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# **Land-Taking Disputes in East Asia: A Comparative Analysis and Implications for Vietnam**

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## **Report prepared for UNDP Vietnam**

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# Introduction

Many of the economic, demographic, and social changes animating land disputes in Vietnam are also sweeping across other countries in East Asia. The aim of this Report is to provide comparative insights into land-taking disputes in three East Asian countries—China, Indonesia, and Cambodia—that are relevant to Vietnamese conditions. It is not the intention of this Report to provide a comprehensive account of land-taking disputes, but rather to identify trends in dispute resolution. These countries have been selected because each tells a different story about what happens to land disputes when certain institutional and legal reforms are set in motion.

The Report is divided into three country case studies that examine land-taking disputes in China, Indonesia, and Cambodia. The country case studies first provide background context about the system of government, legal systems, and political economy factors driving land disputes. Next they analyze land disputes from three distinct focuses:

- Community consultation with government and/or developers before and during land projects.
- Mediation between communities, government, and/or developers to resolve problems caused by land-taking projects.
- Court litigation between communities, government, and/or developers to resolve problems caused by land-taking projects.

The country case studies show that, with the notable exception of the Constitutional Court in Indonesia, courts have played a minor role in resolving land-taking cases in the region. This finding is consistent with other studies that have found that, in the developing world, courts often lack the capacity to juggle the demands of powerful governments and developers and the complexities of land disputes (Asia Foundation 2001; World Bank 2008).

Another key finding is that land-taking cases create ongoing and contested relationships between state agencies, developers, and land users. Without clear legal authority, unequivocal juridical foundations, or irrefutable land compensation strategies, agreements will break down and be reshaped through fresh conflicts until a new consensus is reached. Dispute resolution is therefore highly dynamic, and land disputes are rarely settled once and for all. In these circumstances, courts, which provide winner-takes-all outcomes, often lack the flexibility to respond to constantly changing conditions. Consultation and mediation provide more responsive and nuanced outcomes.

Similar to courts, these “alternative” dispute resolution systems suffer from systemic shortcomings of their own. What the country case studies show is that no one system, state or non-state, can provide the optimal range of solutions to resolve complex land disputes. Rather than idealizing one system, it makes sense to explore ways of creatively combining elements from both systems. A theme repeated throughout this Report is the need to blend the strengths and mitigate the weaknesses of state or formal (e.g. courts) and non-state (e.g. mediation and consultative) systems. This approach carries the challenge of identifying the comparative strengths and weaknesses of the different systems and finding creative ways of combining two systems that draw on different regulatory traditions.

The report endorses proactive planning as a means of reducing land conflicts by minimizing the area of land taken to accommodate economic expansion and population growth. Finally fiscal measures have reduced the incentives for land taking in China, where local governments use

land sales to fund revenue. A burgeoning literature shows the advantages, but also points to the limits of proactive planning (Moote, McClaran and Chickering 1997). Planning can minimize, but not eliminate land taking. This study aims to understand how the inevitable conflicts caused by land taking are resolved in the three reference countries.

This Report concludes that land tenure reforms are useful in providing clarity about ownership. However without competent land titling and registration agencies and courts, land tenure reforms cannot resolve the underlying conflicts about access to scarce resources. Similarly, institutional reforms have proved ineffective in resolving land disputes unless they level the playing field between state agencies, land users, and developers. Attempts by governments in the region to suppress land disputes have pushed grievances underground, leading in the long-term to more deep-seated and intractable conflicts.

The most effective dispute resolution forums created conditions that put state agencies and developers on a relatively equal footing with land users. In China political reforms have given local communities more say over land development and planning, but more generally the social organizations, such as trade unions, religious organizations and social groups, that elsewhere play an effective dispute resolution function, are under tight government control and have a political function. In contrast grass-roots democracy reforms in Indonesia have made local officials more accountable to land users. The creation of the Indonesian Constitutional Court, also demonstrates that an independent and well-resourced dispute resolution forum can level the playing field between state agencies, developers and land users.

## **Land Disputes and the Political Economy in East Asia**

There is a broad consensus about the demographic and economic forces underlying land conflicts in East Asia (Hsing 2010; Ho 2005). Population<sup>1</sup> and industrial growth have produced historically unprecedented levels of urbanization and industrialization that are driving the conversion of rural land for housing, infrastructure, and industrial projects. In each country studied, land-taking disputes involved a tension between economic development and the private property and social rights of the public.

The scale of urbanization in China is unprecedented. The number of displaced people due to construction projects is estimated to have reached a staggering 50 million, including 17 million displaced by the construction of dams (Dongdong 2014). Although urbanization is also progressing rapidly in Indonesia, most land contests occur when forest land is taken and cleared for large-scale industrial agriculture. In Cambodia, land concessions granted to foreign corporations are at the center of the most intense land disputes.

As the data discussed in the country case studies shows, the socio-economic conditions driving land-taking will continue for decades. In China and Indonesia, urbanization has already reached 50 percent, but it expected to increase by an additional 20 percent over the next 20 years. Cambodia is less urbanized, but it too is expected to face rapid urbanization over the coming decades.

It is the unequal sharing of economic wealth, and in particular, the increasing economic divide between rural and urban populations that animate many land disputes in East Asia. Numerous

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<sup>1</sup> At 0.47 percent per annum, the population growth in China is considerably slower than the 1.04 percent in Vietnam. See United Nations Sources, available at <http://www.tradingeconomics.com/vietnam/population-growth-annual-percent-wb-data.html>.

land-taking disputes take place in the peri-urban and urban fringe areas where the interface between wealthy urban and poorer rural communities is most evident. Tensions are further exacerbated when rural communities see their land taken for private developments, such as golf courses and luxury apartments, rather than for public purposes that might benefit the public and the nation.

## **Methodology**

### **Comparative Analysis**

A question arises in any comparative analysis about the relevance of transferring legal and institutional reforms from one country to another country. Even countries with similar political–legal systems have different internal histories and logics that make the transfer of laws and processes problematic (Nelken 2001; Gillespie 2008). Comparative law studies show that ideas and principles have more success in transferring across borders and stimulating new innovations in foreign legal terrain than laws and processes (Peerenboom 2006).

Following this research, this Report focuses on the core ideas and principles that underlie the resolution of land-taking disputes in the reference countries. This report does not take a technical legal or procedural focus, because the application of this type of knowledge is strongly influenced by core ideas and principles.

### **Country Selection**

The countries were selected because each tells a different story about how certain institutional and legal reforms influence land-taking disputes. They also have comparable institutional capacities and levels of wealth to Vietnam. The Report did not examine land taking in newly industrialized countries, such as South Korea or Taiwan, because the court systems in these countries are much better resourced than in Vietnam. Also the state in these countries can reduce social conflict by drawing on reserves accumulated over decades of high growth to adequately compensate land users displaced by public development projects.

#### ***China case study***

The Chinese study shows what can happen when the government experiments with a type of administrative mediation to force farmers to settle land disputes. Not only has this approach failed to stem the rising number of land disputes, but also it has disrupted the creation of transparent, participatory, and responsive dispute resolution systems that might have reduced the harm caused by land-takings and produced long-term stability.

#### ***The Indonesian case study***

The Indonesian study shows the influence of liberal legal reforms on land disputes. Until *Reformasi* changes began in 1998, the Indonesian political–legal system was analogous to the Vietnamese system. After a decade of grass-roots democratic reforms, land users can now bargain with land developers on a more equitable basis. The Indonesian Constitutional Court has also played a dominant role in protecting the interests of land users.

#### ***The Cambodian case study***

The Cambodian study demonstrates what happens when the state institutions at every level fail to respond to the needs of land users. Cambodian land disputes are now played out in international forums because land users could not find justice at home.

## How Should Land Disputes be Conceptualized?

Since land disputes are contests over finite resources, what constitutes an effective settlement often depends on the observer's perspective. For example, from a governmental perspective, reducing social conflict and promoting compliance with land law may constitute the key measures of success. In other words, states tend to view disputes from a social compliance perspective where laws and policies provide the solutions.

Farmers, on the other hand, may evaluate land disputes from a different range of perspectives. For them, land may have spiritual, sentimental, or economic value that is not recognized and compensated by the state. As disputes progress, what began as a simple contest over compensation may transform into fights about justice and unfair processes.

Social constructionism offers a promising way of framing this observation that different actors interpret land-taking disputes from different perspectives. Rather than assuming that disputes are ordered by uncontested sets of norms and practices, it posits that they are socially constructed from different conceptual frameworks (Felstiner and Sarat 1980). Put differently, what we understand as state land regulations—laws, procedures, and agencies—interact with, rather than displace, non-state modes of land regulation. Viewed from this perspective, laws act as “a form of social mediation, a locus of social contest and construction” (Mertz 1994: 1246). Both state and non-state actors conceptualize disputes from their background beliefs, practices, and goals (Robertson 1999).

This decentered approach provides a valuable corrective to state mythologizing that only central authorities possess regulatory solutions to land disputes. It also sheds light on the remarkable resilience of community land regulation, which continues to flourish despite unprecedented economic development and globalization in East Asia. The importance of community governance to ethnic minorities is well known (Andersen 2011); what is less well documented and understood is the vital role it plays in urban, peri-urban, and rural centers in East Asia.

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# China Country Case Study

## Introduction

China has experienced the fastest level of urbanization in the shortest time span in history. Over a 30 year period, China's urban population increased from 200 million to 700 million, and it is estimated that by 2020, 60 percent of China's 1.4 billion people will be living in cities.<sup>2</sup> Urban expansion necessitates the conversion of rural land for urban and industrial use and causes large-scale human dislocation (Reuters 2013). It is commonly acknowledged that land expropriation in China has boosted China's economic development and also caused tremendous human suffering. Since the 1980s, an estimated 120 million farmers have been displaced in favor of developmental purposes, and China's economic achievement is possible because of the unprecedented human dislocation.

Following this brief introduction, the next section offers an overview of the emerging land law in China, identifying the key characteristics of the Chinese dual land system. Then the "fuzziness" of Chinese land law and the political implications of fuzzy law are discussed, and following that the weak role that the Chinese judiciary plays in land disputes is critically examined. The discussion then examines proactive mediation and its limitations as an alternative to adjudication as a means of curbing the rise of popular protest against illicit land-taking.

## Legal Framework

### History of the Land Tenure System

China operates a dual land ownership system: the urban land system and the rural land system (Chen 2014; Ho 2005). There are two separate legal regimes that govern the ownership and use of rural and urban lands. Under Article 10 of the Constitution 1982, urban land belongs to the state, and agricultural land—land in the rural and suburban areas—belongs to collectives, except for those portions that belong to the state as provided by law. Rural land thus belongs to the people residing in collectives. They exercise ownership rights that are stipulated in the 1986 Land Administrative Law (LAL). These two separate systems serve different functions. Rural land is reserved for agriculture and has to be converted from collective ownership to state ownership before it can be put to urban use.

In 1988 an amendment to the 1986 LAL declared for the first time private rights to use state or collectively owned land. The amendment provided a clear separation of the land use right from the land ownership right effectively legitimizing, retrospectively, a limited *de facto* use right in China that had been in existence since the early 1980s. In rural areas, farmland had previously been contracted out under the well-known household responsibility system (HRS), to individual households for farming purpose for a fixed period of time (15 to 30 years) (Ho 2007). In urban areas, a land auction for urban development was carried out in early 1980s in South China, on a

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<sup>2</sup> See United Nations, "World Urbanisation Prospects, the 2012 Revision," Population Database, available at <http://esa.un.org/unup/>.

pilot basis, without a legal framework.

There is nothing new about land expropriation in the history of the Chinese Communist government (Ho 2005). However, it was the LAL that put expropriation on a proper legal footing. The 1986 LAL and the subsequent amendments legalized expropriation of land, rural or urban, for “construction” purposes, broadly defined to include public utilities, industrial compounds, transportation, and other public services. The newly created land use rights were often highly valuable, and the potential to generate income from land sales is a powerful incentive for expansive expropriation.

There has been a sharp increase in land disputes since the enactment of a legal framework for expropriation (Erie 2007; Pils 2014). In response, the state took a series of actions to recognize private property rights and enhance their legal protection. The Constitution was amended in 1988 to recognize the private sector of the economy as a “supplement” to the public economy, offering a much-needed symbolic protection of private property. The 1986 LAL was subsequently amended with new provisions to establish land use rights in urban and rural areas and also to impose substantive and procedural requirements for expropriation. A number of laws and regulations, such as the 1994 Urban Real Estate Management Law, were enacted to exert tighter government control and regulation over the then newly emerging urban property market. In 1998, with rapid urbanization and growing illegal expropriation of arable land, following a circular issued by the Chinese Communist Party (CCP) and the State Council, the original expropriation provisions in LAL were revised to restrain the state’s power to compulsorily acquire land.<sup>3</sup>

In 2004, a further constitutional amendment finally set out the guiding principles for expropriation in China. Article 10 of the Constitution now provides: “The state may in the public interest expropriate land in accordance with the law and shall provide compensation.” Three years later, the much-celebrated Property Law was passed in 2007, to respond to the public outcries for equal protection of private and public property and growing concerns about the insecurity of land property rights in both rural and urban areas. Together, Article 10 and the Property Law lay out a legal framework for expropriation of rural and urban land respectively in terms of the legal ground for expropriation, level of compensation, and legal procedures.

## Expropriation Procedures

The expropriation of urban land is governed by the Regulation on the Expropriation of Buildings on State-owned Land and Compensation, which was passed by the State Council in 2011. The expropriation procedure includes:

1. A local government to make an expropriation decision (Art. 8);
2. A cross-departmental review of an expropriation plan to ensure conformity to urban planning (Art. 9);
3. A housing expropriation department to draft a compensation plan (Art. 10);
4. The local government to publicize the compensation plan for public consultation (Art.

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<sup>3</sup> See Zhou Yongkang, “关于《中华人民共和国土地管理法（修订草案）》的说明” (Statement of the Draft Bill of Land Management Law Revised), The Second Meeting of 9<sup>th</sup> NPCSC, April 26, 1998.

- 10);
5. Revision of the compensation plan, if any, after the consultation (Art. 11);
6. The local government to set up a special bank account for compensation (Art. 12);
7. The expropriated residents to select a property appraisal institution (Art. 20);
8. An expropriation agreement to be signed between the expropriation department and the expropriated residents (Art. 25); and
9. Expropriation to be performed according to the agreement (Art. 27).

The LAL provides for the expropriation procedure for rural land:

1. The government at respective level is to approve an expropriation proposal according to the nature and size of the rural land to be expropriated (Art. 45);
2. The local government is to announce an expropriation plan (Art. 46);
3. Individuals who have the right to use the land under expropriation are to register for compensation (Art. 46);
4. Local government is to publicize a compensation plan for consultation (Art. 48); and
5. The expropriated rural collective is to publicize the distribution of compensation fund (Art. 48).

## **“Fuzzy” Law, Weak Courts, and Administrative Discretion**

### **Law and Economic Development: A Traditional View**

Chinese law and Chinese economic development demonstrate a unique set of relations. The prevailing view is that Chinese law lags far behind Chinese economic development and that the economy grows in a legal vacuum (Peerenboom 2002). Economic policies are made in response to the global and domestic political and economic conditions, and many of the core policy initiatives lacked the necessary legal support at the time of their implementation, such as the HRS, which allocated agricultural land to individual households in the early 1980s and the auctioning of urban land for development in the early 1980s. Indeed, violation of the Constitution in China is regarded as necessary and even appropriate by the Party and the established legal academia and thus encouraged as long as the violation promotes economic growth. The conventional view is that the Chinese economy could not have grown as it has without disregarding legal rules and rigid regulatory constraints. In that sense, the economy grows in spite of the legal and constitutional limits such that Chinese law retrospectively serves to react to, and affirm, economic initiatives.

### **An Emerging Legal Framework**

Upon closer examination, however, the legal rules and regulatory framework are not as vague and uncertain as many critics have pointed out. Over the decades, Chinese property law has gradually provided a degree of legal certainty and predictability sufficient for economic transactions. For rural land, the Chinese Government has been carrying out the HRS system for more than 30 years and enacted and implemented the Rural Land Contracting Law to secure

households' right of land use for a period of 30 years from 2002 onward (Ho 2005).

As confirmed by the Property Law, the land use right is a proprietary interest that allows the owner to benefit in a variety of ways. Under the current land regime, farmers may contract out the allocated land for agricultural production and may also use part of the land to construct a residential homestead. While householders cannot assign allocated land (Art. 4), they can assign the use right by "subcontract, lease, exchange, or transfer or by other means," as long as the land is assigned for agricultural use and the assignment is kept within the term of the right holder's contract (Art. 34) (Chen 2014).

The legal rules are relatively clear in intra-village land disputes in relation to land use rights. Despite growing urbanization, land disputes among farmers remain a serious concern for the local government. Interestingly, the intensity and frequency of such disputes are largely driven by the employment conditions of migrant workers in cities. When economic conditions improve and the demand for manufacturing labour is high, farmers go to cities to join the workforce (or stay in cities), leaving their farmland unattended. Farmland disputes decline accordingly. Conversely, when China experiences an economic contraction, such as the case in 2008 and 2009, migrant labor returned to their farmland only realizing that their lots had been contracted out by the village authority to other users. Naturally, disputes occur over the use rights of the scarce lots. Other intra-village disputes include land reallocation cases focusing on original redistribution of arable land; transferred land cases that occur when village households unilaterally decide to change the terms and conditions of the contract; and land boundary cases involving the conflict over encroachment of rights among villagers (Whiting and Shao 2014).

A more contentious issue relates to the eligibility of villagers in the distribution of farmland among villagers. Since the size of farmland allocated to each household depends principally on the number of persons in the household, who is counted as a member of the village becomes significant. Despite the clear legal prohibition in land allocation, village authorities are known to exclude female villagers who have married out of the village. It is also commonplace for village authorities to refuse land to women who have married into the village from the outside. The decisions often receive the endorsement of majority of villagers. A special term—"married out women"—is created to capture the particular dilemma that those women face (He 2010).

It is true that some of the related legal rules are in conflict and policy intervention sometimes undermines the proper implementation of legal rules. Nonetheless, the legal framework is largely certain, clearly written, and supported in implementation by meticulously drafted judicial interpretation. Together, they have the potential to provide effective guidance in resolving intra-village land disputes. In Ho's terms, the rural land contracting system is largely credible in the eyes of the farmers (Ho 2005).

Expropriation is a more politically charged and contentious matter, but Chinese law does impose a clear public interest requirement and require proper compensation. In addition, the LAL and the 2011 Expropriation Regulations offer significant procedural safeguards during expropriation, including advance notice, full disclosure of compensation, public consultation, and agency and judicial review. These legal procedures are stated with a degree of clarity and certainty that is sufficient for farmers, and for that matter, judges to rely on. As Cheng has pointed out, Chinese courts, when the political atmosphere permits, are able to rely on those provisions to offer more effective protection for farmers, even though they are not able to stop the expropriation (Cheng

2014). When the CCP or the executive government issues documents to demand better protection of farmers' land use rights, these documents do not create new norms in violation of the existing legal rules. Indeed those documents, such as the famous 2004 "Urgent Notice on Appropriate Resolution of Current Rural Land Contract Disputes,"<sup>4</sup> largely restate legal norms. Policy documents do not create new norms, but rather new mechanisms to enforce existing legal provisions.

Expropriation in urban China is of a different nature and is subject to a different set of rules. The first law was passed in 2001, and its title was indicative of its legislative intent. It was called the Regulations on Demolition and Relocation, depicting an image, as it has happened from time to time, that the government forcefully tears down residential places and evicts the residents. As the title suggested, the law gave wide discretion to the government in the process with little transparency and accountability.

Given the commercial interest and the empowering law, it was not surprising to see the aggressive and predatory expropriation that China has witnessed, and correspondingly the resistance on the part of evictees and a supportive general public (Erie 2007; Pils 2014). With the support of the powerful social media, dramatic resistance took place in different parts of China, which attracted wide international and domestic attention. Under the tremendous pressure of hostile public opinions, the government enacted a new law that provides more clarity in laying out the scope of the rights of evictees and the duties of the government.

A significant reform was the replacement of the Regulations of Demolition and Relocation with the new Regulation on the Expropriation of Buildings on State-owned Land and Compensation Expropriation Regulation in 2011. Again, as the title of the legislation indicates, the new law demands a higher degree of legality and procedural propriety in land-taking. Chen Lei (2014) has made a thorough comparison of the two regulations, pointing out the decisive shift in the objective of the law from facilitating developmental projects to the protection of public interest and individual property rights. There is also a clearer articulation of public interest that warrants expropriation.<sup>5</sup> Another significant change is the requirement that a municipal or country government is responsible for land expropriation. Private developers are no longer allowed to carry out demolition, as was case under the 2001 Regulation. In order to avoid a direct confrontation between the government and the residents, the executive authority is no longer permitted to execute compulsory demolition as formerly permitted in the 2001 Regulation. Under the new law, the executive authority must apply to the court with evidence for a judicial order to initiate expropriation (Art. 28).

## Fuzzy Law in China

While legal recognition of private property right has been a contentious issue in China and the Chinese state offers equal protection of private property with some reluctance and hesitance, there has developed a forceful legislative framework for the protection of private property rights.

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<sup>4</sup> 国务院办公厅“关于妥善解决当前农村土地承包纠纷的紧急通知(2004)“(State Council Office,Urgent Notice on Appropriate Resolution of Current Rural Land Contract Disputes),”No. 21, April 30, 2004.

<sup>5</sup> It includes national defense and foreign affairs; government-led construction of energy, transportation, water conservation, and other public utilities; government-led construction of science, education, culture, health, sports, environmental and resources, preservation, disaster protection and recovery, cultural relics preservation, and other civic utilities; government-led rebuilding of government subsidized housing projects; government-led rebuilding of hazardous buildings and obsolete infrastructure in old rural districts as required by the Laws on Urban and Rural Planning; and as specified by law and regulation and other public needs: Expropriation Regulations, Art. 8.

China's difficulty with private property and its legal protection is no longer due to the lack of clear law, but the political context in which the law is embedded and operates. The existing property regime is built on a one-party authoritarian state with a clear developmental agenda. The predominant state interest is expropriation; the old institutional structure and epistemic settings operate to constrain the role of law and the legal protection it offers. Property law is therefore "fuzzy" in this particular sense (Verdery 1998, 1999). Chinese law is fuzzy because of the "institutional ambiguity" of land ownership and the potential of multiple claimants of the same property with overlapping claim (Ho 2005). It is fuzzy also because of the lack of the routinized rules that are regularly practiced in expropriation and *ad hoc* and informal practice in dispute resolution, as stated below (Erie 2007).

The problem is therefore not so much that the rules are vague and vague law as a result cannot be enforced by courts. While vague law plays into the hands of the executive authorities and allows them to abuse their discretion, a more significant difficulty is the fact that law is not placed at the commanding height in expropriation decision-making and does not control the process. Law is so marginal that its violation is not a major hurdle for the relevant decision-makers. The political context of law is more important than the law itself.

China's polity is decisive in the sense that it is able to make quick policy change on significant social and economic issues with few veto points (see Cox and McCubbins 2001). Power is monopolized in the hands of CCP committees (Lee, Ching Kwan & Yonghong Zhang 2013). In this political system, the secretary of a local Party Committee gains full control of all institutions in the decision-making chain. A decision, once it is made, is not subject to any effective veto. Decision-makers can curb debates, silence dissenting voices, bypass statutory requirements, and fail to inform or misinform the public. Given the lack of effective checks and balances and meaningful external supervision, it is easy to establish a decisive regime.

This does not mean that no formal institutional constraints on the exercise of power exist. Even within the single power, there still exists "parchment division of power." Decisions on certain policies, especially those affecting the general public's welfare, are subject to congressional endorsement, political consultation, expert advising, and public hearing to allow citizen participation. China has in the past three decades designed multiple devices to make the exercise of power more transparent and accountable, in law at least (Yang 2004; Peerenboom 2007). Yet, these new institutional mechanisms do not evolve into effective veto points and can be, and have been, ignored when decisions are made. In promoting China's economic growth, the government has marginalized the social concerns of the people whose land and livelihood would be affected. At a policy level, it is well known that principal local officials are evaluated and promoted according to, first, their ability to promote the local economy and increase gross domestic product (GDP); and secondly, their ability to maintain stability, which economic development requires. Since economic performance provides legitimacy for the authoritarian Party-state, development and stability have been the central task of the regime and the priority of any local government. In this political environment, land becomes a significant source of revenue for the government. The right of ordinary residents to their land becomes a marginal concern, and frequently, the government ignores its own law designed for the protection of those rights, leading to predatory land-grabbing and human catastrophes (Pils 2005).

For the authoritarian decision-makers, those tragedies that land-taking may have caused are temporary, inevitable, and beneficial for national development. As such tragic decisions are made for the national and public interest, they are politically, morally, and therefore, legally

justifiable. Since land belongs to the state, expropriation is justifiable provided it is for the national and public interest.

While the legal protection of property right is growing in response to social protest, it is not forceful enough to make local government officials legally accountable. The listed items of public interest in the 2011 Expropriation Regulations, for example, remain broad and general and are open to interpretation. Without a forceful external power, such as a politically independent judicial system, to assess the public interest and to balance public power and private interests, law alone cannot slow down demolition and relocation.

## A Weak Judiciary

### The Political Context

The judiciary is compliant in an authoritarian state and plays little role in making and reviewing public policies. There is extensive empirical research demonstrating that China has a weak judiciary, which is subject to tight local political control (see e.g. Peerenboom 2002). Politically, the judiciary is an integral part of the local political machinery and is placed under the direct control of the local Communist Party Committee. The Party Committee appoints and controls judges through a political mechanism. Indeed, most of the judges are Party members, and under Party rules, are loyal and accountable to the Party. In terms of their loyalty, judges' fidelity to law is a secondary concern in the decision-making, as will be shown below. Financially, courts in China rely exclusively on local revenue for judges' salaries and their operation; and constitutionally, courts are made directly accountable to the respective people's congresses. The combined effect is that the court has to be sensitive to the social impact of its decisions and responsive to local political demands (Cheng 2014; Fu 2003; Peerenboom 2002).

Given the sensitivity of land and land disputes and the predominant role of the government in policy formulation, courts have played a limited role. The number of land disputes that reach the courts for adjudication is very small. Cheng's (2014) careful search of land disputes in the "China law info," a well-known database, found only 204 cases between 1998 and 2011 relating to expropriation of rural land as provided for in the LAL. Those cases took place after 2004 and were found in different parts of China with drastically different economic conditions. The majority of the cases were civil cases between private parties. Government agencies were defendants in only 35 of the cases (Cheng 2014).

The court played a limited role when adjudicating land disputes. Plaintiffs were much more likely to win in civil cases than administrative cases (Cheng 2014). It seems clear that the court is not in a position to rule against expropriation. According to other research, there is no case in which a court ruled against expropriation on public interest grounds. The only battleground is compensation; the issues relating to appropriation are not justiciable. In making their decisions, the courts examine whether the expropriation followed legal procedures, but do not make adverse rulings against government agencies for violating the procedures governing appropriation or compensation. In cases where rural land is converted for urban uses, the government unilaterally determines the total amount of the compensation and that amount cannot be challenged in the courts. The only issue for the courts relates to the distribution of compensation among different households and individuals. Even on that narrow issue, the court shows great deference to the decision of the respective village authorities (Cheng 2014).

Another key reason courts adjudicate few land-related cases is their reluctance to accept contentious land cases and their ability to avoid accepting cases. It is a well-known practise,

which lawyers have regularly complained about, that given their lack of political clout, the courts regularly turn away potentially sensitive and controversial cases and happily leave those matters to the political or executive organs (Fu 2003). In the infamous example of Guangxi Autonomous Region High Court, the court gave clear instructions to all courts in the region not to accept sensitive cases, including certain land disputes, for adjudication (Whiting and Shao 2014). Cheng (2014) also found that courts routinely rejected claims made by individual farmers on the ground of standing. For the courts, it is the collective, not the individual members in the collective, who owned the land and therefore only the collective, not the individual members, are able to bring a lawsuit to challenge an expropriation.

## Court-based Mediation

Another reason for the apparent lack of adjudication on land disputes is that, since the mid-2000s, most cases in Chinese courts, sensitive cases in particular, settle through court-based mediation. In Chinese courts, legal rules play a limited role only in solving land disputes because of the wide use of mediation (Fu and Cullen 2011; Minzner 2011).

Mediation was well practiced in the Maoist era during three decades of the People's Republic when the planned economy and totalitarian social control made legal institutions redundant. As is well documented, there were ample extra-judicial measures to capture and internalize disputes effectively. Court-based mediation and mediation in general witnessed a sharp decline after China initiated legal reforms in the late 1970s. Mediation experienced a re-bounce in the new century (Fu and Cullen 2011). In 2004, the new government, which came to power at the end of 2002, initiated a new socialist harmonious society campaign. Its essence was to shift the focus from single-minded economic growth to balanced social and economic development that was sensitive to inequality, environment, and other social issues. Translated into judicial policies, the "harmonious society" policies demanded judicial innovations to provide more effective dispute resolution so that a dispute would end when the judicial process concludes. These new initiatives included a diminished use of adjudication and consensus-building among parties in civil justice through enhanced mediation.

The reliance on judicial and extra-judicial mediation reflected a growing lack of faith in the capacity of law to solve growing and intensifying social conflicts. Despite the continuous civil justice reforms, and the drive toward judicial professionalism and the expansion of judicial power, the court system has not proved capable of offering an effective forum for dispute resolution. Facing the rising tide of conflict and disputes, the court system appears to lack both the credibility and capacity to capture and internalize disputes and offer resolution that is accepted as effective and fair.

At the beginning of the new century, there was a large number of disputes surging throughout China, particularly in Beijing. Most of these disputes were law related and had progressed through the legal process or the relevant parties remained dissatisfied with the judicial decision and brought their complaints to political authorities. For the political leaders in Beijing, the decade-long judicial reform not only failed to offer effective dispute resolution, but also may have aggravated conflicts due to the increasing level of bureaucratization and judicial corruption. The adjudicative process and the decisions that came out of that process were not final, were ineffective, and lacked credibility. If the law did not stop litigants and meet the pragmatic, objectives of ending disputes, mediation, which the Communist Party understood, might work.

The 2004 Provisions on Several Issues Concerning the Civil Mediation of People's Court issued by the Supreme People's Court formally signaled an important shift from adjudication to persuasion and mediated settlement. Rules were made to relax the rigid time limit for trials so that judges

were given ample time to persuade parties to settle; it also allows parties to settle at any stage of the trial immediately before the delivery of judgment. The incentive structure, including promotions, has changed in response to the new initiative to compel judges to settle (Minzner 2011).

The initial promotion of mediation was muted and judges were called to mediate in the appropriate circumstances. But the larger political atmosphere was such that courts were losing their limited autonomy and were becoming mere cogs in the larger web of multi-institutional mediation. In the process, the courts gradually gave away the professional identity that they had constructed in the 1990s. Judges were clearly instructed that it mattered little whether judges followed legal or other rules, and it also mattered little whether parties preferred mediation or adjudication. What really mattered was the social consequence of their decisions. The ultimate judicial objective was no longer to uphold the rule of law but to preserve stability and to ensure that cases coming to the courts would end in the courts. In making decisions, Chinese courts are required to consider the social impact of their decisions and the unity between legal reasoning and social impact (Minzner 2011).

In 2007, the Party issued the Three Supremes Doctrines, which became the guiding principles for judicial decision-making. In making a decision, a judge must consider three supreme interests in this order: the Party's Enterprise; Supremacy of the People's Interest; and Constitution and Law. It became clear that the guiding principle for judges is the political agenda of the Party and stability as defined by the Party (Minzner 2011).

## **Grand Mediation**

The weak judiciary reduces the role of formal rules in dispute resolution and allows a high degree of informality in policy implementation and almost unfettered discretion on the part of the administrative authorities. In solving land disputes and other sensitive or collective contentions, the state relies on multi-institutional cooperation and coordinated mediation, referred to as grand mediation, in dispute resolution (Hu 2011).

How does mediation work? First, mediation is official in that it is organized and implemented by state agencies to achieve preliminarily the overriding objectives of the state. In categorizing dispute resolution, the fault-line in China is not between public dispute resolution and private dispute resolution because dispute resolution in private domains does not loom large in the landscape. Rather, it is between judicial mediation and extra-judicial mediation and between geography-based mediation of a general nature and mediation of a specialist nature (such as labor or environment mediation). The point is that China does not develop or promote spontaneous mediation within society and the government does not allow the development of civic social organizations independent of the state to play an active role in settling disputes. With some exceptions discussed below, civil society organizations that capture and absorb disputes elsewhere, such as church or trade associations, simply do not flourish in China's political environment. As a result, organizations that elsewhere play an effective dispute resolution function, such as churches, trade unions, or women's groups, are under tight government control, and the dispute resolution they offer is often, although not always, an integral part of the larger politicized scheme.

Due to the official nature of mediation and the political agenda behind its promotion, mediation is proactive and mediators intervene aggressively to preempt social conflict in a structured and systematic way. Mediators are required to settle disputes that have occurred within their respective jurisdictions so as to prevent the dispute from reaching the higher levels of government for resolution. A dispute that goes out of its immediate jurisdiction for resolution is

regarded as a failure of the respective local authority. Material and other incentives, both positive and negative, are designed to ensure that mediators will do their best to contain local disputes within the same locality (Whiting and Shao 2014).

Because of its proactive and aggressive approach, mediation cannot be voluntary. The parties may at the end of the process agree to a settlement, but this agreement is produced through a heavy-handed approach. Voluntariness has a particularly narrow meaning in Chinese law and practise; as long as the parties consent to an agreement, no matter how reluctant they may be, the process is regarded as voluntary. Indeed, mediators are all encouraged to bring political and social pressure to bear on the parties throughout the process so that they compromise their position and reach agreement. The term "mediation" is not an accurate translation of the Chinese practise because of the aggressive intervention and the resulting lack of autonomy and genuine consent.

Mediation is regarded as more effective in the eyes of the government because it is an open-ended process and not bounded by legal rules. The applicable norms may include legal provisions, but they also include local customary practises or even superstitious beliefs. Local officials recognize, accept, and apply whatever norms to a dispute as long as the officials can end particular disputes. In that sense, grand mediation as practiced in China may operate in the shadow of law, but more often than not, it operates independent of, and in competition with, law. Frequently, grand mediation operates against the law.

Although mediation is officially organized, its operation has a low level of institutionalization, which can be attributed to Chinese pragmatism in social ordering. Simply put, while mediation practise is prevalent, mediation has not evolved into a structured discipline. There are multiple forums for mediation, depending on the type and location of disputes, with different norms applying, different institutions on offer, and different actors in operation. Mediation is regarded as a situational art, something that cannot be learned and is not worthy of learning. Disputes are context specific, involving disputants with different characteristics. Instead of applying general rules, mediators must assess a dispute according to its particular circumstances and invoke a wide range of authorities, to persuade, or compel if necessary, the parties in dispute to reach a consensual decision.

The lack of institutionalization does not necessarily mean that mediation is informal or casual. Given its official and bureaucratic nature, mediation is surprisingly formal in terms of procedures, documentation, and record-keeping. In rural township mediation, for instance, there are standard forms of mediation, and mediators take verbatim minutes of the interviews of the parties involved. All minutes are signed and countersigned with the thumb print of the party affixed at the end of the document. There are, of course, mediation agreements that lay out detailed terms. In sum there is a high degree of formality involved in the mediation process.

Mediation is part of a larger multi-institutional preemptive system designed to capture and end disputes. The Party-state faces diversified challenges appearing in the form of social and economic grievances and has designed multiple preemptive mechanisms to prevent any aggregate effect. Mediation of disputes, especially land disputes that have the potential of aggregate effect morphing into a collective action, is a key strategy of general intervention. It is a duty on the part of all government departments to end disputes as proactively and as quickly as they occur. The state is taking a pragmatic approach in identifying and classifying potential threats and then taking preemptive measures to remove the risk factor. Mediation is an instrument that primarily serves that political function (Fu 2014).

## From Disputes to Protest

While people may not have been satisfied with the court system as it was practiced, this does not necessarily mean the people are satisfied with the alternative. The highly politicized rhetoric, together with its compulsory and unpredictable nature, also deters and frustrates actual or potential users. Although mediation may preempt disputes, it does not offer justice to many. As a result, court cases continue to arise over the years, and despite the criticisms, litigants can claim rights in the court system. But, because of the limited political status of the courts and their lack of capacity and credibility, the courts are also unwilling and unable to play a meaningful role in land dispute resolution.

There is a huge gap between the legal provisions of land rights and the institutional forums on which land disputes can be effectively and fairly resolved. Mediation undermines the legal system and the court-based dispute resolution mechanism, generating more uncertainty and future risk. While effective in suppressing some disputes in the short-term, mediation pushes a large number of disputes to non-institutional forums such as violent self-help and street-based collective action.

First, the Chinese Government, as mentioned above, is decisive in decision-making and there is little accountability in the decision-making process. However, this authoritarian decisiveness does not solve contentions conflicts and it merely marginalizes and backloads difficult issues. A commonly observed irony is that the government encourages citizens to settle their disputes through law, but, at the same time, sets multiple barriers when citizens resort to the law to address their grievances. Because of the lack of accountability in the decision-making process, political and legal institutions that are designed to capture and resolve disputes lack the necessary capacity and independence to solve them, creating institutional barriers that push individuals, whose land was expropriated or whose interests are otherwise adversely affected, to extra-institutional action.

Secondly, frustrated citizens realize that if they can take the matter to the streets and the court of public opinion and if they can speak unequivocally and act collectively and firmly, it is increasingly likely to force the government to take its own law more seriously. In this alternative model of social mobilization, individuals organize themselves and act forcefully and collectively to bring their private grievances to the public attention. In response to the protest, the government is forced to bargain with its opponents and regularly makes certain concessions to the protesters' demand (Keliher, Macabe & Hsin-Chao Wu 2012).

## Informal Negotiations

A large scale empirical study conducted under the auspices of the Chinese Academy of Science<sup>6</sup> (Hurst, Mingxing Liu and Ran Tao, 2010) in 2005 found public participation in solidarity organizations (mass-organizations) had a positive influence over land use cases, reducing the scale of disputes and number of participants in disputes. The study found that clan associations, business associations and other semi-autonomous social organizations with close personal links to village authorities could use their leverage to confer moral legitimacy on village officials who

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<sup>6</sup> The project interviewed over 1,700 people in 121 villages across six provinces in China.

governed well and constrain officials who abused their positions. In return for good governance the semi-autonomous social organizations promoted orderly and contained political action and land protests

In regions where citizens were less engaged in social organizations, officials had few effective external constraints on their behavior. For example, the survey found that most reports about serious breakdowns in social order, large-scale violence or rioting, occurred in Sichuan, which was the province with the least well-developed semi-autonomous associations (Hurst, Mingxing Liu and Ran Tao, 2010, 14). What this and similar studies (Tsai 2007) suggest is that some semi-autonomous social organizations in China are sufficiently independent from local party and state agencies to effectively monitor and check land officials. For example, an old people's association (*Laoren Xiehui*) in Fujian Province organized collective action against the local village authorities. Commencing in 2001, the association sent petitions to local authorities when compensation payments for land requisition failed to reach villagers. Four years later the association organized a series of protests involving 20-30 participants to oppose the establishment of a university campus on village land. When the local government failed to act, the association sent petitions and then visited Fujian provincial authorities mobilizing over 200 protesters. Each protest was carefully calculated to exert enough pressure to prevent the land seizures, but was small enough to avoid exacerbating tensions (Hurst, Mingxing Liu and Ran Tao, 2010, 13).

The semi-autonomous associations managed to prevent land disputes from 'getting out of hand'— and sometimes defused conflict - by representing villagers in negotiations with local leaders, calming tempers and ensuring results in terms of improved governance or services' (Hurst, Mingxing Liu and Ran Tao, 2010 11-12). To perform this 'boundary-spanning' function the associations needed close links with local party and state. They needed inside information to calculate how far they could go in representing their members without crossing the boundary and becoming dissidents.

## **Wukan Village Dispute**

The Wukan village dispute, in which thousands of villagers protested illegal land takings, was reported in newspapers around the world. This case shows when confronted with disputes that have been publicized and politicized, the government then tries to offer a legal solution and bring contentious matters back to the institutional channels. However, as the Wukan protest, law offers a partial solution within the authoritarian context (Lagerkvist 2012; Fu 2013). Legal actions, promised or actual, either stall collective disputes and backload direct confrontations until they erupt again or dissipate them by "releasing steam" among the aggrieved parties.

When Wukan villagers became aware that land was sold without their authorization and without proper compensation, their immediate response was to petition the government to resolve their dispute through institutional channels. Interestingly, no attempt was made to bring the case to the courts, and in the eyes of the villagers, the court system was irrelevant in the particular case. The understanding was that land-taking is a highly politicized issue and can only be resolved through political means. When frustrated with the lack of response from the government, the villagers sought self-help by taking to the streets, which led to a sustained and occasionally violent confrontation with the authorities. Eventually, the villagers forced the authorities to negotiate and make the necessary concessions. Villagers were allowed to choose their own leaders with the expectation that the democratically chosen leaders would perform effectively in seeking the return of the stolen land (Fu 2014).

What is significant about this case is not only the scale of the protests, which amounted to an open insurrection, but also the response by senior provincial officials. After attempting to use police action to repress the villagers, senior party officials in Guangdong Province changed their perspective (Fu 2013). Rather than regarding the villagers as dissidents, the party officials began view the Wukan protest as a result of economic exploitation and political repression of the marginalized peasants. They publically acknowledged the harm caused by rapid market reform and recognised that the Wukan protest was legitimate, since the villagers were merely demanding transparency and accountability and their legal rights to 'know and participate' in village governance as provided by the law (Keliher and Wu 2012; Fu 2013). Villagers sought to protect their economic interests and did not challenge the political system.

The Guangdong government agreed to the villagers demand for free elections with candidates nominated by popular ballot. The villages voted for an Electoral Committee to oversee the election of the Villager Committee. With new local government officials who were directly accountable to the villagers, negotiations regarding land compensation reopened and are currently proceeding smoothly. The Party chief, Wang Yang recently concluded that the Wukan reforms have "set a reference standard to reform village governance across Guangdong".

The reforms offered to Wukan villagers were limited and took place in a larger context, which was hostile to any democratic process. As many of the critics from both left and right have pointed out, the Wukan success only tinkered on the margin of the Chinese authoritarian system and had no impact on the larger political system on which village democracy depends. It is currently unclear whether the Wukan experiment is advancing grass roots democracy in China. The significance of the Wukan incident lies in the fact that it brought life to an electoral system and put a law into implementation. While claiming that the Wukan event is a landmark in developing constitutionalism in China, legal reformers wonder whether that the event can be a catalyst for a new round of political reform, realizing that democratic governance and protest of property rights have long been enshrined in the Chinese Constitution and law. Stanley Lubman (2012) points out that "[t]he protest was resolved, not by law, but by the administrative actions of provincial Party officials". Corrupt officials involved may be punished, but the legal actions "would likely be a *fait accompli* following a prior Party decision on their punishment." It is ultimately the democracy-deficit that is the root cause of the political problem facing villagers in Wukan and elsewhere. What has been, or likely to be, achieved through legal reform may not go beyond the limited existing legal rights without further political reforms. The Indonesian case study provides insights into what can happen once local officials are made more accountable through grass roots political reforms.

Beyond the lack of political reform and its disabling impact on legal institutions, there is the political economy of a developmental state looming large in the background. At the end of the day, the villagers, even behind their own democratically elected leaders, would not be in a position to challenge the logic of the development state, which tips the scale decisively in favor of land-taking for economic growth. The economic logic of the market economy as practiced in China necessitates the continuous expropriation of agricultural land for development purposes. The drive toward privatization creates a high degree of inequality and social tension. The alliance between powerful government officialdom and the resourceful business community has led to both market and governmental failure.

Within this particular political and economic context, villagers can hardly rely on the rule of law to protect their property rights. The villagers could not rely on the domestic media to make their claims because there are no politically independent media organizations; and the villagers could not trust the courts for remedies because there is no judicial independence. The implementation of legal rights takes place within an authoritarian one-party state with authoritarianism. The vast

majority of the advocates and reformers are committed to the “system” and are attempting to reform the law within the existing political and economic framework by demanding that the “system” live up to its rhetoric. While reformers may take the approach of changing the system through piecemeal, incremental, and technical reform and prioritizing rights that are less sensitive to the party-state, the reform rhetoric should not be accepted at its face value—it is embedded in same political and economic context, hence the limit of the model offered by Wukan.

## Conclusion

Land is a scarce resource in China, and land disputes are highly complicated issues that are embedded in a particular social, economic, and political context. These disputes cannot be reduced to clear-cut legal issues and solved by courts. Chinese law, on the surface, may have designed a comprehensive framework and effective procedure to handle disputes, but, given the political economy of land disputes in China, those legal rules are bound to be fuzzy and of limited use in practice.

Authoritarian efficiency defines China’s developmental state, which tolerates or justifies repressive approaches in land-taking for economic development with only marginal regard to the interests of the people and community. State interest predominates in land-takings, and the imperative of economic growth, which necessitates land-taking, overrides the interest of individuals and rural collectives. Within this context, the court is unlikely to play a significant role in shaping the landscape of the land system and land disputes. The role of the judiciary is more likely to be an ameliorative and marginal one.

A decisive system is not necessarily a resolute one, and the Chinese authoritarian effectiveness in land-taking can force people into compliance and silence in the short-term. But, as grievances accumulate, they will generate confrontation and conflict in the longer-term. When that happens, the authoritarian state may have to retreat into the background and allow legal rules and legal institutions to play a more meaningful role. In a transition state experiencing drastic social and economic change, land dispute resolution is bound to be a messy process.

Fiscal reforms have proved more effective than dispute resolution in China because they curb the incentives by local governments to take farmland. The legally-mandated compensation given to villagers is relatively low compared to the land transfer fee that the state charges the end-users of land. This means that compensation received by land users is generally around ten per cent of the entire land transfer fee. The remainder of the fee is retained by central and local governments. Experimental changes that have centralized the land tax systems have removed some of the incentives for local governments to take land to generate revenue.

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# Indonesia Country Case Study

## Introduction

Indonesia is the fourth largest country in the world and the largest country in Southeast Asia. It has a population of approximately 250 million living on more than 6000 islands. Indonesia's land mass of 1.81 million square kilometers is not evenly populated—Java has one of the highest population densities in the world and contains Indonesia's largest cities—Jakarta, Surabaya, and Bandung. Although 50 percent of the population lives in urban centers, large tracts of Sumatra, Kalimantan, and West Papua remain forested and lightly populated. Approximately 26 percent of the land area is classified as agricultural and 49 percent of the land area is covered by forests (Asian Development Bank 2006; USAID 2012 4–5).

At six percent annual gross domestic product (GDP) growth, Indonesia is one of the most rapidly developing economies in the world. The per capita gross national income (GNI) is USD 3,420, making Indonesia a middle-income country (World Bank 2013). As Indonesia rapidly industrializes, less than 30 percent of the population is currently employed in employment, and employment in industry (22 percent) and services (48 percent) is rapidly increasing. From 1980 to 2010, the urban population increased from 22 percent to 50 percent of the population.<sup>7</sup> It is expected to reach 70 percent by 2030, resulting in the conversion of approximately 5000 square kilometers of farmland into urban uses. Like other fast-growing East Asian countries, urbanization and industrialization are placing unprecedented pressure on farmland and forests, giving rise to increasing numbers of land disputes.

Over the last 20 years, the most complex land disputes have occurred where developers take forest land for industrial agriculture, such as palm oil plantations (Bakker 2008; USAID 2012). An estimated 40 million Indonesians live in the forests that are currently under pressure from development. According to the National Forestry Council, conflicts over forest management currently involve nearly 20,000 villages in 33 provinces throughout Indonesia (Butler 2013). The rights to more than 1.2 million hectares are in dispute.

This country case study focuses on two reforms in Indonesia that have been successful in preventing and resolving land-taking disputes. The first set of reforms, which has been labeled grass-roots democracy, includes the decentralization of land-planning powers to provincial and district level governments, coupled with the development of a more democratically responsive and participatory state. The second set of reforms concerns the establishment of a Constitutional Court, which, more than any other state body, has given farmers a forum to rebalance negotiations with government officials and land developers. Before examining these reforms, the discussion first describes the institutional, legal, and political context for land-taking disputes in Indonesia.

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<sup>7</sup> See United Nations, "World Urbanisation Prospects, the 2012 Revision," Population Database, available at <http://esa.un.org/unup/>.

## Political Constitutional Structure

### State Structure

The Republic of Indonesia has four state branches. The executive branch is led by an elected president who controls a cabinet of ministers. The legislative branch is comprised of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR), which acts as the house of review over the president and constitution, while the House of Representatives (*Dewan Perwakilan Rakyat* or DPR) (560 seats) is comprised of members elected to serve five-year terms. The former body formulates and passes most legislation, including the land laws. Below the central level, the 34 provinces are led by elected governors and Regional People's Representatives Assemblies (*Dewan Perwakilan Rakyat Daerah*). These bodies enact local laws governing land management at the provincial level.

Since gaining independence in 1948, Indonesia's judicial system has slowly evolved from Dutch colonial law. Courts follow the civil law system. The Supreme Court (*Mahkamah Agung*) presides over provincial and district courts. Courts have the jurisdiction to hear administrative and civil complaints arising from land-taking cases. Although the Constitutional Court was not established until 2003 (Butt and Lindsey 2009), it has unquestionably had a greater impact in settling land disputes than the mainstream court system. The Constitutional Court has the power to review the constitutionality of land laws passed by the DPR, but it cannot review administrative rulings issued by the president or provincial governments.

### Land Law and Policy

To understand land disputes in Indonesia, it is necessary to explore the country's pluralistic land tenure system. Indonesia is unique in the East Asian region in maintaining parallel *Adat*<sup>8</sup> (customary) and state land tenure systems. As we shall see, many contemporary disputes arise from the intersection of the two systems.

#### ***Pre-colonial land tenure***

Prior to Dutch colonization, the *adat* village system bound communal groups and the land together (Kato 1989). Land occupation rights were created when land users fulfilled social obligations to local nobles (*Agung*) and/or village/family hierarchies. Individual property rights were merged into the community's collective right to use and dispose land. In this pre-industrial society, there was no concept of land as a commodity or the alienation of private property rights from community rights.

Although the precise details of *adat* differed from village to village, there were three main types of land tenure (Kato 1989). *Hakmilik* rights applied to individualized land used by family groups. As families cleared and farmed land, their individual rights increased, whereas community interests became latent, but never entirely disappeared. Since individualized land claims were based on usage, the longer the period of use the stronger the *hakmilik* rights became. If land was left uncultivated, over time it reverted back to community use (*hakuluyuk*). This flexible land tenure system evolved to reflect agricultural practises, which rotated land from intensive

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<sup>8</sup> The term *adat* was originally an Arabic word meaning "custom" or habit that was localized into Indonesian society.

cultivation to periods where it regenerated into forest land. In each village, some land (*tanehkesain*) was reserved exclusively for community use and could not be individualized as *hakmilik*.

### **The Basic Agrarian Law 1960**

Under the Dutch colonial government, European land laws applied to the main cities and provincial towns and to large industrial rubber and sugar plantations. For most Indonesians, the *adat* land tenure system continued with few interruptions. In the newly independent state of Indonesia, colonial laws governing land tenure were prioritized for urgent reform. The major challenge for the new government was reconciling a modern land titling system with the vague and fluid *adat* land tenure system.

Article 1 of the Basic Agrarian Law 1960 (BAL) (*Undang-undangpokokagrari*), Law No. 5 of 1960, declared that the state is responsible for managing land, water, air, and all natural resources. BAL established a vertically integrated set of legal and institutional structures governing non-forest land (Sumanto 2008; Wallace 2008). The National Land Agency is responsible for cadastral mapping and issuing land titles.

BAL attempted to accommodate *adat* concepts with “progressive” social concerns to protect the interests of farmers. Article 33 (Sec. 3) of the 1945 Constitution provides that the “land, the waters and—the natural riches contained therein shall be controlled by the state and exploited to the benefit of the people.” Reflecting this provision, Article 6 of BAL provides that all rights to land have a social function as the provider of food and clothing.

Article 5 of BAL states that *adat* shall form the “basis of the system of land rights for the whole of Indonesia,” provided it is not contrary to other provisions in BAL. In 1967, the government enacted the Basic Forestry Law (Law No. 5 of 1967), which was replaced by a new Basic Forestry Law (BFL) in 1999 (Thorburn 2004). The BFL effectively established a parallel vertically integrated set of legal and institutional arrangements covering forest land. Since 1967, land has been either categorized as forest land, which is regulated by the BFL, or non-forest land, which is regulated by BAL.

### **Conflict between State Land Law and Adat**

Article 3 of BAL recognizes communal *adat* land rights, known as *hakulayat* (Sumanto 2008). *Hakulayat* is a legal term denoting communal rights of a (ethnic) community to land based on *adat*. Since communal rights require a community-designated leader and territory controlled by *adat* (*masyarakathukum Adat*) (*Adat Law Society*) (see Arts 2(4), 3 of BAL), communal rights no longer apply in urban and peri-urban areas where villages have been subsumed into the fabric of cities. Further limiting *adat*, BFL 1967 claimed all forest land for the state and eliminated customary rights for those Indonesians in remote areas who were most likely to practice *hakulayat* and other forms of *adat* (Bakker 2008). As we shall see, the Constitutional Court has recently wound back state rights over customary forest land.

BAL and BFL had two dramatic effects on *adat* land claims. First, they froze the creation of new *adat* land (Sumanto 2008). Secondly, under the doctrine of eminent domain, they claimed all *hakuluyuk* for the state. This meant that, from the enactment of BAL and BFL in the 1960s, all unused *adat* land was considered state property. The population of Indonesia has increased by 74 percent since 1960, but until a recent Constitutional Court ruling discussed below, forest land (*hakuluyuk*) could no longer become individualized and converted into *hakmilik* land titles. In sum, the individualized, exclusive land tenure rights created under BAL and BFL were

insufficiently flexible to accommodate the fluid relational rights underpinning *adat* tenure (Fitzpatrick 2008; Lindsey 1998).

### ***Land-taking powers***

Article 18 of BAL empowers the state to revoke land rights for the public interest—a concept that is defined to include the interests of the people and state. By law the state must pay adequate compensation. In practise, levels of compensation paid by the government are low and highly arbitrary, and the regulation does not require payment of compensation to land users lacking documentary land titles (World Bank 2007). More recently, Law No. 2 of 2012 on Land Procurement for Development in the Public Interest now clearly requires the state to “balance the interests of development and the interests of the public.” It also explicitly requires the state to pay compensation that is “reasonable and fair.”

### ***Land tenure rights recognized under BAL***

BAL recognizes four main types of land tenure:

1. *Hakmilik* (right of ownership) is unlimited in duration and is capable of being transferred and mortgaged;
2. *Hakpakai* (use right) applies to possessory rights that are limited in duration;
3. *Hakgunausaha* (right to exploit) is a long-term agricultural commercial right; and
4. *Hakgunabangunan* (right to build) grants long-term (70 years) rights to construct and use buildings.

## **The New Order Regime: Authoritarian Land Governance**

The New Order regime under President Suharto (1967–1998) was unsympathetic to land reform issues and did little to implement BAL. After 50 years, less than 30 percent of land has been converted into BAL titles, because the procedures were complex and expensive and conveyed few tangible benefits to land users (Lindsey 1998; Fitzpatrick 2008). Title by registration did not connect to the fluid nature of interests in *adat* land and created artificial distinctions between individual control and communal land. Under current land titling practises, it will take 60 years to register all land titles (USAID 2012).

Throughout the New Order regime, law and courts played a very limited role in resolving land disputes (Asian Development Bank 2006; Linnan 2008). Rather than emphasizing private property rights, the policy of *Hukum Negara* (State Law), promoted by the New Order regime, subordinated law to executive power. This highly nationalistic legal doctrine (Bourchier 2008) permitted the president and other senior officials to justify state policy and law by referring to vague notions of village-life. In practise, the president governed through executive orders, and the legislature and courts were stripped of powers to oversee government action.

Developers with connections to the president were given “control” over forest areas (*adat* land) (Hapsari 2011; McCarthy and Moeliono 2012). The Ministry of Forestry (MoF) oversaw a system of enclosure and land conversions that involved excising areas out of the “forestry estate” for private developers. Developers were given long-term leases for the forest land, which could be used for industrial agriculture or on-sold for profit.

Families who had occupied land for generations usually could show payment of land taxes or produce other documents proving that they or their ancestors purchased the land. They were relatively secure from land grabs even without formal BAL titles. People claiming rights over *hakulayat* forest land, in contrast, had almost no tenure security.

## The Reformasi Period (1998 to present)

When President Suharto was removed from office in 1998, and *reformasi* (reform) took hold, farmers began to express their discontentment about land-takings. They not only wanted more say over future land projects, but also wanted to revisit past projects in which state coercion had been used to secure unfair compensation and resettlement deals. As it turned out, the Suharto Government's failure to consult fairly with farmers pushed grievances underground, where they intensified and became increasingly violent and difficult to resolve. It is estimated that at least 1500 major land conflicts remain unsettled from the Suharto period (USAID 2012).

Two key reforms that began during the *Reformasi* era in the late 1990s have improved the opportunities for land users to resolve land disputes. First, grass-roots democracy reforms have decentralized land administrative powers to provincial and district level governments, increased democratic accountability, and relaxed state controls over community organizations. The second key reform introduced a Constitutional Court, which has given land users a means of challenging legislation that unconstitutionally limits land rights.

## Grass-roots Democracy: A Promising Approach to Land-taking Disputes

This section outlines the development of a cluster of reforms that have been labeled grass-roots democracy. It is argued that, working together, these reforms have increased the opportunities for *adat* land users to negotiate equitable compensation deals with developers taking *adat* land.

After decades of authoritarian and centralized rule, a key *reformasi* project aimed to empower citizens at the provincial level (Asian Development Bank 2006; McCathy and Moeliono 2012). Laws No. 22 on Regional Autonomy 1999 and Law No. 25 on Intergovernmental Fiscal Relationships 1999 provided the framework for political and legal decentralization. Provincial and city governments gained new responsibilities to plan and manage financial resources (Bakker 2008). Land affairs were among the responsibilities devolved to the regional government under Law No. 22 of 1999 (Bakker 2008). As we shall see, the laws gave local *adat* communities more control over land—in the process significantly reducing the number and intensity of land disputes in Indonesia (McCarthy 2007; Bakker 2008; Bakker 2012).

New practises such as participatory planning, budget management, and consultations in civic forums gave citizens more say during the planning processes before major projects commenced (Bakker 2012). For example, Article 111(2) of the Regional Autonomy, Law No. 22 of 1999 (RAL), states that all district regulations must take the rights, origins, and *adat* traditions (*hak, asal-usul, dan adat-istiadat*) of villages into account. This provision significantly improves the ability of traditional village authorities to advance *adat* claims to land.

Further increasing the power of *adat* communities, Articles 56 to 67 of Law No. 32 of 2004 gave villagers the right to elect regional heads. This reform has made local authorities more responsive to community-based electors and local social and economic concerns. The government issued two regulations in 1999 (Presidential Regulations No. 1 and No. 5 of 1999),

which established guidelines for the settlement of communal land rights disputes. A case study about community consultation in East Kalimantan illustrates the importance of these reforms.

### **Case Study: Grass-roots Democracy in East Kalimantan**

During the Suharto regime, large-scale industrial plantations were carved out of the East Kalimantan forests. The plantations were financed by associates of the president. As previously mentioned, although BAL recognized *adat* land interests, under the eminent domain doctrine, forest land could be taken by the state without paying land users full compensation. Protests by local farmers against the appropriation of their land were suppressed by the police, but local resentment grew with every new national development project (Bakker 2012).

In the Paser region in East Kalimantan, industrial corporations lodged claims with the provincial government to clear large areas of *adat* forest land for palm-oil plantations. *Adat* communities challenged the validity of state law, by pointing to their historic use of *adat* land. As one farmer put it: "our *adat* was even respected by the Dutch colonists when they came here, and now our own government is telling us that it is no longer valid? Nonsense." (Bakker 2010: 6; Bakker 2012). Another argued: "Of course the land is mine, the government just does not recognize it." (Bakker 2010: 14).

#### ***Elected officials are accountable to voters***

To challenge the palm-oil plantations, small-scale *adat* farmers needed to advocate their case to government negotiation teams (*pertanahan*) responsible for resolving land conflicts (Presidential Regulation Nos. 1 and 5 of 1999). Since grass-roots democratic reforms were introduced, local officials are now more receptive to pressure from *adat* communities. For example, Ridwan Suwidi was elected district head of Paser in 2005 on a platform of strengthening *adat* land rights in regional policies. "One of Suwidi's main election promises had been to increase the overall wealth of the district's population and improve the living conditions of the population at large, but especially those of the 'common people.'" (Bakker 2010: 15).

#### ***Facilitators and mediators***

Another important factor in improving the position of farmers is the appointment of intermediaries who can negotiate with government officials and land developers. A survey about forest disputes found that success is closely related to the capacity of facilitators and mediators to negotiate outcomes (Zazali 2012). Facilitators who could reconcile the different conceptual approaches of the farmers, developers, and government officials were the most successful in bringing the parties together.

Reforms that relaxed controls over the formation of non-government organization (NGOs) have significantly improved the facilitation and mediation of land disputes. NGOs have sprung up to represent many different aspects of social life in Indonesia, including the interests of *adat* communities (Bakker 2010). Some of these NGOs are closely connected to particular *adat* communities and play an effective role in promoting consultation and mediation. According to commentators, NGOs facilitate negotiations by informing government negotiation teams (*pertanahan*) about the validity of *adat* land claims. Organizations, such as *Lembaga Adat Paser* (Foundation for Adat in Paser), are capable of fielding articulate and well-respected facilitators and mediators. Others perform a "boundary-spanning" function in linking *adat* groups with state regulators. They function like the quasi-autonomous associations discussed in the China case study, in moderating the behavior of state officials.

## **Case Study: Land Dispute Lubuk Jering and PT. RAPP Pulpwood Plantation**

### ***Dispute background***

Farmers and developers in Pekanbaru, Riau Province, Sumatra, invited the Indonesian NGO Scale-Up to resolve an on-going land dispute (Scale-Up 2010). A conflict developed between Lubuk Jering villagers and the pulpwood plantation company PT RAPP over community forest land (*hakuluyuk*) (23,000 hectares) taken by the Ministry of Forestry for an industrial pulpwood plantation. The farmers claimed that PT RAPP's concession took customary forest land that they inherited from their ancestors. Farmers could point to several old cemeteries as evidence of long-term occupation of the land.

The conflict between Lubuk Jering and PT RAPP reached a peak in 2006 when construction of the plantation began. The villagers organized a series of protests and released a statement conveying their opposition to the plantation. When petitioning did not work, the villagers staged street demonstrations and blockaded a road to the plantation site. Negotiations sponsored by Scale-Up began in January 2007 and were completed in November 2008 when the villagers and PT RAPP agreed that Lubuk Jering would be recognized as the owner of 1,024 hectares of the 1,627 hectares of disputed territory.

### ***Factors facilitating dispute resolution***

The consultations began with each side making a mutual agreement to respect each other. This commitment facilitated transparent communication and information flows between the two parties and with other stakeholders. It also built a commitment to fair and transparent outcomes and pressured the parties to avoid one-sided, manipulative, and coercive tactics.

The parties were allowed to appoint their own representatives for the negotiations. This marked an important break from the standard negotiation model supported by the National Land Administration and provincial governments, whereby only community officials are appointed to represent farmers (Sumanto 2008). In this case, the village representatives were appointed by a community-wide meeting and decision-making process (*Musyawah*). Villagers appointed 11 representatives from the village government, youth, spiritual leaders, customary leaders, and other informal leaders. PT RAPP established a negotiating team drawn from its staff.

Before negotiations commenced, the representatives met with the Scale Up mediator to agree on a "roadmap" to resolve the dispute. The roadmap involved several phases—identifying each other's claims and concerns, ensuring that each side agreed about the facts of the disputes, followed by negotiations and finding consensus. Reports prepared by independent specialists from Riau Islamic University were used to establish commonly agreed facts about the case. An economic feasibility study was used to define the compensation formula. During the negotiations, each side took suggested decisions back to their constituency for approval, and no decisions were made without this approval process.

### **Summary: Grass-roots Democracy**

The success of grass-roots democratic reforms is revealed by a recent survey about the outcomes of land disputes in East Kalimantan (World Bank 2006). It found that an average of 94 percent of households displaced by forest developments had received compensation, as compared to only 1 percent before reforms. This difference was attributed to the improved capacity of *adat* farmers to consult and mediate with developers.

In the post-Suharto period, the land tenure system still enables developers to displace *adat* landholders. What has changed is that grass-roots democratic reforms have made provincial and district leaders more sensitive and responsive to the interests of *adat* farmers. Naturally, democratic reforms have not removed corrupt incentives, and issuing permits for plantation or mining activities remains highly lucrative for malfeasant government officials (Hapsari 2011). Nevertheless, in a democratic environment, regional governments are now aware that they need popular support to govern effectively. The government has become susceptible to claims for land justice, especially those organized and supported by NGOs and *adat* organizations. The government remains the authority controlling state land law as well as—to a large extent—*adat*, but the law is no longer there for the exclusive benefit of the politically connected elite.

In short, the land law has not changed substantially in the post-Suharto period, but what has changed is the political representation of *adat* communities and their capacity to consult and negotiate with government officials. This rebalancing of the power relationship between local government and land users would not have been possible without the emergence of local NGOs, which are capable of representing the interests of local land owners. Unlike in China, where semi-autonomous organizations are only effective where they have developed informal linkages with party and state agencies, the legislative framework in Indonesia gives NGOs autonomy to monitor and check the exercise of state power to ensure that land development takes into account the interests of land users. Far from blocking development, as some Indonesian critics of *Reformasi* predicted, *adat* communities generally welcome development provided they share some of its benefits.

## **Constitutional Courts: Giving the People Power to Review Land Policy**

Complementing grass-roots democracy, the Constitutional Court has significantly reduced land disputes. The court's intervention into this politically contested space is remarkable given that the mainstream court system in Indonesia is widely regarded as politically supine and corrupt (Pompe 2006).

*Reformasi* legal reforms aimed to change *negarahukum* (state law) by introducing institutional checks to prevent the accumulation of power in the presidential and executive branches of the state. Constitutional amendments in 2002 introduced a type of "rule of law" based on constitutionalism (Lindsey and Santosa 2008). A key aspect of this reform was the establishment of a constitutional court with powers to review the constitutionality of state legislation. The Constitutional Court was formed in 2003 as a separate agency from the main court system (Butt and Lindsey 2009). To avoid importing the corrupt judicial culture from the mainstream court system, judges for the new court were largely recruited from outside the judiciary.

From its very first case, the Constitutional Court actively interpreted the Constitution, paying particular attention to the Constitution's spirit—the rule of law and the state's obligation to "protect the people" (Butt and Lindsey 2009). In the process, the court has "uncovered" new constitutional principles, citizens' rights, and state obligations—a bold step, especially in a country with a conservative and subservient mainstream judicial system.

### **Land Cases in the Constitutional Court**

Over the last five years, NGOs have filed many petitions with the Constitutional Court challenging legislation and regulations relating to land and natural resources. The court's decisions in these cases have radically improved the bargaining power of *adat* landholders in

disputes with developers. More than decades of legislative reforms, they have given poorer households more security over land tenure.

### **Case Study: Constitutional Court Ruling No. 45/PUUJIX/2011 in Relation to Forest Lands**

In a recent landmark decision, the Constitutional Court ruled in decision No. 45/PUUJIX/2011 (MK45) that provisions in the Forestry Law 1999 that gave the MoF powers to take forest land without paying compensation were unconstitutional (Wells et al 2012). This decision was the first step in allowing *adat* farmers to gain tenure rights in customary forest areas.

The plaintiffs argued that Article 1(3) of the Forestry Law, No. 41 of 1999, which defines the process by which Indonesian Forest Zones (*Kawasan Hutan*) are established, was unconstitutional. They complained that many administrative districts (*Kabupaten*) where hundreds of thousands of people lived had been designated as *Kawasan Hutan*, leaving the people dependent upon the MoF for permission to undertake development activities.

The Constitutional Court accepted the plaintiffs' argument that Article 1(3) of the Forestry Law violated their constitutional rights, including Article 28G (rights to protect self, family, honor, dignity, and assets) and Article 28H (property rights and rights against arbitrary acquisition). The plaintiffs claimed that, under Article 1(3), the MoF could "designate and/or gazette" forest zones. A designation is a simple administrative procedure that does not necessarily take into account the interests of the people living in forest areas. The court ruled that the word "designate" should be removed from Article 1(3), requiring the MoF to gazette land, a more formal legislative process that required them to consult with the provincial and district level authorities representing *adat* communities.

The court gave the following reasons for this decision:

- Since Indonesia is a country ruled by law, an officer of the state must act in accordance with laws and regulations.
- Procedures that establish forest zones without consulting stakeholders constitute authoritarian government and are incompatible with the Constitution 1945 (as amended). The determination of the boundaries of forest zones influences the lives of many people and should not be created solely through designation without gazetting.

In changing the relationship between the MoF and local governments, the decision gives *adat* land users more input over the use of forestry land. The decision stopped short of giving *adat* land users tenure rights in forest land.

### **Case Study: Constitutional Court Ruling No. 35/PUU-IX/2012 in Relation to Forest Lands**

Further improving the rights of *adat* land users, the Constitutional Court decided in May 2013 to limit state ownership over customary forest land (*hakulayat*) (Butler 2013).

The Alliance of Indigenous Peoples of the Archipelago (AMAN) filed a judicial review with the Constitutional Court in March 2012. AMAN argued that the MoF had not complied with Article 3 of the Forestry Law, which states that "Forest management shall be aimed at providing maximum prosperity for the people based on justice and sustainability." Contrary to this provision, they accused the MoF of violating the rights of indigenous peoples by transforming

customary forests into state-controlled lands. The complaints focused on concessions granted to developers to establish plantations and/or construct mines in areas designated as forest zones.

The court eliminated the word “state” from Article 1F of the Forestry Law 1999, which previously declared that “customary forests are *state* forests located in the areas of custom-based communities.” The new provision revives customary adat claims over forest land that was extinguished by Forest Law in 1967. Article 5 of the Law was also amended to say that state forests include customary forests.

Justice Muhammad Alim concluded that:

Members of customary societies have the right to clear forests belonging to them and use the land to fulfill their personal and family needs. The rights of indigenous communities will not be eradicated, as long as they are protected under Article 18b of the Constitution (Court Ruling No. 35/PUU-IX/2012).

Following this case, NGOs supporting *adat* farmers have urged provincial and district governments to issue permits to formally acknowledge customary *adat* claims over forest land. In the future, the MoF cannot grant development permits in areas classified as customary forests without first conducting a Free, Prior Informed Consent (FPIC) process. This process will give *adat* farmers a more secure basis for negotiating fair compensation with developers.

In summary, the Constitutional Court rulings have significantly improved the tenure rights of adat farmers using forest land. Prior to these rulings, the MoF had power under the Forestry Law to designate an area as a forest zone and displace pre-existing adat claims to the land. After the rulings, the MoF must negotiate with the land users claiming customary rights over forest land. Adat farmers now have more say in what lands are taken for development and can compel developers to negotiate more equitable settlement packages.

## Conclusions

The central message from the Indonesian case studies is that land disputes are most effectively resolved where developers, government, and land users can exchange ideas and negotiate on a relatively equal footing. *Reformasi* has incrementally increased the legal and political rights of land users and in the process more equitably rebalanced the interests of government, developers, and land users. What this suggests is that legal reforms that clarify land use rights and establish “best practice” dispute resolution forums are insufficient on their own. Further political and institutional reforms are required to level the playing field between land users and powerful government officials and developers.

The reforms in Indonesia show that there are two different ways of leveling the playing field: grass-root democracy reforms and well-resourced politically independent courts.

There are four core components to grass-roots democracy reforms:

- Decentralize power over land planning to provincial and district level governments.
- Strengthen local elections to make officials accountable and responsive to local voters.
- Relax controls over the formation of NGOs that represent local communities.
- Allow NGOs to monitor and check the exercise of state power to ensure that land development takes into account the interests of land users.

The case studies suggest that all of these reforms are necessary before land users can effectively engage with government and developers. Decentralization coupled with grass-roots democracy

makes local officials responsible for land planning and more accountable to the needs of local people. The emergence of autonomous NGOs was another vital reform. NGOs not only enable land users to mobilize resources, but also act as “boundary spanners” in communicating the complex issues surrounding land disputes in a mutually comprehensible language and idioms. These actors are constrained in authoritarian polities, such as pre-*reformasi* Indonesia and contemporary China.

The establishment of a strong independent Constitutional Court gave the people of Indonesia a forum where the Constitution and law could level the playing field between land users, government agencies and developers. Although the Constitutional Court has not intervened in particular land conflicts, it has consistently interpreted BAL and the Forestry Law to rebalance the equation in favor of small-scale land users.

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# Cambodia Country Case Study

## Introduction

With a population of 15 million, Cambodia is one of the smallest countries in Southeast Asia. Most people live in rural villages, and less than 20 percent of the population reside in cities—one of the lowest levels of urbanization in the region.<sup>9</sup> Cambodia has a youthful population, and more than 50 percent of its people are less than 25 years old. Rapid population growth and rural migration are increasing urbanization levels, which are expected to reach 35 percent by 2030 (Khemro 2006). As in other rapidly developing East Asian countries, urbanization and industrial development are placing pressure on farmland, although forests still cover 50 percent of the landmass.

Over the last decade, Cambodia's economy has been growing on average at 6 percent gross domestic product (GDP) per annum (World Bank 2013). Despite this steady economic progress and the significant reduction in poverty levels, per capita income remains low. Cambodia is classified as a low-income country (World Bank 2013).<sup>10</sup> Most farmers are engaged in subsistence agriculture, and there are high levels of landless rural workers (estimated at 20 to 30 percent of the rural population) (USAID 2011). Industrial development is largely confined to labor-intensive textile and clothing industries, and over 70 percent of the population earn their livelihood from the land.

The Cambodian case study demonstrates that well-drafted land tenure laws cannot resolve land disputes without competent, independent, and transparent legal institutions. Over the last decade the government has enacted one of the most sophisticated land tenure frameworks in the region. At the same time legislation has clarified and strengthened land tenure rights, the number and intensity of land-taking disputes have continued to increase.

Since the mid-2000s, the largest and most hotly contested conflicts have arisen over land taken for industrial agriculture. Recalling the land concessions granted during the French colonial period, the government allocated large areas of fertile agricultural land—2.2 million hectares constituting 10 percent of the landmass—to domestic and foreign investors in the sugar and other agro-industries (Brinkley 2013). The United Nations Capital Development Fund (UNCDF) estimated that in 2010 as much as 30 percent of Cambodia's privately held land was owned by only 1 percent of the population (UNCDF 2010). This has led to high levels of social inequality with the Gini coefficient rising in Cambodia from 0.35 in 1993 when land concessions began to 0.43 in 2012. It is now one of the most unequal societies in East Asia (World Bank Data 2013).

In 2010, there were 282 officially recognized unresolved land disputes affecting an estimated 220,000 people (Neef and Siphath 2012). Farmers displaced by land concessions have been unable to claim just compensation through formal state institutions, such as the Cadastral Commission and the courts, and have turned instead to public protest to voice their grievances. As domestic institutions failed them, farmers looked to non-government organizations (NGOs) for support. Currently, the NGOs have taken the land disputes off-shore and are using courts in the United

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<sup>9</sup> United Nations World Urbanization Prospects, available at <http://esa.un.org/unup/>.

<sup>10</sup> The per capita gross national income (GNI) is currently USD880.

Kingdom, as well as transnational codes of business practise to pressure land developers to negotiate with the farmers.

## Political and Constitutional Structure

After two decades of conflict and civil war, the Paris Peace Agreements in October 1991 launched Cambodia onto the road to reconstruction (Brinkley, 2011). With United Nations' support, the first national elections were conducted in May 1993. The elections established a constitutional monarchy with King Norodom Sihanouk as first head of state. King Norodom Sihamoni is the current head of state.

### State Structure

The Kingdom of Cambodia functions as a constitutional monarchy with the king as head of state (Brinkley, 2011; Kong 2012). State powers are divided among three state branches. Legislative power is vested in the National Assembly and the Senate. The National Assembly functions as a lower house and proposes laws and enacts the constitution (Arts 90–93). The Senate functions as an upper house and reviews legislation passed by the National Assembly (Art. 113 of the Constitution 1999). Delegates in the National Assembly and senators in the Senate are elected by national elections held every five years.

Executive power is exercised by the Royal Government. This body formulates state policy and issues the decrees that implement laws passed by the National Assembly and the Senate. The Ministry of Interior is responsible for administering provinces, districts (*srok*), and communes (*khum*). There are currently 24 provinces and four municipalities (Phnom Penh, Sihanoukville, Kep, and Pailin). The Ministry of Land Management, Urban Planning and Construction, discussed below, regulates the land administration system.

The Supreme Constitutional Council, formed in 1998, advises the king on constitutional change and also interprets the constitutionality of legislation (Constitutional Council 2009) (Art. 136 of the Constitution 1999). It provides constitutional rulings to the courts, but citizens cannot bring cases directly to this body. Unlike the Indonesian Constitutional Court, this body has played no part in resolving land taking disputes.

Judicial power is exercised by the Supreme Court, which presides over the Appellate Court and provincial and district level courts. The Appellate Court reviews both *Ang Het* (matters of fact) and *Ang Chbab* (matters of law), while the Supreme Court hears only *Ang Chbab* (matters of law) (Kong 2012: 11). Members of the Supreme Court and Constitutional Council are recommended by the Supreme Council of Magistracy, a nine-member body chaired by the king and including high-level judicial officers.

As Phallack Kong (2012: 8), an eminent Cambodian legal scholar, has observed:

The current legal system is a hybrid legal system, which is an amalgamation of Cambodian customs, the French based legal system (an influence from French colonization), and the common law system, which is an influence arising from foreign aid assistance to legal and judicial reform in Cambodia.

## Constitutional Development

The Constitution 1993 (amended 1999) established a liberal democratic state (Hor, Peng 2012). Article 1 of the Constitution 1993 provides that the country shall be ruled “according to the Constitution and to the principles of liberal democracy and pluralism.” Article 31 goes on to provide that “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights.” It also stipulates that the legislative, executive, and judicial branches of government shall be separate. Furthermore, all Khmer citizens possess the right to establish associations and political parties. In short, the Constitution 1993 provides all the ingredients of a rights-based liberal regime.

Cambodian constitutional scholars argue that many of the liberal democratic principles found in the Cambodian Constitution 1993 were borrowed from Western constitutionalism (Peng 2012). They claim that these principles are often disconnected from the political elites and the personal patronage networks surrounding the Cambodian People’s Party, which governs Cambodian society (Hughes 2012: 273–278). Rather than laws, legal institutions, and property rights allocating resources, it is extra-constitutional personal connections that regulate resources (Ricigliano 2009: 9–19). It will take time, they argue, for imported legal principles to work their way into the political and legal fabric of the nation. During this transitional stage, the liberal ideas will change to reflect local precepts and practises, and it is unrealistic to expect Cambodian constitutionalism to closely resemble the regulatory systems found in mature western states. This uncertain application of liberal constitutional principles contrasts with the rapid and broadly based liberal constitutional reforms introduced into Indonesia during the *reformasi* period.

## Land Laws and Administration

### History of Land Tenure

Cambodia’s changing political regimes have each left their mark on the land tenure system. Cambodian people traditionally believed that their land was owned by the “Land Protector” or “Machas Tek Machas Dey”, who is both the owner and protector of the land (Hel 2012). Land occupants were expected to fence and maintain land and could lose ownership rights by abandoning possession of land.

Formal land management and administration began in Cambodia under the French Protectorate (1863–1953) (Hooker 1978). The first Land Decree in Cambodia enabled colonial authorities to grant “unoccupied” land to concessionaires, provided cultivation began within three years (Slocomb 2007). As Slocomb (2007: 18f) notes: “[t]he land concession system was arguably the most blatant expression of colonial power in French Indochina, a blunt instrument wielded for the single-minded ambition of capital.”

Article 644 of the Civil Code of 1920 defined land ownership as the “use of land without interference” (Hel 2012). The French colonial authorities developed an extensive cadastral system and introduced title by registration. By 1925, 105,000 hectares of land concessions had been awarded to rubber companies in Cambodia and Southern Vietnam (Cochinchina). The colonial land laws applied to the main urban centers and to industrial plantations (Hooker 1978). For most of the rural population, customary land systems continued to apply.

The colonial land system continued to function for some years after independence in 1953. However, due to increasing political instability, the land management system began deteriorating from 1970 to 1975. Under the Pol Pot regime (1975–1979), not only were private property rights abolished, but also all cadastral records, including cadastral maps and land titles, were destroyed (Hel 2012). Professional staff working in land law and land management, registration, and surveying were re-deployed to the countryside, left the country, or were executed.

From 1979 to 1989, the State of Cambodia modeled its legal system, including the land laws, on the Vietnamese legal system (Kong 2012). The “people” owned the land, which was managed by the state. Citizens had rights to occupy and inherit but not sell land. Agricultural land remained under collective ownership.

With the formation of the State of Cambodia in 1989, the government re-introduced private property rights for home ownership (Hel 2012). In order to strengthen the legal foundations of land ownership, the government issued Decree No. 100 KR on Land in 1992. The Decree extended ownership to land for housing, but farmland could only be possessed temporarily.<sup>11</sup> It was not until the Constitution 1993 that private ownership of land gained full recognition with rights to sell, dispose, lease, and mortgage land (Hor 2012). By this time, the de-collectivization of cooperative farmers had been completed.

At the same time, the government re-established concessionary rights for industrial plantations of more than 5 hectares. By 1993, the government had established more than 30 forestry concession zones covering about 6.5 million hectares and privatized those zones for exploitation (Neef and Siphath 2012).

### ***The Land Law 2001***

The Land Law 2001 continued the incremental progression toward the individualization of property rights in Cambodia (Thiel 2010).<sup>12</sup> It stipulates three types of ownership of land: private, public, and collective ownership. There are two aspects of public ownership that are relevant to land-taking cases (Hel 2012). First, public land cannot be sold to private entities. It is estimated that the government holds about 75 to 80 percent of the country’s territory under the status of “state public land” (USAID 2011). Secondly, the state can privatize public land, which can then be sold to private investors. It is this capacity to convert public land into private land that animates the most hotly contested land concession disputes.

The Land Law 2001 also settled the longstanding problem of determining when farmers could claim private ownership over de-collectivized farmland. Since the Khmer Rouge destroyed the land records, few farmers could provide documentary evidence to back up land claims. To resolve this problem, the Land Law 2001 allowed farmers to claim ownership where there has been uncontested occupation for five years.

### ***Land concessions***

A key aim of the Land Law 2001 was to establish a secure property right system as a means of stimulating economic development. Sub-Decree 146 on Economic Land Concessions (RGC 2005)

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<sup>11</sup> Article 19 of Decree No. 100 KR on Land 1992.

<sup>12</sup> Royal Krom No. NTS/RKM/0801/14 promulgated the new law.

gave the government wide-ranging powers to effectively privatize public land by granting Economic Land Concessions (ELCs) to private developers. As the case study discussed below demonstrates, the ELC regime did not result in an even playing field for Cambodian entrepreneurs. On the contrary, it has concentrated land in the hands of a few corporations, while the farmers whose land had been taken for the ELCs have been unable to use legal institutions to press their claims for equitable compensation.

### **Land administration**

The Ministry of Land Management, Urban Planning and Construction (MLMUPC) has a wide mandate to manage land in Cambodia. It operates through four general departments: General Department of Land Management and Urban Planning, General Department of Construction, General Department of Cadastre and Geography (GDCG), and General Department of Administration. The GDCG is responsible for land registration and land administration, geodetic and cadastral surveying, mapping, and property valuation. Land registration, the administration of land transactions, and land use planning take place in the provincial and district branches of the MLMUPC.

In the early 1990s, the government began a campaign to register private land titles. After 10 years, only around 550,000 land parcels were registered. In 2002 the Land Management and Administration Project (LMAP), with World Bank backing, set out to register the remaining untitled property parcels. Originally planned to run for five years, the LMAP began encountering problems in 2008. The World Bank complained that the project was deliberately avoiding issuing land titles to farmers residing on public land that was slated for ELCs. The Bank claimed that this policy left farmers without land titles and recognized rights to compensation for the land taken for ELCs (Hughes 2012: 277–278).

## **Formal Mechanisms for Resolving Land Disputes**

The Land Law 2001 provides three mechanisms for resolving land disputes:

- case-by-case resolution;
- mediation through the Cadastral Commission and the National Authority for Land Disputes Resolution; and
- court resolution.

### **Case-by-case Resolution**

The Ministry can establish a commission to resolve a large-scale and complicated land dispute. The commissions are required to resolve the disputes through consultation or mediation. Where amicable solutions cannot be found, disputes are referred to the MLMUPC.

### **Resolution by the Cadastral Commission**

Disputes concerning unregistered land must be sent to the Cadastral Commission and National Authority for Land Disputes Resolution at MLMUPC. Article 47 of the Land Law 2001 clearly stipulates that disputes between land users shall be investigated and resolved in compliance with the determined procedure. The Cadastral Commission at MLMUPC is required to base its decisions on the evidence gathered during the investigations.

As the case study discussed below suggests, the commission has been unable or unwilling to provide determinations in the sensitive cases involving large-scale ELCs.

## **Courts**

Inter-Ministry Prakas No. 02 BRKR/03 dated November 26, 2003 states that the courts have the jurisdiction to resolve disputes over registered land, while the Cadastral Commission has jurisdiction over unregistered land. This jurisdictional division effectively deprives the courts of power to resolve disputes where farmers have been dispossessed by ELCs. As previously noted, these are the most widespread and egregious land disputes in Cambodia.

## **Sugar Production in Cambodia: A Case Study in Land-taking**

This case study concerns a land-taking dispute in Koh Kong province in south western Cambodia. The dispute began in 2006 when approximately 10,000 hectares were taken from farmers to establish two ELCs to grow and refine sugar cane for export markets. The ensuing dispute between the farmers and the sugar producers has been bitter, protracted, and often violent. This case study is instructive in showing that, when all of the domestic avenues for resolving the dispute were exhausted the farmers, with the assistance of NGOs, turned to international legal forums for justice.

## **General Information about Koh Kong**

Most of the approximately 140,000 people living in Koh Kong depend on agriculture for their livelihoods. This generally involves slash and burn farming on small land holdings of approximately 1 to 3 hectares (WFP 2013). Few farmers have formal land titles and claim ownership through continuous long-term possession of land (APRODEV 2011).

To diversify the economy and increase wealth, Cambodia's National Strategic Development Plan promotes industrialized agriculture in the province (Open Development 2013). A key aspect of the plan is to grant ELCs to agricultural investors. The investors clear the land and plant industrial export crops such as sugar and offer wage labor to the farmers (Open Development 2013).

Industrial agricultural development in the province has been significantly strengthened by Everything But Arms (EBA), a preferential European Union (EU) trade scheme established in 2001 to help farmers in the world's least developed countries (LDCs). Under this scheme, the production of sugar in Cambodia has become highly lucrative as it can be sold to the EU duty free and at a guaranteed minimum price per tonne. Approximately 100,000 hectares in four Cambodian provinces, including Koh Kong, have been granted as ELCs for sugar production (EC&IDI 2013: 8).

## **Taking Land for ELCs**

In August 2006, the Ministry of Agriculture, Forestry and Fisheries (MAFF) granted two ELCs of nearly 10,000 hectares each in the Sre Ambel and Botumsakor districts in Koh Kong to two Cambodian entities—Koh Kong Plantation Co. Ltd. (KKPT) and Koh Kong Sugar Industry Co. Ltd. (KCSI). Local business entrepreneur and senator Ly Yong Phat's company, the LYP Group, held a 20 percent ownership stake in each company. He later sold his stake to Khon Kaen Sugar Industry Public Company Ltd. (KSL), a Thai sugar company.

KSL currently has a 70 percent stake in the two Cambodian companies that were granted the ELCs. Taiwanese company Ve Wong owns the other 30 percent. KSL hold a five-year contract to supply sugar to UK sugar trader Tate and Lyle Sugar (TLS).

What land was taken to form the ELCs? Local villagers farmed about 5000 hectares of the land granted to KKSI and KKPT (Sokha 2007). They were informed by the LYP Group that their farmland formed part of the newly granted ELCs. Four hundred and fifty-six families were forcibly evicted from the land by guards recruited from local police and the military to make way for a sugar plantation (Sokha 2006).

## **The Farmers' Claim**

The farmers argue that the ELCs granted to KKPT and KKSI were illegal and should be cancelled. They made four main claims:

- Under the Land Law 2001 the maximum size limit for an ELC owned by a single company is 10,000 hectares. The ELCs granted to KKPT and KKSI are twice this legal limit (Land Law 2001, art. 59) because KKPT and KKSI are owned by the same company.
- The farmers had well-documented possession rights under the Land Law 2001 and were eligible for land title certificates. According to the Land Law 2001, ownership titles are granted where farmers can prove continuous occupation for more five years. In this case, the farmers produced household registration papers or UN identification papers demonstrating long-term occupation (EC&IDI 2013: 25).
- Cambodian land law prohibits interference with land pending the issuing of land titles (Land Law 2001, arts 30–39). The farmers claimed that the ELCs interfered with their rights of possession during the conversion process.
- The ELCs did not follow the procedures stipulated in Sub-decree 146 on Economic Land Concessions 2005. Article 3, Sub-decree 146, requires public consultation for environmental and social impact assessments showing voluntary resettlement plans for landholders. This consultation did not take place before the ELCs were granted by MAFF (ERI 2013). In fact, some farmers were evicted from their land by KKPT and KKSI in May–June 2006, two months before the ELCs were officially granted. They said: “When the company came in May 2006, they bulldozed without consultation or any environmental impact assessment ... They bulldozed the fields and streams. They shot our animals. After about 100 families’ land was taken away, we started taking pictures.” *Teng Kao, village representative, Koh Kong province who lost nearly 10 hectares to the plantations* (Hodal 2013). “We had no warning—they came one day and began clearing the fields—they cleared my field and I want to know why.” *Koh Kong Farmer* (Open Development 2013).

Few farmers (23) received compensation for their losses. Most compensation payments ranged from USD75 to USD750, and small land allotments (0.2 hectares), much less than the market value of the land taken for the ELCs (EC&IDI 2013: 64).

## **Domestic Dispute Resolution Forums**

### ***Consultation and mediation***

The dispossessed farmers staged peaceful protests that were often met with organized suppression from the police and the military (Human Rights Asia 2006). In March 2007, villagers travelled to Phnom Penh and submitted a petition to various government agencies including the National Assembly, the Prime Minister’s Cabinet, the Ministry of the Interior, and the Council

of Ministers. They also filed a complaint with the National Authority for Land Dispute Resolution. This is the body responsible under the Land Law 2001 for resolving disputes concerning unregistered land.

Although these government agencies entered into dialogue with the farmers, in five years they have not produced any concrete resolutions binding the sugar companies or government agencies (SMSG 2007: 17). Attempts by the villagers to negotiate solutions directly with the sugar companies have been unsuccessful. In August 2008, a Cambodian NGO, the Community Legal Education Center (CLEC), wrote to KSL about the illegality of the ELCs on which they were growing and processing sugar and the negative impact the sugar industry had on the dispossessed farmers. In September 2008, KSL replied denying any knowledge of the complaints (SMSG 2007: 10). They claimed that villagers had been compensated. At a recent meeting with LYP Group representatives in February 2013, a farmer representative reported:

The company is saying it has reached a resolution with all the families except nine, but this is not true. We have not gotten any compensation for the 1,300 hectares taken from us. (Titthara 2013)

### ***Court action***

In tandem with petitioning central government authorities, the farmers filed criminal and civil cases against KKSI and KKPT in the Koh Kong Provincial Court in February 2007. The CLEC drafted a statement of claim seeking to cancel the two ELC contracts (ERI 2013: 9). The court dismissed the criminal case. The civil case was finally set for a hearing on July 26, 2012, five years after it began (Channyda 2012). However, it was delayed again, as the attorneys for the sugar companies failed to appear.

In addition to delaying the court proceedings, the judges of the Koh Kong Provincial have attempted to push the case back to administrative authorities (e.g. Cadastral Committee), claiming that the court lacks jurisdiction (ERI 2013: 13). In fact the case is about the legality of the ELC contract, not the land claims by the farmers, a matter that is clearly within the court's jurisdiction.

In the six years since the dispute began, the farmers have attempted to push their claims through every dispute resolution forum provided by the law. Although the claims have not been rejected outright, none of the forums has allowed the farmers to discuss liability and compensation with the developers on a relatively equal footing. The developers have not been required to answer in detail the specific details of the farmers' claims.

## **International Dispute Resolution Forums**

In 2010, after exhausting all domestic political and judicial dispute resolution mechanisms, the villagers, with the aid of various NGOs, embarked on a multi-pronged campaign to enlist international dispute resolution forums to resolve the dispute.

### ***Complaints with foreign governmental agencies***

NGOs acting for the villagers have turned to a range of transnational forums to pressure the sugar companies to negotiate with the villagers (ERI 2013: 10). This tactic relies on the extraterritorial jurisdiction in the EU and the USA that holds firms domiciled in these jurisdictions liable for actions carried out anywhere in the world.

In 2010, the CLEC wrote to the European Commission, requesting that it investigate KSL's contract with Tate and Lyle Sugar (TLS) (ERI 2013: 10). It will be recalled that TLS is a UK-registered transnational corporation. In 2012, 97 percent of Cambodia's (Euro) 10 million sugar exports were sent to the EU; TLS bought 99 percent of these exports.

In October 2012, the European Parliament instructed the EU Commission to investigate the rising number of human rights abuses caused by the dispossession of farmers by ELCs in Cambodia (ERI 2013: 10). The European Parliament recommended the temporary suspension of trade preferences on agricultural products where human rights violations had occurred (EC&IDI 2013: 83).

CLEC, together with other NGOs, have filed petitions with other European agencies requesting that they investigate companies and groups that have invested in KSL and that might be in breach of ethical guidelines. For example, in November 2011, CLEC and Earth Rights International (ERI) petitioned the Norwegian Council on Ethics to investigate the activities of KSL (ERI 2013: 11). The Norwegian Global Pension Fund is an investor in KSL. CLEC and ERI argued that the Pension Fund's financial stake in KSL violates the Fund's Ethical Guidelines (SRSG 2007: 10). An outcome is still pending.

Petitions have also been lodged with US agencies. On October 31, 2012, CLEC and ERI filed a complaint on behalf of dispossessed farmers with the US National Contact Point (NCP) about human rights abuses relating to the operations of the sugar companies in Koh Kong province (US Department of State 2013). The complaint alleges that American Sugar Refiners (ASR), through its subsidiary TLS, purchased sugar from KSL that was produced at the Koh Kong Plantations on land that was unlawfully acquired (US Department of State 2013). ASR is bound by the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. Under these guidelines, it "...had an obligation to avoid contributing to conduct inconsistent with the Guidelines and, given it was the sole purchaser of sugar from the Koh Kong plantation, had the opportunity and responsibility to use its leverage to mitigate such conduct by the operators of the plantation" (US Department of State 2013).

ASR initially cooperated with the US NCP and agreed to participate in mediation to find a solution to the land dispute. But ASR withdrew from the mediation when it learned that CLEC had launched litigation against TLS in the UK (discussed below) (US Department of State 2013). The US NCP closed this case on June 4, 2013 because the parties failed to agree about the terms of consultation and mediation, saying:

The NCP recommends ASR evaluate the issues raised by the NGOs and consider how to address them, even if the conditions may not exist now to address them through the NCP process. In particular, the NCP recommends that ASR conduct a corporate human rights policy review process, consistent with the recommendations of the Guidelines and the UN Guiding Principles. Such a policy process could include consultations with external stakeholders. (US Department of State 2013)

### ***Transnational codes of practise***

Cambodian NGOs have also attempted to use transnational codes of practise to pressure transnational corporations involved in the Cambodian sugar industry. Transnational NGOs, such as Bonsucro, formulate codes of practise governing labor and other conditions in the sugar industry (Bonsucro 2013). Firms engaged in the sugar industry, including TLS, require certification from Bonsucro to sell their product into western markets.

In 2011 CLEC and Equitable Cambodia (EC), Cambodian-based NGOs, filed a complaint with Bonsucro about the activities of TLS in Cambodia (ERI 2013: 10). After investigating the complaint about the dispossession of farmers in Koh Kong province, on July 8, 2013, Bonsucro suspended TLS's membership. According to reports, TLS had failed to cooperate resolving the complaint and had ignored a request to review compensation paid to the dispossessed farmers (Bonsucro 2013). The suspension of membership means that TLS is unable to market its sugar as a certified ethical product. This will have price implications in western markets where consumers pay a premium for ethical products (Bonsucro 2013).

### ***Court litigation in third-party countries***

In addition to relying on governmental and transnational codes of practices, NGOs acting for the dispossessed farmers have turned to courts in third-party countries to prosecute their claims. On March 28, 2013, CLEC filed a civil law suit against TLS, a UK registered firm, in the UK High Court (commercial division) (The High Court of Justice Claim 2013 Folio 451: Particulars of claim). The statement of claim alleges that TLS purchased sugar that was produced on land that was wrongfully taken from farmers in Koh Kong province. It claims that TLS "knew that the villagers were the owners of the raw sugar or ought to have known given its position as a leading player in the sugar market" (Davies 2013; Hodal 2013). It further claimed that TLS "'wrongfully deprived' the villagers of their property for its own benefit" (Davies 2013). The sugar cane harvested on the contested land was first processed in Cambodia and then in Thailand until it was on-sold to TLS for final processing. The statement of claim argues that "pursuant to Cambodian law, the claimants are the owners of the land" and as such "are entitled to the sugar cane" (The High Court of Justice Claim 2013 Folio 451: Particulars of claim).

The claim is based on property law. It argues as follows: since the farmers owned the land they were entitled to the proceeds of the sugar harvest. If TLS did not have good title to the land, then it was not entitled to sell the sugar harvest to TLS. As a consequence, TLS did not receive good title to the sugar and held the proceeds of the sugar sales on behalf of the farmers.

After the litigation was filed, TLS was sold to American Sugar Refining, which is now the defendant. It has counter-claimed that TLS had no knowledge of any prior ownership of the land in Koh Kong province (The High Court of Justice Claim 2013 Folio 451: Counter claim). Further, it has counter-claimed that the farmers have no claim to the sugar cane grown on the disputed land, even if they did previously own it, because they had not paid for the seed stock or production costs. The farmers are claiming compensation for some of the 48,000 tonnes—or roughly €24m worth—of sugar that TLS's London refinery has allegedly received since 2010 (Hodal 2013). In July 2013, after a preliminary attempt at mediation failed, the case was set for hearing in the High Court later in 2013.

Ou Virak, president of the Cambodian Center for Human Rights, called the case "extremely important" for several reasons (Brinkley 2013). First, it makes the point that Cambodia's own courts are thoroughly corrupt and inept and are incapable of resolving this type of action domestically. As previously mentioned, complaints lodged with the domestic courts in 2007 have still not been heard. Ou concluded that "such companies will be exposed to a greater level of scrutiny in the future. This in itself could potentially have an effect on the level of land grabs that we're currently seeing" (Brinkley 2013).

## Conclusions

The Cambodian case studies show that the best-drafted land laws cannot protect land users without independent and competent state institutions. The Cambodian Land Law 2001 is one of the most comprehensive land laws in East Asia. It provides individual property rights for farmers who can show long-term use of land. However, the law relies on a competent and transparent land administration department to impartially issue land titles in accordance with the ground rules established in the Land Law 2001. The World Bank withdrew support for the land titling program in Cambodia, complaining that local authorities were not issuing titles to farmers in areas that were scheduled for conversion into ELCs. Once land titles are issued to farmers, it is much more difficult for the authorities to clear land for industrial agricultural concessions.

Further compounding the problems for Cambodian farmers, the individualized nature of property rights recognized in the Land Law 2001 does not support collective action by farmers. Instead, farmers relied on NGOs to mobilize resources and take collective action to protest land takings without adequate compensation.

As the Koh Kong case study showed, domestic dispute resolution forums comprehensively failed to give farmers a platform to negotiate an equitable compensation deal with the sugar producers. Since 2007, the Cadastral Commission has failed to organize consultations or mediation between the farmers and the sugar producers. Attempts to challenge the legality of the ELCs in the courts have also been blocked. The Cambodian courts have delayed hearing actions and attempted to push the action back to government agencies for determination.

Frustrated by their lack of success in domestic dispute resolution forums, the farmers have taken their dispute to international forums. EU and US bodies have been petitioned to investigate human rights abuses resulting from the dispossession of Cambodian farmers. Farmers have also attempted to pressure Tate and Lyle, the main international purchaser of sugar produced by the Koh Kong ELCs. Tate and Lyle has lost certification for its products by Bonsucro, a transnational standards organization. So far this pressure has not forced the sugar producers to negotiate compensation agreements with the dispossessed farmers.

In another development, farmers have taken Tate and Lyle to court in the UK. This strategy relies on the extra-territorial jurisdiction of UK courts to hold firms registered in the UK liable for activities conducted around the globe. If successful, this action will give the dispossessed farmers access to the profits generated from the sugar grown on their land. In effect UK courts will be enforcing the private rights granted under the Cambodian Land Law 2001, a function that Cambodian state institutions have consistently failed to perform.

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# Vietnam Country Case Study: Land Grievance Redress

## Introduction

The Vietnam Country Case Study first maps the main causes of land taking disputes in Vietnam and then explores in more depth the possibility of drawing experiences from the reference countries discussed in the preceding case studies.

## The Constitution and Land Law Revision in 2013 and the Way forward: Outlining the Problem

According to the World Bank, in the decade 2001 to 2010, one million hectares of farmland was converted to non-agricultural purposes in Vietnam [13]. The Ministry for Agriculture and Rural Development estimates that each hectare may affect the life of at least ten people, particularly in densely populated areas in the Red River Delta (Northern Vietnam) each hectare may affect as many as 15 people. This means that the conversion of rural and agricultural land into urban and industrial use in the last decade had affected the life of more than ten million Vietnamese farmers [14]. In short, land conversion in Vietnam has affected the life of one in nine Vietnamese.

Inevitably, land grievances will present a social challenge for the Party and State of Vietnam for decades to come. There were 700,000 land-related complaints from 2009 to 2011. Land grievances dominate complaints sent up to the central government, which accounted for no less than 70% of all types of administrative complaints and petitions in Vietnam during 10 years since the Land Law 2003 came into effect [15]. Tensions and conflicts over land are especially acute on the peri-urban areas where the disparity between property values and compensation rates is often the widest. Public protests against land seizure continued to increase in 2012 and 2013, even though property values slumped and economic growth declined [16]. "Failure to resolve land disputes could mean that inequality worsens as some lose access to land without proper compensation and this could, in turn, lead to social unrest," said Victoria Kwakwa, the World Bank's country director. "It could also mean missed opportunities for investments that could create jobs and promote Vietnam's rapid growth. Neither outcome is ideal" [17].

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<sup>13</sup> World Bank, *Compulsory Land Acquisition and Voluntary Land Conversion in Vietnam: The Conceptual Approach, Land Valuation and Grievance Redress Mechanisms*, Hanoi, 2011.

<sup>14</sup> CPV, [http://dangcongsan.vn/cpv/Modules/Preview/PrintPreview.aspx?co\\_id=30257&cn\\_id=612523](http://dangcongsan.vn/cpv/Modules/Preview/PrintPreview.aspx?co_id=30257&cn_id=612523), see also Website of Ministry for Agriculture and Rural Development, [http://www.agroviet.gov.vn/pages/news\\_detail.aspx?NewsId=17169](http://www.agroviet.gov.vn/pages/news_detail.aspx?NewsId=17169).

<sup>15</sup> Report of Government Inspectorate to National Assembly on *Handling administrative Complaints and Denunciations*, Session 4, National Assembly XIII, October 2012.

<sup>16</sup> Online interview with General Inspector Huynh Thanh Phong, March 31, 2013. <http://baodientu.chinhphu.vn/Home/Tong-Thanh-tra-Chinh-phu-noi-ve-giai-quyet-khieu-nai-to-cao/20133/165314.vgp>. See also: Evaluation of Five Years Implementing the CPV Directive No 130/TB-TW dated Oct 1, 2008 to Handling of Citizen's Complaints and Denunciations, <http://noichinh.vn/tin-tuc-su-kien/201311/hoi-nghi-so-ket-5-nam-thuc-hien-thong-bao-so-130-tbtw-ngay-10-01-2008-cua-bo-chinh-tri-ve-giai-quyet-khieu-nai-to-cao-293043/>.

<sup>17</sup> Bloomberg, Dec 09, 2013, *Vietnam Tightens Land Seizure Law after Farmers Protests*, <http://www.bloomberg.com/news/2013-12-08/vietnam-tightens-land-seizure-law-after-protests-southeast-asia.html>.

This Report examines the formal and informal institutions that resolve land-taking disputes in Vietnam. Following the same structure used in the China, Indonesia and Cambodia cases, the Vietnam case study begins with a discussion on overall legal environment to explain as how social tensions and conflicts relating to land seizure arise in Vietnam's context. Next, the report will discuss the various forums and channels that are used to prevent and to resolve land-taking disputes in the country. Finally, in concluding the report, lessons from the Vietnam case will be drawn, but also the relevance of foreign experiences for Vietnam will be briefly discussed.

## **The legislative framework: Land Acquisition, Compensation and Disputes**

From late 1980s until now, Vietnam issued five Laws on Land in the years of 1987, 1993 revised 1998, 2003 and 2013. To implement these land laws, a huge body of governmental regulation has been promulgated. This rapid change of the land law reflects the pressures of commercialization of the land as Vietnam industrializes and urbanizes. Historically, private property rights in land existed, but legal protections were weak and unsystematic. French rulers introduced the modern land registration system, protecting private land. After the collapse of the colonial rule and during the wartime this registration system was abandoned [18]. Following the unification of the country in 1975, land was nationalized by the 1980 Constitution, which declared that all land and natural resources shall belong to the "ownership of the whole Vietnamese people".

In dismantling the central planning economy and Soviet cooperatives in agriculture, the State began to recognize the lease system, granting limited rights to use agricultural land to agricultural families. According to the Land Law 1987, the initial term of lease was confined to 20 years. Beginning with the 1993 Land Law, the State extended the scope of land use rights granted to farmers and land leased to foreign investors. It also recognized that land has a value and the State had the right to determine the value of land when it was converted for industrial or residential purposes. Yet, with an eye to investment promotion, the State sought to keep the land price low, estimated at only 10-30% of the market price of the land [19].

The expansion of the market economy in Vietnam has significantly increased the value of land. Foreign and domestic investors and land users in urban areas demand certainty and protection for their land use right. In 2003, the Land Law was substantially revised to meet this requirement. The 2003 Law extended the scope of protected rights of land users, including the right to capitalize all interests associated with land (right to use land, right to transfer land use right, right to use land as collateral for loans, right to contribute land as capital in creating companies, etc.). Land use rights leased to investors and granted to families for housing purpose, have become more strongly protected by the law.

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<sup>18</sup> Nguyen Ngoc Dien, Property Registration: Theory and Practise, *Legislative Studies* (Tạp chí Nghiên cứu Lập pháp), no. 6(214), March 2012), pp 48 – 53.

<sup>19</sup> Dang Hung Vo, *What Do We Need to Amend in the 2003 Land Law*, *Legislative Studies*, (148) June 2009 pp 32-40

## Recent Legislative Responses to Land-taking

The XI Congress of the Communist Party Vietnam in 2011 proclaimed that institutional reform is one of three strategic priorities to recover the economy and accelerate growth. In implementing this strategy, the Constitution was recently revised. In accordance with this change, fundamental new legislation and policies shall be overhauled in the years to come. For example, the Land Law 2013, taking effect in July 2014, aims to address widespread land disputes that increasingly risk undermining the Party and the State by turning aggrieved farmers into mass unrest that might deter foreign investment.

The Land Law 2013 is the fifth revision of the Land Law. It was adopted following four years of robust discussion on constitution reform, which concerned, among other matters, the monopolistic power of the state authorities to expropriate rural land for urban and business use. Partly reflecting social demand, the Constitution was revised with an attempt to tighten land seizure rules. Under new constitutional principles that take effect from January 01, 2014, state authorities can only expropriate land for reasons defined by law, such as national defense and security purpose, as well as economic-social development projects which benefit the public and the nation as whole. The new law is clear that the process of land acquisition should be public and transparent, and that compensation should comply with the law [20].

The Land Law 2013 clearly provides that expropriation of large parcels of land for socio-economic projects of national importance must be approved by the National Assembly or by the Prime Minister. Provincial people councils can approve smaller projects in rural areas [21].

Besides tightening the legal grounds for land expropriation, the new legislation also contains provisions aiming to strengthen the rights of existing land users. The land use for housing purposes, either in urban or in rural areas, is indefinite and creates an individual property right [22]. In a new development, the time limit for land use rights for agricultural land have been extended from 20 to 50 years, with a possible extension in the future [23]. Despite calls to liberalize the ownership on land or at least introduce a diversity of land ownership, both the Constitution and Land Law 2013 cement the political concept that all land in Vietnam belongs to the whole body of Vietnamese citizens [24]. In a regional comparison, this concept is not unfamiliar to East Asia. As a political concept, the ownership of the entire body of Vietnamese people on land corresponds to Article 143 of the Chinese Taiwan Constitution, which provides that all land shall belong to the entire body of citizens. It is also corresponds to the concept of ownership in the Chinese Property Law 2007 [25].

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<sup>20</sup> Article 55, paragraph 3 Constitution 2013 of Socialist Republic of Viet Nam (Constitution 2013).

<sup>21</sup> Article 62, paragraph 2 Land Law 2013

<sup>22</sup> Article 123 paragraph 1 Land Law 2013.

<sup>23</sup> Article 126 Land Law 2013.

<sup>24</sup> Article 53 Constitution 2013, Article 4 Land Law 2013.

<sup>25</sup> Article 143 Taiwan Constitution, adopted 1946, latest revised 2000, provides that *"all land within the territorial limits of the Republic of China shall belong to the entire body of citizens. Private ownership of land, acquired by the people in accordance with law, shall be protected and restricted by law. Privately owned land shall pay taxes according to its value and may be purchased by the Government according to its value"*. See: <http://www.taiwandocuments.org/constitution01.htm>. Chinese Property Law 2007, Article 47, notes that *"with regard to the properties belong to the State according to law, they are owned by the State, that is, by the whole people"*.

However, as a workable legal concept, this concept increasingly protects land use rights as a bundle of *quasi-private property rights*. As a principle well established during the five revisions of the Land Law, residential and industrial land users enjoy a wide range of property rights, such as rights to transfer, to exchange, to lease, to inherit, to use land use right as collateral for bank loans or to contribute this right as capital in formulation of business companies [26]. It is expected that this legal recognition of property right on land will continue, and hopefully will also extend to agricultural land, when civil and commercial laws, such as the Civil Code, the Law on Real Estate Market, and the Law on Housing, are revised in the coming years. The political concept of ownership of the whole body of Vietnamese people on land does not hinder residential and industrial land use rights. In contrast, the political concept of ownership retained in the new legislation limits the size and commercial exchange of farmland, creating strong disincentives to develop an agricultural land market and investment in agriculture.

Nevertheless, compared to the land law of People Republic of China, the legal regime for rural land uses in Vietnam is more certain and predictability. Unlike China, rural land does not belong to the vague “collectives” of residents living in villages, in Vietnam each parcel of housing or agricultural land belongs individually to farmer households. Land use certificates were issued to individual farmers, and not to collectives. The village’s management, either the Party leadership or the administration, has no right to convert agricultural land to housing or business purpose. The power to do so rests only with the administration at district level, and at provincial level for taking land from legal entities such as from business corporations, religious or foreign organizations [27]. Party and government administration at villages or wards may have a role in implementing land appropriation, in facilitating the participation of land users and thus helping to resolve disputes, but they are not authorized to take land.

Not only narrowing the legal grounds for land appropriation, the revised Land Law 2013 also attempts to tighten the process of land taking and increase its transparency. This change will help to avoid inappropriate land seizures and hopefully reduce complaints.

## **Land Planning**

Article 69 of the Law on Land 2013 provides that Fatherland Front Committees at commune levels; in cooperation with commune People’s Committee and investors are responsible for ground clearance and compensation. These bodies are required to persuade occupants to follow land acquisition plans. There is currently no opportunity for land users to participate in conciliation or mediation meetings with state authorities. These regulations assume that land users will passively follow the land acquisition plans and do not provide opportunities for stakeholders, including land users, to raise their voice or discuss together the formulation and implementing of plans.

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<sup>26</sup> Article 167 Land Law 2013.

<sup>27</sup> Article 66 Land Law 2013.

## Revised Land-taking Procedures

Based on practices firmly established in the last decades and on experiences collected through the implementing of administrative regulation [28], the new Land Law 2013 provides that the land taking process shall include three main steps: (i) notification about land expropriation, (ii) preparation and implementation of the compensation plan, and (iii) clearance of land.

**Notification:** Notification to users shall be made at least 90 days in advance with regard to agricultural land, or 180 days for non-agricultural land, before authorities decide to acquire land [29]. Notification shall be public. It has to be listed at village administrative offices and shall be announced in the mass media [30]. It shall be also notified individually, namely the notification shall be sent to each individual and household.

**Compensation Plan:** Either a land development office or a board for compensation, support and resettlement (*known as clearance offices*), assigned by the authority in charge of land clearance, will prepare the compensation plan in conjunction with the village administration. Land users have a right to be represented in the meetings and submit opinions for the Plan. Meeting minutes must be signed by the village or ward administration, representatives of the Fatherland Front and signed by representatives of the land users. If land users oppose the Plan, the clearance office must meet and discuss their opinions and suggestions [31]. The minutes of meetings shall reflect both the supporting as well as the opposing opinions of land users. After the compensation plan is approved by the district or provincial administration in charge, the clearance office will be authorized to implement this plan.

**Clearance:** The law requires the implementation of compensation plans to be public and transparent. The approved plan must be displayed at the village office and disseminated to the individual land users. If land users do not voluntarily handover the land, the village or ward administrators, representatives of Fatherland Front and the clearance office shall persuade them to comply with the plan. Where land users continue to resist, the district administration can implement compulsory eviction. Compulsory clearance boards implement eviction orders. Such boards are supposed to persuade the land users to voluntarily handover the land. If this final attempt fails, a minute on the compliance with the clearance plan shall be made, and within 30 days from the day this minute is made, the forceful eviction of land user can proceed[32].

The Government is expected to issue decrees and guidance to implement the new legislation. However, an absolutely new approach appears to have been introduced by the Land Law 2013. From now on, the power to interpret law by the Government is limited. The Government is only authorized to issue guidance to implement the particular stipulations in the Law, which the National Assembly has authorized. For example articles 61, 62, 63, 66 and 69 of the Land Law

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<sup>28</sup> Notably the Governmental Degree No 69/2009/ND-CP dated August 13, 2009 on Land Planning, Land Acquisition, Clearance, Compensation, Support and Resettlement. See also Nguyen Quang Phuc et al, *Agricultural Land for urban development: The Process of Land Conversion in Central Vietnam*, Habitat International 41 (2014) pp 1-7.

<sup>29</sup> Article 67 paragraph 1 Land Law 2013.

<sup>30</sup> Article 69 paragraph 1 (a) Land Law 2013.

<sup>31</sup> Article 69 paragraph 2 Land Law 2013.

<sup>32</sup> Article 71 Land Law 2013.

2013 do not authorize the Government to issue interpreting decrees or guidance. If this new approach is strictly implemented, a new age of greater regulatory consistency will begin. In contrast to the previously discussed forms in Indonesia, citizens in Vietnam lack any forum where they can challenge the government for not complying with the new provisions in the Land Law 2013 or the Constitution.

## Problems with the Administration of Land-taking

As occurred in recent years, citizen complaints and denunciations relating to land taking are caused by somewhat vague rules that enable authorities to expropriate land for a wide range of social-economic development projects. Potential investors and land developers are introduced to land site by local authorities or they can select their own sites and then apply for authorities to check whether the land chosen is compatible with the master planning and other regulations [33]. Land grievances were caused, because the existing land users were not properly informed during the land-taking process and were not given opportunities to participate in the land planning process. In extreme cases, the obligation of land users was merely to handover the land to the clearance office in receiving the compensation, support and resettlement at rates as determined by local authorities.

## Land Pricing

A serious cause of land-taking disputes was and will continue to be the compensation rates based on land prices determined by the provincial authorities. Although recent studies show how other issues, such as a sense of procedural justice and cultural connections to land play a major role in influencing how land users evaluate compensation [34]. Land users frequently claim that compensation rates are unjust. The legal rule remained the same in the new legislation, giving the power to determine land prices to the state authorities. Provincial administrations (People Committees) decide on the land price framework for individual projects on the frame price approved by the Provincial People Councils. Thus, the power to decide land prices still remains with the provincial administration [35]. When it comes to forceful evictions, these rates are payable to individual land users [36].

In order to limit abuse of power of local authorities and to reduce the inconsistencies in valuing land, the new legislation provides that market prices shall be considered, but do not ultimately determine land values. According to this new rule, the land price determinations are based on several criteria, among others, land price determination shall base on common market prices, which are applied to land with similar uses [37]. Where there are disputes, the authorities are supposed to confer with a land value consultant [38]. Additionally, in order to create more

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<sup>33</sup> World Bank, *Compulsory Land Acquisition and Voluntary Land Conversion in Viet Nam: The Conceptual Approach, Land Valuation and Grievance Redress Mechanisms*, Hanoi, 2011

<sup>34</sup> See T & C Consulting *Public Land Disputes in Viet Nam: A Multi-Actor Analysis*, November 2013 The Asia Foundation, Hanoi.

<sup>35</sup> Article 13, clause 5; Article 114 paragraph 3 (d) Land Law 2013.

<sup>36</sup> Art 77 Land Law 2013.

<sup>37</sup> Article 112, paragraph 1 (c), Land Law 2013.

<sup>38</sup> Article 115 Land Law 2013.

consistency and certainty, the land price frame shall not be changed annually, as this was frequently the case in the recent years, but shall remain in future for a longer period, as provided for by Land Law 2013, for at least five years.

In contrast to the land acquisition, the Government is expressly authorized to issue sub-laws to guide and interpret land valuations. Because the Law itself contains only vague rules the details of land valuation will depend on governmental policies in the coming years.

## **Fiscal Incentives in Land-taking Cases**

The land-taking disputes in Vietnam, as with the previously discussed Chinese, Indonesian and Cambodian cases, are very complex in nature. They appear as legal disputes on the surface, but there are many underlying problems that transcend the law. Land grievances are frequently caused, or deepened, by the power of authorities to expropriate land for a wide range of purposes. This occurs notwithstanding the type of legal regime, whether land users own or lease land. The economic and fiscal roots of land grievances lie deeply in the desire of local authorities to convert agricultural and rural land into urban and industrial uses for revenue. This conversion benefits mostly the authorities and land developers and limits the participation of farmers in land planning and dispute resolution.

For land developers, the business in conversion of rural and agricultural land into urban and industrial land remain lucrative and attractive provided the price paid for land clearance remains low and there are reasonable annual lease rates and tax obligations payable to the local authorities.

Therefore the existing fiscal and taxation laws remain an important incentive for many, but certainly not all, land takings. Competition among provinces to attract investment is another reason why land compensation payment remains low in some areas.<sup>39</sup> Under the existing fiscal regime, local authorities still desire to exploit their public power to seizure land to increase revenues. Mechanisms and forums to resolve land disputes so far focus on strengthening the property rights of farmers, to ensure proper implementation of the law, and focus on the role of the judiciary or administration in handling citizen's complaints and denunciation. Not only does the Land Law need to be revised to strengthen the legal position of land users, but other legislation and institutions, such as Law on State Budget, Taxation Law, and Law on Local Governance, should be revised as well, in order to facilitate the active participation of land users and the public in the determination of revenue and profit derived through land conversion.

Therefore, in addition to focusing on measures of improving the capacity of government inspectorate and administrative courts in handling the increasing number of citizen's complaints on land taking, the Government should also consider policies that reduce the incentives for land conversion which adversely affect the of life of millions of farmers.

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<sup>39</sup> See T & C Consulting, *Public Land Disputes in Viet Nam: A Multi-Actor Analysis*, November 2013, The Asia Foundation, Hanoi.

## Institutional Responses to Land Disputes

Although recognizing the importance of land grievances in undermining the economy and social and political stability of the country, the Vietnamese government still needs to develop a comprehensive strategy to make land disputes resolution just, fair, and peacefully. As previously observed, there is little public debated about how to reach sustainable revenues for provinces and to avoid reliance on selling land to investors to meet budget shortfalls. There is also little discussion about how to enable the existing land users to share the benefits created by land conversion.

The Government of Vietnam considers land-taking disputes narrowly. It focuses almost exclusively on technical legal issues or the implementation of law and policy by local authorities. This position is attributable to the view that land ownership belongs to the people and farmers only possess quasi-ownership rights. Land taking disputes are thus considered internal administrative problems rather than conflicts with rightful owners.

According to the Guidelines on Handling of Citizen's Complaints and Denunciations adopted by the Party on January 10, 2008, major land grievances in the country are due to (i) inconsistent regulatory framework on land use and land management; (ii) historical incidents; (iii) irresponsiveness of local governments in handling complaints; and (iv) lack of legal awareness of petitioners [40]. The same formula has been applied in Government reports about land dispute for decades.

Since disputes are primarily regarded as an administrative problem, rectification efforts concentrate on improving the legal consistency and proper implementation of the law. In practice the central Government and local authorities in Vietnam have developed the following five channels resolve land grievances:

### **Awareness of the Law and Dissemination of Legal Information**

Based on the assumption that the increasing number of complaints and denunciations relating to land taking are due to the lack of legal information and awareness by land users and improper understanding of the law by local cadres, the Government has implemented a comprehensive program to enhance legal transparency and disseminate legal information to the public. According to the Law on Legal Dissemination and Education adopted June 20, 2012, provincial authorities are obliged to operate centers providing legal information and consult with citizens. Besides efforts made by the state, the mass organizations in the political system, such as the Fatherland Front, Trade Union, Women Union, Union of Vietnamese Farmers, the Youth Union, and Lawyers Association also operate their own centers to disseminate legal information and

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<sup>40</sup> See Notification of the CPV Politburo No 130/TB-TW dated January 10, 2008 on Handling of Citizen's Complaints and Denunciations, <http://baodientu.chinhphu.vn/Hoat-dong-Bo-nganh/Nhin-lai-5-nam-giai-quyet-khieu-nai-to-cao/186054.vgp> also online interview with General Inspector Huynh Thanh Phong, March 31, 2013, <http://baodientu.chinhphu.vn/Home/Tong-Thanh-tra-Chinh-phu-noi-ve-giai-quyet-khieu-nai-to-cao/20133/165314.vgp>. Reports of Provinces on Handling of Citizen's Complaints and Denunciations share the same view, see for example Directive of Can Tho Province No 12/2009/CT-UBND dated June 10, 2009 on Handling Citizen's Complaints and Denunciations relating to Land Disputes in Can Tho Province.

providing free or charge legal consultancy for citizen. Down to ward's offices and post offices in villages, in the last two decades, enormous efforts had been made to disseminate legal documents and pamphlets aiming to increase legal awareness of citizens.

For their own part, the state controlled news and media also contribute to broadcasting the land policies and law of the central and local government. In all public institutions, there shall be a "legal dissemination and education board" in charge of raising legal awareness for their employees. According to Ministry of Justice, in order to fulfill the tasks of legal dissemination, the central and local authorities shall support the work of so called "law communicators" (*bao cao vien phap luat*) [41]. In addition, there is in Vietnam a special day called the "Day of Law "to reinforce the importance of following the law [42].

Similarly, the new Land Law 2013 also requires local clearance offices to organize meetings to disseminate legal information, to lead dialogue with existing land users, and where needed, to persuade land users to accept the compensation plan. The board for compulsory eviction is also required to inform and to persuade land users to handover the land.

When land grievances become violent, unsurprisingly, the provincial leadership urgently instructs all lower authorities to promptly intensify measures to raise legal awareness of the citizen. The chiefs of village or ward administration and representatives of Fatherland Front are obliged to lead dialogue with land users, explaining rights and persuade them to comply with the clearance and compensation plan. In case the disputes become entrenched and negatively affect the image of the local government, state officials and employees in public institutions are required by the Party to undertake measures to persuade family relatives to withdrawn complaints or otherwise to comply with the final and binding solution made by the authority in charge [43]. Despite these enormous efforts to disseminate law and raise legal awareness among the public, the success of these measures to prevent land grievances seem to be, at best, very modest.

## **Grass-roots Dialogue and Reconciliation**

Village and ward level government and Fatherland Front official's attempts to resolve land grievances at grass-roots and prevent land disputes from spilling over to higher levels. Their representatives prepare measures to land taking, participate in formulating compensation plans; they also organize meetings and discussions with land users.

Where disputes erupt, the local officials organize reconciliation meetings. Mediators are selected from the village, and are frequently nominated by mass organizations [44]. According to Ministry

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<sup>41</sup> See Law on Legal Dissemination and Education 2012, Degree No 28/2013/ND-CP dated April 04, 2013 to implement the Law on Legal Dissemination and Education.

<sup>42</sup> According to Article 8 Law on Legal Dissemination and Education 2012, the Day of Law is November 09.

<sup>43</sup> According to Decision 47/QĐ-TW issued by the CPV Central Committee dated February 28, 2012 on 19 prohibiting clauses, Party members are prohibited to join unlawful meetings, demonstrations, to abuse the right to complaints and denunciation, to sign collectively with other petitioners on one complaint, or to organize collective complaints, see: <http://baodientu.chinhphu.vn/Dua-NQ-Dai-hoi-XI-cua-Dang-vao-cuoc-song/Ban-hanh-quy-dinh-ve-nhung-dieu-dang-vien-khong-duoc-lam/130988.vgp>

<sup>44</sup> Law on Grass-root Reconciliation, as adopted June 20, 2013 and take effect on January 01, 2014.

of Justice, from 1999 to 2012, 628,530 grass-root mediators reconciled 38 million disputes. Approximately 80% of the disputes were settled amicably [45]. At each reconciliation meeting, staff working in the legal affairs office plays a key role. They may prepare for the meeting, explain the rights and obligations of land users, explain law and regulation to participants, record the opinions and proposals of the users and other participants, and finalize the meeting minutes.

The reconciliation meetings are often more successful when developers are willingly to join the meetings and respond constructively to the proposals made by land users [46]. In some cases, land grievances can be reduced remarkably, when developers and the existing land users reach innovative settlements, for example: increasing financial support for relocation and resettlement or create additional jobs for land users. As the case studies in China and Indonesia demonstrate, innovation is a key way of finding compromises. The conciliation process needs to navigate around the rigid legal rules on compensation and financial support for relocation and find creative ways to reconcile the state and land users.

Despite the positive nature of dialogue and reconciliation meetings, the reconciliation process has its own loopholes. Reconciliation may be fruitful for disputes among citizen, or among them and business companies. But the reconciliation process is poorly designed for disputes between authorities and land users who have to accept prices determined by the authorities. As the previously discussed grand mediation in China showed, representatives from the mass organizations are politically dependent on the local authorities. It is difficult for them to take an independent position to persuade both the authorities and the land users to reach a common goal. Even in cases where the disputing parties reach agreement, the reconciliation agreement has no binding force. If one of the disputing parties does not voluntarily fulfill its commitment the case is referred to the courts.

## Citizens' Petitions

Land users have constitutional rights to protect their rights against administrative wrongdoings by making complaints and denunciations. The authorities are obliged to receive citizen's petitions and to handle their complaints according to the law [47]. Based on a proposal made by the Government Inspectorate, a Law on Reception of Citizens Petitions was adopted recently [48].

State and Party authorities from all levels are obliged to receive citizen' complaints and denunciation petitions. Two separate laws on handling of citizen's complaints and of denunciations were adopted in 2011 [49].

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<sup>45</sup> MOJ, 2013, Proposal on the Draft Law on Grass-root Reconciliation to the National Assembly,

[http://duthaoonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_LUAT/View\\_Detail.aspx?ItemID=566&TabIndex=2&TailieuID=645](http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=566&TabIndex=2&TailieuID=645).

<sup>46</sup> For experiences in Province Vinh Phu, see Tap chi Cong San 27/02/2014, "Urbanization process and protection of farmers' economic interests in Vinh Phuc nowadays", <http://www.tapchiconsan.org.vn/Home/Viet-nam-tren-duong-doi-moi/2014/26056/Qua-trinh-do-thi-hoa-va-van-de-bao-dam-loi-ich.aspx>, for experiences in Vung Ang, "Experiences on land clearance and reallocation in Vung Ang economic zone", Nhân Dân 3 December 2013, or for experiences in Province Nghe An, see "Làm dân vận phải gần dân, vì dân", Website of CPV, 15/10/2013, [http://dangcongsan.vn/cpv/Modules/Preview/PrintPreview.aspx?co\\_id=30117&cn\\_id=614531](http://dangcongsan.vn/cpv/Modules/Preview/PrintPreview.aspx?co_id=30117&cn_id=614531).

<sup>47</sup> Article 30 Constitution 2013.

<sup>48</sup> Law on Reception of Citizen, adopted by National Assembly on November 26, 2013.

<sup>49</sup> Law on Complaints and Law on Denunciations, both adopted on November 11, 2011.

Aiming to keep land grievances at the local level, and avoid large groups of farmers gathering in parks and at government buildings in Hanoi and Ho Chi Minh City, the Government urged local leaders to receive citizens' petitions on a regular monthly basis. Each provincial administration operates its own facility to receive complaints. The chairman of the provincial people committee or his deputies, are personally required to receive citizens at least once a month. Frequently joining him are representatives of line-departments, delegates from the elective provincial People Council, and sometime delegates of the National Assembly as well.

Land users may also express their complaints at regular meetings of elective bodies within their constituency, which are organized usually four times a year. In many cases, land petitioners directly send their complaints to National Assembly's delegates or to high-ranking Government and Party leaders.

The complaints received from these various sources are first handled by the authorities that made the administrative decision in the first instance. The Law on Complaints 2011 attempts to improve the transparency of citizen's complaints. A rigid time frame was also introduced aiming to push the authorities to deal promptly with citizen complaints. The petitioner shall have the right to request the authorities in charge to provide documents, evidence or other proofs necessary for the case [50]. The authority being petitioned must organize dialogue to hear the petitioner presenting its concerns. The petitioner may hire legal consultancy and collect evidence to support their case. If unsatisfied with the decision of the authority, petitioners may submit complaints to higher administrative agencies. Alternatively complaints may be sent to administrative courts.

Complaints about land clearance and compensation rates are submitted, for the first round, to the district people committee. After consulting its subordinated departments for land and natural resource management and for public finance, the district authority invites land users to discuss the complaint. Petitioners have a chance to exchange their views with governmental inspectors before the district administration decides on the complaint.

The second round repeats with almost the same methods used at the provincial level. In handling hundreds of thousands citizen's complaints annually, the Government Inspectorate in Vietnam relies on a complicated system of internal governmental inspection, which exist in all line ministries and provinces. Undoubtedly the government inspectorate system may function well as an internal controlling mechanism to discover and to correct administrative wrongdoings. But as a government agency, it is difficult for the inspectorate to protect the rights of land users in disputing cases with superior administrative authorities. According to government sources, approximately 42 percent of land complaints received annually are resolved, leaving more than half unsettled [51].

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<sup>50</sup> Articles 13.1.c, 14.1.d Law on Complaints 2011.

<sup>51</sup> See Nguyễn Tấn Phát, 2008. "Shortcomings of land policies and challenges for three-pronged agricultural development in Vietnam", *Nghiên Cứu Kinh Tế*, no. 366 (11): 55-70.

## Administrative Litigation

Administrative courts function as a special chamber within the provincial people courts. They were introduced into Vietnam for the first time in 1997. Since then, the law on administrative litigation was revised several times, the last revision was in 2010 [52].

According to the existing law on administrative procedure, the scope of administrative litigation in Vietnam is extremely narrow. Land users can only make claims to the court to review administrative decisions and acts as defined under Article 28 of the Law on Administrative Procedure 2010. The court may accept claims to challenge the decision to acquire land made by the chairman of the district administration, but courts cannot challenge normative resolutions adopted by the provincial people councils. In other words, a decision to evict people is challengeable, but not the land price framework which forms the base for compensation rates. Further reducing that scope of review, land users cannot challenge resettlement policies which were adopted by the elective people council in the legal form of normative resolutions.

The court of first instance is frequently at the district level. Like their Chinese counterparts, district courts in Vietnam are reluctant to accept administrative complaints. Judges are unable or unwilling to make verdicts challenging land-taking measures approved by the district governments. Based on data provided by the Government Inspectorate and the Ministry of Justice (2011), it is estimated that the total number of administrative cases accepted by courts is only 0.25% of the total number of complaints lodged to administrative authorities [53]. There is little chance for the land user to win against district people committee in the first instance [54].

In a few cases, the plaintiff may win the case when appellate courts overturn the procedures followed by lower courts. Even in these very rarely cases, the winner may soon feel hopeless when seeking to enforce the verdict of the provincial court against the district authority. The court may order that the district authority grant the land user a plot of land as compensation for relocation, however this verdict remains unenforceable when the district resists or where there is no land available [55].

## Handling Protests

Aggrieved farmers often gather in large groups, sometime with hundreds of protestors, and demonstrate outside government buildings in Hanoi and Ho Chi Minh City, and sometimes also at the private houses of senior government and Party leaders. As noted by the Party, over the years the gathering becomes better organized, seemingly well advised by legal professionals,

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<sup>52</sup> Law on Administrative Procedure as adopted on November 26, 2010.

<sup>53</sup> MOJ, November 04, 2011, *On situation of administrative procedure*, <http://moj.gov.vn/ct/tintuc/Pages/thong-tin-khac.aspx?ItemID=4594>.

<sup>54</sup> See for example, *Pháp Luật Việt Nam, xử đã khó, thi hành án còn khó hơn*, <http://baophapluat.vn/tu-phap/thi-hanh-an-hanh-chinh-xu-da-kho-thi-hanh-con-kho-hon-122740.html>.

<sup>55</sup> Deputy Chief Judge Do Khac Tuan of Ho Chi Minh City Provincial People Court, *On Enforcement of Verdicts of Administrative Courts*, Report at Conference on Administrative Litigation in HCM City on May 24, 2012.

and possibly also “being supported by hostile forces” [56]. The number of gatherings increases significantly at times when the National Assembly, the Government or the Party conveys its important meetings sessions. Some individual aggrieved farmers react on very extreme ways, such as threaten to burn themselves to death. For example, Doan Van Vuon, a farmer from Tien Lang, Hai Phong shot on the police who were attempting to acquire his land in January 2012 [57]. In another example, in September 2013 another farmer, unsatisfied with compensation, stormed a provincial land clearance office in Thai Binh, killing one official and injuring four others [58].

Land users also organized themselves to collective protests to resist the eviction. In April 2012, as a thousand armed police attempted to clear land in Van Giang, Province Hung Yen, they faced strong and long lasting resistance from protesting land users. Two reporters of Vietnam Television and several farmers are beaten brutally. At first the forceful eviction in Van Giang was not considered worth reporting by state controlled media. On contrast, thanks to the social media, bloggers and citizen journalists the event was covered on the Internet in full detail [59]. Eventually, as public dissatisfaction increased, the protest of farmers in Van Giang appeared in state controlled newspapers [60].

Learning from rural unrest in Thai Binh and Highland Tay Nguyen in previous years [61], the Party and State in Vietnam respond in these cases with particular care and caution. Recognizing that the deep root of the grievances lies in the conflicting land policies, historical incidents and poor land management; the Government avoids using harsh forces to suppress farmers protest. In contrast, the Government seems to employ a strategy that differentiates the protestors. While local government attempts to persuade aggrieved farmers with material supports, the police focus their efforts on detecting and punishing the core elements leading and organizing the protests.

## Lessons and Recommendations

The Vietnam case, once again, confirms that land taking disputes are very complex. They arise when disagreement exists about sharing the benefit of converting rural land to other purposes among state authorities, developers and land users.

The strategy that Vietnam’s government employs to cope with increasing land grievances is primarily preventive. It focuses on improving the legal awareness of land users and public servants to implement properly law and policies. To prevent conflicts, local authorities are required to discuss land planning with land users. The dialogue is supposed to begin early at the phase of preparing the land expropriation, continue during its implementation, and settle

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<sup>56</sup> The CPV Central Committee for Home Affairs, *On Situation of Complaints and Denunciations in 2013*, <http://noichinh.vn/cong-tac-noi-chinh/201312/ket-qua-cong-tac-tiep-dan-va-giai-quyet-khieu-nai-to-cao-cua-cong-dan-nam-2013-293315/>.

<sup>57</sup> See Sài Gòn Tiếp Thị “Facts about the Land, Land Rent, Coercion in Tien Lang”, Feb. 2 2012 <http://sgtt.vn/Thoi-su/158493/Su-that-ve-viec-giao-dat-thue-dat-cuong-che-o-Tien-Lang.html> .

<sup>58</sup> See: <http://www.bbc.co.uk/news/world-asia-24057039>.

<sup>59</sup> See: [http://www.bbc.co.uk/vietnamese/vietnam/2012/04/120424\\_van\\_giang\\_showdown.shtml](http://www.bbc.co.uk/vietnamese/vietnam/2012/04/120424_van_giang_showdown.shtml).

<sup>60</sup> See Báo Nông Nghiệp Việt Nam 26/04/2012 <http://nongnghiep.vn/nongnghiepv/72/1/1/93949/ruong-dat-nhin-tu-chuyen-cuong-che-o-van-giang.aspx> or Tuổi Trẻ, two weeks later: <http://tuoitre.vn/chinh-tri-xa-hoi/490901/van-giang-noi-lo-muu-sinh-sau-thu-hoi-dat.html>.

<sup>61</sup> Human Right Watch 1997, <http://www.hrw.org/reports/1997/vietnm/Vietn97d.htm>.

complaints at a later stage. If properly implemented, these forums will help land users to present their views. Ensuring the right to be heard is an important step toward active participation. When developers and local authorities willingly attend dialogue with land users and respond constructively to their proposals, innovative solutions can be found, thus significantly reducing discrepancy among the disputing parties. The grass-root democracy as experienced recently in Indonesia may converge with Vietnam's experience in facilitating the active participation of land users in land taking procedure.

Although the processes in place give land users rights to present their grievances, there are some fundamental shortcomings with the current systems. As we saw in the previously discussed case studies, there is a fundamental power imbalance in Vietnam between state officials and land users. The current land regime does not make officials sufficiently accountable to legal standards and citizens to make them responsive to the reasonable demands of land users.

### **What Reforms Might Redress this Power Imbalance?**

The Indonesian case study showed the advantages of allowing the aggrieved parties to nominate conciliators. This process overcomes the problem of the state being both a player, in the sense of benefiting from land taking and also being the referee. The Indonesian case studies also demonstrated the benefits of commissioning independent expert advice about the adequacy of the compensation payments. In Vietnam, non-adversarial grass root mediation is quite successful in resolving a wide range of complex social problems. This process could be adapted to deal with land taking disputes by injecting conciliators who are independent from the state. Another change that would help redress the power imbalance is to create a positive duty of officials to take objections into account and give reasons for not changing plans to address grievances. This reform will give land users grounds for complaint if their concerns are brushed aside.

Currently administrative courts lack powers to review the substantive merits of land taking cases and consider the adequacy of compensation levels. According to existing Law on Administrative Procedure 2010, administrative courts only have the power to review individual administrative acts [62]. Land taking policies and regulations that are adopted by the central government and by local People Councils are not subject to juridical review. For instance, the compensation rate or resettlement policies, which were adopted by a resolution made by a Provincial People Council, cannot be challenged by in administrative courts. Administrative courts only have powers to review the improper exercise of state power, such as applying the wrong compensation rate or violating the terms of a resettlement plan. Reforms that extend this jurisdictional power would give land users more leverage over land taking cases. The establishment of specialized land tribunals at the central or regional level might overcome some of the problems of local courts automatically supporting local government planning policies.

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<sup>62</sup> See Articles 28.1, 3.1 and 3.2 Law on Administrative Procedure 2010.

Although Vietnam has ruled out the creation of a constitutional court or review body in the short term, given the success this body in Indonesia in redressing the power imbalance between state officials and land users, thought should be given to establishing such an institution in Vietnam.

The Indonesian case study also shows how increased public participation in local elections increases the accountability of local officials in land taking cases. However, in order to increase the responsiveness and accountability of local authorities to the voice of land users, further fundamental institutional reform are needed. Notably, among others, the mechanisms to ensure the freedom to election, at least at the local level to directly elect the leader of village's or ward's administration. Also citizens need a right to be informed, and the right to challenge administrative wrongdoings which contradict constitutional principles. The revised Constitution 2013, in principle, recognizes all those rights. Foreign models and experiences, for example the Indonesian experience with the Constitution Court, may in the short term have little direct impact on the design of institutions in Vietnam. On the other hand, general legal principles, such as the idea to protect land user's rights against administrative wrongdoings, will certainly spread out across the borders.

The wave of new legislation, initiated by the new Constitution 2013, will continue to cover all most important laws affecting the power of local authorities to acquire land. The new Land Law 2013, which will take effect at middle of 2014, aims to strengthen the rights of land users and limit the power of authorities to seizure land. In the years to come, fiscal and taxation laws need to be revised with the purpose of encouraging local governments to seek other sustainable revenues, rather than in selling land to property developers. A far reaching comprehensive strategy is needed to redress land grievances. From the lesson learned, this strategy might comprise at least some of the following features:

**First**, to ensure that the property rights of land users are properly protected. This requires the full implementation of the Land Law 2013, and a fully functioning land administration system that follows clear procedures when issuing titles to land users.

**Second**, the increase the transparency and accountability of local government to avoid arbitrary and illegally appropriation of land. Land grievances rarely are directed against central government, they occur almost entirely during the implementation of the law at the local level. The role and capacity of the Government Inspectorate in this regard should be improved in order to secure administrative discipline and proper law implementation within the state apparatus.

**Third**, land users should be entitled to share the benefits of land conversion. In addition to receiving land compensation, land users should have a right to negotiate with land developers in innovative ways to share the benefit of the land conversion. In determining the land price, the role of market force as indicated by the Land Law 2013 need to be strengthened.

**Fourth**, extend grass-roots mediation during the land planning and compulsory acquisition stages, giving land users rights to nominate conciliators/mediators to create dispute resolution forums that are more independent from the interests of local governments.

**Fifth**, develop national land resettlement guidelines to provide a benchmark for best practice in compulsory land acquisition, resettlement and compensation. These guidelines should be based on international best practice standards.

**Sixth**, the development of responsible media is crucially important in improving the accountability of local authorities and promoting the active participation of land users. In response to vibrant social media, the state controlled media needs to be reformed in order to fully reflect the diverse interest of state authorities, developers and land users.

**Seventh**, although the judiciary currently has only a limited role in resolving land disputes, an effective land acquisition system requires a fully functioning court system. Administrative courts that are independent from political systems have the capacity to level the power imbalance between the state and citizens, which is vital for effective dispute resolution. One possible way of increasing the capacity of administrative courts is to give provincial level courts the power to hear first instance complaints arising from land taking. This would distance the court from the administrative agency conducting the land taking. Other countries have shown that specialized land tribunals, which are functionally separate from the mainstream judicial system can withstand pressures from powerful local governments with vested interests in land taking outcomes.

**Eighth**, policies relating to public revenue and property tax should be revised in order to create incentives to share the benefits of land taking between governments, developers and land users. A set of fiscal and taxation policies could reduce the current inequality between these entities.

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## Report Conclusions

The country case studies show that land-taking disputes are inevitable in rapidly developing societies. But they also demonstrate that early and effective interventions can reduce the number and intensity of disputes. Although useful in clarifying entitlements, land tenure rights did not play a decisive role in resolving disputes. Legal rights cannot resolve fundamental conflicts over scarce resources. Contradicting claims that economic development resolves land disputes, studies have found no statistical correlation between village size/ wealth and the frequency and intensity of land disputes (Hurst, Mingxing Liu and Ran Tao, 2010, 10). By far the most important factor in reducing disputes is placing land users on a relatively equal bargaining position with state officials and land developers.

The country studies also reveal that land disputes are not static and evolve over the life of the conflict. As the emotional intensity of disputes increases, what may begin as simple disagreements over the amount of compensation often transforms into more deeply rooted conflicts over ideological principles. For this reason, effective consultation that brings the disputing parties together at an early stage in the dispute is often the most effective way of preventing conflicts from becoming intractable.

### Consultation

Consultation is most useful during the pre-conflict stage before frustration and emotion transform peaceful disputes into violent confrontations. Consultation can take many forms, with or without moderators directing discussion. It works by letting the key actors deliberate their deeply internalized perceptions, attitudes, and intentions in open dialogue that reduces emotion and encourages rational exchanges.

The case studies from China, and especially Indonesia, show the importance of giving land users an effective voice in planning land developments—a process that significantly reduced the scope and intensity of land disputes. A large scale empirical study conducted under the auspices of the Chinese Academy of Science<sup>63</sup> (Hurst, Mingxing Liu and Ran Tao, 2010) in 2005 found public participation in solidarity organizations (mass-organizations) had a very positive influence over land use cases, reducing the scale of disputes and number of participants in disputes. However in China the organizations, such as trade unions, religious organizations and community associations, that elsewhere play an effective dispute resolution function are under tight government control and have a politicized function that reduces their effectiveness in resolving conflicts.

The Indonesian case study demonstrated the importance of social organizations in creating a level playing field for consultations between land users and powerful state agencies and developers. They also reveal the importance of getting disputants to agree about the facts of the case. Many land-taking cases are complex, and disagreements arise about which sets of facts accurately describe land tenure rights and compensation packages. Consultation in Indonesia has overcome this problem by inviting independent third parties to research the facts under

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<sup>63</sup>The project interviewed over 1,700 people in 121 villages across six provinces in China.

dispute. The third parties, who are often experts drawn from university departments, prepare reports that evaluate land claims and assess the market value of compensation payments offered by developers. The reports then form the basis for on-going negotiations between the government, developers and land users.

## Mediation

A core difference between consultation and mediation is found in the interaction between actors. During consultations, actors and intermediaries have the sole task of representing particular interests. Mediators, on the other hand, need to remain detached from the actors to avoid accusations of corruption and bias. Like consultation, mediation seeks consensus among the disputing parties through intensive discussions and negotiations. In the course of the mediation, the actors learn about each others' interests, motivations, and desires.

In many countries in East Asia, mediation is often linked to societal norms (Fu 2009; Peerenboom and He 2009). It is effective because mediators are not bound to follow state law, which sometimes serves central rather than local interests. In addition, they can use local norms that are accepted by the actors.

In drawing on a wide range of sources to resolve disputes, grand mediation in China seemed to offer a useful form of dispute resolution. But closer investigation reveals a shortcoming with grand mediation; it is a type of administrative—rather than adjudicatory—mediation. Instead of emerging as an alternative to court litigation, grand mediation has become a local government strategy for resolving land disputes through administrative power. It has proved ineffective in preventing land disputes from escalating into political confrontations, because it does not give land users access to the core benefits of mediation—informal adjudication by impartial referees. It is also largely divorced from the social structures and norms that land users might recognize as appropriate ways of fairly dealing with land.

An important lesson that can be drawn from grand mediation is that mediation is ineffective where the state is an active participant and attempts to “manage” disputes to favor the state interest. In contrast, studies show that grand mediation has been a popular and successful means of resolving civil disputes, such as inheritance cases and civil debt. In these cases, mediation grows out of social processes and provides a forum where the law is flexibly applied to suit the needs of the disputants (Hu 2011: 1082–1086).

Mediation is also effective where semi-autonomous organizations trusted by land users and local state officials act as independent adjudicators. The role played by semi-autonomous organizations in China and non-government organizations (NGOs) in Indonesia in mediating disputes between land users and developers has been discussed in the China and Indonesia Country Case Studies. These organizations act like the “boundary spanners” because they can explain the concepts underlying disputes using language and idioms that are understood by land users, developers, and state officials. Through this dialogue, they can identify common ground that might form the basis for lasting settlements. Of equal importance, such organizations have the linkages into the community and government that compel each side to take the mediation seriously and refrain, at least temporarily, from using political means to leverage better outcomes. When faced with “boundary spanners,” even authoritarian Chinese agencies must concede power and deal with land users on a relatively equal footing.

The grass-roots reforms in Indonesia are a significant development, because electoral reforms have made state agencies politically responsive to local land users. Elected officials at the

provincial and district levels are now politically compelled to take the concerns of *adat* communities into account in granting development permission for industrial agriculture.

## Courts

In contrast to consultation and mediation, litigation through courts involves formal law-based adjudication. Court procedures follow formal rules that govern what types of arguments and evidence are and are not accepted. Unlike consensual dispute resolution, judicial decisions are binding and may produce results that none of the litigants support.

Courts have a poor record in resolving land cases in developing East Asian countries. Formal court systems have been viewed historically throughout much of East Asia as colonial or alien impositions that are disconnected from indigenous norms and dispute resolution practises. Although this perception is slowly changing and litigation rates are increasing, there remains the systemic problem that courts are not particularly attuned to resolving disputes to the satisfaction of all concerned (Teubner 2001). Judges produce acceptable outcomes, not because the law is responsive to underlying social conditions and is well understood by the public, but rather because the law provides legal solutions to problems that cannot be resolved through consensual dispute resolution. As a consequence, courts tend to work well where litigants are prepared to accept law-based outcomes, but struggle to find lasting settlements where law, legal reasoning, and judges lack social legitimacy. This partially explains why unsuccessful litigants in land cases often do not accept the final decision by courts of appeal and continue to lobby political and government agencies.

### **Chinese courts**

Of all the countries in East Asia, China's court system most closely resembles the Vietnamese system. Both court systems were originally modeled on the judicial and procuratorial institutions developed in the former Soviet Union and maintain close working relationships between party and state officials and the courts (Nicholson and Quang 2005). Despite substantial reforms over the last two decades, courts in China and Vietnam share some common characteristics that limit their capacity to effectively adjudicate land-taking cases.

A recent review of 200 land-taking cases in China from 2004 to 2011 (discussed in the "China Country Case Study") reveals the close connection between courts and the party and state (Cheng 2014). This political nexus does not significantly influence decisions in civil cases, such as inheritance and divorce, which involve private property claims. It is an entirely different matter where land users mount administrative actions against the state seeking to prevent land-takings or increase compensation payments.

The Case Study found that courts tend to interpret the entitlements of land users narrowly in land-taking cases, restricting compensation to the productive value of land rather than market prices. Judges view land ownership in rural areas as entitlements rather than recognizing fully autonomous private property rights. Land users are consequently treated as members of collectives without the individual standing to claim market compensation for their land rights. To avoid making rulings that might give land users compensation in excess of payments offered by local government agencies, judges push cases back to government officials. The following statement from the Zhejiang Provincial High People's Court Research Group illustrates the pressures faced by courts in land-taking cases (Hurst, Liu and Toa 2010):

When the defendant's [local government] concrete actions are in error, the court does not give a verdict according to law, instead it uses mediation methods

(*xietiao fangshi*) to get the plaintiff to withdraw their suit. Especially in cases of land takings, housing demolitions and other mass disputes, the local government in the general name of economic development and stability puts pressure on the court, demanding that the court uphold the defendant's concrete behavior. In this situation the court falls into a difficult spot where it doesn't dare (*bugan*) to issue a verdict saying the government lost, and also cannot fail to take the legal interests of the plaintiff into consideration. In a situation in which it is under pressure from both sides, the completely safe plan is to begin a multi-sided mediation between the plaintiff and the defendant in order to make the plaintiff withdraw their case.

Another finding with direct relevance to Vietnam is that Chinese judges interpret the law according to party socio-economic policies. Researchers (Fu 2009; Cheng 2014) have shown how court decisions in land-taking cases closely follow changes in socio-economic policies addressing land disputes, sometimes without accompanying changes to statutory laws. For example, from 1997 to 2004, the Chinese Communist Party (CCP) followed the principle of "taking account of fairness while keeping efficiency as the priority" (CCP Report 1993). After 2004, however, the policy changed to "emphasize efficiency for primary allocation; emphasizing fairness for reallocation" (CCP 2007). Courts were asked to play different roles over time, alternatively to "protect the sail of the economy" and "to promote a harmonious society."

These socio-economic policies resulted in the following judicial outcomes:

- Private property rights cannot prevent governments from taking land or challenging the legitimacy of government takings.
- Substantive issues such as abuse of power are considered much more important than procedural violations.
- Government agencies are permitted to unilaterally determine compensation for collectively owned land, but courts require local governments to negotiate compensation with the owners of urban land.
- Rural land users were permitted to claim fixtures and young crops and sometimes resettlement subsidies.

There are a range of reasons given for the weak position of Chinese land users in challenging land-taking and compensation decisions. Standard explanations include vague laws and regulations as well as fiscal and corrupt incentives for local governments to maximize land-takings and minimize land compensation. This Report suggests several additional reasons. Courts are unsympathetic toward individual land claims and routinely interpret the same provisions in the land law in different ways to favor state interests. When legal rules are unclear, for example, the Land Management Law does not stipulate how to distribute compensation to land users, judges look for guidance from party instructions and local government policies rather than develop judicial doctrines that might uniformly and transparently guide their decisions. This approach follows the "Three Supremacies" policy: judges shall always keep in mind the supremacy of the party line, the supremacy of the people's general interests, and the supremacy of the Constitution.

One consequence of this subordination of law to political policy is that judges are reluctant to accept politically controversial cases and push them back to government officials for resolution through grand mediation. Judges face a difficult position: "on one side, a powerful government agency may have demolished houses or occupied land for policy purposes; on the other side are a group of people who are angry, helpless, but ready to demonstrate in front of the court if the court's decision is considered unfair" (Cheng 2014). Courts in China struggle to impartially resolve land-taking cases under the "Three Supremacies" policy.

In principle, rural land users in Vietnam possess clearer land use rights than their counterparts in China. Whether Vietnamese administrative law courts will follow the Chinese lead in narrowly construing individual rights in land-taking cases remains uncertain. However, given the policy and structural similarities between these court systems, it seems unlikely that Vietnamese courts will be able or willing to provide effective and impartial dispute adjudication when confronted with political pressure from party and state agencies (Nicholson and Quang 2005).

### ***Indonesian courts***

Indonesia provides an excellent example of what can happen if courts are independent from the political and state apparatus and are staffed by competent and uncorrupted personnel. The Indonesian Constitutional Court provides effective outcomes for land users because it was created separately from the main Indonesian court system, which is widely considered corrupt, politically compromised, and incompetent.

The Constitutional Court has attracted considerable public legitimacy through well-publicized cases that have overruled state legislation on many occasions. As a result, both state agencies and citizens respect the Constitutional Court as the final arbitrator on highly controversial issues such as the capacity of the Ministry of Forests and Natural Resources to take forest land and extinguish the rights of *adat* communities. The Constitutional Court has given Indonesian land users a platform to argue on a relatively equal basis with the most powerful state agencies and land developers in the country.

### ***Transnational courts***

Cambodia provides a case study of what happens when domestic dispute resolution agencies comprehensibly fail to deal with land-taking disputes. Frustrated by years of delays and obfuscation, land users in Koh Kong Province took their action against foreign land developers to the UK High Court. This action, which compromises Cambodia's reputation as a foreign investment destination, was only contemplated because domestic institutions failed to provide satisfactory outcomes.

## **Fiscal Measures**

Efforts to reduce the revenue received by local governments in China from land taken have proved effective on an experimental basis. China is a special case because a tax-sharing system commencing in 1994 made local governments dependent on land sales for revenue. According to a 2010 report prepared by the China Academy of Social Science, between 1998 and 2009, revenue from land sales in China increased from 50.7 billion to 1.5 trillion RMB, and the percentage of land sales revenue increase from 3 per cent in 1998 to 11 per cent in 2008. By 2009 land revenue contributed one third of the budgets for local governments and was increasing at an annual rate of 39 per cent. The appetite for debt is huge because local governments have accrued 2 trillion USD in debt funding infrastructure projects.

Local governments in the other countries studied were not directly involved in large-scale infrastructure projects and consequently were not as dependent as Chinese local governments on land sales for revenue. For this reason fiscal measures, such as centralizing land tax have not been effective in controlling land taking by local governments in Indonesia and Cambodia.

## Implications for Vietnam

This Report suggests certain directions for resolving land disputes in Vietnam.

1. In rapidly developing economies, proactive planning can reduce, but never eliminate land-taking disputes. There are, however, strategies that governments can follow that will reduce the intensity and number of disputes.

2. Clear land tenure rights can reduce confusion about ownership claims that underlie some land taking disputes. However, land tenure rights are only effective where they reflect equitable land allocation policies. Clear tenure rights can entrench inequalities if the primary allocation system is unfair. In addition, tenure rights are ineffective without efficient and transparent land-titling agencies and independent and competent courts that are willing to protect private rights against powerful state agencies and land developers.

3. Attempts by governments in the region to suppress land disputes have pushed grievances underground, leading in the long-term to more deep-seated and intractable conflicts.

4. Finding resolutions through consultation at an early stage in the conflict has the most chance of reducing the intensity of land-taking disputes. Disputants are most likely (if at all) to reach pragmatic outcomes before the emotional intensity of disputes increases and disputants find ideological (epistemic) reasons to oppose settlements.

5. Lasting settlements are most likely to occur where land users, state agencies, and land developers negotiate together in relatively unmediated dialogues. This may happen, as demonstrated in China, where informal connections link the social organizations representing land users with party and government agencies. Without these linkages, social organizations have no effective way of making local party-state agencies accountable to land users. Rather than relying on informal linkages, the Wukan reforms (Fu 2014) and grass-roots democracy reforms in Indonesia have enabled land users to organize and represent their interests to local governments and developers. Grass-roots democracy conveyed political power to the people. This has enabled relatively unmediated consultation/mediation that has resolved otherwise intractable disputes.

6. Grand mediation in China clearly shows that state managed dispute resolution that favors the state interest is ineffective in reducing the scale and intensity of land disputes. Especially in an age when social media rapidly spreads information about land disputes, land users form clear views about the justice and appropriateness of land-taking and compensation and are difficult to manipulate through state-managed mediation and litigation. Courts in China and Vietnam are especially ill-equipped to deal with land-taking cases because of their subordination to party-state socio-economic policy.

7. Low-level political participation in policy implementation is possible in China, but institutional channels for resolving land disputes are rigidly restricted. Tight state management of formal dispute resolution has the unintended consequence of driving land users into non-institutional channels. Frustrated land users organize themselves to demonstrate their dissatisfaction, and with the support of the wider community, as well as public and social media, they force the government to a compromise. Since grass-roots democracy reforms in Indonesia gave *adat* communities the capacity to represent themselves through NGOs, the number of violent and confrontational disputes has reduced.

8. The discussion suggests that land disputes take place in alternating sequences of negotiation and open conflict. Without persuasive legal authority, unequivocal juridical foundations, or a

credible land compensation strategy, agreements will break down and be reshaped through fresh conflicts until a new consensus is reached. The process is therefore highly dynamic: land disputes are rarely settled once and for all, and dispute resolution practises need to be sufficiently flexible to deal with rapid change.

9. When the government relaxes “state management” powers and opens dispute resolution to genuine dialogue and negotiation, creative ways to reconcile law and order and protecting private rights emerge. As the Wukan case and the new grass-roots democracy reforms in Indonesia demonstrate, effective dialogue is only likely to occur where land users have the power to deal with state officials on a relatively equal footing.

10. It is unrealistic to entirely rely on dispute resolution to mitigate land disputes. Fiscal measures, such as removing the benefits of land sales and taxation, can reduce the incentives for local government to take land and pay low compensation. For example, a report prepared by the Chinese Academy of Social Science concluded that local government might follow land-taking rules more closely if tax incentives were removed (Cheng 2014).

11. New courts that are independent of party–state organizations and entrenched judicial corruption have the capacity to protect private land interests and level the playing field between land users and powerful state agencies and land developers.

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