

# GOOD GOVERNANCE AND NATURAL RESOURCES TENURE IN SOUTH EAST ASIA REGION



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*The views expressed in this publication are those of the authors and do not necessarily reflect the views of FAO.*

Photography: FAO

## List of abbreviations

AEZ	Agro-Economic Zones
ALRO	Agricultural Land Reform Office
ASTV	Asian Satellite Television
CARP	Comprehensive Agrarian Reform Program
CBD	Central Business District
CODI	Community Organizations Development Institute
CPI	Corruption Perception Index
DMCR	Director General of the Department of Marine and Coastal Resources
DOL	Department of Lands
FAO	Food and Agriculture Organization of the United Nations
FIDF	Financial Institution Development Fund
GDP	Gross Domestic Product
GLTN	Global Land Tool Network
IT	Information Technology
KPI	Key Performance Indicators
LDD	Land Development Department
LMW	Lao Women Union
NESAC	National Economic and Social Advisory Council
NHRC	National Human Rights Committee
NPL	Non Performing Loans
NSDI	National and Spatial Data Infrastructure
PAD	People's Alliance for Democracy
PLEC	Public Land Encroachment Committee
TAO	Tambon Administration Organization
TCC	Tambon Community Council
TI	Transparency Index
VLAP	Vietnam Land Administration Projects

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## Summary

Southeast Asian Countries manifest most if not all of the symptoms of weak governance in land management. While there may be disparities in current levels of economic development, there are common problems which countries in this region share. Firstly, all Southeast Asian countries face increasing supply constraint of land for agricultural production given the decline in natural forest coverage. Secondly, while there may be functioning land markets, these may not necessarily be ones characterized by well-defined property rights systems. Different types of land tenure may co-exist and countries are all expediting the process of land registration and rationalizing existing property rights system to lay the foundation for an efficiently functioning land markets. Third, there is widespread land conflicts arising from overlapping of claims particularly those involved with for large scale investments or infrastructure projects. Finally, in varying degrees, Southeast Asian countries are confronting problems of land concentration, excessive land subdivision and fragmentation.

To establish the foundations of good governance, Southeast Asian countries are embracing combinations of legal and technical measures under various command and control measures. These however, tend to be primarily top-down and oftentimes disproportionately focused on technical components of land administration. Moreover, they are often based on planners' perspective and are seldom free of political interests. Within this context, Southeast Asian good governance in land administration can be said to be hindered by a number of constraints. First, between economic and pro-poor land policies, the balance is likely to be tipped in favour of the former particular given the potential to capture private gains among those in control of the political power and administrative organs. Second, there is widespread administrative corruption because of the inappropriateness of the reward and incentives system. However, by comparison to 'state capture', it is less damaging both in scope and in scale. Thirdly, while the principle of the law protects the rights of citizens, such rights cannot be enforced because citizens do not have easy access to the judicial system.

Based on the above, among the urgent changes which may contribute to improved good governance in land administration are (i) improving of coordination among land-related responsible agencies to reduce overlaps and improve cost-effectiveness of State expenditures, (ii) adjusting reward systems of executing staffs to improve work performance as well as provide counterbalancing force against corruption at higher levels of administration, (iii) exploring win-win options for aligning commercial interest in the economic exploitation of land and natural resources with conservation efforts which at the same time to incorporate poverty eradication objectives, (iv) creating legal pluralism and alternative dispute settlement mechanisms to increase access to the judiciary system or to raise attention of policy makers and technocrats. In this connection, one channel of creating access could be the media which has proven to be effective at disclosing information and getting (almost) immediate response from decision makers.

## 1. Background and Coverage of the Report

The purpose of this report is to provide a regional background paper on the status, trends and regional champions in the field governance of land and natural resource tenure specifically in relation to good governance. The contents are divided into three major sections. The first presents an overview of Southeast Asia and overall assessment of ‘*good governance*’ for Southeast Asian Countries on the basis of Corruption Perception Index (CPI) and Transparency Index (TI). Details in Section three focus on the key issues of land management in Southeast Asia namely, declining natural forest coverage, property rights in land resources, emerging issues regarding overlapping of claims over land and land distribution. In section four, land management issues of Southeast Asia are discussed in relation to the principles of good land governance as defined in the FAO’s (Food and Agriculture Organization of the United Nations) Guidelines on Good Governance in Land Tenure and Administration which is discussed under four broader areas, namely (i) the policy framework and the fundamental goals of land management, (ii) administrative issues, (iii) transparency in land administration and (iv) accountability.<sup>1</sup> Finally, based on issues discussed we highlight some key issues for consideration and inclusion in the Voluntary Guidelines of Responsible Governance of Tenure of Land and Natural Resources

In Southeast Asia, there may be functioning land markets but not necessarily ones characterized by well-defined property rights systems. Different types of land tenure may co-exist and attempts to superimpose property rights concepts and reassertion of state claims for conservation purposes, for large scale investments or infrastructure projects are among the drivers of land conflicts. Southeast Asian Countries manifest most if not all of the symptoms of weak governance in land management. Among the features are centralized structure of land administration, lack of transparency and accountability enabling misuse and abuse of power and evidences of rent seeking behaviour both at the level of policy makers and at the implementing level. The results of weak governance are reflected in inadequacy of legal protection for the rights of the poor and general inefficient use and mis-use of land resources and negative externalities on both supply and quality of the land and other related natural resources base.

Through combinations of legal, institutional and technical measures, countries have put in efforts to build the foundations for efficient and effective management of their land and natural resources. These measures are however, predominantly command and control measures which are heavily oriented to what can be technically achieved. Moreover, means and ends can be mismatched for two reasons. One is that they are primarily top-down, designed by bureaucrats, technocrats and often based on perceptions of the situation seen from planners perspective and they are not free of political interests.

The other is that in delivering the means, there are major leakages from rent seeking behaviour of politicians and technocrats and from pure incompetence in implementation which invariably result in mismatches between when intervention was needed and when they were delivered. In this report, we highlight several initiatives of

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<sup>1</sup> FAO, Land Tenure Studies, Vol. 9. Good Governance in Land Tenure and Administration



countries in the Region to address such gaps which have at least broadened the base for involvement of stakeholders by providing checks and balances into land management.

## 2. Southeast Asia and Indicators of Good Governance

Southeast Asia comprises 11 countries with a combined population of 554.4 million<sup>2</sup>. The level of economic development is diverse with the two richest country (on GNI per capita indicator alone) being Singapore and Malaysia. Thailand, Indonesia and the Philippines are grouped together as Lower Middle Income Country. The remaining countries, Cambodia, Lao PDR, Myanmar and Vietnam with GNI per capita not exceeding 700 USD/per year are grouped among Lower Income Countries.

Lao PDR and Vietnam are the few remaining socialist countries where Centrally-Planned economic systems have embraced the principle of market-economies. The political systems in the remaining countries, i.e. Cambodia, Indonesia, Malaysia, Myanmar, the Philippines and Thailand, are ‘nominal’ democracies. Beyond such formats of having political parties and general elections, how democratic these countries are lies outside of the scope of this paper.<sup>3</sup>

Countries such as Indonesia, Malaysia, the Philippines and Thailand are no longer dependent on revenue from land-based agriculture with shares of less than 15% to GDP (Gross Domestic Product). Among the lower income countries, reliance on revenue from the agricultural sector is higher but with the exception of Lao PDR, the agricultural sector’s share of total GDP in these countries have been surpassed by the services and industrial sectors. But land resources management is not just about land allocation for agricultural production but also about balancing allocation to competing uses. Moreover, although agriculture may not be an important source of revenue, the larger percentage of the population for most of the Southeast Asian countries still live in the rural areas and it is still the largest employment sector.<sup>4</sup> Despite the large income disparity among the countries, poverty eradication is a common challenge for countries in this region. Information available on the percentage shows that among lower income countries such as Cambodia and Vietnam, around 30% of their population living below the national poverty line (Table 1).

Good governance in land cannot really be separated from other aspects of good governance in the government of those countries. Two sets of indicators have been reviewed. The first is Corruption Perception Index (CPI) which is constructed by Transparency International (TI). CPI scores measures perceptions of business people and analysts within the countries over public sector corruption. Scores range from the lowest 1 reflecting perceptions that there is a very high degree of corruption to the highest ideal score 10 meaning (in principle) that there are no corruptions at all.

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<sup>2</sup> World Bank Country Data

<sup>3</sup> If having political parties and general elections are considered as ‘democratic’ then countries such as Cambodia and Myanmar are ‘democracies’.

<sup>4</sup> The three exceptions being Indonesia, the Philippines and Malaysia.

Among the Southeast Asian countries reviewed, the highest score is 5.1 for Malaysia<sup>5</sup> (Table 2). For other Southeast Asian countries, the low CPI scores can be considered as the situational context for the analysis of good governance in land administration in the Region. The CPI scores concentrate around the lower end ranging from the lowest 1.4 for Myanmar to the highest score for Thailand which is only 3.3.

The second indicator reviewed was the index of economic freedom prepared by the Heritage Foundation. Of the 11 indices of economic freedom<sup>6</sup>, the two categories of interest are 'Property rights' and 'Freedom from corruption'. Freedom with respect to property rights address issues such as legal protection of private property, the extent to which the executive branch of government interferes with the legislature and the judiciary, the functioning of land titling systems and the percentage of landowners having documentations to prove their ownership. The second indicator which is freedom from corruption is based on TI's CPI index for 2006. The scores are presented in percentages where the higher the percentage reflects the higher level of freedom for that indicator. As with the CPI, the scores of Southeast Asian hover around the lower end. For freedom over property rights, the higher scores are only 50% for Malaysia and Thailand. Cambodia, Indonesia and the Philippines each scored 30% for this indicator.

For the three countries scoring 10%, one major reason is the judiciary's lack of independence and corruption among judges and court clerks which therefore cannot provide the fair and adequate protection for private property be it for land, Intellectual Property Rights and investments. For Vietnam, it was also noted that while the foundations for protection of property rights have been laid, there is perceived needs for the development of law and enforcement mechanisms.

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<sup>5</sup> Singapore which is not covered by this paper has the fourth highest score among countries surveyed of 9.3.

<sup>6</sup> The 11 categories are (1) business freedom, (2) trade freedom, (3) fiscal freedom, (4) government size, (5) monetary freedom, (6) investment freedom, (7) financial freedom, (8) Property rights, (9) freedom from corruption and (10) labour freedom.

**Table 1. Basic Social and Economic Indicators of Southeast Asian Countries, 2006**

	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Thailand	Timor L'este	Vietnam
<b>Population and Income</b>									
Population, mid-year (millions)	14.4	223	5.8	25.8	51	84.6	64.7	1.0	84.1
GDP (US\$ billions)	7.3	364.8	3.4	150.7	na	117.6	206.3	0.36	59.3
GNI per capita (Atlas method, US\$)	490	1,420	500	5,700	na	1,420	2,990	840	690
GNI (Atlas method, US\$ billions)	7	316.7	2.9	146.9	na	120.1	193.5	0.86	58
<b>Average annual growth, 2000-06</b>									
Population (%)	2	1.3	1.6	1.9	1.1	1.8	0.9	4.5	1.3
Labor force (%)	3	1.9	2.2	2.5	1.9	3.7	1.2	7.0	2.1
<b>Most recent estimate (latest year available, 2000-06)</b>									
Poverty (% of population below national poverty line)	35	18	na	na	na	na	8.48 <sup>1/</sup>	-	29
Urban population (% of total population)	20	49	21	68	31	63	33	27	37
<b>(% of GDP)</b>									
Agriculture	30.1	12.9	42	8.7	na	14.2	10.7	32.2	20.4
Industry	26.2	47	32.5	49.9	na	31.6	44.6	12.8	41.6
Manufacturing	18.6	28	20.9	29.8	na	22.9	35	2.6	21.3
Services	43.7	40.1	25.5	41.3	na	54.2	44.7	55.0	38.1
Agriculture (growth rate % p.a.)	5.5	3	2	5.2	na	3.8	4.8	0.0	3.4

Note : <sup>1/</sup> Year 2007 for Thailand

Sources : The World Bank Group, World Development 2007

**Table 2: Freedom over property rights, freedom from corruption and CPIs.**

Country	Freedom over property rights (%)	Freedom from corruption (%)	Corruption Perception Index
Cambodia	30	21	2
Indonesia	30	24	2.3
Lao PDR	10	26	1.9
Malaysia	50	50	5.1
Myanmar	10	19	1.4
Philippines	30	25	2.5
Thailand	50	36	3.3
Timor L'este	na	na	na
Vietnam	10	26	2.6

Sources: Index of Economic Freedom by the Heritage Foundation and the Wall Street Journal 2008

### 3. Key issues in land management

While there may be disparities in current levels of economic development, there are common problems which countries in this region share. Firstly, all Southeast Asian countries face increasing supply constraint of land for agricultural production given the decline in natural forest coverage. Secondly, countries are all expediting the process of land registration and rationalizing existing property rights system to lay the foundation for an efficiently functioning land market. Third, there are widespread land conflicts arising from overlapping of claims. Finally, in varying degrees, Southeast Asian countries are confronting problems of land concentration, excessive land subdivision and fragmentation. In this section, each of these common problems and challenges to land management are discussed.

#### 3.1 Declining Natural Forest Coverage

Southeast Asia is a region which is still rich in natural forests and biodiversity resources. Countries such as Indonesia, the Philippines and Thailand have experienced rapid and continued deforestation over the decades. The Philippines and Thailand's natural forest cover has now reduced to only around 25% of the total country area. With diminishing forest resources, deforestation rate has also slowed down to around 0.5% but this is more reflecting the physical frontier reached as opposed to improved efficiency and effectiveness of forest protection measures. Indonesia is the largest country in Southeast Asia, around three times the size of Thailand which is the next largest country in the Region. Around 49% of Indonesia's land is still under natural forest cover and deforestation rate of 1.8% p.a. is still the highest in the region. Post-conflict countries and formerly centrally planned economies such as Cambodia, Lao PDR and Vietnam are by comparison, richer in natural resources with a high percentage of land still under forest cover. There are notable differences in deforestation rates which are higher for Cambodia (1.4) and Myanmar (1.3), moderate for Lao PDR (0.5% p.a.) and remarkable reversing trend for Vietnam where forest cover is reportedly increasing by 2.2% p.a. over the period between 1990-2005 (Table 3).

Emerging and transitional economies such as Cambodia, Lao PDR, and Vietnam rely on land and land-based natural resources stock for employment and for revenue generation to greater extent than the higher income countries in the Region such as Thailand, Indonesia and the Philippines. The issue however, is not whether or not countries should exploit forests resources. The issue is *how* these countries do so, by what rate of forest conversion and under what rules over access and benefits are shared. Thailand's earlier land policy clearly placed more weight on economic growth through large scale conversion of natural forests for construction of physical infrastructures such as roads, hydropower plants, irrigation systems. From the 1950s through to early 1970s, people were encouraged to clear natural forests so land can be brought under productive uses. Logging and mining concessions have been granted, as they are being granted now in Lao PDR and Cambodia, because it is the most immediate source of wealth that can be tapped. Fifty years later, with changes in the demand and the supply-side of the equation and with the by-products of pro-growth economic policy being the increasing income disparity and absolute numbers of people living under the poverty line, conversion of natural forests becomes a crime against the State with the people at the lower end of the economic strata often taking

proportionately higher share of the blame. Ultimately the environmental externalities arising from over-exploitation over natural resources use are becoming more apparent and more intensified while neither efficiency nor equity criteria can be satisfied.

**Table 3: Land Profile of SEA Countries**

Country	Land area (sq.km) (thousands)	Agricultural land (% of land area)	Irrigated land (% of cropland)	Forest area (% of land area)	Nationally protected areas (% of total land area)	Deforestation (average annual % 1990-2005)
Cambodia	177	30.3	7	59.2	23.5	1.4
Indonesia	1,812	26.4	12.4	48.8	14.3	1.8
Lao PDR	231	8.5	16.5	69.9	16.2	0.5
Malaysia	329	24.0	4.8	63.6	30.7	0.5
Myanmar	na	na	na	na	na	1.3
Philippines	298	40.9	14.5	24	8.2	na
Thailand	511	36.4	28.2	28.4	15.7	0.6
Timor L'este	-	22.9	-	8.0	-	-
Vietnam	310	30.9	33.7	41.7	4.4	-2.2

Sources: The World Bank Group, World Development 2007

### 3.2 Property Rights over Land

Property rights systems in Southeast Asia vary. In Lao PDR, all land belongs to the national community. The state protects the right of individuals to use, transfer and inherit their land use rights; 'Use rights' for agricultural land and forest land is only valid for three years but can apply long term use right which cannot be sold, leased or used as collateral. Similarly in Vietnam, property rights belong to the people and the State administers land on their behalf. There is no private property, but individuals are given rights to use land and there are transactions, leasing, lending, borrowing, selling, exchanges and bidding for these land 'rights'.

In the case of Cambodia, only those who were already occupying land at the time when the 2001 Land Law was enacted were entitled to complete five year occupation to become recognized as the legal owner. Social concessions were granted whereby the landless can apply for a piece of land for residence or for farming purposes free of charge. Large scale economic concessions were granted to firms to lease land for 99 years provided that the land is below ceilings specified.

In Thailand, there are three types of land rights namely; (i) full private property rights, (ii) conditional private property rights and (iii) occupancy or 'usufruct rights'. Full private property rights are granted under the Land Code 1954 provided that the claimer has occupied and utilized the land prior to 1954, and/or can provide documents that support the claim. Private property rights given to beneficiaries of land allocation programs can be subject to restrictions over transfer of land except to lawful descendents. In some cases, restrictions are binding for a period of 5-10 years. In others such as for land reform beneficiaries who have completed payment under the hire-purchasing agreements, private property rights cannot be transferred unless to lawful descendents or back to the Agricultural Land Reform Office or to farmers' institutions. In public land, public agencies can formally endorse the rights to occupy

and utilize; in such cases, the legal claim falls short of private property rights. These are occupancy rights granted under Article 1367 of the Civil Code, usufruct rights for land in the National Forest Reserves, in land reform areas, in state lands and in public lands.

In Southeast Asia and many other Developing Countries, land markets may exist but not necessarily land markets characterized by well-defined property rights systems. Different types of land tenure may co-exist and attempts to superimpose property rights concepts and reassertion of state claims for conservation purposes, for large scale investments or infrastructure projects are among the drivers of land conflicts in many developing countries. Having well-defined property rights is widely accepted as the precondition for good land management. Southeast Asian countries have therefore invested resources in the land registration process. Almost all countries received financial and technical assistance from international development agencies such as the World Bank. The World Bank 1<sup>st</sup> generation projects focused mainly on titling whereas the 2<sup>nd</sup> generation projects came to place greater emphasis on laws and regulations, institutional reforms. It had only been in the 3<sup>rd</sup> generation projects are the issues of corruption and accountability more explicitly dealt with. The latest assistance to Vietnam under the Vietnam Land Administration Projects (VLAP) sees higher investment in the development of National and Spatial Data Infrastructure (NSDI) this being based on the assumption improved land administration governance is contingent on having consistent land information database.<sup>7</sup>

Like many Southeast Asian countries, Thailand has been a recipient of financial and technical assistance from the World Bank and Ausaid to the Department of Land in the series of Land Titling projects which contributed to the tremendous progress in issuing land titles.<sup>8</sup> To speed up the titling process, certain regulatory frameworks had to be modified, but not without social and economic trade-offs. The merits of shortened procedures created loopholes which benefited occupiers of land who may not have had the legitimacy of claim. In 2004, with registration of private land in its final stages, approximately 40 percent of the total area of the country a total area of 20.48 million hectares is classified as private land.

### **3.2.1 Overlapping Claims and Land Use Conflicts**

Land disputes due to overlapping claims are one common problem area among countries in Southeast Asia. Many cases of conflict have been recorded where national forest reserves of various categories overlap with areas already claimed by local communities or individuals. Increasing number of cases is being reported where concessions for mining and commercial crops have been granted for land already occupied often by small-scale holders. In Indonesia, prior to the 1999 logging bans, there had been 150 mining companies with concessions overlapping with 8.7 million hectares were protected forests and 2.8 million hectares of conservation forests. In Cambodia Officials are reportedly abusing their power by confiscating land of the small holders. Forced evictions have been ordered by court without sufficient investigation for occupants who lacked of formal claims for land which technically belong to the State. Many cases of land sales and land concessions affecting

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<sup>7</sup> K.C. Bell. Good Governance in land administration. FIG working Week. Hong Kong, China SAR, May 13-17, 2007.

<sup>8</sup> ADBTA 3643-THA Policy and Program Priorities for Balancing the Roles of Agriculture in Rural and Environmental Development. September 2002

indigenous people have been also revealed. In Lao PDR, overlapping boundaries between State land, land occupied and utilized by the people and cooperative State farm land, conflicts have arisen from land titling as well as State investment projects. Increasing conflicts are noted between allocation of land for agriculture and industry, between local use and foreign investment and between forestry and community settlements.

One of the reasons why overlapping claims are such common occurrences is the open access characteristic of forest resources. Forest land, which is public land by definition, is cleared and cultivated for a number of years before the State asserts legal claim at which point, *de facto* 'occupier' become 'encroacher'. Given the population increase and demand for land and the open-access situation, the problems of overlaps between *de facto* of the people and *de jure* claims of the State are likely to expand and aggravated because legal and administrative systems to handle the conflicts not only lag behind the process of land use changes but have tended to be more 'reactive' or responding to changes and problems that have occurred, rather than 'proactive' in anticipating or even directing the changes.

### 3.2.2 Land Distribution

Equitable land distribution is recognized as a precondition for efficiently operating land market. In Southeast Asia countries, there are two aspects of land distribution i.e., land concentration and land fragmentation. The concern over land distribution is less on the existence of large landholdings but more on statistical inference that there is a higher percentage of the poor among the landless and the small holders.<sup>9</sup> The Philippines' agricultural sector for example, consists of two major groups: (i) 'small farmer sector' and the 'traditional sector' and (ii) the 'capitalist farmer' or the non-traditional sector. In 1988 when the Comprehensive Agrarian Reform Program (CARP) was implemented, around 70 percent of the agricultural population was landless or near-landless households. In Vietnam, over 11 million households or around 80 percent of the population live in the rural areas. On average each farming household has 7-8 plots of land. Per capita land holding is only 0.2 hectare and the average farm size in the Mekong Delta which is major agricultural production area is 1.2 hectares. In Thailand, land concentration and the presence of large numbers of absentee landlords in the fertile plains of the Central Region were the main grievances which led to social unrest in the 1970s and the enactment of the Agricultural Land Reform Act in 1975. Land concentration still persists today however. Based on information from the Department of Lands, most of land parcels which are privately owned i.e. 86.85 percent is less than 1 hectare.

To ensure equitable land distribution, Southeast Asian countries have launched land reform measures which focus less on the dismantling of large landholdings however and more on land allocation to the poor, the landless and the near-landless. In Vietnam, the objectives of the successive land reforms since 1988 have been to reduce land fragmentation to increase the size of small landholdings.

Similarly in Thailand, Agricultural Land Reform in Thailand was not a radical land redistributive reform with compulsory acquisition of private land from large landowners to landless and near landless farmers. The focus of land reform in public

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<sup>9</sup> The poor are also very dependent on agriculture land and related assets, from which they have derived income. Recent loss of such income has aggravated their poverty status.



land has switched to formalizing occupancy rights of farmers who have cleared and farmed areas in areas classified as national forest reserve<sup>10</sup>, the purpose being to provide the security of tenure for small holders who are occupying degraded forest areas.

To prevent land concentration, many Southeast Asian countries have laws over ceilings on sizes of landholdings some of which dates back for considerable period of time. Indonesia's Basic Agrarian Law was enacted in 1960 and Thailand's Land Code even further back to 1954.<sup>11</sup> In Vietnam, given the increasing number of landless farmers particularly in the Mekong Delta, there are restrictions over the maximum size of land. Land holdings for planting annual crops must not exceed two hectares for the Central and Northern provinces of Vietnam, and no more than three hectares for the southern provinces. For perennial crop, the maximum land holding size is set at ten hectares. Ceilings can be applied nation wide, or they may vary in different administrations as in the Philippines. Land ceiling can also vary according to the types and purposes of land use. However, land ceilings are generally seen to be inhibiting investments, restrictions have either been formally withdrawn, by-passed or overlooked (oftentimes by the advice of the public agencies themselves). In effect therefore, one can conclude that there are no effective measures to limit the maximum land holding size.

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<sup>10</sup>Cabinet resolution of January 1975 specified that deforested (encroached forest) areas within national reserve forests could be allocated to farmers either through land settlement programmes or under provisions of the Agricultural Land Reform Act, 1975. Allowance for utilization of National forest areas will also be permitted so long as this does not lead to deforestation or is in any way in conflict with the intention of preserving forest resources.

<sup>11</sup> Section 3 of the Land Code, Articles 34 and 55 states that a person can own no more than 50 rai of land for agriculture and no more than 10 rai for industrial uses. For commercial and residential uses, the maximum land size allowed is 5 rai. These restrictions in the Land Code were subsequently lifted by the Revolutionary Order No. 49 in 1959 on grounds that imposing a ceiling would inhibit the growth of the economic sectors. There are thus effectively no land ceilings for Thai nationals. Otherwise beneficiaries of land allocation programs under the Land Code, Land for the Livelihood Act, land reform beneficiaries are not entitled to more than 50 rai for agriculture and 100 rai for livestock grazing. In practice, the average size of landholding is between 10-20 rai. Buddhist temples, Roman Catholic Churches, Islamic Mosques can own land but not exceeding 50 rai unless proven that land was owned prior to the enactment of the Land Code. Foreigners investing more than 40 million Baht can purchase land for residential purpose but not exceeding 1 rai and subject to approval by the Minister of Interior

## 4. 'Good governance' in Land Administration in Southeast Asia

The discussions in this section are presented in reference to the ten principles for good governance in land as defined by the FAO's Guidelines on Good Governance in Land Tenure and Administration which have been grouped in four areas, namely (i) the policy framework and the fundamental goals of land management, consultative and democratic, (ii) administrative issues, (iii) transparency criteria, and (iv) accountability.

### 4.1 The Principles and Goals of Land and Natural Resources Management

The broader principles or ideologies that set the framework for good governance in land management are that (i) the process of policy formulation should be consultative and embodying the value judgments of interested and affected parties and <sup>12</sup> (ii) land policies should encourage sustainable land development.<sup>13</sup> In addition to these two criteria, the goals of land management should be to create a functioning land market, one in which there is well defined property rights systems that provides legal protection, security of tenure, equitable land distribution and sustainability of land use.

#### 4.1.1 On Consultative Process of Policy Formulation

Whatever the political system, '*decentralization*' of decision-making and management is a sound principle to advocate. The extents to which political systems in Southeast Asian countries allow consultation in policy formulation vary. Our observation is that even in democratic societies in this region, decentralization seldom moves beyond the '*format*'. In Thailand although the concept of decentralization has been around for decades, until the 1997 Constitution, the power to manage land and natural resources vested in the State had never been challenged. The long lists of Acts, institutions and Committees presented in Table 5 are examples of how the State has exercised such power (see also table 4 for land titling/registration process in different countries). The 1997 Constitution technically ended the monopoly power of the State to manage natural resources and environment. Articles 46, Article 56 and Article 79 explicitly state the right of the local and traditional economies to participate with the public sector in protection, conservation and utilization of natural resources as well as ways in which the State can support the people to participate.

The autonomy of local governments and the authority to look after natural resources in the area under their jurisdiction are stated in Articles 284 and 290. Translating the principles of decentralization has taken over decades with constraints arising from the management structure, budget, manpower and the general outlook of those in the public sector. The major inhibition however, is that the Constitution states that to exercise the power given, there must be by-laws and 10 years afterwards the process to amend legislations to reflect the paradigm change is still on-going.

The 2007 coup d'état may have punctuated the political process, but there is at least continuity in the ideology over systems of governance. Not only does 2007 Constitution continue to embrace '*Decentralization*' and involvement of the

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<sup>12</sup> Ibid. p. 10

<sup>13</sup> Ibid. p. 11

stakeholders in decision making processes, the big step forward is that wordings requiring the drafting of by-laws to translate principle into practice have been omitted.

**Table 4: Land registration/titling process**

Cambodia	Indonesia	Lao PDR	Philippines	Thailand	Vietnam
<p>WB 3<sup>rd</sup> generation project (2000-2006)</p> <p>Land Administration and Management projects</p> <p>National and provincial cadastral commissions to reduce the time, costs and the difficulties of gaining access to the judicial systems</p>	<p>WB 3<sup>rd</sup> generation project (2000-2006)</p> <p>Land Management Policy and Administration projects. These 3<sup>rd</sup> gen projects involved</p> <p>1) expansion of 1st and 2nd generation projects 2) wider policy reform, 3) State land management, 4) Land use planning and development and 5) good governance</p> <p>Under WB project Clear specification of service delivery standards, published list of regulated fees and charges</p>	<p>WB 2<sup>nd</sup> generation project (1995-2000)</p> <p>1<sup>st</sup> and 2<sup>nd</sup> Land Titling project; 2nd generation projects also involved streamlining laws; capacity building of both public and private sectors; valuation and tax and service delivery</p> <ul style="list-style-type: none"> <li>• Under WB project</li> <li>• Clear specification of service delivery standards, published list of regulated fees and charges</li> </ul> <p>Administrative means of land dispute resolutions</p>	<p>WB 2<sup>nd</sup> generation project (1995-2000)</p> <p>1<sup>st</sup> and 2<sup>nd</sup> Land Administration and Management projects (LAMP)</p> <p>Under WB project, one-stop-shop</p>	<p>WB 1<sup>st</sup> generation project (1980-1995)</p> <p>1<sup>st</sup> and 2<sup>nd</sup> Land Titling project</p> <ul style="list-style-type: none"> <li>-registration</li> <li>-capacity building</li> <li>-land reform</li> </ul> <p>Completed? for private land</p> <p>Land information system for private land is complete, standardized and computerized. It's the public land that is the problem and this is important because this is where the poor and the indigenous people are concentrated</p> <p>Thailand uses the Torrens System. There are many types of land document such as S.K.1, Bai Chong or N.S.2, N.S.2., N.S.3, N.S.3.K,N.S.5, title deeds</p>	<ul style="list-style-type: none"> <li>• Vietnam Land Administration projects</li> <li>• Involve some areas of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> generation projects</li> <li>- NSDI</li> <li>- enhancement of good governance and civil service reforms</li> </ul>

**Table 5: National focal points for land administration**

Indonesia	Lao PDR	Philippines	Thailand	Vietnam
<ul style="list-style-type: none"> <li>• Ministry of Forestry</li> <li>• Districts (authority given by the Regional Autonomy Act no. 22/1999) (equivalent to Thailand's local governments)</li> </ul>	<ul style="list-style-type: none"> <li>• National Land Management Agency (NLMA) newly established through merging of Department of Lands under Ministry of Finance and Department of Lands and the State Asset Department</li> <li>• Department of National Land Use Planning and Development Ministry of Agriculture and Forestry</li> </ul>	<ul style="list-style-type: none"> <li>• Land Management Bureau; Department of Agrarian Reform (DAR); Department of Environment and Natural Resources (DENR)</li> <li>• Department of Agrarian Reform</li> </ul>	1. Line Agencies MOI;MOAC, OAE, LDD, RFD, MONRE, ONEP, DMCR, PCD; local communities; local governments and NGOs	MONRE

#### 4.1.2 On Sustainability

Sustainability is ensured through having land use systems which balances social, economic and environmental needs. At the policy and planning level, land use planning and zoning measures at least reflect the recognition of the importance of balancing social and economic objectives of land use, and between efficiency and equity objectives in manners which do not compromise environmental concerns. Presently, the means to achieve sustainability criteria is heavily reliant on the use of physical planning and command and control measures. There is as yet, limited use of economic instruments to influence behaviour of economic agents.

#### 4.1.3 Security of Tenure and Equity of Land Distribution

Security is defined in terms of security of tenure through having property rights, land registration and legal systems that protect those with legitimate interest against forced evictions.<sup>14</sup> Countries have launched land titling and registration which would involve investment in both the hardware (computers, equipments, mapping, GIS, etc.) and human capacity for the management as well as the operational side of land administration. The process of land registration would also require clarifying boundaries between public land and land where people have *de facto* but not necessarily legal rights.

Turning to the 'equity' criteria, despite the difference in abundance of land supply and the demand for productive land, Southeast Asian countries are also trying to set rules and regulations that would ensure more equitable land distributions. Various pieces of legislation countries in Southeast Asia are addressing the issue of land distribution by combination of measures to break up large holdings and consolidation of small and fragmented as well as adoption of fiscal measures to create disincentives to hoard land and create incentives to use land.

<sup>14</sup> Ibid. p.11. c 9

## 4.2 Administrative Aspects of Good Land Governance

Three broader areas identified as being instrumental to the administrative aspects of good land governance, include (i) efficiency, effectiveness and competency, (ii) accessibility to services either in adequate spatial coverage or internet technology and (iii) the integrity of implementing officials and in-built mechanism to prevent corruption, incentives for good performance and accountability for errors, misconduct and/or abuse of authority.<sup>15</sup> ‘Efficient’ and ‘effective’ land administration systems, according to the Global Land Network, should also be affordable, accessible to all, can be maintained and updated over time, pro-poor and gender sensitive.<sup>16</sup>

### 4.2.1 Efficiency, Effectiveness and Competency

We see the above criteria as being ‘operational’ aspects of land administration which can be measured against quantifiable indicators such as having simplified rules and procedures and administration that are service oriented.

While countries are trying to be efficient in terms of services delivery, the greater challenge is how to overcome the problems of fragmented institutions and legal complexities which are the major causes undermining speedy delivery of services. The lesser challenge is improvement of technical components of land administration. As mentioned earlier, Southeast Asian countries have received and are currently receiving financial and technical assistance but still have insufficient infrastructure for cadastral mapping, registration of land records and transactions. Nonetheless, they are progressing towards having comprehensive and accurate land data bases which can be regularly updated.

With a longer head start, Thailand’s land information system for private land has been complete, standardized and computerized. However, similar to other Southeast Asian countries, the problems of land administration are more intense in public land where the poor and the indigenous people are concentrated. One of the main confusion is the multiple scale maps that the public agencies that seldom match. The Royal Forestry Department may for instance, be using map scale 1:50,000 while the Department of Land uses scale 1:4,000 and other agencies such as the Agricultural Land Reform Office, the Department of Land Development, etc. may be using different map scales. In addition, there may not be common reference coordinates among all these maps. Standardize mapping scale is therefore the pre-requisite for resolving land conflicts which is why Thailand is preparing aerial photos scale 1: 4,000 for the entire country which will be used as base-maps for all agencies.

In Thailand, many land related public agencies are trying to become efficient by becoming services-oriented. The Department of Lands for example, take pride in its efforts in having improved access to land registration services and ranking 4<sup>th</sup> out of 175 countries for the few steps required to register land transactions.<sup>17</sup> To improved access to services is now experimenting with a ‘24 hour Land Clinic’ opening 7 days/week to answer queries and give advice over issues related to land registration.<sup>18</sup>

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<sup>15</sup> Ibid. pp. 10-11

<sup>16</sup> Global Land Network, Good Land Governance Policy Paper. Progress to date and the way forward. [www.GLTN.net](http://www.GLTN.net)

<sup>17</sup> DG of the DOL quoting a World Bank Study

<sup>18</sup> The trial run is between July 2008-September 2009.

Another key player in Thailand's land management is Agricultural Land Reform Office (ALRO). The agency has also recently launched a Land Reform Mobile Services Unit initially to cover 800 Sub-districts in 393 districts. Around 6.4 million land reform beneficiaries occupying 1.8 hectares will benefit. The purpose of these mobile units is to improve efficiency in the use of land resources and to increase income. Services provided include legal advice which concerns the Agricultural Land Reform Law. There will also be private sector involvement on production promotion services which will focus on 37 commodities, financial institutions for provision of low interest credits, information technology and promotion of community enterprises. Similarly, since the end of 2007, the Land Development Department (LDD) has launched a pilot "Information and Services Centre" to provide a one-stop-service to farmers. Apart from inputs for soil conservation (vetiver etc), there is also information on the types of assistance provided by LDD, information about soil types and suitability for different types of plants. There is also Information Technology (IT) services showing interactive maps of soil series and suitability.

How effective are these measures in relation to the goal? Measurement of effectiveness is easier done for quantifiable output rather than the 'outcome'. The quantifiable indicators being for example, number of land reform beneficiaries, number of title deeds registered, number of people trained, the existence of land use plans, zoning measures, etc. Similarly, for the above initiatives of the Department of Lands (DOL) and ALRO, effectiveness would be measured by how many phone-calls answered or how many land reform beneficiaries have been covered by the mobile service units.

Measurement in terms of 'outcome' throws a different light on what has been achieved and what cannot be disputed is that the goals of good land governance remain elusive because deforestation process still goes on and no small numbers of people are still classified as poor have been presented in the preceding section.

### **4.3 Transparency and good governance in land administration**

Two preconditions have been identified by the FAO guideline as being instrumental to achieving transparency in land administration, namely: (i) accessibility of information, (ii) the existence of the rule of laws including the manner in which they have been drafted and enforced without discrimination against race, gender or religion.

#### **4.3.1 Accessibility to Information**

Good governance in land administration according to the 'Transparency Criteria' is contingent ability to access to information regarding rules and procedures, costs. In the case of Thailand, the legal foundation is laid down to ensure two-way communication of information, the right to access and obtain information and the right to express opinions and feedbacks.

The right to access and obtain information the principles are laid out in Section 56 of the Constitution that *'A person shall have the right to know and have access to public data or information in possession of a Government agency, a State agency, a State enterprise or a local government organisation, unless the disclosure of such data or information shall affect the security of the State, public safety or interests of other persons which shall be protected or purport to be personal data, as provided by law'*. In addition, Section 57 states that *'a person shall have the right to receive data,*

*explanations and reasons from a Government agency, a State agency, a State enterprise or a local government organisation prior to the approval or the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning such person or a local community’.*

On the right to express opinions and feedbacks, a person has the right to ‘*express his or her opinions to agencies concerned, for assisting further consideration of such matters. In planning social, economic, political and cultural development, or in undertaking expropriation, town and country planning, zoning and making by-laws likely to have impacts on essential interests of the public, the State shall cause to be held comprehensive public hearings prior thereto.*’

A person also has the right to participate in the decision-making process (Section 58), to present petitions (Section 59) and to file lawsuits against a Government agency, a State agency, a State enterprise, a local government organization or other State authority which is a juristic person to be liable for an act or omission done by its Government official, official or employee. (Section 60)

All such provisions should safeguard the interests of the public and by minimizing asymmetry of information and increasing accountability, they can be considered as key components for good governance in land administration. In the past, access to inside information enabled those in political power to capture benefits. Following the 1997 financial crisis in Thailand, for instance, land use as collateral for many Non Performing Loans were resold through auctions under the management of the Financial Institution Development Fund (FIDF) which was responsible for management of non-performing loans (NPL). Through having inside information, a piece of land in a prime location in the Central Business District (CBD) area of Bangkok has been bought auctioned off at price far below what would have been offered in the market and came to be one of the most notorious land scandal of the decade. Many well-connected people have reaped ample benefits from similar leakages of information on locations of public investments for roads, sky trains, airport constructions, etc.

One other observation on access to information is that it is not just between the state and the people. Equally important is ***access to information among public agencies*** in land management as fragmentation of institutions also means fragmentation of information controlled by the concerned public agencies. The existence of a comprehensive land tenure data base that is shared by implementing agencies would allow for considerable saving of costs while at the same time contribute to efficiency criteria by improving accuracy and speed of services delivery. But lack of coordination among responsible public agencies is yet another indicator of weak governance in land administration. To address this would require exploring institutional politics and to understand that the jurisdiction over different types of public land as well as the control of information over various dimensions of land are sources of bargaining power for the concerned agencies for budget man-power and other types of resources allocation.

#### **4.3.2 The Existence of the Rule of Law**

Good governance in land administration requires that land laws and regulations be accessible and citizens are in positions to bring their grievances to the court of law and that laws are clear, drafted in participatory and transparent manner, responsive and consistent. One essential feature mentioned in both the FAO and the GLTN (Global Land Tenure Network) guidelines is that the rule of law should have respect for legal pluralism, recognition for traditional and alternative dispute resolution and alternative dispute resolutions and other forms of mediation to reach conciliation out of court.<sup>19</sup> Moreover the laws, rules and procedures should be consistent and impartially enforced. Details in Table 6 are some information of the land related laws of Thailand and other Southeast Asian countries in the process of building or improving the legal framework. What is common is that the legal authority is spread out in more than one piece of legislation. The broader principle for land resources management in Cambodia, similar to Thailand, is laid out by the Constitution of the New Royal Kingdom of Cambodia. More specifically related to Land is the Land Law 2001. Implementation of many aspects of the law however required several sub-decrees (by-laws) and five years following the enactment of the 2001 Land Law many by-laws cannot be passed. The legal framework for utilization and conservation of forestry resources are the Forestry Law 2002 and the Environmental Protection and Natural Resources Management Law 1996.

The Constitution of Vietnam lays down the fundamental principle that the land belongs to the people of Vietnam and the State administers land on their behalf. In addition to the 2003 Land Law, Vietnam also has the Ordinances 64/CP (1993) and 02/CP (1994) which regulate use of land for agriculture and forestry land allocation. Under the Land Law 2003 farmers are allocated land for planting annual crops and aquaculture for a period of 20 years during which time, they have the right to transfer, exchange, lease and mortgage (the rights can be transferred through inheritance). For perennial crops, the same rights are granted for a longer period of 50 years.

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<sup>19</sup> Global Land Network, Good Land Governance Policy Paper. Progress to date and the way forward. [www.GLTN.net](http://www.GLTN.net)



**Table 6: Law of selected countries in Southeast Asia**

Cambodia	Indonesia	Lao PDR	Philippines	Vietnam
<ul style="list-style-type: none"> <li>• Land Law 2001</li> <li>• Forestry Law 2002</li> <li>• Environment Protection and Natural Resources Management Law, 1996</li> </ul>	<ul style="list-style-type: none"> <li>• Natural Resources Management and Agrarian Reform</li> <li>• Basic Agrarian Law no. 5/1960</li> <li>• Forestry Law 1999</li> <li>• Tenancy Act 2/1960 on conditions in sharecropping</li> </ul>	<ul style="list-style-type: none"> <li>• Land Law 1997 (2003)</li> <li>• Forestry Law 1996</li> <li>• Agricultural Law 1998</li> <li>• Property Law</li> <li>• Inheritance Law</li> <li>• Family Law</li> <li>• Prime Minister's Decree No. 52/PM</li> <li>• Apart from the Constitution, 7 laws, 2 Decrees, 1 Politburo Order, 2 Ministerial Directions and 7 binding Decisions</li> </ul>	<ul style="list-style-type: none"> <li>• Land Reform Law 1988 (Comprehensive Agrarian Reform Program)</li> </ul>	<p>Land Law 2003(amended from 1993) -House Law Ordinances 64/CP (1993) amd 02/CP(1994)</p>
<b>Thailand</b>				
<ul style="list-style-type: none"> <li>• Land Code 1954</li> <li>• Royal Forestry Act</li> <li>• National Park Act 1997</li> <li>• National Forest Reserve Act B.E. 2507</li> <li>• Land for the Livelihood Act 1968</li> <li>• Agricultural Land Reform Act 1975</li> <li>• Town Planning Act 1975 For urban areas</li> <li>• Agricultural Land Consolidation Act 2517</li> <li>• Land Readjustment Act 2547</li> <li>• Land Development Act (survey, classify, land use planning and recommending measures for land and soil conservation</li> <li>• State Land Act 1975 for overseeing and protecting land belonging to the state for public uses =</li> <li>• Building Act 1979</li> <li>• Real Estate Land Development Act 2000 (to control land for land real estate/property development)</li> <li>• Land Excavation and Landfill Act 2000</li> <li>• Tenancy Act Inhibiting. Discourages land leasing given long leasing period as specified by the law</li> <li>• Civil and Commercial Code Article 540; the DOL must be notified if the leasing period for land exceeds 3 years in which case it must be recorded at the back of the title deed</li> <li>• Thailand Real Estate Act 1979 (producers with export license can rent, hire-purchase or purchase land from the IEAT)</li> <li>• Agricultural Land Tenancy Act 1981(leasing period of at least 6 years and rent ceiling)</li> </ul> <p>Act on Immovable Property Leasing for Commerce and Industry 2542 (expanding leasing period from the maximum of 30 year under the Civil Code to 50 years and once completed can be extended for a period not exceeding 50 years to provide incentives for long term investment)</p>				

### 4.3.3 Laws Enforcement and Access to Justice

Beyond having the laws, good land governance depends on how the law is interpreted and enforced in a non-discriminatory manner<sup>20</sup>, the protection provided to those with legally protected rights or claims. Oftentimes, laws are narrowly defined and executing agencies have the tendency to stick to the wordings used and rather than the principle of the law. For executing agencies, this is safer route to take because in general one is unlikely to be praised for making the extra effort but nevertheless risk taking the

<sup>20</sup> FAO, op.cit. pp10-11

blame. It is predictable therefore those government officials who stick out their neck for the causes of the public good and the underprivileged are rare.

A shared experience in land administration in Southeast Asia is that the law appears to be impartially enforced in favour of private businesses that appeared to be in more advantaged positions to benefit from inside information and obtain cooperation of concerned public agencies. Land maybe under customary tenure or local-traditional communities may have occupied, utilized and shared benefits from land use. In many cases, remote communities unaware that claims have to be reasserted are at disadvantage *vis a vis* those who not only have information, but also know how to manipulate rules and regulations to support their interests. They are able to do this because implementing agencies are not above taking bribes.

The effectiveness of the rule of law is also conditioned by how accessible the judiciary process is to the general public. Boxes 1 and 2 below are examples of how local communities and victims of negative impacts of infrastructure investment projects have to create their own channels to voicing their grievances or to seek solutions outside of the formal channels.

**Box 1: Rule of Law, Laws, rules and procedures consistently and impartially enforced.**

Since 2003, many grassroots organizations in Thailand have formed themselves into a 'Land Reform Network for the Poor of the Southern Region'. The demands are that the State should not renew concessions granted to the private sector to lease land within national parks and national forest reserves for oil palm plantation; expropriate more than 100,000 rai<sup>21</sup> that has been illegally claimed.

Concessions covering some 200,000 rai have been granted to private operators has been leased to both domestic and foreign investors. According the Tenancy Act for Commerce and Industry 1999, foreign investors can lease not more than 100 rai for a period of 30 years which can be extended to 100 years. The local people network however, argue against approval of new lease contracts on grounds that (i) there are risks of further encroachment into the natural forests, (ii) land formerly under oil palm concession should be reallocated to landless people to reduce the pressure to convert natural forests.

These networks have organized public meetings to provide information over legal rights and options to solving problems of landlessness and deforestation. A list of 25,000 names of landless families has been submitted to the State through Surat Thani's people network.

With lack of cooperation from the concerned public agencies to verify whether or not there has been encroachment of natural forest areas outside of the concession areas, the network has created their own Task Forces to execute the task. Their refusal to leave the premise to let the Public Task Forces-finally formed-led to two violent incidences before the last and most violent confrontation on December 2003. Thereafter, any attempts to enter the premise to prove that private concessionaires were violating their contract were ruled as unlawful. From the perspective of the local

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<sup>21</sup> Rai is a unit area measurement used in Thailand where 6.25 rai = 1 hectare

people, no actions are being undertaken by the State against the concessionaires who are violating the contract and continue to utilize land after the concessions have already expired. The people's Task Force claimed that in Krabi alone, there were 45 cases of violation where the private businesses were using 120,523 rai outside of the concession area.

To the general public, particularly to the poor and uneducated, the fragmentation of the administrative and legal systems described earlier, even daunting to practitioners and academic, must seem almost impossible to comprehend. The story of *Yai Hai*, an old farmer whose land has been flooded because of a dam is being built described in the box below is an example of how the justice system appear to the poor and the uneducated.<sup>22</sup>

### **Box 2: The Story of Grandmother Hai**

- 1975 Paddy land has been appropriated for construction of public pond for the community.
- 1978-1984: *Yai Hai* started a personal campaign to try and make her grievances known to the concerned Ministries and Departments.
- 1994-1998: *Yai Hai* joined the Federation of Farmers of Northeast Thailand.
- 1999: *Yai Hai* joined the Federation of the Poor and the villagers who were protesting outside the house of parliament because of the impact from Pak Mun dam
- 2000: *Yai Hai* traveled to Trang, hometown of Chuan Leekpai, Prime Minister at the time.
- 2003: Under Thaksin government resolved to the use of force against the demonstrators and *Yai Hai* had to go back to Ubon Rachathani.
- 2004: Some 27 years after starting her personal crusade to get her land back, *Yai Hai*'s photograph finally appeared on the newspaper, news of her fight finally reaching the public. Her words were '*my land is still there. It's just the water between me and my land, take the water away and I will get my land back.*'
- August 2004: Her Royal Highness Princess Somsawalee presented *Yai Hai* with a gift for the courage and the perseverance she has shown at Mahidol University.
- December 2004: She was awarded an Honorary Ph.D. in Law by the Wongchawalitkul University, Nakhon Ratchasima
- March 2005: She was awarded a prize by the Ministry of Social Development and Welfare on Women's Day.

Lessons learnt from the two examples above are that the laws and the channels presented in the preceding section do not work for the people who need them. Government officials are more ready to strictly enforce the law on the local people but were more prepared to be lenient for private businesses. Similar incidences are occurring in Cambodia and Lao PDR where concessions for uses of forest areas both for commercial logging and for expansion of commercial tree crops such as rubber and oil palm, have resulted in forced evictions of local communities. In the Philippines, land administration is known to favour of large scale farmers and corporate agri-businesses has also been observed. Since the mid 1980s, Indonesia's customary land

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<sup>22</sup>Her name is *Hai*, the pre-fix *Yai* literally means grandmother and it is the term Thais people use to call old women,

tenure security had been threatened by transmigration projects, granting of logging concessions and government support for conversion of natural forests and legal confusions and uncertainty have been devastating to the rural communities.

Cases above are occurring despite the existence of numerous pieces of legislation. They became common experiences among the poor because the legal systems and judicial systems were complex and are habitually abused by the politically powerful. Until recently, the only channel left for the poor in Thailand such as *Yai Hai* were pressure groups such as Federation of the Northeastern Farmers or the Assembly of the Poor. These pressure groups were not positively viewed as being evidences of the 'legal pluralism'. They were viewed as groups who do not respect the rule of the law. When cases such as '*Yai Hai*' become public, her grievances will be seen too but it does not mean that problems of thousands of other people like *Yai Hai* will be addressed because the system remains the same.

Technically, the rights of *Yai Hai* and many in similar situation are actually protected by the Constitution. On rights in property, Section 41 of the 2007 Constitution states that the property right of a person is protected. Section 42 of the Constitution states that '*The expropriation of immovable property shall not be made except by virtue of the law specifically enacted for State affairs dedicated to public utilities, necessary national defence, exploitation of national resources, town and country planning, promotion and preservation of the quality of the environment, agricultural or industrial development, land reform, conservation of ancient places and sources of historical value or other public interests.*'

Thailand's 2007 Constitution is a lengthy document consisting of 309 Articles. Its wide coverage reflects the intention to address as many flaws in governance, land rights being among these. In the future problems such as those of *Yai Hai*'s in principle, should therefore not recur and even if it does, '*fair compensation*' for land expropriated should be paid in '*due time*' to the landowners or those who having '*the rights*' and that the amount of compensation will be fairly assessed with due regard to the normal market price, mode of acquisition, nature and location of the immovable property.

Recently, significant changes have taken place which has been fundamentally reactions against what is described as corruption on a grand scale or 'state capture'. Government policy is manipulated to support the interests of individuals, families, relatives and their business links under the banner of 'democracy'. Crisis creates improved understanding that the one minute action of citizens voting in the ballot box is only the 'format' and not the substance of democracy; nor does winning the majority votes entitle the ruling government to overlook the interests of the minorities. Amidst the social and economic crisis in Thailand during and after the Thaksin Government, the faith of the public has been much revived by the emerging phenomena of Judiciary Reform. One of the landmark cases in the history of land administration in Thailand was the ruling Supreme Court's Criminal Division for Political Office Holders over the misuse of inside information to win the auction of the land parcel in Bangkok CBD mentioned earlier. The three year prison sentence passed is the assurance the public needed that even the rich and the powerful must abide by the rule of law.

#### 4.4 Accountability

Accountability in good governance in land management is contingent upon three major conditions: (i) having mechanisms for checks and balance (ii) administrative systems that embraces the principle of civic engagement and (iii) integrity of implementing officials and in-built mechanism to prevent corruption, incentives for good performance and accountability for errors, misconduct and/or abuse of authority.<sup>23</sup> In the following paragraphs, each of these conditions will be discussed drawing mainly on the experiences of Thailand.

##### 4.4.1 Mechanisms for Checks and Balance

In principle, the people now have both formal and informal channels to make their grievances known. Unsatisfied service-users can file complaints to the responsible agencies for any unjust ruling or lack of transparency. Counterbalancing power was normally perceived in the form of committees represented by the concerned public agencies, experts and members of the private sector. The functions of this committee are formally to oversee and evaluate on the basis of 'key performance indicators' (KPIs). In addition, there is also the Department of Internal Auditor which oversees that uses of budget are in accordance with the set plans. Complaints can also be submitted to the Office of the Prime Minister, the Office of the Inspector General of the House of Parliament, National Human Rights Committee, the Public Land Encroachment Committee, the Office of the National Crime Anti-Corruption Commission, or the Administrative Court. How effective these channels are depends on how accessible they are to the general public. Many formal channels may appear redundant because people are not making use of them.

###### *a. The National Crime Anti-Corruption Commission*

Among those mentioned, the National Crime Anti-Corruption Commission deals with high profile cases of corruption at the national level while the Administrative Court established in 1999, exists along side the Court of Justice in Thailand's dual court system to try and adjudicate administrative cases.

###### *b. Public Land Encroachment Committee (PLEC)*

More specifically related to land is the Public Land Encroachment Committee (PLEC) established in 1992 for purpose of resolving problems of land use conflicts arising from overlapping between state's claims versus claims of individuals or local communities over public land. One of the common problems of land administration for Southeast Asian countries is the overlapping claims between lands belonging to the state. By definition, any land not claimed by private individuals belongs to the State. The actual '*formal*' claim of the state is made by the authorities and the procedures specified by various pieces of legislation, Cabinet Decisions and Ministerial Orders. There is however, no uniform way of doing this. Some agencies may simply use map scale 1/50,000 without any on-ground verifications. Others may be merely verbal descriptions of the geographical settings. The lack of physical and indisputable demarcations is therefore the main reason why there are numerous disputes, between the public agencies themselves, between the public agencies and the local people who claim *de facto* right, and between the people themselves. Prior to the PLEC, to challenge claims of the state over public land, an individual would have to take the

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<sup>23</sup> FAO, op.cit. p. 10-11

case to the criminal court, a lengthy and costly process with great uncertainty over the outcome. The function of the PLEC would be to verify whose claims are valid between the State and the people or local communities thereby minimizing the need for settlements in court.

Ten years later in 2002, the Office of the Prime Minister issued a new regulation to replace the existing one. In 2003, Committees to Oversee Public Land Encroachment at the Provincial level was appointed. The mandates of the national and provincial level committees were to monitor and ensure that the public agencies execute their task to prevent further encroachment of public land and to address problems at the provincial level. The intention was to ensure integration of efforts at the national level as well as at the provincial level.

In addition to verifying claims, the PLEC also executes a number of preventive measures, these being (i) survey and verify boundaries of the different types of public land for purpose of developing inventories; (ii) the formulation of land use plans that would maximize public sector interests, (iii) to disseminate information regarding the use of public land, training courses were designed and delivered to various target groups such as local leaders, concerned public agencies, public agencies, educational establishments and the general public. Maps indicating distribution, location and types of public land were posted at the Provincial and District Offices as well as local government offices.

The PLEC relies almost entirely on technical approaches using aerial photographs dating back as near as possible to the date of the claim as possible and other supporting documents issued by the public agencies such as household registration, birth certificates, tree crops, etc. The verification process is not only technically and labour intensive. Even with loans of technically competent staffs from other agencies, PLEC has limitations in supply services at the pace required to handle the accumulation of cases which needs to be verified. Again, timely delivery of services is a major drawback. In addition, people who believe that they have the right over land and are reluctant to undergo through the process of having their rights verified and often choose the alternative of submit complaints to the National Human Rights Committee.

*c. National Human Rights Committee (NHRC).*

Cases where the victims tend to be the poor, the under privileged class, those without influential connections have invariably found their way to the National Human Rights Committee (NHRC). Between 2001 and 2007, around 68 percent out of the total 494 complaints submitted to the National Human Rights Committee were related to rights over land. Common land conflict cases of are between the State and the local people and increasingly between local governments and local communities and they can be grouped into four areas (i) National level state agencies announcement of protected areas over land where people claim de facto occupancy rights, (ii) Encroachment of public (grazing area) by local people, (iii) Use of of public (grazing area) by public agencies, (iv) Encroachment of public (grazing area) by private businesses: use of forest land by Forest Industrial Organization-Reafforestation project over land used by the people. The NHRC accepts cases on grounds that human rights have been violated but it does not have the authority to verify land rights, its contribution has been primarily to channel these cases to the PLEC. Nevertheless, having NHC back-up may be the leverage to getting more attention from the concerned public agencies.

*d. The Whistleblowers*

Any report related to Thailand on issues of transparency and corruption would be incomplete if the People's Alliance for Democracy (PAD) is not mentioned. The PAD emerged initially from a media tycoon blowing whistle about the corruption at the policy level under the Thaksin government. With information on national televisions being limited to pro-government news, people sought and found information from this alternative media channel. The gradual coming together of the urban population and information hungry citizens from provinces all over the country eventually formed into the People's Alliance for Democracy (PAD), a civil movement that had been the decisive factor leading to coup d'état in September 19, 2006. The PAD continues to gain support with now some 20 million households tuning on to Asian Satellite Television (ASTV). ASTV viewers came to be the army of citizens that has continued to campaign against the nominee governments of the former Thai Rak Thai Party dissolved by the Constitution Court in 2007 for election fraud. Thailand now has one of the most effective whistle blower disclosing corruption and fraud including those related to land.

In this information technology age, the media can be a faster and more effective communication channel hence, a powerful instrument to ensure transparency and hence, good land governance. A two hundred pages research report on corruption of politicians for example, may have less impact than a 1-2 minute television or radio broadcast or a short article in the newspaper. No government agencies want to be disposed to the public for misconduct in land management and neither do politicians. One such case is where some 20 villagers disclosed information to *Matichon* on December 2007 the some parts of the mangrove forest located next to private land parcel were also being cleared, that signposts have been put up claiming ownership and preventing entry. In 2004, local villagers, the Royal Forestry Department, Petroleum Thailand, the Navy and the Provincial Governor had been involved in replanting mangroves in that area which to celebrate the fifty anniversary of the reign of His Majesty the King. Now the villagers were being told that the same piece of land which lies inside the National Forest Reserve was really private land which had title deed to claim private ownership for an area of 21 rai issued as in 1984. While cases such as these are not uncommon, in this situation it seems that even the public agencies are confused over the legal status of the land parcels in question. Villagers challenged the validity of the title deed to the Provincial Land Office and were notified that the verification would have to be done at the national level office in Bangkok. As the dispute concerns coastal resources, the Director General of the Department of Marine and Coastal Resources (DMCR) herself visited the site and pressured that detailed investigation should be a high priority because the remaining mangrove resources in the area were found to be in pristine condition. Getting *Matichon* involved was a strategic and effective move. It alerted the politicians and got government officials moving.

But there may be more channels for involvement of stakeholders in Thailand, there are diverse forms and initiatives in other Southeast Asian countries. Cambodia apparently runs Telephone complaint handling hotline. In Vietnam, although allocation of land use rights is the responsibility of the General Department of Land Administration, the implementation however is done by the People's Committees at the District and at the Commune levels. In Lao PDR, the Lao Women Union (LWU) has been active in creating public awareness and community participation and in addition the Lao PDR

government has also outsourced NGOs for public awareness and community participation. In Lao PDR, there are five levels of conflict resolution management system from village, district, and provincial to central levels. Altogether five channels, (i) mediation, (ii) judiciary, (iii) regulated administrative authority, (iv) regulated legislative authority and (v) regulated party mechanisms.

#### **4.4.2 Land-use and Management Plans**

Having land use and management plans drafted through democratic and consultative processes have been recognized by both the FAO and GLTN for being an essential condition for good governance. The extent to which land use and management plans can be instrumental to creating accountability should depend on whether such plans are legally binding and the compulsory nature of compliance. In Developing Countries such as Thailand, land use and land resources management plans is seldom more than specifications of what is technically and physically feasible. Both Thailand and Indonesia have comprehensive forest classifications. Under Indonesia's 1999 Forest Zone for example, there are 5 types of forests: (i) Nature Reserve/Nature Conservation and Hunting Park, (ii) Protection forest, (iii) Limited production forests, (iv) Permanently production forests and (v) Convertible production forest. Thailand also has Agro-Economic Zones (AEZ), a land use plan which is ideally a tool to promote agricultural diversification and improve the quality and value added of targeted products are model land uses which would in principle balance the economic, environmental and physical aspects of agricultural production. Numerous other land use plans exist such as Comprehensive Town Plan, Land capability maps, Pollution Control Areas. These plans, including the AEZs have had limited impact in directing land use as they are not legally binding, no sanctions for non-compliance and no benefits for complying. Moreover, with no commitments from decision makers, land management and land use plans have also had limited contributions in ensuring continuity of measures.

Land use plans can contribute to good governance if it can guarantee continuity. Land policies have therefore tended to be punctuated and swayed in directions of interests of politicians and certainly of limited value as a means to create accountability. Many pro-poor land policies are also pro-politicians in power as no other policies can be more popular than the promise of land distribution and granting of property rights. The Comprehensive Agrarian Reform Program (CARP) under the Marcos government for example, were observed to have had various overlapping intentions, to legitimize the authoritarian regime, to debase the communist guerrilla movement and to crush some of Marcos's opponents who were land-based elites.

Creating accountability and preventing corruption through building access to information. Following the principle of the rights of citizens to know and have access to public data or information, the Official Information Act was enacted in 1997. As mentioned earlier such principle is reaffirmed in Section 56 of the 2007 Constitution.



#### **4.4.3 Civic Engagement**

Good governance in land under the ‘Civic Engagement’ requires that there be dialogue and consensus building orientation and measures to facilitate participation of all groups and active participation.<sup>24</sup> In the past decade, civic engagement in Thailand has taken concrete forms and has at least started to provide the much needed check and balance mechanism.

One such mechanism is the establishment of the National Economic and Social Advisory Council (NESAC), a legacy of the 1997 Constitution. Both the principle of establishing NESAC and the functions of NESAC are maintained in the 2007 Constitution. According to Section 258, NESAC’s mandates are to give advice and recommendations to the Council of Ministers on economic and social problems, including legislation concerned, give opinions on national economic and social development plan and other plans as provided by law before their adoption and publication. By composition, NESAC comprises 99 members selected to represent different social and economic groups. Members are divided into economic (agriculture, industry and services), social and natural resources. Because the 99 members are drawn from and represent different social and economic interests, NESAC is in principle the replica of the civic society. It should thus contribute to the process of civic engagements by providing the forum for public debate, promote learning processes and provide feedbacks from the civic society to the government. Land and related issues is one important area of public concern and debate. How effective can the contribution be depends on how well NESAC understands the issue. In the past, commissioning fact finding studies and organizing conferences participated by inviting experts and stakeholders have been a short and relatively effective way to fill up this knowledge gap. The ultimate measurement is to the importance governments and executive agencies attach to these opinions.

One other channel for civic engagement is the Community Organizations Development Institute (CODI). CODI is among the organizations created by Top-Down initiatives established in 2000 as a Public Organization. Until 1992, CODI had operated under the Ministry of Interior (notoriously Top-Down organization) but since then has been transferred to the Ministry of Social Welfare and Development. Its mandates are (i) to support and enhance the role of the community organizations and of the local mechanisms in development, coordinate the efforts of civil society and their multilateral partners, (ii) to develop the Community Financial Institutes and the community – oriented economy and (iii) to build and develop the loan system as a tool for community development. In addition to broader welfare issues, debts and housing problems of the urban and rural poor, natural resources management is one of CODI’s mandates.

The advantage of being a Top-Down NGO is that CODI has access to financial resources. In the past, substantial funds from the World Bank were managed by CODI under the Social Investment Project. Presently, CODI receives funding from various sources including the Thailand Research Fund. Without going into the politics of NGOs in Thailand which is by no means a homogenous entity, having one NGO with access to formal channel to decision making process is better than having none. CODI’s network structure at least reflects involvement of the ‘civic’ groups and the

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<sup>24</sup> Global Land Network, Good Land Governance Policy Paper. Progress to date and the way forward. [www.GLTN.net](http://www.GLTN.net)

involvement of local organizations. The major hindrance is not whether CODI is really bottom-up driven or not but that heavy reliance on external funding and emphasis on project-oriented activities might mean that whatever contribution CODI might make risk being terminated when the projects terminate.

A most recent legal instrument to support civic participation is the People's Council Act, 2008. Given that economic development has weakened the local and traditional communities and exploited the natural resources bases, the principle of the Act is to strengthen and build capacities to sustainably manage its resources. Moreover, recognizing that local and traditional communities have a significant role in the democratic process and good governance, the Act requires that a Tambon Community Council (TCC) be established comprising representatives of local and traditional communities and not more than one fifth of the members should be experts/resource persons.

The relevance to land management is that the mandate of the Tambon Community Council is to encourage members to cooperate with the Tambon Administration Organization (TAO) and public agencies in the management, conservation and utilization of natural resources.

In principle, the TCC should support the TAOs, but many have argued that functions of the two local level organizations may overlap. A function not stated, but could well be the contribution of the TCC is to provide the check and balance for local level politics which is also lacking.

## **5. Key Issues for Voluntary Guidelines of Responsible Governance of Tenure of Land and Natural Resources**

In this report, we have highlighted some of the key issues of land management in Southeast Asian countries and discussed some of legal, institutional and operational measures. The root cause of poor land management can originate from the policy directives themselves and well as the nature in which policies are implemented. The means to establish the foundations of good governance are combinations of legal and technical measures under various command and control measures heavily oriented to what can be technically achieved. Means and ends however can be mismatched for two reasons. One is that they are primarily top-down designed by bureaucrats, technocrats and often based on perceptions of the situation seen from planners perspective and they are not free of political interests. The other is that in delivering the means, there are major leakages from rent seeking behaviour of politicians and technocrats and from or pure incompetence in implementation which invariably result in mismatches between when intervention was needed and when they were delivered.

Finally, based on issues discussed we highlight the following issues for consideration and inclusion in the Voluntary Guidelines of Responsible Governance of Tenure of Land and Natural Resources:

1. Between economic and pro-poor land policies, the balance is likely to be tipped in favour of the former particular given the potential to capture private gains among those in control of the political power and administrative organs. One way of minimizing these unbalanced objectives is to align commercial interest in the economic exploitation of land and natural resources with conservation efforts which at the same time to incorporate poverty eradication objectives. Recent efforts both in Developed and Developing Countries to understand the total economic value of land and natural resources provide opportunities for non-extractive and *in-situ* conservation efforts that can bring in additional technical and financial resources for conservation, provide employment and income for the poor and at the same time more environmental and sustainable flow of 'rents' that can be captured at the national level.
2. On administrative issues relating to good governance in land management, our observations are that technical competencies can be achieved at much lower cost if there were better coordination among responsible agencies. However, this would not only affect corrupt administrators and politicians, but would also unsettle institutional politics both through readjustment of the size of the budget allocation and the share of land and natural resources that public agencies control.
3. Between 'state capture' and 'administrative corruption', we believe that the worse of the two evils is the former. Administrative corruption may be widespread because of the inappropriateness of the reward and incentives system. Generally, the pay is low and seldom is good performance recognized and rewarded and as such, the reward system tends to give signal to risk averse and risk neutral officials to not to step outside whatever regular duties are required. One partial solution would be to review of reward systems not only on monetary returns but also in relation to career and professional advances. This may help improve integrity of

officials who may ultimately help provide the counterbalancing force against corruption at higher levels of administration.

4. Details discussed highlight that while the principle of the law protects the rights of citizens, such rights cannot be enforced because citizens do not have easy access to the judicial system. This necessitates the existence of legal pluralism and alternative dispute settlement mechanisms. Cases have been presented which illustrated that legal and judicial systems were complex and of limited value to those who might need protection and that these can be habitually abused by the politically powerful. Beyond having the laws, good land governance depends on how the law is interpreted and enforced and how accessible the judiciary process is to the general public. The experiences of Thailand show that there are channels which would increase access to the judiciary system or to raise attention of policy makers and technocrats regarding (intended and unintended) impacts of land policies. Interestingly one such channel that has proven to be effective in disclosing information and getting (almost) immediate responses has been the media. Currently, initiatives have been undertaken by the countries in the Region that would at least broaden the base for involvement of stakeholders by providing checks and balances which would contribute to improvement of good governance in land management.