014). Employment is unlikely to increase much in these sectors given their capital intensive makeup.

With around 80% of the rural population engaged in subsistence production, tenure security is vital for 2.3 million people engaged in agriculture, and 4.5 million people living in rural areas (World Bank, 2014). Despite a low population density of around 29.1/km<sup>2</sup>, arable land per capita is low at around 0.2ha/person or 6.1% of the total land area (USAID, 2013).<sup>53</sup> The majority of this land is along the Mekong flood plain and its tributaries, and government policy has focused on maximizing its use through permanent, intensive farming for both domestic supply and export. Agriculture provides around 27.7% of GDP (World Bank, 2014).

Rice cultivation is central to rural and urban peoples' livelihoods and food security. Average urban households, for example, depend on own-grown rice for 50% of their needs, and poor urban households grow 94% of their rice consumption needs (Russell et al., 2015). Wet-season lowland rice occupies 714,000 ha, upland rice 215,000 ha and dry-season rice 57,000 ha (MAF, 2014). A growing number of farmers cultivate maize, cassava, rubber, and coffee for sale.

Rural development, therefore, plays a central role in the government's policy agenda for political stability and poverty reduction. Lacking the means to invest heavily in infrastructure such as irrigation, the government has tried to expand agricultural production through land policy (Ducourtieux et al., 2005). To reach its target of exiting Least Developed Country status by 2020, the government has promoted private sector investment for growth and poverty eradication. In 2006 the government formulated its campaign to 'turn land into capital', partly to make up for a lack of local public and private sector finance (Kenney-Lazar, 2015b). In 2009, the Investment Promotion Law was amended to facilitate foreign investment, including allowing foreigners to own land and incentives in the form of reduced duties and taxes (Hett et al., 2015).<sup>54</sup>

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<sup>52</sup> These titles conveyed permanent land use rights which could be bought and sold, mortgaged or bequeathed (USAID, 2013).

<sup>53</sup> Of the 10.3% of the country's land area classified as agricultural, 0.4% is permanent cropland and 3.8% is permanent meadow and pastureland. About 11% of agricultural land is fallow (USAID, 2013).

<sup>54</sup> Leasing rates are low, at \$3 to \$9 annually per hectare, compared with rates of \$30 to \$70 for other parts of Southeast Asia (Kenney-Lazar, 2015b). From 2004 to 2005 revenues from state land assets totaled \$7.2 million, or only 0.24% of GDP (Kenney-Lazar, 2015b).

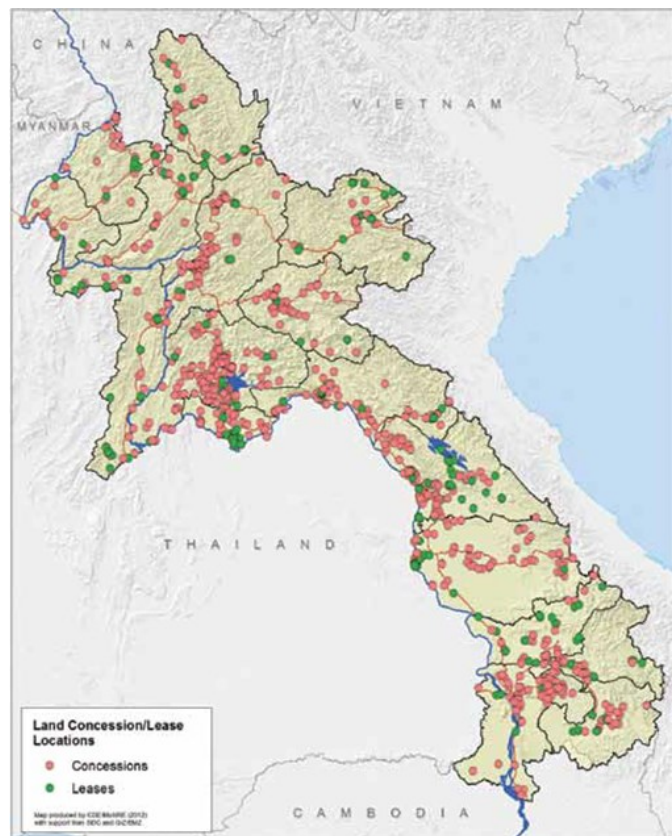


## The development of land concessions

The land concession model represents a fundamental change in the control of forest areas, often with the idea that granting concessions would enable the government to achieve other policies, such as eradicating shifting cultivation. Land concessions have been allocated for up to seventy years or more, often without surveys, supervised land allocation, consultation with local communities or consideration of existing land uses. Provincial authorities have granted significant areas to mainly Chinese, Japanese, Indian, Vietnamese, and Thai companies for plantations such as rubber, eucalyptus, acacia, jatropha, sugarcane, oil palm, and cassava to meet growing international demand.

The most comprehensive government-sanctioned publication to date on land concessions and leases in Lao PDR (Schönweger et al., 2012), shows that more than 2,600 land-lease and concession agreements were granted, covering a total of 1.1 million hectares for agriculture (including tree plantations) and mining, with 135 investments making up 89% of the leased land area (see Figure 3).<sup>55</sup> The map excludes logging concessions, contract farming and hydropower projects, so the total area of land under concessions is much larger.

Between 2000 and 2009, the number of land deals increased fifty-fold. Chinese, Thai and Vietnamese backed investments make up 23% of all deals, and cover 579,821 ha, or 53% of all land under investment (Schönweger et al., 2012). Many of these concessions are in the central and southern provinces, while a contracting or 'cooperative' model predominates in the North (Dwyer, 2011). In total, it is estimated that five million hectares, equal to 21% of the country, are under lease or concession to either domestic or foreign parties (Wellman, 2012).



**Figure 3. The location of Leases and Concessions in Lao PDR. Map includes only those with spatial data, 1,258 projects.**

Source: Schönweger et al. (2012)

The study also found that large areas of concessions have been allocated in unstocked forestland (largely forest fallows)<sup>56</sup> and in primary forest (Schönweger et al., 2012). This gives an idea of the impact on upland shifting cultivators and on forest resources. The intensity in granting

<sup>55</sup> This State Land Leases and Concessions Inventory was the result of cooperation between Lao PDR, Switzerland and Germany, and was the first systematic inventory that allowed for visualizing and analyzing land investments across the entire country.

<sup>56</sup> Unstocked forest is defined as “forested areas in which crown density has been reduced to less than 20% because of logging, shifting cultivation or other heavy disturbance” (Barney, 2008:14).



concessions has generated a range of impacts. The airing of complaints at an international forum in Vientiane may be what led to the disappearance of Somphone Sombath in December 2012 (Shoemaker and Ironside, 2014).

One in five villages is affected by land investments and they exceed the area used for wet rice production (Schönweger et al., 2012). Ethnic minority populations are particularly impacted, leading to the loss of access to livelihood resources as well as spiritual sites. Thousands of people have been forced to leave their villages and find work outside farming. For example, communities living along the lower Hinboun River whose livelihoods were severely damaged by the flooding and erosion caused by the Theun-Hinboun Hydropower Project, had to take up upland rice cultivation to feed their families. Yet the land available for upland cultivation has increasingly been taken for industrial tree plantations by Oji Pulp and Paper (Shoemaker and Ironside, 2014). This loss of customary land is resulting in poverty, dislocation, and social disruption, creating consequences which are as yet not fully known for vulnerable rural villagers.

Concessionaires have been widely criticized for using coercive tactics such as clearing land in use by local communities with little or no consultation or compensation (Russell et al., 2015). Concession companies clearing coffee which is considered a 'modern' crop, was partly responsible for a moratorium on all concessions over 100 ha in 2007.<sup>57</sup> This moratorium was repealed in May 2009. However, in July 2009 a new moratorium was announced on all concessions over 1,000 ha (Russell et al., 2015). The same year, Decree 135 on leases and concessions directed different ministries to collect and review data on lease and concession projects (Hett et al., 2015). In June 2012, a second moratorium suspended approval for mineral exploration, eucalyptus and rubber plantations until the end of 2015 and called for an assessment of the quality of investments in these sectors (Hett et al., 2015, see Figure 4).

None of these moratoria have been very effective in altering the rate of land conversion and forest cover loss (Russell et al., 2015). The granting of concessions has continued often at the provincial level (Kenney-Lazar, 2015b). Reports have also highlighted the rampant illegal logging which is part of large scale land clearing operations (Smirnov, 2015).<sup>58</sup>

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<sup>57</sup> There were also reports in the Vientiane Times in mid-2006 of concession companies encroaching on land which villagers were using for government sponsored cattle raising. After an investigation following a complaint by the company, a NLMA spokesperson raised the question of whether it was time to think about a moratorium on concessions.

<sup>58</sup> This is linked to both hydropower and plantation development and occurs in both future reservoirs and upstream watersheds.



**Figure 4. Lao land investment policies**

Source: Hett et al. (2015)

## Forest protection

In 2010 the Department of Forestry estimated Lao PDR's forest cover at 9.5 million ha or 40.29% of the total land area (Forest Trends, 2014). Despite the policy priority on forest protection, between 2006 and 2012 forest loss was estimated to be between 80,000 ha to 170,000 ha per year (Forest Trends, 2014). Global Forest Watch data indicates a loss of 191,031 ha of forest in 2014 and a loss of 1.6 million ha (more than 8%) of tree cover from 2001 to 2014.

The agriculture-forestry sector is the largest contributor to national greenhouse gas emissions. Main drivers of deforestation are agricultural expansion, forestry plantations, mining, hydropower, infrastructure, and urban development. There is little intact forest landscape left; even protected areas have been heavily impacted (Harfenist, 2015). The national Forest Strategy aims to increase forest cover to 70% by 2030 through sustainable management and reforestation. Plantations are included in official estimates of forest cover.<sup>59</sup>

## Land and Forest Allocation (LFA)

After pilots in Louang Prabang and Xayabury provinces beginning in 1990, LFA was approved as national policy in 1994 and officially adopted by MAF in 1996 (Ducourtieux et al., 2005). However, villager participation was limited, and allocation was often carried out typically over 2-3

<sup>59</sup> See, for example, article in Vientiane Times (February 14, 2013), <https://wle-mekong.cgiar.org/forestry-cover-target-could-be-out-of-reach/> Consistent data on national forest cover is also lacking. The national definition of forest is >20% tree canopy cover. FAO's definition is >10%. Using this definition, forest area in 2010 was almost 15.8 million ha or 67% of the total land area.

days per village with little follow-up (IR, 2008; Chamberlain, 2008).<sup>60</sup> There was also no systematic analysis of all land held by each family during the allocation process (Mann and Luangkhot, 2008).<sup>61</sup> These reforms raised governance questions of who to allocate land use rights to and for what purpose (Kenney-Lazar, 2015b).

The original government thinking was that market development would be via farming households increasing their productivity rather than by allocating large areas of village-managed land to foreign companies (Ducourtieux et al., 2005). Concessions were envisioned as a way to develop extra land that could not be developed by farmers (Kenney-Lazar, 2015b). This explains why land, such as conservation and protection forest and individual agricultural land, that by law cannot be conceded has been allocated to companies (Kenney-Lazar, 2015b).

Land allocation took place in resettled and established villages (Mann and Luangkhot, 2008). As part of the LFA process, Village Land and Forest Management Agreements were developed between DAFO and village authorities (Mann and Luangkhot, 2008). However, these did not accommodate traditional land use types or provide any real tenure rights (Mann and Luangkhot, 2008). Often changes to land classifications by DAFO did not follow an existing land use plan and land classification. Land allocation generally failed to accommodate the variety of land uses, changes in land use resulting from compulsory resettlement, migration or allocation of land to concessions, changes in household labour and productive capabilities, etc. (Mann and Luangkhot, 2008). This means land allocation was virtually unenforceable as it could not adjust to the realities of a household's expansion and contraction and undermined the structuring of household labour (Mann and Luangkhot, 2008).

Some families received a house plot and 2 ha of paddy field, while in other cases 42 ha of cultivation land had to be divided amongst 160 families (Mann and Luangkhot, 2008). In other cases still, villages received between 1 and 0.3 ha per family of agricultural land, depending on who was resettled first (Mann and Luangkhot, 2008). Needless to say resentment was felt throughout the country with land allocation often viewed as a mechanism to reduce and separate villages from their traditional lands.<sup>62</sup>

LFA significantly transformed local social arrangements. Traditionally, land-poor households could negotiate with land-rich ones for annual use without paying rent. After land allocation, paying rent became the norm, making it much more difficult for cash and labour-poor households to obtain cultivation land (Mann and Luangkhot, 2008). As more households struggled with food security, they could not assist poorer households in times of food shortage (Mann and Luangkhot, 2008). Moreover, in fixing the amount of land available to a household, the flexibility to adjust income sources and spending levels is restricted but taxes still must be paid. Indebtedness can easily follow (Mann and Luangkhot, 2008).

Land allocation, therefore, detached ethnic minorities from customary land management that supported the poor and ensured basic food sufficiency. It also decreased cooperation between those who customarily shared their land and labour (Mann and Luangkhot, 2008).

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<sup>60</sup> Limited local government budgets and technical skills resulted in rapid implementation of LFA without sufficient consideration of customary practices (Fujita and Phanvilay, 2008).

<sup>61</sup> Mann and Luangkhot (2008) report that almost all TLUCs were issued in the name of male household heads rather than reflecting gendered inheritance norms or conjugal property rights.

<sup>62</sup> A Khmu National Assembly member recounted that one-third (over 13,000 people) of the entire Khmu population of Phongsaly Province fled the province to avoid land allocation (Chamberlain, 2001).

## Poverty Reduction and “New Poverty”

Lao PDR is considered a least developed country, even though poverty has reduced significantly from 33.5% in 2002 to 23.5% in 2012/13 (World Bank, 2017). Food insecurity, however, continues to be a critical issue with 22% of people undernourished (Kenney-Lazar, 2015a). Rural poverty is highest in the uplands, particularly in the Centre and Southern parts of the country along the eastern border with Vietnam and also along the northern border with China (MAF, 2014; USAID, 2013).<sup>63</sup> Poverty is lowest in the Mekong Corridor, Northern Lowlands and Vientiane Plain (USAID, 2013). Food insecurity is becoming a major problem in some areas. There is also a widening poverty gap between rural and urban dwellers.<sup>64</sup>

High poverty rates persist among Austroasiatic (42.3%) and Hmong-Lu Mien (39.8%) groups (UN, 2015). The Millennium Development Goal to halve poverty was achieved but inequality has increased, and the target of reducing underweight and stunting was missed (UN, 2015). In rural areas without road access, rates of stunting and underweight children are twice those in urban areas, and stunting rates among Hmong-Lu Mien and Sino-Tibetan (Tibeto-Burman) ethnic children exceed 60%, nearly double the Lao-Tai group (UN, 2015).<sup>65</sup> The gap of three times the rates of stunting between the poorest and richest households has widened in recent years (UN, 2015). In addition, children in the poorest quintile are up to four times more likely to die before their fifth birthday than those from the richest (UN, 2015). Bokeo, Champassak and Salavan provinces have seen an increase in the depth and severity of poverty (UN, 2015).

Conventional analysis depicts small farmers as unproductive mired in poverty partly because the non-monetary value of their productive activities are not adequately accounted for. Poverty reduction strategies developed by the government with assistance from bilateral and multilateral donors are focused on increasing economic activity through ‘modernizing’ and transforming traditional, subsistence farmers into market-oriented agribusiness producers. A World Bank document, for example, notes progress in poverty reduction from policy efforts to commercialize agriculture, with small farmers reporting increases in selling some produce from 35% in 1998/99 to 71% in 2010/2011 (World Bank, 2014). This policy approach, along with conventional analyses of poverty, are at odds with empowering communities through strengthening customary tenure rights and ensuring food security through access to local resources.

From the above discussion, a key question is the degree to which recent policies and economic development projects have created ‘new poverty’ in Lao PDR, or whether poverty, following conventional analyses, is endemic. There is a weight of evidence pointing to significant ‘new poverty’ in the country. Chamberlain (2001) identified significant new poverty, mainly related to poorly implemented resettlement and land allocation. Follow-up studies have supported these links between donor-supported government rural development policies and an increase in rural poverty and suffering (Kenney-Lazar, 2015a; Baird and Shoemaker, 2007).

<sup>63</sup> Sekong (in the south) and Huaphan (in the north) are considered the two poorest provinces in the country (MAF, 2014), with per capita annual income around 40% of the national average of 1,069 USD during the period 2006-2010 (MAF, 2014).

<sup>64</sup> For example in Attapeu Province, city people are getting rich from selling rural peoples’ land, precious stones, and minerals while rural people are selling their labour in rubber and sugarcane plantations for 600,000 kip per month (75 USD). Large numbers of people have been moving toward living under the poverty line in the past 2-4 years. In Louang Prabang, city people enjoy good incomes from tourism and other activities while rural people lose land for teak and other plantations (Interview 16, 2016).

<sup>65</sup> Infant and under-five mortality are high in Louang Prabang, Louang Namtha, Oudomxay and Salavan.

## Annex 2. Piloting Communal Land Registration and Titling

Following the introduction of a partial legal framework for communal land titling in 2007, two pilot projects were implemented – in Sangthong District, Vientiane prefecture and Nakai District, Khammouane Province. In Sangthong, Temporary Land Use Certificates (TLUCs) were issued in 2011 for five village forests consisting of secondary forest, mainly of bamboo, for 2,189 ha (Schneider, 2013).<sup>66</sup> Registration and adjudication was conducted and titling is yet to follow (DoL/LIWG, 2012). The declaration certificate specifies land rights are held by the bamboo handicraft group, and the area is to be used for bamboo and rattan production (Schneider, 2013). However, the TLUC is labeled “map of state land” (*penti din lat*) and is in the name of the village to be administered by the village authorities, not the bamboo group (Schneider, 2013). This appears to be a “delegated management” form of tenure, rather than full ownership (Hirsch and Scurrah, 2015: 10).

In Nakai, 14 hamlets that were resettled because of the Nam Theun 2 hydropower dam received permanent collective title in 2013 to all village lands that were not individual or state land (Schneider, 2013). Included were village forest areas, cemeteries, community infrastructure and an additional 2,780 ha of agricultural land, totaling 17,428 ha (Schneider, 2013). The titles were issued in the name of the original 14 hamlets, which have since been consolidated into 10 villages with village authorities represented by the elders and community leaders from each of the 14 hamlets (Schneider, 2013). Decisions on the use and management of the communal areas need 70% agreement of eligible households, with one vote per household (Schneider, 2013).

More recently, GIZ/MoNRE have been implementing communal land registration in three districts in Huaphan Province. Communal titles cannot be issued because there is not yet a formally established process or format for these titles. Communal land includes village use forests, grazing areas, and paddy lands. It is intended that these will be converted to titles when the new land law/legislation is clarified. Regulations for village use forests were drawn up as part of the PLUP process, allowing the village use forests to be registered as communal. Village protected forest and Conservation forest remain registered with the State. Collective titles, for schools, meeting halls, fishponds, temples, cemetery and spirit forests have been issued in some cases, indicating that the current MoNRE land registration system accommodates registration of titles to collectives, but not to communities. As of the end of 2016, 330 communal plots had been surveyed and registered in 25 villages for an average of around 44 ha per plot. The largest single piece is a 400 ha grazing area. One reason the area per plot is low is that in Huaphan Province, many paddy fields are communal.<sup>67</sup> Spirit forest areas average 2-5 ha. An average of 13 communal parcels has been registered per village.

<sup>66</sup> The certificate of one of the villages, Ban Xor, was for 1,887 ha of the total 2,189 ha. Interestingly another village, Ban Ngiew, customarily manages paddy fields communally, reallocated to families every three years (DOL/LIWG, 2012). This land was not registered.

<sup>67</sup> This is historical, as Huaphan Province is considered one of the cradles of the revolution. Since the late 1970s when paddy fields were collectivized, the original owners moved to other provinces and the paddy fields belong to the village. The people now using this land felt private titles would cause disputes with former owners. The communal option avoids these disputes.



One of the reasons for the slowness of the pilots is that PLUP has to be carried out first and community members consulted about areas for communal registration. However, GIZ representatives feel that the process increased understanding within the government of communal land management.<sup>68</sup> Other organizations that have in the recent past explored or attempted to pilot communal land registration and titling include Gret, SUFORD-SU project and CIDSE-Laos.

At present, communal land titling requires submitting a management plan or the village regulations or other existing rules and regulations concerning the communal land (Rock et al., 2015). This offers opportunities for integrating customary management practices. During PLUP simple village regulations or forest and agricultural land regulations are established, which can be based on traditional rules and regulations.

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<sup>68</sup> The Land Management Decentralization Project (LM-DP) is a GIZ project running from 2015 to 2017 to strengthen systematic land titling in four provinces so that this may be rolled out countrywide. It succeeded the Land Management and Rural Economic Development (LM-RED) project, which carried out land use planning in the north, and merged with the GIZ Northern Upland Integrated Rural Development Programme (NU-IRDP). NU-IRDP carried out PLUP and participatory agricultural land management (PALM) in 231 villages in 10 districts and 3 provinces (Huaphan, Louang Prabang and Phongsaly).

## Annex 3. List of Contributors for the Study

Government		
Interview 1	Ethnic Affairs Department	Lao National Assembly
Interview 2	Legal Drafting Committee	MONRE
Interview 3	International Relations Division	Lao Women's Union
Interview 4	Department of Land Use Planning	MONRE
Development Partners/NGOs		
Interview 5	Staff (2 people)	Development Partner
Interview 6	Former staff	Development Partner
Interview 7	Staff	Land network
Interview 8	Staff	National Non-Profit Association
Interview 9	Staff	International project
Interview 10	Staff	International project
Interview 11	Former staff	International NGO
Interview 12	Staff	International NGO
Interview 13	Staff	International project
Interview 14	Advisor	International project
Interview 15	Staff	International NGO
Interview 16	Advisor	International project
Researchers		
Interview 17	Senior Researcher	Lao expert
Interview 18	Senior Researcher	Ministry of Agriculture and Fisheries

## Annex 4. Checklist of Questions

### Objectives

1. Understand the situation of customary tenure, problems and opportunities for legal recognition
2. Engage with key decision makers – to understand their perspective
3. Initial recommendations for a 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 marginalized groups? 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?
- Who are the right holders in law?
- What legal provisions are there for the recognition of shifting cultivation?
- 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 customary tenure recognition?

- How can existing policies for recognition of customary tenure 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 for the government recognizing the 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 tenure 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?
- Important multi-stakeholder alliances
- What capacity building for alliances/networks 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.*

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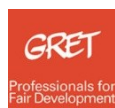
*The **MRLG Thematic Study series** examines major themes related to land tenure in the Mekong Region. It is aligned with strategic priorities of MRLG and is intended as background document for all relevant MRLG partners. As such, the series consists of a synthesis of existing references in a particular 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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