

Paper: FDI in land and the need to establish a concession inventory: The case of Lao PDR

Oliver Schoenweger, Land Policy Adviser, GTZ

Introduction

The Lao People's Democratic Republic (Lao PDR) is a landlocked country in Southeast Asia with a total area of 236,800 km². Except for the alluvial plains of the Mekong valley below the 200 meter elevation, over 80% of the country is mountainous, of which a little over half has an elevation between 1,000 and 2,000 meters with sub-tropical temperatures.

Though Lao PDR has developed a lot in the last decade with economic growth rates of 7.8% in 2007 and 7.2% in 2008, the country is still one of the poorest in the region and counts among the Least Developed Countries (LDC). The GDP per capita (at PPP) increased in 2008 to 2,387 USD per year, but 76.8% of the population live on less than 2 USD per day (2002) and 19% suffer from hunger. Lao PDR claims to be a food self-sufficient country (in terms of rice production), but production is not regionally balanced and in 47 districts, food aid was given in 2008 to avoid hunger and famine.

Lao PDR is divided into 16 provinces and one municipality. Each province is further subdivided into districts. 6.7 million people live in the country, i.e. on average 27 people live per km². The underdeveloped infrastructure is matched by a lack of well educated people - only 61.5% of school children reach the last grade of primary school. This creates a bottleneck for further investments in the development of rural areas. Nearly 80% (2005) of the population work in the agricultural sector contributing only 42% to the total GDP. Families mainly practice subsistence farming and do not produce for the market. In total 1.25 million ha are cultivated with rice being the main staple food growing on 781,000 ha and representing 68% of the cultivated area.

It is estimated that on average an agricultural household has 0.5 – 3 ha for its private use, in addition to village land and communal forest. Forests are an important source of income.

Official data from 2005 from the Ministry of Agriculture and Forestry (MAF) reported that until 2002 41.5 % of the land area was covered with forest. A more current estimate by the end of 2007 from the National Land Management Authority (NLMA) reported a figure of 35%. Climate conditions for agricultural production are favorable for many agricultural products and most parts of Lao PDR do not suffer from water shortages.

Nevertheless, pressure on land is increasing due to population growth, but also because of resettlement and regrouping programs. Especially ethnic minorities are forced to move from upland areas into the valleys; Villages near hydro-power projects and mining areas are reallocated and other villages lose forest and agriculture land due to plantation concessions granted on land which had been used by them before. Since 2002, many concessions were given to national and international companies in order to increase agricultural and mining production which caused an increase in land conflicts.

Legal Framework

Land Tenure

By constitution, all land is property of the state. Nevertheless, the assignment of permanent use rights allows a land market to evolve. According to the Land Law 2003 the Lao tenure system is de facto based on state land and private land, whereas domestic property, as long as it is not colliding with public interests, is secured by article 16 of the constitution. Additionally, communal land is defined in the Decree 88 from 2008, but not yet included within the Land Law. Six forms of land documents are known, granting different bundles of property rights.

None of the documents issued in rural areas gives the owner 100% security to exclude others from the use of the land. While conflicts with other villagers (mainly boundary and inheritance conflicts) are easily solved by village heads and elders, people have no security in case of government projects or state concessions. Since 1997 the Lao government, supported by the Land Titling Project initiated by the World Bank, has allocated roughly 540,000 land titles, but in settlement areas only.

Since 2002, when land pressure increased due to the emergence of Foreign Direct Investment (FDI) in land and resettlement programs, tenure insecurity in rural areas has grown tremendously. Land use rights in Lao PDR for agricultural and forest lands have been allocated by the state to rural villages and local households through the Land and Forest Allocation (LFA) procedures and to private sector business investors (both foreign and domestic) through concession agreements and various forms of “cooperative” lease arrangement.

Over the last decade, the relationship between these approaches to land allocation has increasingly raised questions about the impacts of private sector agribusiness investment on rural livelihoods and associated issues relating to the tenure security of rural households.

Legal Framework for Investors

A major condition for transforming state land assets into capital is to attract investments that need state land. Two important obstacles to developing a favorable investment climate in Lao PDR are the cumbersome investment approval procedures and unclear responsibilities of state authorities. There is a growing consensus that the quality of government regulation on business is a major determinant to prosperity. According to a compilation of benchmarks on business regulations in a recently published report by the World Bank (World Bank 2009) conditions for starting a business in Lao PDR are among the least attractive in Southeast Asia and the Pacific Region.

Domestic and foreign investors can obtain land via long-term state land leases, concession contracts and contract farming. According to the Land Law different authorities are in charge depending on the land size. The mandate of provinces to authorize state land leases and concession contracts is quite limited in scope. They may only lease or concede up to 100 ha of state land, while up to 10,000 ha need to be approved by the central Government. An area exceeding 10,000 ha needs the approval from the National Assembly. Under 3 ha, district authorities were allowed to authorize concessions. In reality many concession areas larger than 3 ha were given out by district authorities and also areas larger than 100 ha were granted by the provincial authorities.

In order to promote FDI the Government of Laos (GoL) has implemented the “Promotion of foreign investment law“. According to this law, foreign investors must submit their proposals to the Department of Domestic and Foreign Investment (DDFI) of the Ministry for Planning and Investment (MPI). Proposals for projects worth USD 20 million or more require the approval of the Prime Minister.

The President and Vice President of the DDFI can sign approvals that involve investments of less than USD 10 million, FDI equal to or less than USD 3 million can be approved at the provincial level by all provinces, and in large provinces the ceiling for provincial approval is USD 5 million. The DDFI screening process takes into account the financial and technical feasibility of the project, input from relevant line ministries, and government policy (Tucker, 2009).

In recent years, the Lao Government has undertaken efforts to streamline its procedures for approving foreign investment. According to the amended Law on Promotion of Foreign Investment and its implementing Decree 6, the government has been trying to establish a ‘one-stop-service’ administered by DDFI.

Concession fee rates, usage charges for natural resources, and royalties set by law are not based on supply and demand. Different approaches applied in the provinces to determine fee rates do not seem

to meet market standards. Granting land free of charge should be restricted to joint ventures when the land offered constitutes the GoL contribution to the project, but is entirely dispensable in the case of other domestic or foreign investments. The prospect for reasonable profit is deemed to be a sufficient incentive and enterprises should not be subsidized (GTZ-LPDP 2006).

Land Tenure Security

Tenure security is based on legal security. This again requires a consistent legal frame without any loopholes, overlaps or contradictions. The Lao laws generally provide a good base for land administration and therefore for land markets. However, provision of rules is slightly better for urban land markets than for rural land markets. Quite a number of issues for instance the amount of fees for issuing Land Titles are left with the provincial administration to decide. There is a need for a nationwide regulation on who is entitled to issue Land Titles and what fees should be charged. There are probably too many decrees, instructions, notifications, proposed amendments etc. on fees related to land surveying, adjudication, transactions, mortgages etc. It should be considered how to harmonize fees as the jungle of regulations on land related fees favors corruption.

It seems best to issue Land Titles at the District Land Offices as this makes it easier for people to apply for them. Provincial Land Management Agencies are too far away and it would take too much time and transport costs for people to go there. A pilot land registration project (Land Management and Registration Project – LMRP) in two provinces is currently implemented by GTZ. The pilot is using a decentralized approach, meaning land use planning and land titling is done by district authorities.

National Policy

Through the National Socio-Economic Development Plan (NSED) 2006-2010, the Lao Government wants to promote foreign direct investment in the agriculture, hydropower and mining sectors to foster growth, reduce poverty and achieve the Millennium Development Goals. Commercial crop/tree plantations are one of GoL's priority areas for the promotion of foreign investments.

The current forest sector strategy by 2020 anticipates an area of 500,000 ha of industrial tree plantations in Lao PDR by the year 2020. Lao PDR is now experiencing the 3rd tree plantation boom while the 1st boom was in mid 90s with mainly teak planted by small farmers and 2nd in early 2000s with mostly eucalyptus led by the ADB's loan project. However, this 3rd boom is much larger in scale and more diverse in species than the past two booms. Not only large investors - both foreign and domestic - but also farmers are converting their fallow and sometimes even forest land to rubber, agarwood and teak plantations. Transnational companies are establishing and/or looking for land for fast-growing pulp-wood plantations to feed their paper-mills abroad (MAF 2007).

Main Types of Investments in Land

Concession

Concession refers to a type of investment whereby land is transferred to companies which are responsible for all their investment and cultivation/ construction. Large concessions are usually the preferred form of investment since it maximizes company control over the land.

In the 2nd tree plantation boom in the 2000s international companies started buying up existing concessions for paper production. Since then large concessions have been handed out for rubber, maize, Jatropha, sugarcane, cassava, agro-wood and other cash crops.

The introduction of concession farming fits into three key policy goals. First, it is said to make underutilized land more productive. Second, it reinforces the government's goal of eliminating shifting cultivation. Finally, concessions provide valuable FDI. This can help develop not only concession land (by providing infrastructure, jobs and stimulating the local economy) but also provides Government revenue that can help develop other regions (Hansen, 2007). Despite this potential increase, government revenue remains limited due to the low concession fees. At present the fees are about 3-9 USD/ha/year which are the lowest rates in the whole region.

Contract – Farming (or “Cooperative” private sector agribusiness investments)

Contract farming is an investment scheme that provides farmers with critical investments in exchange for a guaranteed share of the profits or harvest. By codifying the commitments of the farmer and trader, it provides “a strategy for reducing the risks inherent in growing crops and delivering them to the market” (Fullbrook 2007, p. 48). Ideally, it should produce a reliable market for the farmer and a stable secure supply for the trader or processor. Unlike concession farming, farmers retain rights to their land. As a result, contract farming has the potential to improve the land rights of smallholders and local communities while also potentially improving land productivity, boosting the local economy, and generating state revenues. On the other hand, unfair contracts have the potential to result in risks to farmers and debts if the crops fail, if quality standards are not achieved or if contracts are not honored. The lack of legal knowledge, process and the disproportionate power of the companies compared to the farmers are other factors to be taken into consideration (Fullbrook, 2007).

The “2+3” model is the most commonly promoted form of contract farming in the Lao PDR. There are 5 inputs in this model: land and labor provided by the farmer, and capital, technology, and marketing provided by the investor. The capital (seedlings, fertilizer, and equipment) is provided as a loan while future profit is generally divided in a respective 70/30 split (farmer/investor). In this model, the aim is to provide villagers with secure access to their land and a stronger sense of ownership in the plantations (Fullbrook, 2007).

In the “1+4” model (also called “concession-like model”), farmers give only land while the investor is responsible for the planting and maintenance with hired labor. Correspondingly, profits are reversed with the investor retaining the 70% share. Unlike concession farming, villagers still retain rights to their land and often a minority portion of the harvest in addition to wages.

Contract farming, in this case, amounts to the villager renting his land to the investor. Contract farming is a relatively new investment scheme in Lao PDR. In the Prime Minister's 2007 memorandum, “2+3” contract farming was emphasized as a better approach to FDI in the agricultural sector that would ensure local level benefits. It has been heavily promoted in northern Lao PDR, where reportedly over 10,000 ha have been planted under contract schemes. In the “2+3” arrangement, contracts are usually signed for 30 to 35 years for crops ranging from maize and rubber to chilies and pulpwood (WFP, 2009). Unfortunately, almost no information is available about impacts on the farmers' livelihood. And still, most investors prefer “1+4” arrangements.

Current Situation of FDI in Land in Lao PDR

Most FDI in Lao PDR still goes into the resource sector, particularly hydropower and mining (about 80% of total FDI). However, FDI in non-resource sectors has increased since 2008 compared to previous years. Major FDI to Lao PDR in recent years comes from the region, mainly from Thailand, China, Vietnam, Australia, India, Japan and Korea. In 2008, China had invested the most, taking over the top spot which was held by Thailand until 2007. Vietnam also passed Thailand to take second place (Vientiane Times, 2008). About one third of private foreign investment in Lao PDR comes from Thailand; the modern economic sectors and trade in the capital city as well as in the Mekong basin are operated by Thai companies (Haberecht, 2008/2009).

The economic relationship between Lao PDR and Vietnam is expanding. Vietnamese enterprises are investing in hydroelectric, mining and industrial tree plantations in Lao PDR. In 2007, China made pledges of trade and investment in Lao PDR worth USD 876 million and direct Chinese investment was approved at USD 1.1 billion by August 2007 (Yale Global, 2008). Currently many Northern provinces are, for all intensive purposes, economic zones for the Southern Chinese province of Yunnan. Contract farming, especially for rubber plantations, forms a considerable part of the business ventures. The massive expansion of rubber plantations vis-à-vis Chinese companies in Northern Lao PDR stems from a mix of market demand and land constraints in China and political incentives from both the Lao and Chinese governments (Haberecht, 2008/2009).

The GoL has already handed out sizable concessions such as a USD 30 million project by the Dac Lac Rubber Company for 10,000 ha of rubber trees; and a USD 30 million project with Viet Nam-Laos Rubber Joint Stock. A minimum of 150,000 ha had been granted to six plantation companies (involving rubber and eucalyptus), representing an investment of USD 500 million.

In Lao PDR, rubber cultivation reached about 12,000 ha in 2006 with plans for nearly 200,000 ha by 2010. There has been considerable discussion in the development literature of how small-scale rubber production in northern Lao PDR has helped to reduce rural poverty, though at some environmental cost. This example is frequently cited by international donors and development organizations as a positive example of small-holder-led export agriculture. Yet it does not represent the kind of rubber (or plantation) development occurring in the South – most of which is large-scale, foreign-owned, and in direct conflict with other land uses and users (WWF, 2007).

During the late 90s hoping to put a damper on the opium trade through China, the Chinese national Government started a program providing loans to Chinese businesses to invest in opium eradication projects in Lao PDR. Under this rubric, increased numbers of new Chinese investors supplied Lao farmers with seeds and inputs for commercial production of sugarcane and rubber crops. As a result, competition for swidden and fallow forests intensified, altering not only upland people's customary relationship with land and resources, but challenging the resource management framework established during the 1990s.

In May 2007, Prime Minister Bouasone Bouphavanh declared an indefinite moratorium on large land concessions for mining and agriculture “to address shortcomings of previous strategies”. Yet only a month into the moratorium, the governor of Vientiane Province granted 705 ha of land to a South Korean rubber project.

The Concession Inventory

Background

NLMA was only established officially in 2004 and started to fully function from 2006 onwards. NLMA a Government Administrative Organization under the Prime Minister's Office has a mandate to identify and define laws, policies and legislatives and strategic plan for managing and administering land and natural resource. Besides this, NLMA has a responsibility to identify, collect, manage and provide information on land and natural resource such as surveying, allocating, zoning, categorizing and plan the use of land and natural resource nationwide.

Nowadays, demand for land and natural resource use is increased, especially local and external investors want to use land and natural resource for activities of agriculture, industry, mining, tourism and so forth by leasing or conceding. The current significant issue is the land concession for growing industrial trees such as rubber trees, eucalyptus trees, agar wood trees, *Jatropha*, etc.. But, the process for approval, zoning for defining areas, categorizing land and natural resource lease and concession rates are not implemented equally nationwide. No recording and collecting of lease and concession information takes place. The lack of monitoring and inspecting the implementation of lease and

concession contracts is obvious. Because surveying, allocating, and zoning of land and natural resources were not done prior to approval of lease and concession, for instance, in some locations lease and concession areas cover the production areas of farmers, protection and conservation forest. In other areas, there is an overlap of different concession areas.

Therefore, illegal logging and destruction of forest, illegal exploration and exploitation of natural resources in the premise of lease and concession have been noted as well as conflicts between representatives of state agencies and villagers, companies and villagers, representatives at district and province level.

The guidelines for granting land concessions or leasing contracts are not clearly defined and guidelines for the selection of land for concessions are not developed yet. In combination with misuse of power and corruption at all levels, concessions are sometimes given without respecting the people's rights to live on these lands or are even granted twice, resulting in an increase in land conflicts. Forests are often substituted by plantations, meaning that an important source of income (in terms of NTFPs), especially for the poorest, is lost, aggravating food insecurity. In general, there is no or insufficient compensation for loss of access to land/forests.

Since investments in land have increased dramatically in the last years and no reliable and comprehensive data about these investments were available, NLMA requested GTZ/LMRP support in 2008 for collecting data on all concession and lease projects (in form of FDI, Joint Venture and domestic investment) in the country and for establishing a concession inventory. For four out of 17 provinces, the data are already available. The initiative of NLMA supported by GTZ/LMRP has for the first time developed transparency on investment projects in the 4 provinces already covered.. The German Federal Ministry for Economic Cooperation and Development (BMZ) has approved the support for extending the project to all provinces. A nationwide land lease and concession inventory should be finalized until mid of 2011. Besides this, the project will study the environmental and socio-economical impacts deriving from large scale land lease and concession.

Objectives and results envisaged

Objectives of the concession inventory project are:

1. Land and natural resource management, use and protection are highly effective, sustainable, economically improved; the natural environment is not negatively impacted and better protected.
2. Land lease and concession activities are properly managed and coherent with existing laws and regulations, characteristics of each zone, location and social-economic development plan in each period.
3. Management of land and natural resources are balanced; social and economic development by considering food production, hydropower electricity production and tourism as main activities is facilitated through strategic planning.

Results envisaged by the concession inventory project:

1. To re-summarize land lease and concession information around the country (quantity of projects, name of operating companies, areas, zone, categories and project locations that are already approved) in order to enable the central management and administration to fulfill their coordination role
2. To collect and study information on land and natural resource lease and concession nationwide.
3. To collect and summarize information from line agencies at national and local levels.
4. To identify social-economic and environmental impacts from large scale land lease and concession in the two pilot provinces of GTZ/LMRP.

5. To consult on the process of approval, monitoring and management of land lease and concession.

Expected benefits

1) NLMA, Government organizations at national and local level involved with land and natural resource management and administration:

- NLMA will have land and natural resource lease and concession information at national, provincial and capital levels, including detailed information on the location of lease and concession areas
- Land and natural resource management authorities at national and local level will improve their capacities in data summarizing, data collection, data analysis and data maintaining on land and natural resource lease and concession through the practice in the fields and through trainings.
- NLMA (at central, provincial and district level), line ministries and other relevant organizations will have information for monitoring, inspecting and managing active land and natural resource lease and concession projects under their own responsibilities; and for the approval of further land and natural resource lease and concession.
- The Government will use this information for identifying and defining policies, strategies, development plans, management and administration of land and natural resource nationwide.
- The Government will be aware of social-economic and environmental impacts deriving from large scale concessions
- Results will be used for updating/revising laws and regulations, policies, legislatives and strategies in order to improve managing land lease and concession in order to facilitate the harmonization of processes around the country.
- The Government will be able to increase national income through activities of land and natural resource lease and concession and to monitor investment activities systematically

2) Companies, local and external investors who have invested and will invest in land and natural resource in Lao PDR

- Companies, investors (foreign and domestic), local and external organizations conceding or leasing land and natural resource in Lao PDR will have more tenure security for their investment area
- Companies, local and external investors who concede and lease land and natural resource in Lao PDR in Vientiane Capital and Vientiane Province will be able to make required payment of relevant fees based on their rights and obligations systematically and continuously
- Companies, local and external investors will have relevant information for preparing their investment proposal.
- Conflicts between companies or investors and people may be reduced

3) The Lao People

- Villagers nearby concession areas are better protected from concession-encroachment on their own land, communal land or forest land
- Lao people will have improved access to information about lease and concession projects in their country or nearby their villages.

Methodological approach

- GTZ/LMRP supports the Land and Natural Resource Research and Information Centre (LNRRIC) financially and with technical assistance

- A small team the LNRRIC was trained in handheld GPS-equipment usage, mapping, ArcGIS, Q-GIS and creating spatial data sets
- The team collects data in the field and cross checks new data with already available data
- The team uses GPS equipment to obtain the exact location of concession projects and where possible surrounds the project area
- All data is then entered in a Database-System and the mapping is done in ArcGIS (now changing to Q-GIS). The location of each concession is added using the GPS data. This data is overlaid with a GIS base map and satellite images (where available)

First results

- The National Assembly has recognized the possible benefits of the concession inventory project. As a consequence NLMA has been asked by the Governmental Secretariat to extend the concession inventory nationwide (after the first two provinces).
- In the 4 provinces, where the inventory is implemented so far, more than 600 concession/lease projects were identified and entered in the Database and Mapping Software
 - The case of Vientiane Province shows a dramatic increase of FDI in land projects. Concessions were granted for 293,487 ha representing more than 15% of the total area of Vientiane Province (1,852,500 ha). The largest concession areas were granted to the mining sector with 267,381ha. Among the agricultural and agro-industry sectors land concessions of 12,114 ha were granted for the production of agro-fuel (mostly Jatropha projects), 7,290 ha for rubber production and 5,093 ha for wood production.
- The mapping visualizes typical problems: concession projects overlapping each other, concession projects located within conservation/protection area, concession projects or large parts of them actually located districts other than where the agreement was signed, the plantation area being much larger than the agreed size of concession area, etc.
- LNRRIC had to present the results from four provinces in front of the Ministers, the National Assembly and the Prime Minister. As a consequence, the problematic situation of handing out large concession areas to foreign investors without proper survey and planning was discussed at high political level.

Lesson Learned

- This method is time consuming, because all concession/lease projects need to be visited in order to get the necessary GPS points.
- Many concession projects are large areas without road-access; therefore surrounding the whole area (by Motorbike or walking) is often not possible. In the future, the team will work with satellite images in order to estimate the boundaries and calculate the surface area.
- Collected information has to be carefully analyzed and recommendations/lessons drawn