



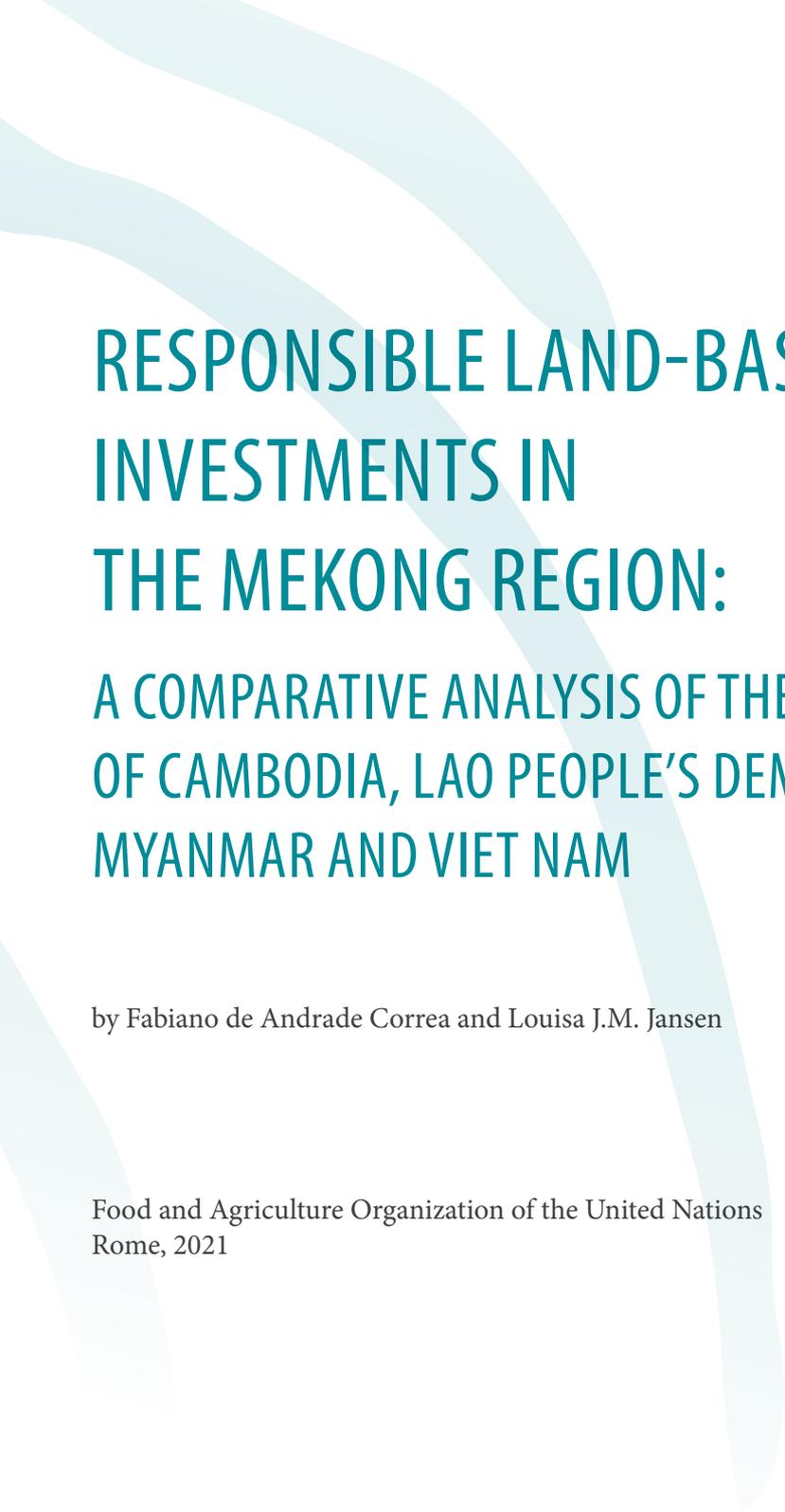
Food and Agriculture
Organization of the
United Nations

RESPONSIBLE LAND-BASED INVESTMENTS IN THE MEKONG REGION:

A COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORKS OF CAMBODIA, LAO PEOPLE'S DEMOCRATIC REPUBLIC, MYANMAR AND VIET NAM







RESPONSIBLE LAND-BASED INVESTMENTS IN THE MEKONG REGION:

A COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORKS
OF CAMBODIA, LAO PEOPLE'S DEMOCRATIC REPUBLIC,
MYANMAR AND VIET NAM

by Fabiano de Andrade Correa and Louisa J.M. Jansen

Food and Agriculture Organization of the United Nations
Rome, 2021

Required citation:

de Andrade Correa, F. and Jansen, L.J.M. 2021. *Responsible land-based investments in the Mekong region – A comparative analysis of the legal frameworks of Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam*. Rome. FAO. <https://doi.org/10.4060/cb3937en>

The designations employed and the presentation of material in this information product do not imply the expression of any opinion whatsoever on the part of the Food and Agriculture Organization of the United Nations (FAO) concerning the legal or development status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. The mention of specific companies or products of manufacturers, whether or not these have been patented, does not imply that these have been endorsed or recommended by FAO in preference to others of a similar nature that are not mentioned.

The views expressed in this information product are those of the author(s) and do not necessarily reflect the views or policies of FAO.

ISBN 978-92-5-134168-1

© FAO, 2021



Some rights reserved. This work is made available under the Creative Commons Attribution-NonCommercial-ShareAlike 3.0 IGO licence (CC BY-NC-SA 3.0 IGO; <https://creativecommons.org/licenses/by-nc-sa/3.0/igo/legalcode>).

Under the terms of this licence, this work may be copied, redistributed and adapted for non-commercial purposes, provided that the work is appropriately cited. In any use of this work, there should be no suggestion that FAO endorses any specific organization, products or services. The use of the FAO logo is not permitted. If the work is adapted, then it must be licensed under the same or equivalent Creative Commons licence. If a translation of this work is created, it must include the following disclaimer along with the required citation: "This translation was not created by the Food and Agriculture Organization of the United Nations (FAO). FAO is not responsible for the content or accuracy of this translation. The original [Language] edition shall be the authoritative edition."

Disputes arising under the licence that cannot be settled amicably will be resolved by mediation and arbitration as described in Article 8 of the licence except as otherwise provided herein. The applicable mediation rules will be the mediation rules of the World Intellectual Property Organization <http://www.wipo.int/amc/en/mediation/rules> and any arbitration will be conducted in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

Third-party materials. Users wishing to reuse material from this work that is attributed to a third party, such as tables, figures or images, are responsible for determining whether permission is needed for that reuse and for obtaining permission from the copyright holder. The risk of claims resulting from infringement of any third-party-owned component in the work rests solely with the user.

Sales, rights and licensing. FAO information products are available on the FAO website (www.fao.org/publications) and can be purchased through publications-sales@fao.org. Requests for commercial use should be submitted via: www.fao.org/contact-us/licence-request. Queries regarding rights and licensing should be submitted to: copyright@fao.org.

CONTENTS

Foreword	iv
Acknowledgements	vi
Abbreviations and acronyms	vii
Executive summary	viii
Recommendations and ways forward	xii
1. Introduction	1
1.1 Responsible investments and tenure security	2
1.2 Legislation and the role of safeguards for land tenure rights in the context of land-based investments in agriculture	6
1.3 Mekong Region: challenges for customary tenure security and responsible investments	8
1.4 Aim of the study and methodology	11
2. Assessment of national legislation for tenure rights safeguards in land-based investments in agriculture	15
2.1 Ratification of the ICESCR and constitutional protection for HLP rights	15
2.2 Legal provisions promoting responsible investments and investments by/in smallholders	17
2.3 Clear and transparent rules on allowable transactions of land tenure rights	19
2.4 Legal provisions defining large scale land transactions and a ceiling for such transactions, including requirements for additional approvals	23
2.5 Clear definition of expropriation for public interest; requirement for just compensation and resettlement procedures	25
2.6 Requirement for investors to respect national law, including human and tenure rights	27
2.7 Requirement for environmental and social impact assessments of investment projects	28
2.8 Requirement of consultations of affected stakeholders and, when applicable, FPIC	30
2.9 Legal provisions requiring the monitoring of impacts from investments on tenure rights	32
2.10 Provisions for grievance mechanisms of affected stakeholders and access to justice	33
3. Opportunities for strengthening responsible investments	37
4. Recommendations and ways forward	41
4.1 General recommendations	41
4.2 Specific recommendations for each country	42
References	44
Legislation and Policies	48
Annex A. Selected relevant paragraphs from the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security	50



FOREWORD

In the Mekong Region, the livelihoods of many people, particularly the vulnerable and rural poor, are based on secure and equitable access to and control of land, fisheries and forest resources. Pressures on these resources are increasing due to ongoing agrarian and environmental transformations because of climate change, increased investments in land, resource scarcity, rural–urban transitions and population growth. It is acknowledged that improving tenure governance is at the centre of development challenges in the region. Governments in Cambodia, Lao People’s Democratic Republic, Myanmar and Viet Nam are revising their policies, legal frameworks and practices in order to meet these challenges.

Land-based public and private investments are essential to improve food security and nutrition and to reduce inequalities. Responsible investments by tenure rights holders who are increasing sustainable agricultural production and generating higher incomes, while at the same time enhancing equality between women and men, youth and elder generations, rural and urban areas, are particularly important. Such land-based investments involve a complex interlocking system of global and national interests. National governments play a pivotal role because on the one hand, they identify the amount and location of land available for investments, together with promotion agencies that have been set up to serve as a “one-stop-shop”; on the other hand, governments have also sought to limit investments by protecting certain areas (e.g. for cultural reasons, nature conservation and protection of biodiversity,

landscape values, protection of indigenous peoples). National governments' decisions concerning the allocation of land and natural resources to investors affects large numbers of people, not only at the time of the investment, but for generations to come.

Given the likely increase of future investments in agriculture, which are essential for sustainable and resilient food systems delivering food security and nutrition, it is vital to analyse the legal frameworks in the four countries. All forms of transactions in tenure rights as a result of investments in agriculture should do no harm, safeguard against dispossession of legitimate tenure rights holders and environmental damage, and should respect human rights. Therefore, in accordance with existing obligations under both national and international laws, governments must ensure that their actions respect and protect human rights and meet environmental standards according to existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments. Responsible investment is encouraged by practising responsible governance of land tenure and natural resources, thereby promoting sustainable social and economic development, and encouraging sustainable and resilient food systems.

The recognition of customary tenure systems and responsible land-based investments that safeguard legitimate tenure rights and right holders are the interconnected main themes for mainstreaming the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) in Cambodia, Lao People's Democratic Republic,

Myanmar and Viet Nam. This study aims at providing an assessment of the legal frameworks in the four countries to analyse whether safeguards for legitimate tenure rights and tenure right holders can be identified in legal provisions applicable to decisions related to land-based investments in agriculture. The assessment also aims at informing and supporting ongoing processes of policy and legal reform in the four countries, as well as the work of organizations that provide support to these processes.





ACKNOWLEDGEMENTS

The original text of this report on responsible land-based investments in the Mekong Region – prepared by Fabiano de Andrade Correa and Louisa J.M. Jansen – has and benefited from the review and inputs of (in alphabetical order) Ohnmar Myo Aung, Marianna Bicchieri, Anh Tuan Nguyen Do, Akiko Inoguchi, Jana Herold, Emma McGhie, Ratana Pen, Phouthasack Souvannasao, Margret Vidar, and Mark West. The final technical review and editing was done by Louisa J.M. Jansen.

The policy brief was edited by Kim Des Rochers, and laid out by Maria Guardia Marin based on the original designs and illustrations prepared by Luca Feliziani.

FAO wishes to express its appreciation to the Government of Switzerland (Swiss Agency for Development and Cooperation) for the financial contribution that made this publication possible, and to all the individuals named here for their valuable time and expertise.

ABBREVIATIONS AND ACRONYMS

ASEAN	Association of Southeast Asian Nations
CESCR	Committee on Economic, Social and Cultural Rights
CFS	Committee on World Food Security
CFS RAI	Principles for Responsible Investment in Agriculture and Food Systems (endorsed by the CFS)
ELC	Economic Land Concessions (in Cambodia)
FAO	Food and Agriculture Organization of the United Nations
FPIC	free, prior and informed consent
HLP	housing, land and property rights
IESCR	International Covenant on Economic, Social and Cultural Rights
IPCC	Intergovernmental Panel on Climate Change
MIC	Myanmar Investment Commission
MoALI	Ministry of Agriculture, Livestock and Irrigation (in Myanmar)
MoNRE	Ministry of Environment and Natural Resources (in Lao People's Democratic Republic and in Viet Nam)
MoNREC	Ministry of Natural Resources and Environmental Conservation (in Myanmar)
MPI	Ministry of Planning and Investment (in Lao People's Democratic Republic)
MRLG	Mekong Region Land Governance Project
OHCHR	Office of the United Nations High Commissioner for Human Rights
QIP	Qualified Investment Project (in Cambodia)
USD	United States dollar
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

EXECUTIVE SUMMARY



EXECUTIVE SUMMARY

Substantive investments are required for achieving the United Nations 2030 Agenda for Sustainable Development Goals of ending poverty and hunger worldwide (SDGs 1 and 2), both globally and in the Mekong Region. At the same time, investments should be carried out in a responsible manner in order to ensure they sustainably benefit livelihoods of communities and those that depend on land and natural resources, as well as to ensure environmental protection and integrity.

Land tenure security is a prominent factor in the promotion of responsible investments. Safeguarding and promoting land tenure security, including customary tenure systems, is not only a precondition for the promotion of responsible investments in land and agriculture, but also a matter of respecting and upholding the human rights of peoples and communities that live in and depend on the land where such investments take place.

Land governance is a key development challenge in Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam, with land expropriation being one of the main drivers of rural poverty and food insecurity. Overall, across the region, large-scale land acquisitions in the form of industrial agriculture and tree plantation development often exclude smallholders from their own farms and from access to and control over fisheries, grazing, and forest resources that are essential for their livelihoods, resulting in (near) landlessness, unemployment and poverty. This has strong implications for the

promotion of responsible investments, especially because Cambodia, the Lao People's Democratic Republic, Myanmar and Viet Nam are predominantly rural with rural populations of 75.8, 63.7, 68.9 and 62.7 percent (CIA, 2020), respectively, which are heavily dependent on agriculture and based mainly on customary land tenure systems.

International instruments on this matter, such as the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT), the CFS Principles for Responsible Investment in Agriculture and Food Systems (CFS RAI) and the Association of Southeast Asian Nations Guidelines on Promoting Responsible Investment in Food, Agriculture and Forestry (ASEAN RAI), provide important guidance for governments and the investment community on the development of an enabling framework for more responsible investments that respect and safeguard all legitimate tenure rights. Further, national legislation plays a key role in this matter, including through the provision of safeguards for tenure rights in the context of agriculture investments.

The aim of this study is to provide an assessment of the legal frameworks in these four countries of the Mekong Region, to analyse whether such safeguards for legitimate tenure rights and right holders can be identified in legal provisions applicable to decisions related to land-based investments. The study aims at informing and supporting ongoing and future processes of legal and policy reform in the four focal countries, as well as the work of organizations (e.g. national institutions and international and non-governmental bodies) that provide support

to such processes. The assessment is based on the following indicators, extracted from relevant binding agreements and guiding instruments:

1. Ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and enshrinement of Housing, Land and Property rights (HLP) in the Constitution;
2. Existence of legal provisions promoting responsible investments and investments by and/or in smallholders;
3. Existence of clear and transparent rules on allowable transactions of tenure rights;
4. Existence of legal provisions defining large-scale land transactions and a ceiling for such transactions, including requirements for additional approvals;
5. Existence of a clear definition of expropriation for public interest (including a definition of “public interest” itself); and a requirement for just compensation and resettlement procedures;
6. Existence of legal requirement for investors to respect human and tenure rights;
7. Existence of legal requirement for consultations of affected populations and, when applicable, free, prior and informed consent;
8. Existence of legal requirement for environmental and social impact assessments of investment projects (environmental impact assessment, social impact assessment, environmental and social impact assessment);
9. Existence of legal provisions requiring the monitoring of impacts from land-based investments on tenure rights;

10. Existence of legal provisions creating grievance mechanisms and determining access to justice for legitimate tenure rights violations arising from investments.

The analysis undertaken aimed at providing a snapshot of the existing provisions in national legislation that provide safeguards with regards to agriculture investments and supporting more responsible investment practices.

Despite the challenges identified, there are also opportunities for each country to promote change and further improve the situation regarding the recognition and protection of legitimate tenure rights, protecting people’s livelihoods, and promoting responsible investments. The four countries are going through different processes of legal reform, which provides momentum and entry points to address the challenges and create opportunities for change that will benefit their agrarian and environmental transformation and reduce inequalities. The analysis undertaken also indicates that countries in the region could learn from one another with regard to their different challenges and legal reform processes. These countries have comparable backgrounds and similar tenure systems in which the State has a major role as owner or manager of all lands and assigns land-use rights. As some of the issues have been more developed in one country in relation to the others, an exchange of experiences can provide important lessons learned and inspiration for paths of action and improvement.

Indicators	Cambodia	Lao People's Democratic Republic	Myanmar	Viet Nam
Housing, land and property rights in the Constitution				
Promotion of responsible investment				
Clear rules on transactions of tenure rights				
Definition of large-scale land transactions and a ceiling for them				
Definition of expropriation for public interest				
Requirement for investors to respect national law and tenure rights				
Consultation and free, prior and informed consent				
Impact assessment				
Monitoring of investments				
Grievance mechanisms				

Score	Explanation
	No legal provision identified
	Limited provisions identified in related legislation
	Specific provisions identified in investment and/or land-related instruments

RECOMMENDATIONS AND
WAYS FORWARD



RECOMMENDATIONS AND WAYS FORWARD

Based on the analysis carried out, and on the opportunities identified, a series of recommendations can be made to strengthen the promotion of responsible investments in the Mekong Region.

The general recommendations applicable to the four countries are:

- Leverage existing pilot cases: the analysis undertaken demonstrates that many legal provisions already exist and can be employed, with appropriate interpretation, to safeguard tenure rights and rights holders in the context of land-based investments. In all four countries, there are pilot initiatives in many areas that aim at operationalizing the recognition and protection of legitimate tenure rights in diverse circumstances, even when the legal framework has gaps regarding their protection. Such pilot cases should be expanded to promote change on the ground, and leveraged to inform legal reviews and institutional processes.
- Undertake capacity development across the investment community: implementation of the laws in all countries seems to be a key issue, and enforcement of laws should be a priority. In this regard, capacity development on the laws and their use among all interested stakeholders, and institutional support for implementing agencies, should be considered.
- Awareness raising and engaging key “change

agents”¹: it should be noted that legal compliance alone is not enough to promote responsible investments. Rather, there must be a recognition of the politics and power dynamics behind the management of land and natural resources, and there is a need to identify and recognize legitimate tenure rights and rights holders at an early stage in order to level the playing field for negotiation; create accountability around global principles; and monitor implementation of land-based investments.

- Awareness should be built among investment communities (e.g. government ministries, investors, civil society) at all levels of governance, and in all countries, on guidance for responsible investments and the relevance of performing steps (e.g. due diligence, and overcoming legal barriers/gaps by supplementing these with international standards. The investment community, in particular investors including those that are already willing to act responsibly, should be involved in a review and guidance process on the implementation of the respective legal frameworks.
- Address free, prior and informed consent (FPIC), which seems to be an issue that deserves particular attention in the region. Although the legislation in the four countries contains elements requiring consultations of affected communities and land-use rights holders affected by investment projects, this seems to be a grey zone as, on the one hand, the extent to which such consultations are effectively carried out is questionable, and on the other hand, there seems to be little room for the affected

¹ Persons who voluntarily take an interest in the adoption, implementation, and success of a cause, policy, programme, project or product. They cause a change in the way things are done or the way ideas are viewed. Also called ‘change advocates’ or ‘champions’.

stakeholders – through grievance mechanisms – to effectively oppose proposed investments and infringements of their tenure rights.

- Exchange of experiences in legal drafting and implementation, as well as institutional arrangements and practices, can provide important insights and lessons learned among countries in the Mekong Region.

Country-specific recommendations are as follows:

■ CAMBODIA

- Strengthen legal provisions on responsible land-based investments and requirements for investors to respect national law, human and tenure rights.
- Strengthen safeguards concerning expropriations, in particular on the definition of standard of compensation, access to information and grievance mechanisms; as well as for monitoring of investments.
- Support law enforcement, especially as a means to achieve social justice.

■ LAO PEOPLE'S DEMOCRATIC REPUBLIC

- Strengthen safeguards concerning expropriations, in particular on the definition of public purpose.
- Strengthen: provisions around FPIC; gender mainstreaming in these sectors; recognition and protection of rights in forestland (i.e. State land), considered a separate domain and particularly governed by a separate law; grievance mechanisms.
- Promote coordination between the Land, Forestry

and Investment sectors, and promote the national targets to secure 70 percent forest cover. Address existing inconsistencies between the Forestry Law and the Land Law, as the latter includes a recognition of customarily used forestland (but not communally used), whereas the Forestry law explicitly omits “customary use” as one of the categories of forestland use (but then includes this for forest resources use.)

- Raise awareness and include the investment community in consultations on the review of the legal framework; promote discussion (e.g. through multi-stakeholder partnerships, processes and platforms to identify responsible investment change agents) and capacity development.

■ MYANMAR

- Implement a moratorium on legal revisions until the new National Land Law is in place and land-related laws are being harmonized, in order to avoid that such revisions are not aligned with future directions that the future law will determine.
- Make a clear provision of recognition of customary tenure rights, including tenure rights over the lands they manage according to customary rules; further, provide a definition of customary lands, through a participatory and consultative process, which is key for the interpretation of provisions such as what are Vacant, Fallow, and Virgin Lands.
- Strengthen safeguards for land expropriation, which should be done according to strict requirements of “public purpose”.

■ VIET NAM

- Strengthen legal provisions on responsible land-based investments and requirements for investors to respect national law and human and tenure rights.
- Strengthen provisions allowing for the payment of market price for lands confiscated or object of resettlement, addressing current shortcomings in these processes.
- Address legal bottlenecks would otherwise enable more investments in this area. Despite several new pieces of legislation aiming to enable more investments in agriculture, complicated procedures to lease or buy land, insufficient land (use) planning, and inaccurate information about land, among other issues, are reported as prominent barriers for more investments by agricultural enterprises.





1. INTRODUCTION

1. INTRODUCTION

Since 2008, the demand for agricultural land in developing countries has increased sharply (FAO, 2016a). While land is considered to be an attractive asset for investments, it differs from other asset classes due its multifaceted nature as a resource deeply linked to livelihoods, culture, social structures and norms, access to food, water and shelter, as well as cultural and spiritual traditions to peoples worldwide (FAO, 2016a).

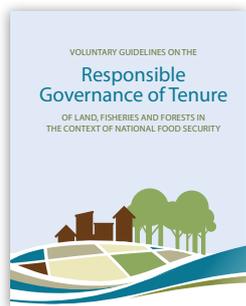
In the Mekong Region, land continues to play a central role for national development and the livelihoods of rural agricultural households, with smallholder farmers being prominent in the development of the agricultural sector and food security and nutrition. Although the relative importance of the agriculture sector for the overall economy has witnessed some decline in the region, the sector remains a strategic job provider for the majority of the population in countries such as Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam. Hence, access to land continues to be a central concern in the livelihoods of rural people (Ingalls *et al.*, 2018). At the same time, land and natural resources are reportedly becoming scarcer in the region due to factors such as government grants of large land concessions to national and foreign investors, land speculation, climate change, forest exploitation, urbanization and population growth, coupled with insecurity of land tenure (FAO and MRLG 2019a). In all four countries there has been a pronounced trend since the 1990s towards large-scale, land-based investments. While

playing a role in rising gross domestic product in host countries, it is reported that the expected benefits of such investments have not fully materialized, owing to factors such as state revenue resulting from investments being lower than the expected, social and environmental costs having exceeded their benefits, and having been largely borne by the rural poor. Among the main causes of these challenges, under-recognition of land tenure and local uses prior to land acquisition are cited as prominent factors (Ingalls *et al.*, 2018).

This report is part of a broader series of reports on two interconnected, main themes for mainstreaming the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT, FAO 2012) in Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam: 1) the recognition of customary tenure systems, and 2) responsible land-based investments that safeguard legitimate tenure rights and right holders. Building on these previous efforts, this report looks specifically into the role of legislation in providing safeguards for the protection of *legitimate* tenure rights, and for the promotion of more responsible agricultural investments in the four countries of the Mekong Region.

The VGGT explicitly consider “legitimate” as not only those tenure rights formally recognized by national law, but also those rights that, while not currently protected by law are considered to be socially legitimate in local societies (FAO 2016b; also see Annex A of this report).

1.1 RESPONSIBLE INVESTMENTS AND TENURE SECURITY



Substantive investments are required for achieving the United Nations 2030 Sustainable Development Agenda's goals of ending poverty and hunger worldwide (Sustainable Development Goals 1 and 2). Global estimates show that an additional USD 265 billion per year between 2016 and 2030 (on

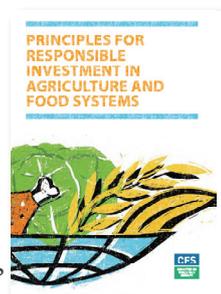
average) are needed for social protection and pro-poor investments in productive activities, of which USD 140 billion should target investments in rural development and agriculture. Notably, such investments are needed from both public and private sources (FAO, IFAD and WPF 2015).

Importantly, investments should be made in a responsible manner in order to ensure they sustainably benefit livelihoods of communities and those that depend on land resources, as well as to ensure environmental protection and integrity (FAO 2019). The VGGT provide that responsible investments should “do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage” (FAO 2012, p. 21).² In addition, there is an increasing understanding that responsible investments should go beyond a “do-no-harm approach” and, instead, actively promote positive social and environmental outcomes, including smallholder-sensitive investments based on partnerships with land rights holders and small-scale rural producers, and positively contribute to policy objectives such as food security and nutrition and rural development (Cotula, 2019a).

² VGGT paragraph 12.4; This has also been enshrined in the CFS-RAI Principle 5: responsible investment in agriculture and food systems respects legitimate tenure rights to land, fisheries and forests, as well as existing and potential water uses.

The Committee on World Food Security (CFS)'s Principles for Responsible Investment

in Agriculture and Food Systems (CFS RAI), is the first globally approved guidance instrument that broadly defines what responsible investment in agriculture constitutes: the “creation of productive assets and capital formation, which may comprise physical, human or intangible capital, oriented to support the realization of food security, nutrition and sustainable development” (CFS, 2014, p. 3). It requires “respecting, protecting and promoting human rights, including the progressive realization of the right to adequate food in the context of national food security, [...] entails respect for gender equality, age, and non-discrimination and requires reliable, coherent and transparent laws and regulations” (CFS, 2014, p. 4).



In September 2017, the Ministers on Agriculture and Forestry within the Association of South East Asian Nations (ASEAN) agreed to develop the ASEAN Guidelines on Promoting Responsible Investment in Food, Agriculture and Forestry (ASEAN RAI; ASEAN, 2018). The ASEAN RAI aim to promote investment in food, agriculture and forestry in the ASEAN region that contributes to regional economic development, food and nutrition security, food safety and equitable benefits, as well as the sustainable use of natural resources. Although inspired by the CFS RAI, the ASEAN RAI are noted to have adapted the former to the ASEAN context, with more emphasis on technology and innovation, climate change and natural disasters, regional approaches, and home/host country dimensions, as 80 percent of investments

in the Southeast Asian region are reported to be intraregional (AsiaDHRRA, 2020). Of note, the ASEAN RAI, like the VGGT and the CFS RAI, are non-legally binding instruments, sometimes called “soft law” instruments,³ that will need to be mainstreamed and adopted at the national level through, among other means, a review and, when applicable, amendment of legislation and change in practices and procedures of investment related organizational structures.

Land tenure security is a prominent factor in the promotion of responsible investments. In fact, irresponsible investments that do not pay proper attention to identifying and respecting all legitimate tenure rights in investment areas often lead to unjust dispossession of land and expropriations, land conflicts, and threats to the livelihoods of those who depend on lands affected by such investment practices. Evidence suggests that timely identification and protection of legitimate tenure rights at the start of investment projects is key, based on fair and open negotiation processes to achieve community consent for investment plans, as tenure issues might otherwise escalate leading to disputes, conflicts and additional costs (Quan, 2019). In addition, the business case for responsible land-based investments is becoming clearer in economic terms, as issues such as the financial impacts of land disputes are estimated to cost investors between USD 10 million and USD 100 million, and the benefits of investing responsibly is considered to outweigh such costs.⁴

³ For a discussion on this topic see Jansen, 2020.

⁴ Julian Quan noted, while presenting at the CFS Week in 2019 (Quan, 2019), that among other benefits, a reduction of the operational risks of delays and conflicts; improved operational efficiency and hence the returns of the investment; a boost on reputation of the investor in local and international markets.

Securing land tenure rights is also part of respecting human rights in the context of responsible investments. The “Housing, Land and Property rights” (HLP rights) have been increasingly clarified and developed under human rights law, starting with the 1948 Universal Declaration of Human Rights, which recognized both the right to adequate housing and the right to own property. Subsequently, article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognized the right to housing as part of the “right of everyone to an adequate standard of living for himself and his family” (UNHR, 1966). Further interpretative General Comments of the ICESCR have been instrumental for understanding the contours of such rights, and the duties and roles of the different stakeholders related to them. The right to housing has been interpreted and clarified by the CESCR in General Comment No. 4 (CESCR, 1991a), which indicates legal security of tenure among the seven components that form the core contents of the right. As such, State parties to the ICESCR, including the four countries focused on in this study, have a duty to protect land users from threats to tenure security of their lands, such as “land grabbing” in the context of land-based investments, and to regulate investment activities in the land sector (CESCR, 2019), as failure to do so could lead to HLP rights violations (Displacement Solutions, 2019).

More recently, the 2018 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas explicitly recognizes a human right to land, defined as the right “individually and/or collectively [...] to have access to, sustainably use and manage land and the water bodies, coastal seas,

fisheries, pastures and forests therein, to achieve an adequate standard of living, to have a place to live in security, peace and dignity and to develop their cultures” (art. 17), and also a right of peasants and other people working in rural areas to “have access to and to use in a sustainable manner the natural resources present in their communities that are required to enjoy adequate living conditions” (art. 5.1). Mirroring the language from the VGGT, this declaration urges States to “take appropriate measures to provide legal recognition for land tenure rights, including customary land tenure rights not currently protected by law, [...] protect legitimate tenure and ensure that peasants and other people working in rural areas are not arbitrarily or unlawfully evicted and that their rights are not otherwise extinguished or infringed”.⁵

In particular, the issue of recognizing and safeguarding customary tenure rights has also been receiving strong international support and consideration. The latest report of the Intergovernmental Panel on Climate Change (IPCC, 2020, p. 29) noted that:

“insecure land tenure affects the ability of people, communities and organizations to make changes to land that can advance adaptation and mitigation [...]; Limited recognition of customary access to land and ownership of land can result in increased vulnerability and decreased adaptive capacity (medium confidence). Land policies (including recognition of customary

tenure, community mapping, redistribution, decentralization, co-management, regulation of rental markets) can provide both security and flexibility response to climate change (medium confidence)”.

This was further highlighted in the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services thematic assessment of land degradation and restoration (Montanarella *et al.*, 2018, p. 617), which noted that:

“[s]ecure rights to land of rural communities (indigenous and non-indigenous) and of their members are considered as an essential contribution to the realization of human rights such as the rights to adequate food, water, health and housing; even though a human right to land has not yet been recognized in international human rights law [...]. Secure land rights are also inextricably linked to land degradation and restoration issues [...]”.

In addition, access to land and security of tenure rights are of paramount importance for the realization of the right to food, another human right closely related and impacted by agriculture land investments. Indeed, former United Nations Special Rapporteur on the Right to Food, Olivier de Schutter, dedicated considerable attention to this issue in his final report to the United Nations General Assembly (UNGA, 2014). In this report, noting the increasing pressure on land and related threats to the right to food, the protection of land users and the implementation of the VGGT were highlighted as key measures, including through ensuring security of tenure and the improvement of

⁵ Of note, CESCR is preparing a specific general comment on land rights related to the ICESCR. See: <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/GeneralDiscussionLand.aspx>.

the regulatory framework concerning expropriation, as well as strengthening customary systems of tenure. Further, the report noted the need to ensure consistency of land investment projects with relevant obligations under international human rights law, as well as to ensure that investments in agriculture and rural development contribute to the realization of the right to food, including through channelling support to sustainable farming approaches that benefit the most vulnerable groups and that are resilient to climate change, and ensuring that investment agreements contribute to reinforcing local livelihood options and to environmentally sustainable modes of agricultural production (UNGA, 2014).

This emphasizes that safeguarding and promoting land tenure security, including customary tenure systems, is not only a precondition for the promotion of responsible investments in land and agriculture (among other policy goals such as mitigation of and adaptation to climate change), but also a matter of respecting and upholding the human rights of peoples and communities that live in and depend on the land where such investments take place. Recognizing the interconnectedness between business conduct and investment and human rights issues, a United Nations Open-Ended Intergovernmental Working Group (OEIWG) has been formed and is working on the drafting of a “Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises”. Interestingly, the draft instrument covers all business activities, domestic and transnational (art. 3), and requires countries to prevent and address human rights violations of enterprises, domestically

and abroad and, among other issues, require them to establish human rights due diligence processes (i.e. mechanisms that identify, assess, prevent, and monitor any actual or potential human rights violations that may arise from corporate business activities, art. 5) (OEIWG, 2020).

The current context of the COVID-19 pandemic has added to the urgency of understanding the need and promoting a continued and strengthened flow of responsible investments in agriculture and food systems. Different from other crises such as the 2009 “Great Recession”, the so called “Great Lockdown” of 2020 is meant to hit hard both developed and developing countries’ economies and lead to much deeper recessions at national and global levels (Schmidhuber and Qiao, 2020). As countries worldwide plan and adopt measures to halt the spread of the pandemic, care should be taken to avoid potential unintended consequences for food security and nutrition, such as availability, access, utilization and stability of food supplies at global, national, local and individual levels, as well as for tenure security. In a context of potential food shortages and disruptions in the supply chain, the human right to food must be safeguarded. Considering that food is a fundamental need, farmers and agricultural workers should receive support within measures to combat the pandemic, as much as global and national food systems should be equally supported in ensuring that hunger and poor nutrition are left unabated. This requires that farmers maintain and invest in productivity with access to affordable credit, and consumers have normal access to procure food needs on the international marketplace (Schmidhuber and Qiao,

2020). An emergency response to the global outbreak of COVID-19, grounded in international law and human rights principles, is recommended to continue achieving the Sustainable Development Goals in the context of Agenda 2030, and, in particular, to fulfil the right to food for all focusing on those most vulnerable to food insecurity (FAO, 2020). This emphasizes the need for more responsible investments in food systems to face this extraordinary challenge of our times. Further, there is an opportunity to leverage COVID-19 recovery packages to increase responsible investments and achieve other policy goals such as the Sustainable Development Goals and the fight against climate change (PRI, 2020).

Taking note of this challenge, the ASEAN Ministers of Agriculture and Forestry issued a joint statement (ASEAN, 2020, p. 2–3) urging countries to:

“[c]ontinue efforts to the implementation of the ASEAN Guidelines on Promoting Responsible Investment in Food, Agriculture and Forestry to increase resilience to, and contribute to the mitigation of and adaptation to climate change, natural disasters and other shocks; [...] to implement necessary measures, projects and programmes at the national level to meet the immediate food needs of ASEAN populations, particularly vulnerable groups in society, boost ASEAN Member States’ social protection programmes and support all stakeholders, including smallholder farmers, and Micro, Small and Medium Enterprises [...], to increase food production and ensure food security in the region.”⁶

⁶ Statement of the ASEAN Ministers on Agriculture and Forestry in response to the outbreak of the coronavirus disease (COVID-19) to ensure food security, food safety and nutrition in ASEAN. Endorsed on 15 April 2020.

1.2 LEGISLATION AND THE ROLE OF SAFEGUARDS FOR LAND TENURE RIGHTS IN THE CONTEXT OF LAND-BASED INVESTMENTS IN AGRICULTURE

The VGGT call for the recognition and protection of all “legitimate tenure rights”, marking an important shift in recognizing rights that enjoy social legitimacy (e.g. customary tenure rights) alongside rights created or acquired through formal procedures (i.e. “statutory” tenure rights) (FAO, 2016b). This has important implications for States required to reform laws, policies and institutions, and for other stakeholders such as companies who have a duty to respect such rights. In addition, the VGGT provide that States “should promote responsible investments in land, fisheries and forests” (VGGT para. 12.1) and “provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment” (VGGT para. 12.6). Investors are also assigned a “responsibility to respect national law and recognize and respect tenure rights of others and the rule of law” (VGGT para. 12.12). For States to give proper practical effect to such requirements, measures such as reconfiguring land tenure due diligence are needed, as “conventional approaches” based on merely checking legal compliance and formal land titles can fail to identify land rights issues that are grounded in social legitimacy. Such issues include those that stem from complex customary tenure systems, from historical grievances, and from contestation of local and national leaders (Cotula, 2019a).

Legislation plays a key role in both recognizing and protecting all legitimate tenure rights and

right holders, and in promoting responsible land-based investments that respect such rights. FAO highlights that incentives and capacity for responsible investments are largely dependent on an enabling environment including supporting laws, policies and institutions (Jull, 2016). Conversely, research emphasizes four recurring trends that illustrate how the lack of an appropriate legal framework that includes appropriate safeguards might pose challenges for more responsible types of investments (Cotula, 2019b):

- Rural people's resource rights enjoy variable but often limited legal protection, including in jurisdictions where legislation or even the constitution formally recognizes those rights. For example, many land laws condition protection of land rights to proof of "productive use", and narrow notions of productivity might undermine the resource claims of groups such as shifting cultivators, pastoralists and hunter-gatherers.
- The extensive land allocation powers of the State, and of traditional authorities, facilitate the granting of concessions to companies over vast areas that might be claimed by others, especially in jurisdictions where the State owns all or most of the land, whereas local communities have socially recognized tenure rights; and where unchecked powers of expropriation enable authorities to unjustly expropriate privately held resources and reallocate them to commercial operators.
- Many States have enacted pro-business reforms to compete for international investments, making land and natural resources available to companies

on favourable terms, ranging from land tenure reform to tax incentives and stabilized contractual regimes.

- An increasing number of bilateral investment treaties permit foreign investors to bring arbitration claims against States and seek compensation for State conduct adversely affecting their business; such treaties can protect foreign investors' resource rights, and even their expectations, against public action to withhold, reopen or revoke commercial concessions in the face of local opposition.

An adequate legal framework at national level is therefore paramount in countries where investments take place.⁷ The VGGT also calls for States that invest or promote investments abroad to ensure that such investments are responsible in the protection of tenure rights and food security. However, very few examples of such legislation exist, and only a few States already developed guidance for investors when investing abroad (USAID, 2015; Fiedler and Karlsson, 2016).

Given the pressure on land resources and the challenges noted above, the VGGT expressly point to the establishment of safeguards in legislation when the State recognizes or allocates tenure rights to land, in order to avoid infringing or extinguishing tenure rights of others. This includes safeguards

⁷ International guidance exists to support countries in assessing and implementing legislation in this regard. Of note, FAO collaborated with IFAD and UNIDROIT for the publication of the Legal Guide on Agriculture Land Investment Contracts (ALIC), a useful resource in the drafting of agriculture investment contracts that follow a rationale of responsible investments. The Guide, approved by the UNIDROIT Governing Council at its 99th Session in September 2020, can be consulted at: <https://www.unidroit.org/english/documents/2020/study80b/s-80b-alic-draft-e.pdf>.

for legitimate tenure rights that might not (yet) be protected by law, and a special focus on women and other vulnerable groups who might hold “subsidiary” tenure rights (e.g. gathering or passage rights) (FAO, 2012).

1.3 MEKONG REGION: CHALLENGES FOR CUSTOMARY TENURE SECURITY AND RESPONSIBLE INVESTMENTS

Land governance is a key issue within development challenges in Cambodia, Lao People’s Democratic Republic, Myanmar and Viet Nam, with land expropriation being one of the main drivers of rural poverty and food insecurity.⁸ Overall, across the region, large-scale land acquisitions in the form of industrial agriculture and tree plantation development often exclude smallholders from their own farms and from access to and control over fisheries, grazing and forest resources that are essential for their livelihoods, resulting in (near) landlessness, unemployment and poverty. Further, such land acquisitions often involve limited job creation, in particular as companies often hire labourers from other places to avoid conflicts with locals (GRET, 2019). Moreover, as smallholder farms are often more productive than large-scale plantations or concessions, over-reliance on large-scale land acquisitions can lead to food insecurity (Namati and Landesa, 2015). This has strong implications for the promotion of responsible land-based investments, especially as Cambodia, the Lao People’s Democratic Republic, Myanmar and Viet Nam, which are

⁸ See for more information the web page of the Swiss Agency for Development and Cooperation at <https://www.eda.admin.ch/countries/cambodia/it/home/cooperazione-internazionale/progetti.html/content/dezaproyects/SDC/en/2013/7F08757/phase2>.

predominantly rural, with rural populations of 75.8, 63.7, 68.9 and 62.7 percent (2020 estimates) (CIA, 2020), respectively, and with populations heavily dependent on agriculture and based mainly on customary land tenure systems. Safeguarding these tenure rights and right holders is key, especially as their livelihoods depend on the full realization and enjoyment of these rights and they are often the least protected because tenure rights in rural, highly productive agricultural and economically important areas (e.g. areas with irrigated cash crops or high-value crops) are usually legally better protected than those in other rural areas.

■ **Cambodia** recognizes 24 indigenous groups, representing around 1.0–1.5 percent of the country’s population (FAO and MRLG, 2019a), and is considered to be the only country in the Mekong Region where legislation clearly recognizes and protects customary land tenure rights (FAO and MRLG, 2019a). Article 23 of the 2001 Land Law defines indigenous communities as “a group of people [...] whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use”. The law defines the lands of indigenous communities as those where they have established residences and carry out traditional agriculture, including areas reserved for shifting cultivation (art. 25), and grants the communities rights of collective ownership, including all rights and protections of ownership as are enjoyed by private owners except the right to sell the land (art. 26).⁹ The law also

⁹ The process of granting the communal land title is further regulated through the 2009 Sub-Decree No. 83 on the “*Procedure of Registration of Land of Indigenous*”

recognizes the traditional authorities and customary practices of land management inside community land, though respect is required for laws of general enforcement related to immovable properties, such as the Law on Environmental Protection, which is a relevant safeguard. There are different views on the system envisioned in the Land Law, which is considered lengthy and expensive, and focused solely on indigenous peoples while other communities (e.g. other rural Khmer populations) should equally have their customary rights protected (FAO and MRLG, 2019a).

■ In **Lao People’s Democratic Republic**, all Lao people are considered ethnic groups. Currently, 49 ethnic groups and 160 subgroups are recognised, which traditionally subsist from cultivation, including shifting agriculture and forest products (FAO and MRLG, 2019b). The legal framework includes provisions that define and recognize customary rights, and establish mechanisms for registration. The 2003 Constitution states that the country is a multi-ethnic country that enshrines equality and the right to protect and promote customs (art. 8). Article 17 of the Constitution and Article 3 of the 2019 Land Law¹⁰ provide that land and natural resources belong to the national community and are managed by the State, which grants “long-term and secure land-use rights” to citizens, legal persons, collectives and organizations; further, customary land-use rights are expressly included in articles 127 and

Communities” and the “Circular of the Ministry of Rural Development on the Procedures and Methods of Implementing National Policy on the Development and Identification of an Indigenous Community”.

¹⁰ Lao People’s Democratic Republic, National Assembly, Land Law No 70/NA, adopted in Vientiane on 21 June 2019. It should be noted that, at the time of writing this report, only an unofficial translation to English of the 2019 Land Law was available.

130 of the 2019 Land Law. The 1990 Property Law establishes five forms of property: 1) State property, 2) collective property, 3) individual property, 4) private property (property belonging to a private economic unit), and 5) personal property (items for personal use) (art. 2). It also states that ownership of land, underground resources, water, forests and wildlife belong to the national community and is vested in the State. Some pieces of legislation offer possibilities of community land registration, such as Article 26 of the Decree on Implementation of the Land Law (No 88/PM of 2008) that recognizes customary land utilization rights for individuals, organizations and village communities for which a land title or land certificate can be issued. In practice, it is reported that customary land rights are only registered in three pilot locations with temporary status, and many such rights go unprotected and risk infringement (OpenDevelopment Laos, 2019). On the other hand, communal land titling is not linked to indigenous status as in Cambodia. Key challenges include unclear political support from higher levels of government, the lack of an agreed procedure for registering and adjudicating communal land areas, and requirements for the formalizing land rights that reportedly pose a barrier to the recognition of customary rights (FAO and MRLG, 2019b).

■ In **Myanmar**, ethnic minorities make up an estimated 30–40 percent of the population, and ethnic States occupy some 57 percent of the total land area along most of the country’s international borders (MCRB, 2014), though the Constitution makes no reference to ethnic minorities and uses “national races” instead. Customary tenure

systems are widespread throughout the country (representing the mainstream regime in upland areas, where shifting cultivation is the norm), including both communal and individual plots. In practice, however, many challenges persist as there are very limited mechanisms for the registration and protection of customary lands (FAO and MRLG, 2019c). Two recent developments imply the legal recognition of customary tenure systems in the country. The 2012 Vacant, Fallow and Virgin Lands Management Law has been amended in 2018, including in article 30(a), a provision determining that the law would not be applicable to “(a) The lands for which the right to use as hillside cultivation (*taungya* land) is granted under the existing law and rules; (b) Customary lands designated under traditional culture of the local ethnic people; and (c) The lands currently used for religious, social, education, health, and transportation purposes of the public and ethnic people”. Another noteworthy legal revision has taken place in 2019 with regards to the 1894 Land Acquisition Law. The new Land Acquisition, Resettlement and Rehabilitation Law includes a recognition of persons holding land under customary ownership among the category of “landowners” whose rights are to be protected under the law. The revised Community Forest Instruction (2019) has also eliminated previous prohibitions against shifting cultivation under its previous versions, which is an important instrument to protect the tenure rights of traditional forests dwellers. These three legal revisions indicate a formal legal recognition of customary tenure rights. A legal provision with overall application would bring further clarity to the matter, as well as clear

procedures to protect and register such lands, which are not yet in place. In addition to these challenges with customary tenure, several other challenges for responsible land-based investments are recognized by the 2018 Agriculture Development Strategy, which emphasizes issues such as limited security of smallholder farmers’ land rights that are aggravated by land registration, classification and titling processes for which limited means (funding and capacity) are available; gender inequality and insufficient recognition of women’s rights in agriculture; ongoing land grabbing, which further aggravates inequality and precipitating social and economic unrest; and environmental degradation and loss of biodiversity (FAO and MRLG, 2019c).

■ **Viet Nam** has 54 officially recognized ethnic groups, of which the Kinh majority accounts for 87 percent of the population. The majority of ethnic minority groups reside in rural, mountainous areas such as the Central Highlands and the Northern Mountains. The 2015 Civil Code recognizes State, private and common ownership. The 2013 Constitution (art. 5) and the 2005 Civil Code (art. 8) allow the right of ethnic groups to use their own language, to preserve their ethnic identity, and to promote and respect customs, habits, traditions and culture. The Civil Code also allows boundaries of immovable property to be determined “in accordance with customary practice or according to boundaries that have existed for thirty or more years without dispute” (art. 175). Further, the 2013 Land Law formally recognizes communities as land users in its article 5. Communities might acquire land-use rights by donation of land, through: 1) receipt of inherited land-use rights, 2) land

allocation by the State, 3) the State's recognition of the existing stable use of the land, and 4) the successful conciliation of land disputes certified by a competent authority (art. 169). Article 131 determines that communities are to be allocated land or to have their land-use rights recognized by the State to preserve national identities associated with their traditions and customs. As a recognized group of land-use rights, communities are entitled to the rights established in article 166, which includes the right to be granted the certificate of land-use rights, to be protected by the State against others' infringements of their lawful rights and benefits related to land, and to receive compensation in cases of land expropriation by the State. Article 26 also determines that the State shall guarantee the rights to use land and land-attached assets of land users. This is further specified in article 27, which expresses that the State shall adopt policies on residential land and land for community activities for ethnic minorities in conformity with their customs, practices and cultural identities and practical conditions, including those engaged in agriculture activities. The land-use rights of communities are considered long-term use rights (art. 125), and article 100 specifically grants communities a land-use right certificate. Such provisions could be interpreted as protecting communities' land-use rights, although customary land tenure rights are not expressly mentioned. In practice, however, it is reported that actual land allocation to communities has not generally been implemented (FAO and MRLG, 2019d). Overall, the Land Law provides a good basis for land allocation to communities, with implementation being the most pressing challenge (FAO and MRLG, 2019d).

The challenges related to the effective recognition and protection of customary land tenure rights pose significant barriers for the promotion of responsible land-based investments in the Mekong Region, especially in a context in which the majority of the population is rural and dependent on agriculture (Ingall *et al.*, 2018). This makes it even more relevant to provide safeguards in legislation that can ensure a level of protection against infringements of legitimate tenure rights related to agriculture land investments.

1.4 AIM OF THE STUDY AND METHODOLOGY

The aim of this study is to provide an assessment of the legal frameworks in these four countries of the Mekong Region in order to analyse whether appropriate safeguards for legitimate tenure rights and tenure rights holders can be identified in legal provisions applicable to decisions related to land-based investments in agriculture. The study aims to inform and support the processes of legal and policy reform in the four focal countries, as well as the work of organizations (e.g. national institutions, international and non-governmental organizations) that provide support to such processes. The study is based on a desk review of legislation, coupled with data retrieved from the literature, and feedback from stakeholders in the four countries to provide comments on relevant implementation aspects (if and when available). The following assessment indicators are guiding the study, based on relevant binding agreements and guiding instruments (FAO, 2012, 2015, 2016b; IFC, 2012a, b; CFS, 2014; OECD, 2014).¹¹

¹¹ The FAO Legal Assessment Tool methodology has been used as an additional source (see <http://www.fao.org/gender-landrights-database/legislation-assessment-tool/en/>).

1. Ratification of the ICESCR and enshrinement of HLP rights in the Constitution;¹²
2. Existence of legal provisions promoting responsible investments and investments by/in smallholders (see VGGT paras. 12.1 and 12.2);¹³
3. Existence of clear and transparent rules on allowable transactions of tenure rights (VGGT paras. 12.5 and 8.2);
4. Existence of legal provisions defining large scale land transactions and a ceiling for such transactions, including requirements for additional approvals (VGGT para 12.6);
5. Existence of a clear definition of expropriation for public interest (including a definition of “public interest” itself); and a requirement for just compensation and resettlement procedures (VGGT para. 16.1);¹⁴
6. Existence of legal requirement for investors to respect human and tenure rights (VGGT chapter 12, and CFS RAI principle 5);
7. Existence of legal requirement for consultations of affected populations and, when applicable, free, prior and informed consent (FPIC) (VGGT paras. 12.7 and 12.9);¹⁵
8. Existence of legal requirement for environmental and social impact assessments of investment projects (environmental impact assessment, social impact assessment, environmental and social impact assessment) (VGGT para. 12.10);¹⁶
9. Existence of legal provisions requiring the monitoring of impacts from land-based investments on tenure rights (VGGT para. 12.14);
10. Existence of legal provisions creating grievance mechanisms and determining access to justice for legitimate tenure rights violations arising from investments (VGGT paras. 12.14 and 7.3).

This report focuses on assessing the texts of laws, and aims to analyse if there are challenges and/ or opportunities for enhancing the promotion of responsible land-based investments based on the findings from this assessment. Often, the text of law is not the main challenge, but rather how its interpretation and implementation are understood and carried out by the different stakeholders involved. In this regard, this report ultimately aims to understand the main legal challenges faced¹⁷ for the promotion of responsible land-based investments and to propose recommendations of potential paths for change accordingly.

¹² As mentioned above, for ICESCR party states there are human rights obligations related to avoiding disruption to adequate housing, including forced evictions that could relate to expropriations of land for investment purposes. Enshrining such rights in the Constitution provides an extra level of protection within the legal system, which could empower legitimate tenure rights holders to access courts and remedy for violations.

¹³ Such promotion can be framed as the general aim of investments in the country in the text of the investment law, for example, but also understood as indirectly promoted through, for example, incentives and/or prohibitions of certain types of investment.

¹⁴ VGGT paragraph 16.1 states “States should expropriate only where rights to land, fisheries or forests are required for a public purpose. States should clearly define the concept of public purpose in law, in order to allow for judicial review”; VGGT paragraph 16.2 states that the planning and process for expropriation should be transparent and participatory; and in VGGT paragraph 16.3 ensures fair valuation and prompt compensation. See also CESCR General Comment 7, paras. 3, 14, 16 and 17 (CESCR, 1991b); and FAO (2016b).

¹⁵ FPIC is a standard protected under the International Labour Organization Convention No. 169 and the UN Declaration on the Rights of Indigenous

Peoples (UNDRIP). Of note, FPIC should ideally be applied also in situations beyond indigenous people’s rights, and should include appropriate and meaningful consultations, as well as the right for people to say no to proposed interventions that would negatively impact their legitimate tenure rights.

¹⁶ VGGT paragraph 12.10 provides that “When investments involving large-scale land transactions of tenure rights, including acquisitions and partnership agreements, are being considered, States should strive to make provisions for different parties to conduct prior independent assessments on the potential positive and negative impacts that those investments could have on tenure rights, food security and the progressive realization of the right to adequate food, livelihoods and the environment”. See also the UN Guiding Principles on Business and Human Rights, Principles 18 and 19, and their commentaries.

¹⁷ Such as the need for legal reform, more awareness of the policy and legal frameworks to allow for proper interpretation and implementation, capacity development of those in charge.

Of note, the study focuses only on national legislation (i.e. constitutions, and primary and secondary legislation) of the four countries in their capacity as (foreign and national) investment recipient countries. Despite the fact that an ever-increasing network of

investment treaties include relevant provisions for responsible investments and their impacts on tenure security (e.g. bilateral investment treaties), these will not be covered as this would broaden the scope of analysis beyond the aims of the study.



2. ASSESSMENT OF NATIONAL LEGISLATION FOR TENURE RIGHTS SAFEGUARDS IN LAND-BASED INVESTMENTS IN AGRICULTURE



2. ASSESSMENT OF NATIONAL LEGISLATION FOR TENURE RIGHTS SAFEGUARDS IN LAND-BASED INVESTMENTS IN AGRICULTURE

2.1 RATIFICATION OF THE ICESCR AND CONSTITUTIONAL PROTECTION FOR HLP RIGHTS¹⁸

■ **Cambodia** ratified the ICESCR in 1992. The 1993 Constitution incorporated several provisions on HLP rights, including a recognition and respect for human rights as stipulated in the Charter of the United Nations, the Universal Declaration of Human Rights, and the covenants and conventions related to human rights, and women's and children's rights (e.g. ICESCR, art. 31). Cambodia's constitution guarantees to all citizens the rights to life, freedom and security (art. 32), and also equality before the law, regardless of race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status (art. 31). All forms of discrimination against women are forbidden (art. 45), including with respect to marriage and family matters. Land is considered to be state property, along with other natural resources such as minerals, lakes and forests, and the control, use and management of these resources shall be determined in legislation (art. 58). The Ministry of Land Management, Urban Planning and Construction is the responsible authority for land issues. All persons, individually or collectively, have the right to ownership (though only Khmer legal

¹⁸ Information on the ratification of the ICESCR has been retrieved from the United Nations Treaty Collection website at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en

entities and citizens can own land). Importantly, the right to confiscate property can only be exercised in the public interest as provided by law and shall require fair and just compensation in advance.

■ **Lao People's Democratic Republic** ratified the ICESCR in 2007. The Lao constitution, amended in 2015, declares that the State acknowledges, respects, protects and guarantees the human rights, including fundamental rights of the citizen in accordance to the law (art. 34). Article 16 determines that the State protects and promotes all forms of property rights: State, collective, private domestic and foreign investment; and article 17 mandates the State to protect the property rights (such as the rights of possession, use, usufruct and disposition) and the inheritance rights of organizations and individuals. All lands, minerals, water resources, atmospheres, forests, natural products, aquatic and wild animals, and other natural resources are a national heritage, and the State should ensure the rights to use, transfer and inherit these in accordance with legislation. The Ministry of Agriculture and Forestry is the main authority related to land management. There are guarantees of equality before the law for all citizens irrespective of their gender, social status, education, beliefs and ethnic group (art. 35), and of enjoyment of equal rights irrespective of gender in the political, economic, cultural and social fields and in family affairs (art. 37). All ethnic groups are also ensured the right to protect, preserve and promote their customs and cultures, with discrimination among ethnic groups being expressly prohibited (art. 8).

■ **Myanmar** ratified the ICESCR in 2017. The 2008 Constitution determines that the “Union is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water, and in the atmosphere in the Union” (art. 37). With the exception of freehold titles in urban areas, tenure rights over the remaining land in the country (except forest land, grazing land, and land held in cantonments and monasteries) are assigned to individuals and companies through grants, leases or licenses, giving the State considerable leverage over how land is used, who uses it, and for how long (Displacement Solutions, 2019). Differently from other countries, Myanmar does not have a single government authority overseeing overall land policy (see further below). Chapter VIII of the Constitution outlines fundamental rights and duties and provisions on HLP rights, including: a guarantee for any person to enjoy equal rights before the law and legal protection (art. 347), as well as a prohibition on discrimination of citizens based on race, birth, religion, official position, status, culture, sex and wealth (art. 348); a statement that the Union shall protect according to law movable and immovable properties of every citizen that are lawfully acquired (art. 356), and protect the privacy and security of home and property, of citizens (art. 357); a guarantee of the right to ownership, the use of property (art. 372).

■ **Viet Nam** ratified the ICESCR in 1982. Viet Nam’s Constitution determines that land and natural resources are “public property, owned by all the people, and represented and uniformly managed by the State” (art. 53). Land is considered “a special national resource and an important resource for national development” (art. 54), and the State is

mandated to allocate or lease land to, and recognize land-use rights of, organizations and individuals, as well as to protect land-use rights by law. The Ministry of Environment and Natural Resources (MoNRE) is the primary government agency responsible for developing and implementing land policies. The Constitution also offers important guarantees for human and, in particular, HLP rights. Article 3 determines that the State shall recognize, respect, protect and guarantee human rights and citizens’ rights, including civil, economic, cultural and social rights (art. 14). The rights of ownership, housing and inheritance are included in article 32, which determines that legislation should ensure their protection. All people are considered equal before the law, and discrimination is prohibited (art. 16). Article 5 determines that all national ethnicities are equal, and all acts of discrimination against and division of ethnicities are prohibited. In addition, gender equality for both sexes is expressly guaranteed in terms of rights and opportunities (art. 26).

These constitutional provisions in the four countries represent relevant safeguards for the protection of tenure rights. It is important that provisions in primary and secondary legislation also reflect, and are coherent with, these constitutional mandates, and that they are ultimately guaranteed by the rule of law and access to justice in case of violations.

2.2 LEGAL PROVISIONS PROMOTING RESPONSIBLE INVESTMENTS AND INVESTMENTS BY/IN SMALLHOLDERS

■ **Cambodia's** revised Investment Law of 2003 has no specific provisions on responsible investments. Investment approvals are issued by the Council for the Development of Cambodia (CDC), which was created as a “one-stop shop” for investors to obtain all necessary licenses and approvals required for investments.¹⁹ Such approvals are issued not to an investor or investing enterprise, but to a specific project (i.e. a project that receives the investment approval is called a Qualified Investment Project (or QIP). A QIP may be in the form of a joint venture, formed between Cambodian entities, between Cambodian entities and foreign entities, or between foreign entities. There is no limitation on nationality or the share-holding proportion of joint ventures, except in the case of investments on land ownership, in which the maximum combined share-holding of all foreign parties must not exceed 49 percent. There are provisions on allowable incentives for specific purposes (e.g. import or export activities, arts. 13–14) which are granted automatically to a QIP, but these do not seem to target relevant matters for responsible investments. At the same time, Section 1 of Annex 1 (Negative List) of the Sub-Decree No. 111 on the “Implementation of the Law on the Amendment to the Law on Investment” of 2005, includes “investment activities not eligible for incentives” in Section 2. These include, among others, small-size operations in agriculture production (e.g. paddy rice farming of less than one thousand hectares

and all kinds of cash crops of less than five hundred hectares), livestock production (e.g. a dairy farm of less than 100 hundred cows), aquatic production (e.g. aquaculture farm with less than five hectares) and small-size timber plantations (e.g. less than one thousand hectares). This may imply, in practice, a lack of support for smallholder land investments falling below the above thresholds, which would not benefit from such incentives.

An incipient form of provision supporting responsible investments in the land sector can be found in the 2005 Sub-Decree 146 on Economic Land Concessions (ELCs), which were one of the main tools used to operationalize agricultural land investments, and was originally linked to rural development and poverty alleviation. Article 3 states that ELCs may be granted to achieve, among other purposes, an increase in rural employment within a framework of intensification and diversification of livelihood opportunities and natural resource management based on appropriate ecological systems. However, it is reported that significant concerns were raised regarding the impact of ELCs on communities and the environment, accounting for frequent cases of forced eviction, involuntary resettlement, or poorly designed relocations, as well as deforestation of large tracts of forestland that were cleared for plantations (OpenDevelopment Cambodia, 2015a; Pen and Chea, 2015). In 2012, Order 01BB on “Measures for Strengthening and Increasing the Effectiveness of the Management of Economic Land Concessions” suspended approval of new ELCs and called for a review of existing ELCs. In August 2014, a commission to assess ELCs was established, leading to the cancellation of many ELCs, although it is reported that the lack of

¹⁹ Website of the Cambodia Development Council (CDC): www.cambodiainvestment.gov.kh/about-us/who-we-are.html

official data makes it difficult to understand the extent of these actions or the current status of the matter (OpenDevelopment Cambodia, 2015a).

■ **Lao People's Democratic Republic's** 2016

Investment Promotion Law, which applies to domestic and foreign investments, states as principles of investment promotion (art. 5) that investments should: 1) aim to improve the livelihood conditions of people; 2) be in compliance with laws and regulations; 3) protect the legitimate rights and interests of the State, people and investors; and 4) protect and use natural resources effectively in compliance with the policy of green growth and sustainability. Further, the 2016 Investment Promotion Law envisions incentives for specific sectors, among which those that are environmentally friendly, and promote the efficient use of natural resources and energy, “clean agriculture” and activities promoting rural development and poverty reduction, and environmentally friendly agro-processing industries (art. 9). Local employment is also fostered, as incentive recipients are required to employ at least 30 Lao technical staff or 50 Lao workers. Moreover, investors are required by the 2016 Investment Promotion Law to promote employment of Lao labour, especially women and ethnic people, focusing on labour skills development, upgrading professional education and technology transferring to Lao employees (art. 72). Specifically, with regards to land, the 2019 Land Law provides that all land activities shall conform to the Constitution and other laws (art. 6), and imposes on all individuals and organizations an obligation to protect their lands and maintain their functions, with minimum impact on the environment (art. 25). The Ministry of Planning and Investment

adopted the 2019 “Instruction on Investment Approval and Land Management Mechanism for Leasing or Concession to Cultivate Crops” (No. 0457/MPI), which has the goal of implementing the 2016 Investment Promotion Law with regards to leasing or concessions for crop cultivation. The Instruction also has provisions reinforcing responsible investments, including: article 4, which cites among the principles of approving crop cultivation, the use of land and natural resources in a sustainable way, and the protection of the legitimate rights and benefits of the State, people and investors; protection and promotion of Lao labour and labour rights, promoting domestic businesses, green growth, contributing to poverty reduction for the people and developing localities where their investment projects are located, among others (part VIII).

■ **Myanmar's** 2016 Investment Law, which applies to domestic and foreign investment, states as its first objective to promote responsible investments, including in agriculture (art. 3). Further, the 2016 Investment Law states prohibited investments as those that might affect the traditional culture and customs of ethnic groups within the Union, and those that might cause significant environmental impacts and that might impact the public (art. 41). Bowman (2018) provides an overview of the different pieces of legislation affecting agriculture land investments. These prohibitions could be used to prevent investments found to impact, for instance, on customary tenure rights. Reports indicate that in practice this rule has limited impact, as arbitrary and arguably illegal land confiscations are reported as a remaining reality on the ground (Displacement Solutions, 2019).

■ **Viet Nam's** 2014 Investment Law has limited provisions on responsible investments. Some provisions contain elements that can be considered safeguards, such as environmental and social impact assessments, which are required as part of the investment application processes (arts. 33–34). Further, for investment proposals on land use, in case the investor does not propose the State to allocate or lease land or to permit change of land use purposes, the investor shall submit a copy of the site lease agreement or another document certifying to have the rights to use the site for project implementation (art. 33). Moreover, Decree 57/2018/ND-CP on “Incentive Policies for Enterprises Investing in Agriculture and Rural Development Sector” offers some particular incentives that target responsible business conduct; as for instance subsidies for activities such as implementing technologies that minimize environmental pollution, and reducing the use of natural resources, fuel and energy (art. 9.1); subsidies to enterprises providing public services such as the supply of clean water to rural areas (art. 13.1); and the construction of social housing for workers (art. 13.5). With regards to land, an interpretation of the 2013 Land Law requires that investors (both domestic and foreign, art. 5) who are allocated or have leased land to be bound by article 6’s principles of land use, which include protection of the environment and to cause no harm to legitimate rights of adjacent land users. This can imply that investors who lease, for instance, agricultural land need to act responsibly.

It should be noted that other pieces of legislation include relevant provisions related to responsible investments, particularly in environmental and social

protection. Viet Nam’s labour code is considered one of the most comprehensive in Asia; the Environmental Protection Law (2014) includes provisions for “polluter pays” measures, payments for natural resource use and rehabilitation of affected areas and mandatory environmental impact assessments for sector and regional development plans. The Prime Minister Decision No. 166/QD-TTg on the plan for implementation of national environmental protection strategy by 2020, with a vision to 2030 also has set goals related to clean technology, pollution control, wastewater treatment and waste. Viet Nam also has undertaken some measures in the country’s investment policy and legal framework to promote responsible investment to preserve the environment and to ensure products produced comply with national and international standards, such as: the Law on Quality of Goods and Products 2007; the Law on Protection of Consumers’ Rights 2010; and the Law on Technical Regulations and Technical Standards 2006.

2.3 CLEAR AND TRANSPARENT RULES ON ALLOWABLE TRANSACTIONS OF LAND TENURE RIGHTS

■ **Cambodia's** 2001 Land Law establishes the main categories of land and tenure rights:

- State land, which can be subdivided into “State public land” (land with public interest value, such as mountains, parks) that cannot be sold or granted in ELCs, although it can be leased for up to 15 years (art. 15); and “State private land”, which can be sold or leased, including long-term leases and land concessions for agro-industrial businesses (art. 17).

- Collective property can be granted with regards to monastery lands and indigenous communities' lands as mentioned above (arts. 20–25).
- Private land, is land that is legally owned or possessed by persons or a company (art. 10). While land can only be owned by national citizens, use of land is permitted to national and foreign investors, including through concessions, long and short-term leases (Investment Law, art. 16).

The provisions of the Land Law must be read together with the Civil Code, which came into effect on 20 December 2011, and has important provisions on the sale, purchase, transfer of ownership, land lease right, and/or setting of mortgages on land. The Civil Code stipulates that ownership of immovable property (such as land) can be acquired through peaceful and open possession for a period of 20 years with the intention of ownership; or after 10 years, if the peaceful and open possession of the immovable property is commenced in good faith and without negligence (art. 162). The Civil Code also introduces the concept of co-ownership of property by multiple persons (art. 202). The ownership of land by investors can only be vested in natural persons holding Cambodian citizenship, or in companies with 51 percent Cambodian participation. The use of land is permitted to investors, including concessions, unlimited long-term leases and limited short-term leases that are renewable (art. 16, Amended Law on Investment). Sub-Decree 111 stipulates (art. 20) that Cambodian Legal Entities might, in addition to ownership rights to land, acquire land-use rights in various forms, including concession, lease, transfer, and as securities. A foreign legal entity, on the other

hand, while not able to own land, might acquire land-use rights through concession, long-term lease for 15 years or more, and renewable short-term lease.

Land concessions can be done through economic (on State private land) or social land concessions (Land Law arts. 48–50). Sub-Decree No. 146 on ELCs and Sub-Decree No. 19 on Social Land Concessions (SLC) elaborate on the legal procedures for ELCs and SLCs, respectively. As noted above, issues surrounding ELCs and other extractive and agribusiness expansion are reported as major causes of violations of tenure rights, including of indigenous peoples' rights, and the granting of new ELCs has been suspended (OpenDevelopment Cambodia, 2015b).

■ **Lao People's Democratic Republic's** 2003 Constitution (art. 17) and the 2019 Land Law establish that 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, companies and State organizations. Land-use rights can be acquired through allocation by the State, transfer, sale or inheritance (art. 126), and land-use rights holders have rights to protect, use, usufruct, transfer and pass the right in inheritance (art. 133). However, it is reported that land titles are generally mostly seen in urban and peri-urban areas (OpenDevelopment Laos, 2019).

Foreign investors are entitled to lease land-use rights from Lao citizens (Land Law, art. 131), and can also receive land concessions (art. 119). The 2003 Land Law prohibited land “speculation” (art. 7), but this provision was not identified in the 2019 Land Law, which nevertheless still requires State approval to

change land-use categories (e.g. from agricultural or forest land to industrial use, Land Law, art. 25–27). Decree 135/2009 on State Land Lease and Concessions, and Instruction 0457/MPI/2019 also regulate these matters. Leases and concessions are similar from a legal point of view, with the major difference being that concessions cannot be granted for less than five years while there is no minimum duration for leases. It is reported that land concessions have had negative social and environmental impacts, including the fact that concessions are granted in areas used by rural communities, thus leading to land loss, as well as loss of food production, resources for consumption, and sources of income. These challenges had led the government to place a moratorium on new concessions for mining, rubber and eucalyptus in 2012, which was set to expire at the end of 2015, but is reportedly still in place (OpenDevelopment Laos, 2018).

■ **Myanmar's** land sector legislation is fragmented because the country does not have a framework or umbrella land law.²⁰ Different pieces of legislation apply to different categories of land (farmland, forest land, fallow, vacant and virgin lands), each of them having their particular processes of land adjudication and recognition of respective tenure rights. This causes uncertainty around, and threats to, the security of land tenure rights. In fact, land is reported to be identified by foreign investors as one of their biggest human rights and due diligence risks, and reduces international companies' appetite to invest in Myanmar (MCRB, 2019). Following the mandate of the National Land Use Policy of 2016, a National Land Council was formed in 2019 and has started the process to draft a

²⁰ Reference is made to this term, intending legislation that defines overall principles, rights and duties with regards to the land sector.

comprehensive land law for the country. The drafting of this new National Land Law should address this legislative fragmentation (Jansen *et al.*, 2020).

With regards to land investments, the 2016 Investment Law defines investments that require either a permit from the Myanmar Investment Commission (MIC, art. 36, especially projects likely to cause large impact in the environment and/or on local community),²¹ or the submission of a proposal for endorsement by the MIC (art. 37), including to obtain rights to use land. The 2016 Investment Law further defines the types of investments that are to be restricted according to article 42, including those investments by foreign investors or those that require joint ventures with national investors, and those that need ministerial approval, and the conditions of land leases (art. 50). Investors with a permit or

²¹ These are further defined in the Investment Rules of 2017: For the provision of subsection (c) of section 36 of the Law, an investment shall be deemed to have a large impact on the environment and the local community if it conforms to any of the following stipulations:

- (a) being or being likely to be a type of project required Environmental Impact Assessment;
- (b) being the investment business located in designated or proposed a protected area, forest reserved area, Key Biodiversity Area or areas selected and specified to support the ecosystem services and cultural and natural heritage, cultural monuments and unspoiled natural areas proposed or specified under the existing laws, procedures and notifications, including the Environmental Conservation Law;
- (c) the land to be used or leased for investment activity:
 - (i) Has been or is likely to be acquired through expropriation by paying compensation, compulsory acquisition procedure or by agreement in advance of such expropriation or compulsory acquisition procedure in accordance with the laws of the Union and will either cause the relocation of at least 100 individuals permanently residing on such land or comprise an area of more than 100 acres.
 - (ii) Comprises an area of more than 100 acres and would be likely to cause involuntary restrictions on land use and access to natural resources to any person having a legal right to such land use or access;
 - (iii) is likely to cause conflict with the proposed investment activity due to litigation in good faith by a person or disputing over ownership of land in obtaining more than 100 acres of land to occupy or use; (iv) may adversely impact at least 100 individuals by continual occupying such land scrutinized by a body which has right to scrutinize in applying to occupy or use land.

endorsement may obtain a long lease of land (art. 50; for foreign investors, an initial period of 50 years). With regards to transparency, the 2016 Investment Law (art. 50[d]) stipulates that investment contracts (land leases) should be registered at the Office of Registry of Deeds.

The absence of a single piece of law that governs transactions applying to all types of land makes the process of getting a land lease complex and often unclear. The 2012 Farmland Law (amended in 2020), managed by the Ministry of Agriculture, Livestock and Irrigation (MoALI) allows applications from national land users for Land-Use Certificates of farmland (art. 3a, and arts. 6a, 6v, 7a, 7b) and from organizations, including government departments or organizations, non-governmental organizations, associations, and companies (arts. 6b and 7b). As these provisions do not specify that a company must be a Myanmar company, and the Myanmar Investment Law permits long-term leases to foreign companies, it is inferred that Land-Use Certificates can also be granted to foreign investment companies with a permit and/or endorsement of the Myanmar Investment Commission (MIC). Land-Use Certificates are freely transferable (subject to restrictions such as transfers to foreign investors), but such tenure rights are considered insecure as they might be revoked by the government if the Land-Use Certificate holder fails to comply with a series of requirements (art. 19) without the possibility of judicial appeal (only administrative appeals to the respective Farmland Management Body, arts. 22–25). Further, the Farmland Law allows for the “repossession of farmland in the interests of the State

or the public’ provided that suitable compensation and indemnity is paid” (art. 26).

The 2012 Vacant, Fallow, and Virgin Lands Management Law, amended in 2018, defines that such lands might be leased for investment, including to foreign investors in joint venture with national ones (art. 4); foreign investors with a permit from MIC, and those in joint venture with national investors are permitted to apply (arts. 5a, 5d, and 5e). The decision to grant the land lease is made in coordination with relevant ministries, including the Vacant, Fallow, and Virgin Lands’ Land Management Committee (chaired by MoALI), Ministry of Natural Resources and Environmental Conservation (MoNREC) (art. 6c) and MIC (art. 7). Especially the latter could be interpreted to require that investments in Vacant, Fallow, and Virgin Lands should follow the 2016 Investment Law’s rationale of promoting responsible investments and, among other requirements, respect local traditions and not cause social or environmental harm. In practice, however, it is reported that this is not the case. Leases granted via the Vacant, Fallow, and Virgin Lands Management Law are temporary (up to 30 years) and not transferable. The broad definition of Vacant, Fallow, and Virgin Lands, and the lack of legal clarity on recognition of customary tenure rights, make the Vacant, Fallow, and Virgin Lands Management Law an instrument that give authorities broad discretion to disregard tenure rights in practice, and in fact it is reported that this law allows for allocation of land wrongly deemed as fallow or vacant but actually with customary use in practice (FAO and MRLG, 2019c).

Finally, investors can also undertake activities in forest land, managed by the 1992 Forest Law (amended in 2018), under the responsibility of MoNREC. Manufacturing forest products is prohibited for foreign investors, but with approval from MoNREC, investors can undertake activities such as forest plantations (art. 13 and those that follow).

■ **Viet Nam's** legislation does not recognize private land ownership but has allocated rights related to ownership, management and use of land to different entities, which can have different rights over a piece of land. The 2013 Land Law determines that the State allocates or leases land to individuals and organizations through issuance of Land-Use Right Certificates. Among those who are allocated land-use rights, households and individuals directly involved in agricultural production are given priority through land-use tax exemption, longer allocation terms, and more rights to the allocated lands compared to other entities. Enterprises and economic organizations are not assigned agricultural land-use rights but only land leasing rights with a definite term specified by the State or other entities. Land-Use Right Certificates can be issued in the name of husband and wife in line with the Land Law, and may be exchanged, transferred, mortgaged, leased and inherited. Differing from some other countries in the region, Viet Nam has a single ministry, MoNRE, that is responsible for handling land management through the allocation of Land-Use Right Certificates.

Residential land and agricultural land used by communities are allocated for indefinite terms; agricultural Land-Use Right Certificates and forest

land for 50-year terms (art. 126). Land can be leased from the State by both domestic and foreign investors for agriculture, production and business purposes. It is reported that there are few cases of large agricultural concessions granted to foreign investors, while State enterprises keep a leading role in the economy and manage over 2.8 million hectares of agricultural and forestland (OpenDevelopment Vietnam, 2019).

2.4 LEGAL PROVISIONS DEFINING LARGE SCALE LAND TRANSACTIONS AND A CEILING FOR SUCH TRANSACTIONS, INCLUDING REQUIREMENTS FOR ADDITIONAL APPROVALS

The VGGT determine that States should provide transparent rules on the scale, scope and nature of allowable transactions regarding tenure rights (VGGT, para 12.5), as well as safeguards to protect legitimate tenure rights from risks that can arise from large-scale land transactions, which “could include introducing ceilings on permissible land transactions and regulating how transfers exceeding a certain scale should be approved, such as by parliamentary approval” (VGGT, para 12.6). Such ceilings can refer to acreage and/or the duration of the investment.

■ **Cambodia's** 2001 Land Law states that land concession areas should not be more than 10 000 hectares (art. 59, which also admits possible exceptions) and with a maximum duration of 99 years (art. 61). The Civil Code determines that its provisions related to perpetual leases shall apply *mutatis mutandis* to land rights created by concessions (art. 307), except where otherwise

provided by special law. Such provisions determine that the term of a perpetual lease may not exceed 50 years, which might be renewed provided that the renewed term does not exceed 50 years counting from the date of renewal (art. 247).²²

■ **Lao People's Democratic Republic's** 2019 Land Law limits leases to a maximum of 30 years, with the option of renewal subject to approval of the provincial administrative authorities, and concessions to 50 years (art. 120), which can also be extended depending on decision of the Government or the National Assembly/ Provincial People's Assembly. More detailed provisions on acreage ceilings for leases and concessions are to be found in Decree 135/2009 on State Land Lease and Concessions (which, at the time of writing, was reportedly still in force, despite the revision of the Land Law). For instance, arts. 28 and 29 have rules on the authorization of the concessions of forest and barren land for agricultural business, granting the Land Management Authority at the provincial or city level the competence to grant concessions of areas up until 150ha and 500ha per project and 40 years of duration; the National Land Management Authority is given such competence up for areas until 30.000ha, and after this limit the competence is given to the National Assembly Standing Committee, based on the Government's suggestion.

■ **Myanmar's** 2016 Investment Law (art. 50) only defines a temporal limit, differentiated in the case of land leases for foreign investors (maximum 50 years, extendable for two consecutive periods of 10

²² Prior to the Civil Code's entry into force, the Land Law had stipulations of a maximum of 99 years. Leases agreed before the Civil Code are considered to remain at such duration (Law on the Implementation of Civil Code, art. 41).

years); more favourable terms might be granted for national investors by the government, without further definition of the terms for such advantages (art. 50e). In the cases of land investment leases through the Vacant, Fallow, and Virgin Lands Management Law, the rules put a ceiling of leases of 3 000 acres at a time up to the total of 30 000 acres (art. 10),²³ which might be extended for "State interest" (not further defined) with authorization of the Union Government. This gives the executive power broad discretion to authorize large land investments in Vacant, Fallow, and Virgin Lands, without parliamentary approval. The Vacant, Fallow, and Virgin Lands Management Law also stipulates a limit of 30 years for the leases, extendable for another 30 years (art. 11).

■ **Viet Nam's** 2013 Land Law limits leases to domestic and foreign-invested for a maximum 50-year period, although in certain cases a 70-year term is permitted (art. 126). The term, however, must not exceed the duration of the relevant investment project. Arts. 129 and following contain detailed rules on quotas for agriculture land and the land allocation process, including on agricultural land used by organizations, overseas Vietnamese and foreign enterprises (to be approved by the Provincial level People's Committee, art. 133; of note, the art. Provides that uring the process of land allocation or land lease, ethnic minority households and individuals in the locality that have no land or lacking production land, shall be pddotized) and land for farm economy (art. 142).

²³ The limit varies according to the type of use; for example, perennial, industrial crops, orchards.

2.5 CLEAR DEFINITION OF EXPROPRIATION FOR PUBLIC INTEREST; REQUIREMENT FOR JUST COMPENSATION AND RESETTLEMENT PROCEDURES

■ **Cambodia's** Constitution states that property can only be confiscated in the “public interest”, following the appropriate legal requirements including “fair and just compensation” (art. 44). The 2010 Expropriation Law gives effect to this provision, defining the principles, mechanisms, and procedures of expropriation, and for “fair and just compensation for any construction, rehabilitation, and public physical infrastructure expansion project for the public and national interests and development”. Expropriation is defined as:

“confiscation of ownership of, with fair and just compensation in advance, immovable property or the real right to immovable property of physical and legal person [...] for construction, for rehabilitation or for expansion of public physical infrastructure which is in the national and public interests”.

Public interest is defined in concrete terms, including activities or projects related to construction or expansion of roads, ports, power stations, parks, and public squares; irrigation systems; buildings and equipment for protection of nature and the environment; construction or expansion of buildings and equipment for research and exploiting mines and other natural resources, gas systems, and land needed for resettlement (art. 5). However, article 5 includes a provision broadly defined as “the implementation as required by the nation in accordance with the

determination made by the government”, which gives broad authority for expropriation on such cases. Further, article 10 provides the government with the authorization to temporarily expropriate in special and emergency cases in which public security is involved,²⁴ temporarily confiscate immovable property or real rights to property without any consultation. In such cases, the government has the discretion to carry out the expropriation without the consultations envisioned the law.

Of note, the law recognizes as “owner of immovable property and/or rightful owner” physical and legal persons, including a legal owner, possessor and all persons who have rights to land and are affected by the expropriation project, therefore providing, in theory, an important safeguard to include all legitimate tenure rights holders (art. 4). The expropriation process includes a comprehensive process in which all rights holders are to be consulted and can appeal to the expropriation, and is to be preceded by the provision of financial compensation based on a market price or replacement price on the date of declaration of the expropriation (arts. 16–22).

■ **Lao People's Democratic Republic's** 2019 Land Law allows the State to “reacquire” the land use right back from the user in case of necessity and for national interests (art. 3). Such cases of expropriation are allowed for public purposes (art. 152). While the law does not define it, it does provide examples, such as the construction of roads, schools, hospitals, irrigation projects and others. Another example includes State investment projects (art. 153), which

²⁴ Defined as fighting fires, floods, forest fires, earthquakes, wars which are about to break out or terrorist attacks, or other situations as determined by the government.

include land leases and concessions, in line with the National Socio-Economic Development Plan. In both cases, the 2019 Land Law determines that a compensation be paid to the land-use right holders, to be determined by a specific committee that shall be established, based on the valuation of land and assets on the land (art. 155). The matter is also regulated by the 2018 Law on Resettlement and Vocation. While this law does not further elaborate on a definition of public purposes, it does include provisions that determine appropriate compensation, resettlement and livelihood restoration for affected people. It is reported that, in general, legal provisions in this area have been broadly interpreted to allow land acquisition for private economic purposes (Open Development Laos, 2019).

■ In **Myanmar**, the 1894 Land Acquisition Act allowed broad discretion for land acquisition (i.e. expropriation) for public purposes, without a clear definition of public purpose, nor covering resettlement issues due to land acquisition) (Displacement Solutions, 2019). A first safeguard in this regard was included in article 7 of the Environmental Impact Assessment Procedure, which requires investments involving involuntary resettlement to adhere to international good practices (e.g. International Finance Corporation's Performance Standards 5 and 7) and bear full legal and financial responsibility for Project Affected Persons. On 19 August 2019, a new Land Acquisition, Resettlement and Rehabilitation Law came into force, having as an objective to align land acquisition based on the New Land Use Policy (which is largely aligned with the VGGT). Several provisions contain important safeguards for tenure

rights: article 15 includes lands that are found to be used under customary tenure (“land used by ethnic groups for traditional purposes”) among the categories of land for which acquisition needs parliamentary approval; people “working on the land for 12 years” but without a land title are included among those who may submit objections to proposed acquisitions and its conditions, which seems to imply a recognition of legitimate tenure rights holders (arts. 3j and 18–21). The law includes the procedure for land acquisition, which requires *ex ante* an environmental impact assessment and/or social impact assessment according to the Environmental Impact Assessment Procedure (art. 9); field investigations and consultation to identify landowners and other affected stakeholders (arts. 11–12); provisions on compensation and damages for tenure rights holders (art. 35), including a choice of monetary compensation or to receive another land, and the right to appeal such compensation given (arts. 35–41); provisions on resettlement and rehabilitation (arts. 46–50), which were absent in the original 1894 Land Acquisition Act. On the other hand, the Land Acquisition, Resettlement and Rehabilitation Law still seems to define “public purpose” in very broad terms (art. 2, including national security and defence, and development projects). Further, it allows for the acquisition of lands in a “case of urgency”, and temporary acquisition of land (arts. 51–55), with provisions drafted in very broad terms and without the requirements for prior field investigations of tenure rights (art. 9). Such provisions undermine the safeguards outlined above, and may give margin to broad discretion of land acquisitions, including for investments that disregard the tenure rights of those that might occupy such lands.

■ **Viet Nam's** Constitution allows the State to recover land in case of “extreme necessity prescribed by a law for national defence or security purposes; or socioeconomic development in the national or public interest (art. 54). Land recovery must be public and transparent, and compensation must be paid in accordance with the law.” The 2013 Land Law has provisions to operationalize this issue. Expropriation must be based on a national defence or security purpose (art. 61) or “in the national or public interest” (art. 62).²⁵ Compensation and resettlement provisions are included in articles 74–87, including the allocation of new land, monetary compensation based on land price, compensation for remaining investment costs, and livelihood restoration support. The application of the Land Price Table is not required in transactions between land users or with other entities. In fact, the regulations on land valuation methods and the actual land price bracket are reported to still have a large difference, far from the market price, which is indicated as a source of concern for people.²⁶ Decree 47/2014 provides additional regulations on compensation, support and resettlement in cases of land expropriation.

It is estimated that 10 percent of the population has been affected by expropriations, which in the last 20 years have primarily targeted agricultural land (OpenDevelopment Vietnam, 2019). Improper procedures of land acquisition, low levels of compensation, and perceived corruption are cited as major causes of land conflicts in the country (OpenDevelopment Vietnam, 2019).

²⁵ This is narrower than in the 2003 Land Law, which allowed land acquisition for economic development purposes, article 38.1.

²⁶ According to sources interviewed for the development of this paper.

2.6 REQUIREMENT FOR INVESTORS TO RESPECT NATIONAL LAW, INCLUDING HUMAN AND TENURE RIGHTS

■ **Cambodia's** 2003 Law on Investment does not have specific provisions on this matter. Other pieces of legislation have provisions that can be analogous, such as the 2003 Law on Forestry. This law envisions that investors can enter into a Forest Concession Agreement with the government for production forests (arts. 13–14). Concessionaires have the right to manage forest product harvesting operations, while, among other duties, not interfering with customary user rights on land property of indigenous communities registered with the State and consistent with the Land law; and customary access and user rights practiced by communities residing within or adjacent to forest concessions (art. 15).

■ **Lao People's Democratic Republic's** 2019 Land Law states as obligations of land-use rights holders (arts. 153 and 141) to use the land in accordance with the land allocation plan of the State and laws without any adverse impacts on social the natural environment, and not to violate rights and interests of others and to fulfil other obligations according to the laws. Similar provisions are included as obligations of the lessee or concessionaire, including to compensate those affected by their operations, to strictly fulfil environmental obligations in accordance with laws and regulations, not violate the rights and interests of other persons and fulfil other obligations as prescribed in the laws (art. 122). Further, the 2016 Investment Promotion Law also envisions obligations for both domestic investors who invest overseas, and foreign investors who invest in the country. The former are required to comply with laws

and regulations of the host countries (art. 66), among other duties. The latter are assigned a longer list of social and environmental obligations, including the promotion of domestic businesses and contributing to poverty reduction, social development, respecting local traditions customs and cultures, and complying with environmental obligations arising from national and international law (arts. 72–73). The Ministry of Planning and Investment’s Instruction 0457/2019 also has substantive provisions regarding the obligations of investors to: respect local traditions, customs and culture; contribute to social development; and strictly comply with environmental obligations and legislation (part VIII.2).

■ **Myanmar’s** 2016 Investment Law requires investors to: use local labour, and respect labour laws and rights (art. 51); respect and comply with customs, traditions and traditional culture of ethnic groups; and abide by national laws and applicable international standards to avoid social and environmental harm, including to cultural heritage (art. 65). Of note, violations of any provisions of the 2016 Investment Law, including the above, may lead to sanctions such as the suspension or revocation of the permit (art. 85) and to prosecution according to respective laws (art. 88).

■ **Viet Nam’s** 2014 Investment Law requires that investments made within the national territory comply with national legislation (art. 4), and that investors decide their business investments according to the relevant national laws (art. 5), which implies an observance of issues such as land rights. Further, the Investment Law lists as “banned businesses” (art. 6) activities such as human trafficking, trade in human tissues, and human cloning, which might be considered in general to be against human rights.

2.7 REQUIREMENT FOR ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENTS OF INVESTMENT PROJECTS

■ In **Cambodia**, article 6 of the 1996 Law on Environmental Protection and Natural Resources Management requires an environmental impact assessment to be conducted for projects likely to have an impact on the environment, whether public or privately funded. Further, article 7 requires that all investment project applications and all projects proposed by the State to have an initial environmental impact assessment or a full environmental impact assessment, to be reviewed by the Ministry of Environment as determined in the Law on Investments. Sub-Decree No. 72 on Environmental Impact Assessment Process was passed in 1999, requiring that an initial environmental impact assessment or a full environmental impact assessment be conducted for all public or private projects that involve activities listed in an attached annex, including projects for agro-industry and land, wood and paper production, mining, chemical plants, textiles and others. Environmental impact assessments should be examined and evaluated by the Ministry of Environment before being submitted to the government for a decision. Public participation is to be promoted in the environmental impact assessment process, and the “Guideline on Public Participation in Environmental Impact Assessment Process” from 2016 further regulates this provision. An exemption exists for exceptional situations related to a declared emergency by the government (art. 2). The environmental impact assessment is also mentioned in regulations such as Sub-Decree No. 146 (2005) article 3, which requires an environmental impact assessment for the approval of an ELC.

■ In **Lao People's Democratic Republic**, impact assessments are required for requests of both land leases and concessions, according to the 2019 Land Law (art. 119), and Decree 135/2009 on State Land Lease and Concession (art. 27). The 2016 Investment Promotion Law also requires that investment applications should include a feasibility study or a business plan containing subject matters and report on environmental, social and natural impact assessment (art. 44). The matter is regulated by the 2013 Environmental Protection Law, which contains provisions determining Strategic Environmental Assessment as a process of anticipating impacts arising from policies, strategic plans, and programmes on the social and natural environment (art. 19) and environmental impact assessments with regards to investment projects (art. 22). Decree 112/2010 on Environmental Impact Assessment further regulates this.

■ In **Myanmar**, the 2016 Investment Law (art. 71) requires the investors to carry out impact assessments with regards to health, cultural heritage, environmental, social impacts, according to the respective laws. The impact assessment procedure is based on the 2012 Environmental Conservation Law, which under article 21, requires MoNREC to stipulate the categories of projects that may have adverse impacts on the environment, and these projects are required to apply for prior permission. The Environmental Conservation Rules in article 52–53 further state that MoNREC determines the project categories that are to undertake an environmental impact assessment or an initial environmental examination to determine if an

environmental impact assessment is needed. The Environmental Impact Assessment Procedure was issued by MoNREC in 2015, and according to article 3, all projects that have the potential to cause adverse impacts (including social impacts) are required to undertake an initial environmental examination or environmental impact assessment, or to develop an environmental management plan, and obtain an environmental compliance certificate. The project proponent submits the proposal to MoNREC for screening (art. 23). If an environmental impact assessment is required, the investigation shall consider all biological, physical, social, economic, health, cultural and visual components of the study area, together with all pertinent legal matters relating to the environment, people and communities (including land use, resources use, and ownership of and rights to land and other resources) that may be affected by the project during all project phases. The project proponent is obligated to ensure that the environmental impact assessment investigation properly addresses all possible adverse impacts (arts. 55–56). Following a review of the environmental impact assessment report, if deemed satisfactory, MoNREC will approve the project by issuing an Environmental Compliance Certificate. Approved projects must then submit environmental impact assessment compliance reports to MoNREC every six months, and the ministry can conduct onsite inspections in case there are concerns or complaints.

The Environmental Impact Assessment Procedure is recognized as representing a good safeguard practice at the regional level and is comparable to environmental impact assessment regulations adopted

by other countries and safeguard requirements of multilateral development banks (Ramachandran, 2018). However, article 36 allows MoNREC to, with the approval of the Union Government, exempt or relieve any government department, organization or private business from complying with any provision contained in this law for the “interests of the Union and its people”. This provision leaves broad discretion for non-compliance. Furthermore, despite some human resource investment and training, the institutional and technical capacity of MoNREC and other ministries to apply safeguard requirements remains below what is needed. There is also a considerable backlog of environmental impact assessment reviews and approvals to be conducted.²⁷

■ **Viet Nam’s** 2014 Investment Law determines that certain types of projects require the preparation of an environmental impact assessment report (EIAR), including projects: 1) requiring investment policy approval by the National Assembly, Government or Prime Minister; 2) using land of nature reserves, national parks, historical and cultural relic sites, world heritage sites, biosphere reserves or “beautiful landscapes”; and 3) that are likely to have adverse environmental impacts. The EIARs should be submitted as part of the dossier for investment application (arts. 33–34). The Environmental Protection Law regulates the environmental impact assessment procedures (arts. 18–19). The EIAR must be prepared in the early stage of project preparation. Depending on the type of project, the EIAR must be submitted for appraisal and approval by MoNRE, the relevant ministries or the provincial People’s

²⁷ See for more information <https://greatermekong.org/building-country-safeguard-system-promote-sustainability>.

Committee. Project owners who are not required to prepare an EIAR must prepare and register a written environmental protection plan with the local People’s Committee at the provincial or district level (depending on the type of project) before commencement of their project. The environmental protection plan must cover location, form and scale of the undertaking, as well as the energy used and types of waste produced, and must set out specific measures to treat waste and minimize adverse impacts on the environment.

2.8 REQUIREMENT OF CONSULTATIONS OF AFFECTED STAKEHOLDERS AND, WHEN APPLICABLE, FPIC

Of note, all the four countries have voted in favour of the UN Declaration on the Rights of Indigenous Peoples, but none of them have ratified the International Labour Organization Convention 169 on the Rights of Indigenous Peoples.

■ **Cambodia’s** legal framework has no specific provisions requiring FPIC (MRLG, 2019).²⁸ In cases of expropriation, the 2010 Expropriation Law requires the Expropriation Committee to conduct a survey recording all rights of the owners and/or rightful owners of affected properties, including a public consultation with the authorities at capital, provincial, municipal, and local level representatives, as well as affected communities. Affected stakeholders can object and present a complaint against the expropriation, which is to be solved with the advice of the Expropriation Committee with the government

²⁸ It is noted that the Ministry of Environment is in the process of finalizing a new Environment and Natural Resources Code of Cambodia, which should make reference to free prior and informed consent and consultative processes expressly.

having the final say (arts. 15–18). Further, and with broader application, the Sub-Decree on Environmental Impact Assessment requires that the Environmental Impact Assessment process should “encourage public participation in the implementation of the [environmental impact assessment] process and take into account their input and suggestions in the process of project approval”, but does not elaborate on the level or nature of public consultation required. The “Guideline on Public Participation in Environmental Impact Assessment Process” of 2016 elaborated on information about the public participation steps in the environmental impact assessment process. Such consultations are also a requirement of Sub-Decree 146 on the ELCs (art. 3); before an ELC can be approved, public consultations must first be held with local authorities and residents of the area.

■ **Lao People’s Democratic Republic’s** laws on land and investment do not have direct references to FPIC or public consultations related to processes of land investment. The 2013 Environmental Protection Law includes among the principles of environmental protection (art. 6) the “active participation and consultation of individuals and organizations” in the protection of the social or natural environment, and envisions that “village units” of natural resources and the environment as part of the environmental management organizations (art. 78), which are entitled to participate in “consultation and to share ideas on environmental issues and endorsement of investment projects or activities sited inside the village” (art. 82). The 2013 Environmental Protection Law requires the environmental impact assessment and strategic environmental assessment to be

developed with the participation of those directly and indirectly involved and affected by investment projects (art. 48). Accordingly, the Environmental Impact Assessment Decree envisions several stances in which those affected by investment projects are to be consulted as part of the assessment process (e.g. arts. 7 and 8), although it does not appear to include a right of veto or consent to the proposed activities.

■ In **Myanmar’s** legislation, no specific provisions requiring FPIC have been identified. An incipient type of FPIC is envisioned in the (not widely known) 2015 Law on the Protection of the Rights of Ethnic Nationalities. Article 5 states that projects that may affect *ta-ne tain-yin-tha* (translated as “indigenous peoples” although the law does not define it) “should receive complete and precise information about extractive industry projects and other business activities in their area before project implementation so that negotiations between the groups and the Government/companies can take place”. This provision is referred also in article 61 of the Myanmar Investment Rules, providing where the investment is subject to the Law on the Protection of the Rights of Ethnic Nationalities, MIC “may” consider specific consultations with State and regional authorities or “other stakeholders”, the assessment process, or in connection with conditions which must be met to obtain a permit. This suggests that the permit may even be issued, based on negotiations having been successful. This provision hence holds potential for creating a proper FPIC process, although it is reported that it has not yet been used in practice (MCRB, 2018).

Stronger requirements for consultations of affected stakeholders are included as part of the environmental

impact assessment and social impact assessment through the Environmental Impact Assessment Procedure. The project proponent is required to arrange for appropriate public consultations through all phases of the initial environmental examination and environmental impact assessment process, and to disclose to the public in a timely manner all relevant project-related information (art. 13). Further, consultations with “affected persons” are to be undertaken under the Land Acquisition, Resettlement and Rehabilitation Law. Article 21 mandates the Land Acquisition Implementation Body to notify “the affected persons of the field investigation of the land intended for acquisition and request the public opinion on the purpose and condition of land acquisition”. The body shall also negotiate and reach an agreement on the projected plans of resettlement and rehabilitation by the department or organization that proposes to confiscate the land, based on the opinions of experts and the demands of the landowner; and inviting objections from the public, including “affected persons”, accepting objections with respect to the purpose and conditions of land acquisition. However, these provisions are drafted in broad terms and do not seem to allow affected stakeholders a “right to say no” to plans considered to adversely impact their tenure rights.

■ **Viet Nam’s** legislation has no specific provision for FPIC. The Environmental Protection Law requires consultations to be done as with the Environmental Impact Assessment process (art. 21). Such consultations are to be done with regulatory agencies, organizations and communities that are directly affected by the project. Such consultations are further

elaborated in the 2015 Decree on Environmental Protection Planning, Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans (art. 12.6), but FPIC is not expressly required.

2.9 LEGAL PROVISIONS REQUIRING THE MONITORING OF IMPACTS FROM INVESTMENTS ON TENURE RIGHTS

■ In **Cambodia**, no provisions were identified in the Law on Investment with regard to the monitoring of investments. The Sub-Decree on Environmental Impact Assessment charges the Ministry of Environment with the responsibility for monitoring projects during the construction, operation and closure phases, with regards to the impacts identified (art. 3). The Department of Monitoring and Environmental Impact Assessment is responsible for reviewing environmental impact assessment reports and conducting this monitoring role.

■ **Lao People’s Democratic Republic’s** 2016 Investment Promotion Law article 72 requires investors to allocate budgets for investment monitoring and evaluation. The Environmental Impact Assessment Decree also requires investment project developers to design an environmental management and monitoring plan to be incorporated into a report on environmental impact assessment (art. 13). In instances of resettlement, the Decree on Compensation and Resettlement Management in Development Projects also determines the monitoring and examination of plans for compensation, resettlement and rehabilitation of affected peoples (art. 26).

■ **Myanmar's** 2016 Investment Law (art. 65) requires investors to submit reports on the social and environmental impacts of the investment throughout its duration. Article 66 allows MIC to assess the continuity of the investment based on such reports. The 2016 Investment Law and Rules (art. 196) requires annual reports on environmental and social performance; and article 197 requires the report to be made public on the internet.

■ **Viet Nam's** Investment Law (art. 69) contains provisions on investment monitoring and evaluation of investment projects. Further, investment project owners are required to develop environmental management plans in line with the environmental management and monitoring programmes proposed in the environmental impact assessment reports already approved (art. 10 of Circular 27/2015 on Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans).

2.10 PROVISIONS FOR GRIEVANCE MECHANISMS OF AFFECTED STAKEHOLDERS AND ACCESS TO JUSTICE

■ **Cambodia's** Investment Law determines that except for land-related disputes, any dispute relating to investment projects shall be settled through consultation between the Council for the Development of Cambodia, the investors, and any other party involved in the dispute (art. 20). If the consultations are unsuccessful, conciliation can be brought to the Council; and finally, disputes can be brought to court or investment arbitration. With regard to disputes over land rights, the 2001 Land Law determines that procedures should be dealt with by the Cadastral

Commission established at the Ministry of Land Management, Urban Planning and Construction. In the case of a continued dispute, matters can be brought to court. Specifically, in the case of expropriations, the 2010 Expropriation Law (art. 14) creates a Complaint Resolution Committee led by representatives of the Ministry of Land Management, Urban Planning and Construction to review and resolve complaints not adequately resolved by the Expropriation Committee (art. 32). Parties can also bring their claims to court in case of unsuccessful dispute resolution.

■ **Lao People's Democratic Republic's** 2016 Investment Promotion Law contains a list of dispute resolution methods (art. 93) which include direct consultations, administrative settlement and judicial claims. Of note, the Law creates the "one-stop service office" (art. 80), as a permanent office of the Committee for Investment Promotion and Management. Among other investment facilitation duties, the one-stop service office is also assigned the duties of: 1) accepting complaints, reporting investors' disputes, and coordinating with relevant sector and local authorities to resolve such issues; 2) providing initial assistance in solving investment-related problems or requests in coordination with relevant sector and local authorities; 3) providing other investment-related services to investors in compliance with laws and regulations; and 4) monitoring and evaluating investments; and 5) reporting to the Committee for Investment Promotion and Management periodically (art. 84). The 2019 Land Law also has provisions on the matter, giving responsibility for resolving administrative and civil land conflicts to government land authorities, and in the latter case, these can also be brought to the judicial system (arts. 161–162). Other well-known and



practiced dispute and grievance mechanisms are the provincial and national assembly hotlines, which are reported to be widely used nowadays.²⁹

■ In **Myanmar**, the 2016 Investment Law (art. 82) envisions the creation of a grievance mechanism for investments by MIC (DICA, 2019),³⁰ which are to be used before disputes reach the level of a legal dispute. In terms of loss of tenure rights related to land acquisition for investments, the Land Acquisition, Resettlement and Rehabilitation Law includes the possibility of administrative objections of land acquisition, and appeal to the court with regards to compensation and damages only (art. 41). Further, as noted above for tenure rights disputes originating from the Vacant, Fallow, And Virgin Lands Management Law and the Farmland Law, there are very few possibilities of accessing the courts other than administrative appeals.

■ **Viet Nam's** Investment Law (art. 14) determines that disputes in investment activities can be settled through negotiation and conciliation. In cases where negotiations and conciliations fail, disputes are to be settled through an arbitration or at court. In particular, with regard to land disputes, those are to be initially solved through conciliation mediated by the commune-level People's Committee (Land Law art. 201). Unsolved disputes can then be brought to court. It is reported that few disputes are adjudicated in the courts, with media attention playing a major role in holding the government and business land users accountable (OpenDevelopment Vietnam, 2019).

²⁹ Information from FAO Country Office official in interview conducted for the preparation of this report.

³⁰ At the time of writing, the information gathered indicated that the process of creating such mechanism is still ongoing.



3. OPPORTUNITIES FOR STRENGTHENING RESPONSIBLE INVESTMENTS

3. OPPORTUNITIES FOR STRENGTHENING RESPONSIBLE INVESTMENTS

The analysis undertaken in the previous section aimed at assessing the existing provisions in legislation that provide safeguards in the context of land-based investments, thereby supporting more responsible land-based investment practices. A summary of this analysis is presented in the table below.

Despite the challenges identified above (in orange and yellow), there are also opportunities for each country to promote change and further improve the situation regarding recognizing and protecting legitimate tenure rights, protecting people’s livelihoods, and promoting responsible land-based investments. The four countries are going through different processes of legal reform and agricultural and environmental transformation, which provide the momentum and entry points to address the challenges and create opportunities for change as identified in section 2.

Indicator	Cambodia	Lao People’s Democratic Republic	Myanmar	Viet Nam
Housing, land and property rights in the Constitution	Green	Green	Green	Green
Promotion of responsible investment	Orange	Green	Green	Orange
Clear rules on transactions of tenure rights	Green	Green	Orange	Green
Definition of large-scale land transactions and a ceiling for them	Green	Green	Orange	Green
Definition of expropriation for public interest	Green	Orange	Green	Green
Requirement for investors to respect national law and tenure rights	Orange	Green	Green	Green
Consultation and free, prior and informed consent	Orange	Orange	Orange	Orange
Impact assessment	Green	Green	Green	Green
Monitoring of investments	Orange	Green	Green	Green
Grievance mechanisms	Green	Green	Green	Green

Score	Explanation
Orange	No legal provision identified
Yellow	Limited provisions identified in related legislation
Green	Specific provisions identified in investment and/or land related instruments

- In **Cambodia**, it is reported that the Investment Law is currently going through a revision, and it is expected to address issues such as the promotion of responsible investments (OECD, 2018). The 2001 Land Law is also slated to undergo a revision starting in 2020, to be completed by 2023.³¹
- In **Lao People’s Democratic Republic**, a revised Land Law was adopted in 2019, following a Party Resolution that sets the direction for future land governance in the country, and was approved by the Central Committee in August 2017 (FAO and MRLG, 2019b).
- **Myanmar** is currently in the process of implementing the 2016 National Land Use Policy and developing a new National Land Law, while also undertaking revisions of the different land related legislations (the Farmland Law, the Forest Law and the Vacant, Fallow, and Virgin Lands Management Law have been recently amended as noted above, which should all should be consistent with new Land Law). The recently adopted Land Acquisition, Resettlement and Rehabilitation Law also brings new elements to guide processes of expropriation and land allocation as seen above. Further, in October 2018, the country introduced the Myanmar Investment Promotion Plan, which aims to attract more than USD 200 billion in investment from responsible businesses over the next 20 years. Myanmar Investment Promotion Plan projects are expected to receive USD 8.5 billion from fiscal 2021–2022 to 2025–2026; USD 12.3 billion from 2026–2027 to 2030–2031; and USD 17.6 billion from 2031–2032 to 2035–2036 (Lwin, 2018).
- In **Viet Nam**, a review of parts of the 2013 Land Law, led by MoNRE is underway, (FAO and MRLG, 2019d), including issues on land acquisition and land accumulation. The Investment Law is also being revised, which could provide an opportunity to include provisions on responsible land-based investments, including provisions requiring investors to respect human and tenure rights.³² It is reported that certain investment incentive policies for agriculture and rural development, such as Decree 57/2018 on “Incentive Policies for Enterprises Investing in Agriculture and Rural Development Sector” are also going through a revision, led by the Ministry of Planning and Investment and the Ministry of Agriculture and Rural Development, which provides an opportunity to target more incentives to responsible investment practices and sectors.
- Across Southeast Asia, the newly adopted ASEAN RAI provides an opportunity to harmonize an approach to laws and policies protecting the tenure rights of women, ethnic nationalities and those without access to land, and promoting the livelihoods of smallholder farmers.

The comparative analysis undertaken indicates that countries in the region are not only promoting changes to how these matters are regulated, but could also learn from one another in their different challenges and legal reform processes. These countries have comparable backgrounds, similar tenure systems in which the State has a major role as owner or manager of all lands and assigns land-use rights. As some of the issues have been more developed in

³¹ Information acquired during workshop with the Cambodia NGO Forum in Phnom Penh on 13 December 2019.

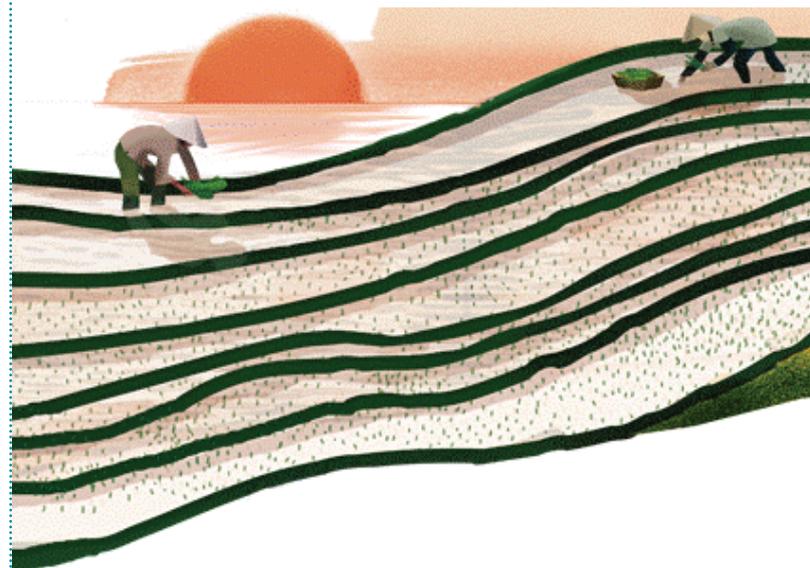
³² See <https://www.linkedin.com/pulse/vietnamese-enterprise-investment-law-september-2019-update-lourey>

one country in relation to the others, an exchange of experiences can provide important lessons learned and inspiration for paths of action and improvement.

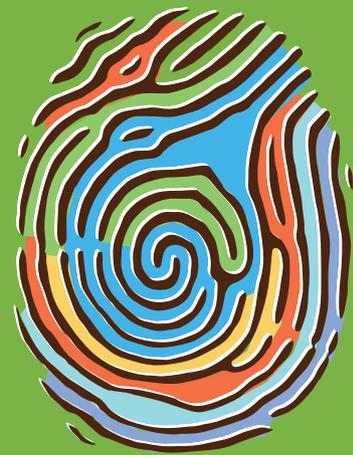
Countries can also embrace opportunities provided by international processes such as implementation mechanisms for the Sustainable Development Goals, revisions of the Nationally Determined Contributions under the Paris Agreement of the United Nations Framework Convention on Climate Change,³³ which will in general address issues of land use, given the prominence of this sector highlighted by the IPCC report cited above. This provides an opportunity to reconsider investment priorities in the land sector and in particular creating and enforcing an enabling framework to attract responsible land-based investments (e.g. the new “sustainable development mechanism” under article 6.4 of the Paris Agreement, or results-based payments such as REDD+). Further, the recent New Delhi Declaration under the United Nations Convention to Combat Desertification³⁴ has reaffirmed the relevance of tenure security and the use of the VGGT for achieving sustainable land management, which also provides all member parties a framework to reconsider and strengthen their laws and policies related to securing tenure rights, including investments.

³³ More information on the UNFCCC’s Nationally Determined Contributions can be found at <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs>

³⁴ See <https://www.unccd.int/news-events/new-delhi-declaration-investing-land-and-unlocking-opportunities>



4. RECOMMENDATIONS AND WAYS FORWARD



4. RECOMMENDATIONS AND WAYS FORWARD

Based on the analysis above, as well as on the opportunities identified, a series of general (section 4.1) and specific (section 4.2) recommendations can be made in order to strengthen the promotion of responsible land-based investments in the Mekong Region.

4.1 GENERAL RECOMMENDATIONS

- Leverage existing pilot cases: the analysis undertaken above demonstrates that many legal provisions already exist and can be used with appropriate interpretation to safeguard tenure rights in the context of agriculture investments in the four countries examined. In all countries, there are pilot initiatives in many areas that aim at operationalizing the recognition and protection of tenure rights in diverse circumstances, even when the legal framework has gaps regarding their protection. Such pilot cases should be expanded to promote change on the ground, and leveraged to inform legal reviews and institutional processes.
- Awareness raising and engaging key “change agents”: it should be noted that legal compliance alone is not enough to promote responsible investments. Rather, there must be a recognition of the politics and power struggles behind the management of natural resources, and there is a need to identify and recognize legitimate tenure rights at

an early stage, to level the playing field for negotiation, to create accountability around global principles, and monitor implementation of investments.³⁵ Awareness should be built among investment communities (e.g. government ministries, investors, civil society) at all levels of governance, and in all countries, on guidance for responsible investments, the relevance of performing steps such as due diligence, and overcoming legal barriers and gaps by supplementing these with international standards. The investment community, in particular investors including those that are already willing to act responsibly, should be involved in a review and guidance process on the implementation of the legal frameworks.

- Undertake capacity building across the investment community: implementation of the laws in all countries seems to be a key issue and enforcement of laws should be a priority. In this regard, capacity development on the existing laws and their use among all interested stakeholders, and institutional support for implementing agencies, should be considered by government entities, international organizations and the donor community working on these issues.
- Address FPIC, which seems to be an issue that deserves particular attention in the region. Though the legislation in the four countries contains elements requiring consultations of affected communities and land-use rights holders affected by investment projects, this seems to be a grey zone as, on the one hand,

³⁵ See <https://www.donorplatform.org/news-land-governance/cfs-46-fertile-ground-for-land-governance.html>.

the extent to which such consultations are effectively carried out is questionable, and on the other hand, there seems to be little room for affected stakeholders to effectively oppose proposed investments and infringements of their tenure rights.

- Exchange of experiences in legal drafting and implementation, as well as institutional arrangements and practice, can provide important insights among the Mekong Region countries.³⁶

4.2 SPECIFIC RECOMMENDATIONS FOR EACH COUNTRY

To strengthen the promotion of responsible investments for each country the following specific recommendations are made:

■ CAMBODIA

- Strengthen legal provisions on responsible investments and requirements for investors to respect national law, human and tenure rights.
- Strengthen safeguards concerning expropriations, in particular on the definition of standard of compensation, access to information, and grievance mechanisms; as well as for monitoring investments.
- Support law enforcement, especially as a means to achieve social justice.



³⁶ FAO has been providing support, for instance, a study visit for Myanmar parliamentarians and senior government staff to Viet Nam to share lessons learned and learn from experiences in the context of legislative reform in the land sector.

■ LAO PEOPLE'S DEMOCRATIC REPUBLIC

- Strengthen safeguards concerning expropriations, in particular on the definition of public purpose.
- Strengthen: provisions around FPIC in the context of leases and concessions; gender mainstreaming in these sectors; recognition and protection of rights in forestland (i.e. State land), considered a separate domain and particularly governed by a separate law; grievance mechanisms.
- Promote coordination between the land, forestry and investment sectors, and promote the national targets to secure 70 percent forest cover. Address existing inconsistencies between the Forestry Law and the Land Law, as the latter includes a recognition of customarily used forestland (but not communally used), whereas the Forestry law explicitly omits “customary use” as one of the categories of forestland use (but then includes this for forest resources use).
- Raise awareness and include the investment community in consultations on the review of the legal framework; promote discussion (e.g. through multi-stakeholder processes to identify responsible investment change agents) and capacity development.



■ MYANMAR

- Implement a moratorium on legal revisions until the new National Land Law is in place and land-related laws are being harmonized, in order to avoid that such revisions are not aligned with future directions that the future Land Law will dictate.
- Make a clear provision of recognition of customary rights, including tenure rights over the lands they manage according to customary rules; further, provide a definition of customary lands, through a participatory process, which is key for the interpretation of provisions such as what is Vacant, Fallow, and Virgin Lands.
- Strengthen safeguards for land expropriation, which should be done according to strict requirements of “public purpose”.



■ VIET NAM

- Strengthen legal provisions on responsible investments and requirements for investors to respect national law and human and tenure rights.
- Strengthen provisions allowing for the payment of market price for lands confiscated or object of resettlement, addressing current shortcomings in these processes.
- Address legal bottlenecks that would otherwise enable more investments in this area. Despite several new pieces of legislation aiming to enable more investments in agriculture, complicated procedures to lease or buy land, insufficient land planning, and inaccurate information about land, among other issues, are reported as prominent barriers for more investments by agricultural enterprises (Viet Nam Investment Review, 2019).
- Improve coordination among the different ministries that currently provide incentives to investors in agriculture, which currently face overlap and gaps the policies, systematizing the incentives provided for the investment in agriculture at both the national and local level; and disseminate information widely to the investor community through investment promotion activities. Further, prioritise investment projects that apply modern techniques to improve the productivity level of the sector, including through criteria to select projects that ensure the sustainability of production and bring positive spill-over effects such as more employment, upgrading workers’ skills, and transferring technology and management skills. Finally, balancing incentives to both domestic and foreign direct investment firms in agriculture (Diem and Thuy, 2019).



REFERENCES

- ASEAN** (Association of Southeast Asian Nations). 2018. *ASEAN guidelines on promoting responsible investment in food, agriculture and forestry*. ASEAN Technical Working Group on Agriculture and Research Development (ATWGARD). Hanoi, Viet Nam. <https://asean.org/storage/2012/05/ASEAN-Guidelines-on-responsible-investment-in-FAF.pdf>.
- ASEAN** (Association of Southeast Asian Nations). 2020. *Statement of the ASEAN Ministers on Agriculture and Forestry in response to the outbreak of the coronavirus disease (COVID-19) to ensure food security, food safety and nutrition in ASEAN*. Endorsed on 15 April 2020 <https://asean.org/storage/2020/04/STATEMENT-OF-ASEAN-MINISTERS-ON-AGRICULTURE-AND-FORESTRY-ON-COVID-19-FINAL-00000002.pdf>.
- AsiaDHRRA** (Asian Partnership for the Development of Human Resources in Rural Asia). 2020. *Engaging ASEAN youth on responsible agriculture investments*. Quezon City, Philippines, AsiaDHRRA. <http://asiadhrra.org/wordpress/wp-content/uploads/2020/06/CFS-RAI-Monograph.pdf>.
- Bowman, V.** 2018. *Legal frameworks for investment in large-scale agriculture in Myanmar: recap and overview*. Presentation delivered at a workshop on Responsible Investment in Plantation Agriculture with a Focus on Land, 27 April 2018. <https://www.slideshare.net/ethicalsector/5-legal-frameworks-for-investment-in-large-scale-agriculture-in-myanmar>.
- CESCR** (Committee on Economic, Social and Cultural Rights). 1991a. *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991. UN Doc. E/1992/23.
- CESCR**. 1991b. *General Comment No. 7: The Right to Adequate Housing (Art. 11 (1) of the Covenant): forced evictions*, 20 May 1997, E/1998/22.
- CESCR**. 2019. *Issue Paper: state obligations under the International Covenant on Economic, Social and Cultural Rights and Governance of Land Tenure*. 66th session.
- CFS** (Committee on World Food Security). 2014. *Principles for responsible investment in agriculture and food systems*. Rome, CFS.
- CIA** (Central Intelligence Agency of the United States). 2020. *World Factbook – People and society*. [Cited 10 January 2021]. <https://www.cia.gov/the-world-factbook/countries/>
- Cotula, L.** 2019a. Land rights and investments: why the IFC performance standards are not enough: a comparison with the Voluntary Guidelines on the Responsible Governance of Tenure. LEGEND Policy Brief, London.
- Cotula, L.** 2019b. *Law and political economy of commodity rushes: reflections on land grabbing in the Global South*. Academic blog 21 October 2019. <https://lpeproject.org/blog/law-and-political-economy-of-commodity-rushes-reflections-on-land-grabbing-in-the-global-south>.
- DICA** (Directorate of Investment and Company Administration). 2019. *The consultative workshop on Myanmar investor grievance mechanism*. Yangon, Myanmar, DICA. <https://www.dica.gov.mm/en/news/consultative-workshop-myanmar-investor-grievance-mechanism>.
- Diem, H.X. & Thuy, D.T.T.** 2019. *Investment in agriculture in recent times: the case of Vietnam*. In: Sakata, S., ed. *New trends and challenges for agriculture in the Mekong Region: From food security to development of agribusinesses*, p. 1–25. Bangkok Research Center Research Report, JETRO Bangkok/IDE-JETRO.
- Displacement Solutions**. 2019. *Land grabbing as an internationally wrongful act: a legal roadmap for ending land grabbing and housing, land and property rights abuses, crimes and impunity in Myanmar*. Geneva, Switzerland, Displacement Solutions. <https://displacementsolutions.org/land-grabbing-as-an-internationally-wrongful-act-new-ds-report-on-ending-land-grabbing-in-myanmar>.
- FAO**. 2012. *Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security*. Rome, FAO. 40 pp.

- FAO.** 2015. *Safeguarding land tenure rights in the context of agricultural investment – A technical guide on safeguarding land tenure rights in line with the Voluntary Guidelines for the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, for government authorities involved in the promotion, approval and monitoring of agricultural investments.* Rome, FAO. 99 pp.
- FAO.** 2016a. *Responsible governance of tenure: a technical guide for investors.* Governance of Tenure Technical Guide No. 7. Rome, FAO. 77pp.
- FAO.** 2016b. *Responsible governance of tenure and the law: a guide for lawyers and legal service providers.* Governance of Tenure Technical Guide No. 5. Rome, FAO. 121 pp.
- FAO.** 2019. *Supporting responsible investments in agriculture and food systems.* Overview of the FAO Umbrella Programme. Rome, FAO. 10 pp. <http://www.fao.org/3/a-i6820e.pdf>.
- FAO.** 2020. *Legal considerations in the context of responses to COVID-19 to mitigate the risk of food insecurity.* Policy Brief, 10 April 2020. FAO, Rome. 4 pp.
- FAO & MRLG** (Mekong Region Land Governance project). 2019a. *Challenges and opportunities of recognizing and protecting customary tenure systems in Cambodia.* Policy Brief. FAO Regional Office for Asia and the Pacific, Bangkok. 13 pp.
- FAO & MRLG.** 2019b. *Challenges and opportunities of recognizing and protecting customary tenure systems in Lao People's Democratic Republic.* Policy Brief. FAO Regional Office for Asia and the Pacific, Bangkok. 12 pp.
- FAO & MRLG.** 2019c. *Challenges and opportunities of recognizing and protecting customary tenure systems in Myanmar.* Policy Brief. FAO Regional Office for Asia and the Pacific, Bangkok. 12 pp.
- FAO & MRLG.** 2019d. *Challenges and opportunities of recognizing and protecting customary tenure systems in Viet Nam.* Policy Brief. FAO Regional Office for Asia and the Pacific, Bangkok. 12 pp.
- FAO, IFAD & WFP** (International Fund for Agricultural Development & World Food Programme). 2015. *Achieving zero hunger: the critical role of investments in social protection and agriculture.* Rome, FAO. 32pp. <http://www.fao.org/3/a-i4951e.pdf>.
- Fiedler, Y. & Karlsson, J.** 2016. *Home country measures that promote responsible foreign agricultural investment: evidence from selected OECD countries.* FAO Commodity and Trade Policy Research Working Paper No. 52. Rome, FAO. 39 pp. <http://www.fao.org/3/a-i5802e.pdf>.
- GRET.** 2019. *Myanmar land and livelihoods.* Policy Brief No. 1. In: GRET [online]. <https://www.gret.org/publication/myanmar-millions-of-farmers-are-at-risk-of-being-considered-trespassers-on-their-own-lands/?lang=en>.
- IFC** (International Finance Cooperation). 2012a. *Performance standard 5: land acquisition and involuntary resettlement.* https://www.ifc.org/wps/wcm/connect/75de96d4-ed36-4bdb-8050-400be02bf2d9/PS5_English_2012.pdf?MOD=AJPERES&CVID=jqex59b.
- IFC.** 2012b. *Performance standard 7: Indigenous peoples.* https://www.ifc.org/wps/wcm/connect/3274df05-7597-4cd3-83d9-2aca293e69ab/PS7_English_2012.pdf?MOD=AJPERES&CVID=jiVQLD.
- Ingalls, M.L., Diepart, J.-C., Truong, N., Hayward, D., Neil, T., Phomphakdy, C., Bernhard, R., Fogarizzo, S., Epprecht, M., Nanhthavong, V., Vo, D.H., Nguyen, D., Nguyen, P.A., Saphangthong, T., Inthavong, C., Hett, C. & Tagliarino, N.** 2018. *State of land in the Mekong Region. Centre for Development and Environment, University of Bern and Mekong Region Land Governance.* Bern, Switzerland and Vientiane, Lao PDR, Bern Open Publishing. 187 pp. <https://www.mrlg.org/wp-content/uploads/2019/07/Mekong-State-of-Land-May2019-with-New-map-MQ.pdf>.
- IPCC** (Intergovernmental Panel on Climate Change). 2020. *Climate change and land. A special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems. Summary for policymakers.* Geneva, Switzerland, World Meteorological Organization and United Nations Environment Programme. 36 pp. <https://www.ipcc.ch/srccl>.

- Jansen, L.J.M.** 2020. *Improving governance of tenure in policy and practice: monitoring in a space for multiple views*. Sustainability 12 (23): 9896; doi:10.3390/su12239896. <https://doi.org/10.3390/su12239896>.
- Jansen, L.J.M., Kalas, P.P. & Bicchieri, M.** 2020. *Improving governance of tenure in policy and practice: the case of Myanmar*. Land Use Policy 100: 1044906 <https://doi.org/10.1016/j.landusepol.2020.104906>.
- Jull, C.** 2016. *Promoting responsible investment in agriculture and food systems: guide to assess national regulatory frameworks affecting large scale private investments*. FAO Legal Papers No. 101. Rome, FAO. 77 pp.
- Lwin, N.** 2018. *Myanmar's ambitious 20-year plan to attract foreign investment*. The Irrawaddy, 9 October 2019. <https://www.irrawaddy.com/business/economy/myanmars-ambitious-20-year-plan-attract-foreign-investment.html>.
- MCRB** (Myanmar Centre for Responsible Business). 2014. *Project level impacts: ethnic minority groups/indigenous peoples*. Part 4.5. <https://www.myanmar-responsiblebusiness.org/pdf/SWIA/Oil-Gas/11-Ethnic-Minorities-Indigenous-Peoples.pdf>.
- MCRB.** 2018. *Briefing paper: Land rights and businesses in Myanmar*. Consultation draft, May 2018. MCRB, Yangon, Myanmar. 39 pp. https://www.myanmar-responsiblebusiness.org/pdf/2018-Briefing-Paper-Land_draft.pdf.
- MCRB.** 2019. *Concern about the impact on responsible investments of the amendments to the Virgin, Vacant, Fallow Lands Law*. Letter sent on 10 January 2019 to the Chairman National Land Use Council and Chairman VFV Land Management Central Committee, Nay Pyi Taw. MCRB, Yangon. <https://www.myanmar-responsiblebusiness.org/news/virgin-vacant-and-fallow-lands-law.html>Namati/Landesa, 2015.
- Montanarella, L., Scholes, R. & Brainich, A., eds.** 2018. *The assessment report on land degradation and restoration*. Bonn, Germany, Secretariat of the Intergovernmental Science–Policy Platform on Biodiversity and Ecosystem Services. 744 pp. <https://doi.org/10.5281/zenodo.3237392>.
- Namati & Landesa.** 2015. *Recommendations for implementation of pro-poor land policy and land law in Myanmar: national data and regional practices*. <https://namati.org/resources/pro-poorlandpolicymyanmar/> and <https://cdn.landesa.org/wp-content/uploads/Recommendations-for-Land-Policy-and-Law-in-Myanmar-English-10.7.151.pdf>.
- OECD** (Organisation for Economic Cooperation and Development). 2014. *Policy framework for agriculture*. Paris, France, OECD Publishing. 72 pp. <http://dx.doi.org/10.1787/9789264212725-en>.
- OECD.** 2018. *OECD investment policy reviews: Cambodia*. Paris, France, Organisation for Economic Cooperation and Development. 246 pp. DOI: <https://doi.org/10.1787/9789264309074-en>.
- OEIGWG** (Open-Ended Intergovernmental Working Group) on Transnational Corporations and Other Business Enterprises with Respect to Human Rights). 2020. *Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*. Second revised draft, 6 August 2020. https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf.
- OpenDevelopment Cambodia.** 2015a. *Concessions*. In: *OpenDevelopment Cambodia* [online]. Phnom Penh, Cambodia. [Cited 1 August 2020]. <https://opendevdevelopmentcambodia.net/topics/concessions/#ref-73837-64>.
- OpenDevelopment Cambodia.** 2015b. *Land*. In: *OpenDevelopment Cambodia* [online]. Phnom Penh, Cambodia. [Cited 1 November 2019]. <https://opendevdevelopmentcambodia.net/topics/land/#ref-76372-6>
- OpenDevelopment Laos.** 2018. *State land leases and concessions*. In: *OpenDevelopment Laos* [online]. Vientiane, Laos. [Cited 1 November 2019]. <https://laos.opendevdevelopmentmekong.net/topics/state-land-leases-and-concessions/>

OpenDevelopment Laos. 2019. Land. In: *OpenDevelopment Laos*. [online]. Vientiane, Laos. [Cited 1 November 2019]. <https://laos.opendevlopmentmekong.net/topics/land/#ref-302-34>

OpenDevelopment Viet Nam. 2019. *Land*. In: *OpenDevelopment Viet Nam* [online]. Hanoi, Viet Nam. [Cited 1 August 2020]. <https://vietnam.opendevlopmentmekong.net/topics/land/#ref-597415-36>

Pen, R. & Chea, P. 2015. *Large scale land grabbing in Cambodia: failure of international and national policies to secure the Indigenous People's rights to access land and resources*. Phnom Penh, Cambodia, Heinrich Boll Stiftung. <https://kh.boell.org/en/2015/03/25/large-scale-land-grabbing-cambodia-failure-international-and-national-policies-secure>.

PRI (Principles for Responsible Investment). 2020. *Sustainable and inclusive COVID-19 recovery and reform*. London, UK, Principles for Responsible Investment. 31 pp. <https://www.unpri.org/download?ac=10839>.

Quan, J. 2019. *Findings and key lessons from LEGEND's work on responsible land investment. Presentation delivered during the meeting of LEGEND partners with the CFS private sector mechanism*, 16 October 2019. <https://www.landgovernance.org/cfs-46-legend-findings-and-key-lessons-from-legends-work-on-responsible-land-investments>.

Ramachandran, P. 2018. *Building a country safeguard system to promote sustainability*. In: Greater Mekong Subregion [online]. Manila, Philippines. [Cited 11 May 2018]. <https://greatermekong.org/building-country-safeguard-system-promote-sustainability>

Rock, F. 2019. *The application of FPIC standards in Cambodia*. Discussion Note Series No. 5. Vientiane, Lao PDR, Mekong Region Land Governance project. 10 pp.

Schmidhuber, I. & Qiao, B. 2020. *Comparing crises: Great Lockdown versus Great Recession*. Rome, FAO. 32 pp. <http://www.fao.org/3/ca8833en/CA8833EN.pdf>.

UNGA (United Nations General Assembly). 2014. *Final Report: the transformative potential of the right to food. Report of the Special Rapporteur on the Right to Food*. Twenty-fifth session of the Human Rights Council, A/

HRC/25/57. New York, UN General Assembly. https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A_HRC_25_57_ENG.DOC.

UNGA. 2018. *United Nations declaration on the rights of peasants and other people working in rural areas*. Resolution 73/165 adopted by the General Assembly on 17 December 2018. New York, United Nations. <https://undocs.org/en/A/RES/73/165>.

UNHR [United Nations Human Rights] Office of the High Commissioner. 1966. *International Covenant on Economic, Social and Cultural Rights*. Adopted on 16 December 1966 and entered into force on 3 January 1976. <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

UNHR. 2011. *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*". Endorsed by the Human Rights Council in Resolution 17/4 of 16 June 2011. https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf.

USAID (United States Agency for International Aid). 2015. *Operational guidelines for responsible land-based investments*. Washington, DC. <https://www.land-links.org/tool-resource/operational-guidelines-for-responsible-land-based-investment>.

Viet Nam Investment Review. 2019. *Agriculture gets much-needed boost from legislators*. In: Viet Nam Investment Review [online]. Hanoi, Viet Nam. [Cited 28 January 2019]. <https://www.vir.com.vn/agriculture-gets-much-needed-boost-from-legislators-65387.html>

LEGISLATION AND POLICIES

■ CAMBODIA

Civil Code of Cambodia, Tentative English Translation (Sep. 172, 2008); the original in Khmer was submitted to the Council of Ministers in June 2003; Discussion w/ WB & ADB in August 2004 reflected.

Constitution of the Kingdom of Cambodia, Adopted by the Constitutional Assembly in Phnom Penh on September 21, 1993 at its 2nd Plenary Session.

Land Law, Royal Kram No.NS/RKM/0801/14 of August 30, 2001.

Law on Environmental Protection and Natural Resources Management, Preah Reach Kram No. NS/ RKM/ 1296/36 dated 24 December 1996.

Law on Expropriation, Ministry of Economy and Finance, Preah Reach Kram No.NS/RKM/0210/003, 2003.

Law on Forestry, Ministry of Agriculture, Forestry and Fisheries, Preah Reach Kram NS/RKM/0802/016, 2003

Law on Investment of the Kingdom of Cambodia, Royal Kram No. 03/NS/94, August 5, 1994;

Law on the Amendment of the Law on Investment, Kingdom of Cambodia, Royal Kram NS/RKM/0303/008/ March 24, 2003.

Order 01BB on “Measures for Strengthening and Increasing the Effectiveness of the Management of Economic Land Concessions”.

Sub-Decree No. 111 on the Implementation of the Law On The Amendment To The Law On Investment Of The Kingdom Of Cambodia No 111 Ank/Bk Dated September 27, 2005.

Sub-Decree No. 146 on Economic Land Concessions, Royal Government of Cambodia No. 146 ANK/BK, 2005.

Sub-Decree No. 19 on Social Land Concessions, the Royal Government of Cambodia No. 19 ANK/BK/ March 19, 2003.

Sub-Decree on Environmental Impact Assessment Process, Royal Government, Council of Minister No. 72 ANRK.BK, August 11, 1999.

■ LAO PEOPLE'S DEMOCRATIC REPUBLIC

Constitution of the Lao People's Democratic Republic, National Assembly, No. 63/NA, Vientiane, 8 December 2015.

Decree 112/2010 on Environmental Impact Assessment, Prime Minister's Office, Vientiane, 18 February 2010.

Decree 135/2009 on State Land Lease or Concession, Prime Minister's Office, VCC, 25 May 2009.

Environmental Protection Law, National Assembly, No. 29/ NA, Vientiane, 18 December 2012.

Forestry Law, National Assembly No. 64/NA, Vientiane, 13 June 2019.

Instruction on Investment Approval and Land Management Mechanism for Leasing or Concession to Cultivate Crops, No. 0457/MPI, Ministry of Planning and Investment, Vientiane, 27 February 2019.

Land Law, National Assembly, No 70/NA, Vientiane, 21 June 2019.

Law on Investment Promotion, National Assembly, No. 14/ NA, Vientiane, 17 November 2016

Law on Resettlement and Vocation, National Assembly No. 45/NA, Vientiane, 15 June 2018.

Property Law, 27 June 1990.

■ MYANMAR

Agriculture Development Strategy and Investment Plan (2018-19 – 2022-23), Ministry of Agriculture, Livestock and Irrigation, 2018.

Community Forest Instruction, Ministry of Natural Resources and Environmental Conservation, Office of the Union Minister, Notification No. 69/2019 Nay Pyi Taw, the 13th Waxing Day of Kasone, 1381 M.E., 8th May, 2019.

Constitution of the Republic of the Union of Myanmar, 2008

Environmental Conservation Law, The Pyidaungsu Hluttaw Law No. 9/ 2012, the 8th Waxing Day of Tagu, 1373 M.E., 30th March, 2012.

Environmental Impact Assessment Procedure, Ministry of Environmental Conservation and Forestry Notification No. 616 / 2015, Nay Pyi Taw, the 3rd Waning Day of Nadaw, 1377 M.E., 29 December 2015.

Farmland Law, Pyidaungsu Hluttaw Law No.11 of 2012, Day of 8th Waxing of Tagu 1373 ME, 30th March, 2012 (2020 amendment).

Forest Law, The Pyidaungsu Hluttaw Law No. 29/2018, the 11th Waxing Day of Tawthalin, 1380 M.E, 20th September, 2018.

Investment Law, the Pyidaungsu Hluttaw Law No. 40/2016, Waning of Thadingyut, 1378 M.E, 181th October 2016.

Investment Rules, the Ministry of Planning and Finance Notification No. 35 / 2017
The 3rd Waxing of Tagu, 1378 M.E, 30th March, 2017.

Land Acquisition Act, 1894

Land Acquisition, Resettlement and Rehabilitation Law, Pyidaungsu Hluttaw Law No. 24, 4th Wanning Day of Wakhaung, 1381 M.E., 19th August, 2019.

Law Amending the Vacant, Fallow and Virgin Lands Management Law (2018), Pyidaungsu Hluttaw Law No. (24), the 2nd Waxing Day of Tawthalin, 1380, 11th September, 2018.

Law on the Protection of the Rights of Ethnic Nationalities, Pyidaungsu Hluttaw Law No. 8 of 2015, Day of 7th Waxing of Taboung 1373 ME, 24th February 2015.

National Land Use Policy, the Republic of the Union of Myanmar, 2016.

■ VIET NAM

Circular on Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans, Ministry of Natural Resources and Environment, No. 27/2015/TT-BTNMT, Hanoi, 29 May 2015.

Civil Code, National Assembly, the Law No. 91/2015/QH13, Hanoi, 24 November 2015.

Constitution of the Socialist Republic of Vietnam, Order No. 18/2013/L-CTN on the promulgation of the Constitution, 8 December 2013.

Decree on Incentive Policies for Enterprises Investing in Agriculture and Rural Development Sector, the Government, No. 57/2018/ND-CP, 17 April 2018.

Decree on Environmental Protection Planning, Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Plans, the Government, No. 18/2015/ND-CP, Hanoi, 14 February 2015, amended by Decree No. 40/2019/ND-CP, 13 May 2019.

Land Law, National Assembly No. 22/2013/L-CTN, 9 December 2013.

Law on Environmental Protection, National Assembly No. 55/2014/QH13, Hanoi, 23 June 2014.

Law on Investment, National Assembly, No. 67/2014/QH13, 26 November 2014.

Law on Protection of Consumers' Rights, National Assembly, No. 59/2010/QH12, 17 November 2010.

Law on Quality of Goods and Products, National Assembly, No. 05/2007/QH12, 21 November 2007.

Law on Technical Regulations and Technical Standards, National Assembly, No. 68/2006/QH11, Hanoi, 29 June 2006.

ANNEX A. SELECTED RELEVANT PARAGRAPHS FROM THE VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY

No. of paragraph and paragraph text (from FAO, 2012)

4.4	Based on an examination of tenure rights in line with national law, States should provide legal recognition for legitimate tenure rights not currently protected by law. Policies and laws that ensure tenure rights should be non-discriminatory and gender sensitive. Consistent with the principles of consultation and participation of these Guidelines, States should define through widely publicized rules the categories of rights that are considered legitimate. All forms of tenure should provide all persons with a degree of tenure security which guarantees legal protection against forced evictions that are inconsistent with States' existing obligations under national and international law, and against harassment and other threats.
4.10	States should welcome and facilitate the participation of users of land, fisheries and forests in order to be fully involved in a participatory process of tenure governance, inter alia, formulation and implementation of policy and law and decisions on territorial development, as appropriate to the roles of State and non-state actors, and in line with national law and legislation.
5.1	States should provide and maintain policy, legal and organizational frameworks that promote responsible governance of tenure of land, fisheries and forests. These frameworks are dependent on, and are supported by, broader reforms to the legal system, public service and judicial authorities.
5.2	States should ensure that policy, legal and organizational frameworks for tenure governance are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.
5.3	States should ensure that policy, legal and organizational frameworks for tenure governance recognize and respect, in accordance with national laws, legitimate tenure rights including legitimate customary tenure rights that are not currently protected by law; and facilitate, promote and protect the exercise of tenure rights. Frameworks should reflect the social, cultural, economic and environmental significance of land, fisheries and forests. States should provide frameworks that are non-discriminatory and promote social equity and gender equality. Frameworks should reflect the interconnected relationships between land, fisheries and forests and their uses, and establish an integrated approach to their administration.
5.5	States should develop relevant policies, laws and procedures through participatory processes involving all affected parties, ensuring that both men and women are included from the outset. Policies, laws and procedures should take into account the capacity to implement. They should incorporate gender-sensitive approaches, be clearly expressed in applicable languages, and widely publicized.
5.7	States should define and publicize opportunities for civil society, private sector and academia to contribute to developing and implementing policy, legal and organizational frameworks as appropriate.
5.9	States should recognize that policies and laws on tenure rights operate in the broader political, legal, social, cultural, religious, economic and environmental contexts. Where the broader contexts change, and where reforms to tenure are therefore required, States should seek to develop national consensus on proposed reforms.
7.1	When States recognize or allocate tenure rights to land, fisheries and forests, they should establish, in accordance with national laws, safeguards to avoid infringing on or extinguishing tenure rights of others, including legitimate tenure rights that are not currently protected by law. In particular, safeguards should protect women and the vulnerable who hold subsidiary tenure rights, such as gathering rights.
7.2	States should ensure that all actions regarding the legal recognition and allocation of tenure rights and duties are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.

No. of paragraph and paragraph text (from FAO, 2012)

9.6	States should consider adapting their policy, legal and organizational frameworks to recognize tenure systems of indigenous peoples and other communities with customary tenure systems. Where constitutional or legal reforms strengthen the rights of women and place them in conflict with custom, all parties should cooperate to accommodate such changes in the customary tenure systems.
9.7	States should, in drafting tenure policies and laws, take into account the social, cultural, spiritual, economic and environmental values of land, fisheries and forests held under tenure systems of indigenous peoples and other communities with customary tenure systems. There should be full and effective participation of all members or representatives of affected communities, including vulnerable and marginalized members, when developing policies and laws related to tenure systems of indigenous peoples and other communities with customary tenure systems.
12.3	All forms of transactions in tenure rights as a result of investments in land, fisheries and forests should be done transparently in line with relevant national sectoral policies and be consistent with the objectives of social and economic growth and sustainable human development focusing on smallholders.
12.4	Responsible investments should do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, and should respect human rights. Such investments should be made working in partnership with relevant levels of government and local holders of tenure rights to land, fisheries and forests, respecting their legitimate tenure rights. They should strive to further contribute to policy objectives, such as poverty eradication; food security and sustainable use of land, fisheries and forests; support local communities; contribute to rural development; promote and secure local food production systems; enhance social and economic sustainable development; create employment; diversify livelihoods; provide benefits to the country and its people, including the poor and most vulnerable; and comply with national laws and international core labour standards as well as, when applicable, obligations related to standards of the International Labour Organization.
12.6	States should provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment from risks that could arise from large-scale transactions in tenure rights. Such safeguards could include introducing ceilings on permissible land transactions and regulating how transfers exceeding a certain scale should be approved, such as by parliamentary approval. States should consider promoting a range of production and investment models that do not result in the large-scale transfer of tenure rights to investors, and should encourage partnerships with local tenure right holders.
12.8	States should determine with all affected parties, consistent with the principles of consultation and participation of these Guidelines, the conditions that promote responsible investments and then should develop and publicize policies and laws that encourage responsible investments, respect human rights, and promote food security and sustainable use of the environment. Laws should require agreements for investments to clearly define the rights and duties of all parties to the agreement. Agreements for investments should comply with national legal frameworks and investment codes.
12.9	States should make provision for investments involving all forms of transactions of tenure rights, including acquisitions and partnership agreements, to be consistent with the principles of consultation and participation of these Guidelines, with those whose tenure rights, including subsidiary rights, might be affected. States and other relevant parties should inform individuals, families and communities of their tenure rights, and assist to develop their capacity in consultations and participation, including providing professional assistance as required.
12.10	When investments involving large-scale transactions of tenure rights, including acquisitions and partnership agreements, are being considered, States should strive to make provisions for different parties to conduct prior independent assessments on the potential positive and negative impacts that those investments could have on tenure rights, food security and the progressive realization of the right to adequate food, livelihoods and the environment. States should ensure that existing legitimate tenure rights and claims, including those of customary and informal tenure, are systematically and impartially identified, as well as the rights and livelihoods of other people also affected by the investment, such as small-scale producers. This process should be conducted through consultation with all affected parties consistent with the principles of consultation and participation of these Guidelines. States should ensure that existing legitimate tenure rights are not compromised by such investments.



©FAO/Roberto Grossman



©FAO/Hkun Lat

©FAO/A.K Kimoto





**Inclusive Rural Transformation and
Gender Equity Division - Economic
and Social Development**
Food and Agriculture Organization of
the United Nations
Rome, Italy

**FAO Regional Office for Asia
and the Pacific**
39 Phra Athit Road, Phranakorn
Bangkok 10200, Thailand

ISBN 978-92-5-134168-1



9 789251 341681

CB3937EN/1/04.21