



Agricultural investments in Southeast Asia: Legal tools for public accountability

Emily Polack, Lorenzo Cotula,
Emma Blackmore and Shalmali Guttal



Agricultural investments in Southeast Asia: Legal tools for public accountability

Emily Polack, Lorenzo Cotula,
Emma Blackmore and Shalmali Guttal

Report from a regional lesson-sharing workshop, Bangkok,
March 2013.

First published by the International Institute for Environment and Development (UK)
in 2014

Copyright © International Institute for Environment and Development (IIED)

All rights reserved

ISBN: 978-1-84369-992-7

ISSN: 2225-739X (print)

ISSN: 2227-9954 (online)

For copies of this publication, please contact IIED:
International Institute for Environment and Development
80-86 Gray's Inn Road
London WC1X 8NH
United Kingdom

Email: newbooks@iied.org

www.iied.org/pubs

IIED order no.: 12573IIED

A catalogue record for this book is available from the British Library.

Citation: Polack, E., Cotula, L., Blackmore, E. and Guttal, S. (2014) *Agricultural investments in Southeast Asia: Legal tools for public accountability*. IIED, London.

Cover photo: Rice threshing in Bali, Indonesia © gnomeandi/iStock

Design: Smith+Bell (www.smithplusbell.com)

Printing: Full Spectrum Print Media. Printed with vegetable oil based inks on Chorus Lux, an FSC certified paper bleached using a chlorine free process.

Contents

Acknowledgements	ii
About the authors.....	iii
Acronyms	iv
Executive summary.....	1
1. Introduction	3
1.1. Agricultural investments in Southeast Asia and the accountability gap	3
1.2. Legal spaces and legal tools in Southeast Asia: what the report is about	4
2. Interrogating investment treaties	6
3. Engaging with national legal frameworks.....	8
4. Harnessing international human rights law	13
5. Scrutinising and strengthening agricultural investment contracting	16
6. Shaping international guidelines, principles and standards	19
7. Conclusion	22
References.....	24
Annex 1. List of participating organisations	25

Acknowledgements

This report distils key lessons learned from the regional workshop, 'Legal Tools for Accountability in Agricultural Investments in Southeast Asia'. The workshop was organised by the International Institute for Environment and Development (IIED) and Focus on the Global South. It took place in Bangkok on 7 and 8 March 2013. The workshop and publication are part of a wider initiative coordinated by IIED on Legal Tools for Citizen Empowerment. They were funded by UK aid from the UK Government, although the views expressed do not necessarily reflect those of the UK government.

The report reflects the ideas and inputs of all workshop participants through presentations, group discussions and debate. All participants were given a chance to comment on a draft and some provided additional input – see Annex 1 for a full list of participating organisations.

About the authors

Emily Polack is a Researcher in the Natural Resources Group at the International Institute for Environment and Development (IIED). Her research focuses on trends and features of the global land rush, models of agricultural investments, and legal tools for securing land rights. She holds a Masters in International Development Law and Human Rights and has a research interest in indigenous rights, legal pluralism and formal and informal accountability pathways in the land and natural resource investment sector.

Lorenzo Cotula is a Principal Researcher in Law and Sustainable Development at IIED. He leads research, capacity support, policy and advisory work on topics at the interface between law and international development. He steers 'Legal Tools for Citizen Empowerment', an initiative to strengthen local rights and voices within natural resource investments in low and middle-income countries.

Emma Blackmore is a Researcher in the Sustainable Markets Group at IIED. Her focus has been on the use and impact of standards and certification in agriculture, mining and fisheries. She has also explored the use of mechanisms to address conflict between companies and communities in natural resource extraction. Emma's most recent work has analysed the growing trade and investment between China and Latin America and the use of sustainability standards therein. Emma has also been involved in IIED's 'Legal Tools for Citizen Empowerment' initiative.

Shaimali Guttal is the Coordinator of the *Defending the Commons* programme at Focus on the Global South (Focus) and currently lives in Bangkok, Thailand. Since 1991, she has been researching and writing about economic development, trade-investment, and ecological and social justice issues in Asia – especially the Mekong region and India – with emphasis on local community and women's rights, and ecological sustainability. Shalmali also works with social movements, civil society organisations and actors, policymakers and academics, to develop campaigns on human rights, trade, investment and development issues.

Acronyms

ASEAN	Association of Southeast Asian Nations
ACIA	ASEAN Comprehensive Investment Agreement
AICHR	ASEAN Intergovernmental Commission on Human Rights
CSO	Civil society organisation
DSF	Dispute Settlement Facility of the RSPO
EIA	Environmental impact assessment
EITI	Extractive Industries Transparency Initiative
EU	European Union
FPIC	Free, prior and informed consent
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IFC	International Finance Corporation
IIED	International Institute for Environment and Development
IPRA	Indigenous Peoples' Rights Act (Philippines)
NCIP	National Commission on Indigenous Peoples (Philippines)
PKKK	National Rural Women Coalition (Philippines)
RSPO	Roundtable on Sustainable Palm Oil
SPI	Indonesian Peasants' Union
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Executive summary

Southeast Asia has been experiencing an investment boom in agricultural land for food, fuel and agricultural commodities. The rise in agricultural investments takes place against the backdrop of a fast-evolving regional context. In this 'Asian Century', trade and investment flows are flourishing across the region, framed and promoted by a new wave of regional and bilateral treaty-making.

Farmland investments are a source of pressures on land and natural resources, alongside other natural resource investments, such as mineral extraction, hydropower development and urban expansion. Well thought-out investment in the agriculture sector can bring benefits to rural communities but there is growing evidence of widespread negative economic, social and environmental impacts associated with large-scale investments.

Investments in agriculture are governed by a wide range of national and international legal instruments. These instruments significantly shape the potential for investment to promote, or undermine, sustainable development. They also determine the levers available to secure local rights and ensure that investments meet the aspirations and needs of rural populations.

Overall, the legal protection of local rights remains weak. In many countries, poor communities are losing out and there is a real risk that benefits of agricultural investments will be concentrated within a narrow segment of society. There is, however, a growing body of experience in strengthening local rights and voices in investment processes. Agricultural producers and affected communities, often in partnership with national and international civil society organisations, are increasingly getting organised and taking action to protect local rights, address power imbalances and secure fairer investment outcomes.

This report distils key lessons learned from a workshop on 'Legal Tools for Accountability in Agricultural Investments in Southeast Asia', held in Bangkok in March 2013. The workshop involved sharing experiences of using legal tools between legal practitioners, activists, academics and civil society groups from across Southeast Asia.

Workshop discussions focused on 'engaging with legal frameworks', and the report is therefore organised by 'arenas' of law. Tools and tactics shared at the workshop include civil society scrutiny of international investment treaties; engaging, challenging and influencing national legal frameworks; harnessing opportunities in international human rights instruments; scrutinising investor-state and investor-farmer contracts; and leveraging opportunities provided by international standards and principles for improving practices on the ground. Innovative examples include using public participation clauses in national law to secure public scrutiny of

investment treaties, seeking judicial review of investment legislation, and running awareness-raising campaigns for farmers on negotiating better contracts.

The experiences shared highlight the critical watchdog and monitoring role that civil society is playing in the region. They also show that no single approach will suffice. Promoting investments in agriculture that respond to local aspirations requires mobilising multiple legal arenas at different levels. This includes work to strengthen capacity at the community level, through to advocacy with federations of producer associations, workers' unions, rights advocates and legal support organisations, to scrutinise investment treaties and contracts, and identify appropriate channels to ensure accountability.

Workshop discussions also emphasised the critical importance of bridging law and politics in legal empowerment strategies. There are clear differences in the political space for citizen action within Southeast Asia. In those countries where political freedoms are limited and citizens who speak out risk repression, legal empowerment strategies need to be tailored to very specific entry points and openings for influence. Where political space is more open, legal tools are commonly used as a component of wider advocacy strategies, and civil society organisations are pushing the boundaries of law to make it work more in the interests of rural populations.

The recognition that multiple levers need to be activated in a strategic way and that it is impossible to dissociate law from politics, demands collaboration between civil society groups with complementary mandates and skill sets. Strategic alliances between farmers, legal practitioners, political economists, campaigners, academics and sympathetic government decision-makers are key. Politically aware legal professionals need to collaborate with legally savvy citizens, and together may form an important alliance for educating parliamentarians and other key institutions. Alliances across borders are particularly important as momentum for regional economic integration in Southeast Asia increases.

1. Introduction

1.1. Agricultural investments in Southeast Asia and the accountability gap

Southeast Asia has been experiencing an investment boom in agricultural land for food, fuel and agricultural commodities. Farmland investments are a source of pressures on land and natural resources, alongside other natural resource investments, such as mineral extraction, hydropower development and urban expansion. Well thought-out investment in the agriculture sector can bring benefits to rural communities but there is growing evidence of widespread negative economic, social and environmental impacts associated with large-scale investments.

The country contexts in which these investments take place vary, partly in terms of politics and socio-economic development, but also in the types of agricultural investments that are promoted. In Malaysia and Indonesia, for example, oil palm dominates the sector.¹ In the Mekong region, particularly Cambodia, Laos and Myanmar, rubber continues to dominate, through both plantations and contract farming. Other major crops expanding rapidly include sugar cane, rice, corn and also livestock.

In Southeast Asia, the rise in agricultural investments takes place against the backdrop of a fast-evolving regional context. In this 'Asian Century', trade and investment flows are flourishing across the region. Transnational corporations from Southeast Asia have been expanding fast. Today, 74 of the largest 2,000 publicly listed companies in the world are based in ASEAN countries, predominantly Malaysia, Singapore and Thailand.²

Investments in agriculture are governed by a wide range of national and international legal instruments. Assessing applicable legal frameworks tells us much about the potential for investment to promote, or undermine, sustainable development. It also helps us better understand what levers might be used to secure local rights and ensure that investments meet the aspirations and needs of rural populations.

Trade and investment in the region have been framed and promoted by a new wave of regional and bilateral treaty-making. New treaties are further liberalising trade and investment flows, and are strengthening the legal protection of foreign investment. There have also been advances in the development of national and regional instruments to protect the rights of those who stand to be affected by the growing

1. Indonesia has 9.4 million hectares under oil palm, with 10–20 million more targeted for expansion. In Malaysia, 4.6 million hectares are under oil palm, with planned expansion of up to 100,000 hectares each year (figures from various sources cited in Polack, 2012).

2. <http://www.forbes.com/global2000/> [accessed 04/07/13].

pressures on resources associated with increased investment activity. This includes developments in international and regional human rights law and mechanisms, and changes in national legislation.

Overall, however, the legal protection of local rights remains weak, undermined by shortcomings in both substantive rules and legal remedies. In many countries, poor communities are losing out and there is a real risk that the benefits of agricultural investments will concentrate among a narrow segment of society.

There are, however, also signs of positive developments. Despite much diversity across countries, agricultural producers and affected communities – often in partnership with national and international civil society organisations (CSOs) – are increasingly getting organised and taking action to protect local rights, address power imbalances and secure fairer investment outcomes. They are also advocating for greater accountability and pushing for investments that support, rather than undermine, the livelihoods of small-scale agricultural producers.

Legal strategies are an important ingredient of this action. Many initiatives are pushing the boundaries of law, in order to make it work in the interests of citizens. Civil society, academics and legal professionals are scrutinising, challenging or using the policy, legal and voluntary instruments that shape, enable and facilitate investment. This can be from concession contracts to contractual relations between companies and farmers; from engaging with national environmental laws to strengthening international voluntary standards; and from scrutinising international investment treaties to harnessing human rights law. These legal strategies involve engaging in politics as much as in legal processes.

On the ground, there is growing demand for tools that enable citizens to have their voices heard, drive strategic development choices and hold government and investors to account. In this report, we refer to these tools as 'legal tools'.

1.2. Legal spaces and legal tools in Southeast Asia: what the report is about

As part of the IIED-led 'Legal Tools for Citizen Empowerment' initiative, IIED and Focus on the Global South convened an international workshop to promote the sharing of experience between practitioners engaged with these approaches in the region. The workshop was held in Bangkok in March 2013. It offered an opportunity for legal practitioners, activists, academics and civil society groups from across Southeast Asia to share their strategies and experiences of using a number of legal tools in relation to agricultural investments.

Workshop discussions spanned issues such as community-based legal empowerment, such as legal literacy trainings on local land rights; to analysis of, and campaigns on, international investment treaties and arbitration. Discussions set out the breadth of tools and their associated challenges, opportunities and outcomes. The meeting identified differences and similarities in approaches, but also the

variation in political and legal contexts that can profoundly influence the relevance and outcomes of different legal empowerment and accountability approaches.

This report presents key lessons learned from workshop discussions. It highlights the views, concerns and practical experiences of many of the constituencies and CSOs within the region. It discusses the entry points that citizens and organisations in Southeast Asia have identified for either improving accountability in general terms, or holding actors to account in connection with particular land deals or investment projects.

The report does not provide a comprehensive description of engagement with all relevant arenas of the law. Rather, it discusses practical experience with some strategies involving use of legal tools; the common feature being the pursuit of justice and accountability. This focus highlights tangible mechanisms and potential spaces for engagement, and the opportunities and challenges they entail.

The report is organised by 'arenas' of law, and the level at which these arenas are located. The use of legal tools at national, regional and international levels is not linear; a community would not necessarily have to use levers at the national level before using them at the regional level, for example; both options could be pursued at the same time. Organising the report in this way helps indicate entry points for change, however, and highlights the types of representation and alliances that might be needed to use these levers effectively.

Section 2 discusses lessons from CSO advocacy to scrutinise international investment treaties. Section 3 examines opportunities for engaging with national legal frameworks, whilst Section 4 deals with harnessing opportunities for accountability in international human rights instruments. Section 5 discusses CSO scrutiny of investor-state contracts. Section 6 outlines opportunities emerging in international standards and principles for improving practices on the ground. Finally, Section 7 explores the implications of the experiences shared at the workshop, for legal empowerment and stronger accountability in the governance of agricultural investments in Southeast Asia.

2. Interrogating investment treaties

Over the past decade, economic liberalisation has spread across Southeast Asia. Governments have adopted reforms to liberalise and facilitate incoming investment, as a driver of economic growth. A push via ASEAN for regional economic integration, to strengthen the competitiveness of the region and promote intra-regional trade and investment, is also driving legal reforms at both regional and national levels.

The ASEAN Comprehensive Investment Agreement (ACIA) sets the framework for investment promotion in the region, defining minimum standards of protection for cross-border investments. In addition, the deepening of Southeast Asia's integration into the global economy is being accompanied by increasing numbers of preferential trade and investment agreements with the outside world. The European Union is currently negotiating bilateral trade agreements with several ASEAN member states: Singapore, Malaysia, Vietnam and Thailand. Emerging multilateral economic partnerships – particularly the Trans-Pacific Partnership Agreement, currently under negotiation – will set the rules regulating a large share of trade and investment flows.

These rules can have far-reaching implications for the ability of governments to regulate in the public interest. For example, treaty commitments for governments to accord investors 'fair and equitable treatment' have been used all over the world to challenge government action that adversely affects ongoing investments. Legal commitments in investment treaties are backed up by effective enforcement mechanisms. If a government violates its commitments, investors can seek large compensation awards from international arbitral tribunals; and if the government does not pay up, investors can seize assets that the government may hold overseas.

Despite these far-reaching implications, the expansion of international treaty-making has not been accompanied by a comparable expansion in the mechanisms for citizens to hold governments and investors to account. In some Western countries, there are opportunities for the parliament or general public to get involved with the development of major trade and investment treaties. In Southeast Asia, these opportunities remain rare.

But civil society within the region has been increasingly active in challenging the negotiation of investment treaties, and the mechanisms through which disputes between investors and states are settled. A coalition of Thai CSOs, for example, used a provision of the national Constitution to demand public scrutiny and debate on the Thai government's negotiation of trade and investment treaties (see Box 1).

Box 1. Thai civil society scrutinises investment treaties

In 2012, a coalition of Thai civil society organisations invoked Section 190 of the Thai Constitution to demand public scrutiny of investment agreements being negotiated by the Thai government.

According to this provision, treaties that affect budgets, economic relations or social security need approval by the National Assembly. The Constitution also requires a public hearing and public disclosure of information. Relevant information to be disclosed would include, for example, the objectives and scope of the debate within the National Assembly.

The Government of Thailand is currently negotiating major economic treaties, including a preferential trade agreement with the European Union. This agreement will include a chapter on investment protection that is effectively equivalent to an investment treaty.

Civil society groups have used the constitutional provision to promote public scrutiny of these negotiations. They have also briefed parliamentarians from both government and opposition on the need for due consideration in signing of investment agreements.

This is opening a space for citizen scrutiny of agreements. But making it work requires a vibrant, well-informed and persistent civil society committed to this type of engagement.

Recent developments, however, suggest that politicians are considering amending the Constitution to roll back the democratic provisions of Section 190.

3. Engaging with national legal frameworks

Agricultural investments – and the rights of rural citizens affected by them – are also shaped by legal frameworks other than trade and investment treaties. Of particular importance are the national laws that govern land tenure, investment, environmental management and state-citizen accountability. These laws influence the extent to which rural people have control over their land and resources, the avenues for investors to acquire long-term land rights, and the applicable social and environmental safeguards.

The rise of large-scale land deals for plantation agriculture is partly driven by features of national legislation. A central role of government in land relations makes it easier for companies to acquire land on a large scale. Also, laws that empower the government to expropriate citizens in the ‘public interest’ are common across the region. Public interest can be broadly defined, allowing expropriation for commercial ventures, with little space for public participation in determining what constitutes the public interest.

Civil society organisations have raised concerns about recent legal reforms in Myanmar, for example. The Farmland Law and the Vacant, Fallow and Virgin Lands Management Law, both enacted in 2012, contain mechanisms for recognition of individual and customary use rights. Yet the legislation confirms the government’s ultimate ownership of all land, important provisions remain vague, and there are limited opportunities to challenge decisions taken by the new Farmland Administration Board – the authority responsible for issuing Land Use Certificates.³ Civil society groups are pushing for: clearer rules for recognising farmers’ (explicitly women and men) use rights; an independent dispute resolution mechanism in relation to leases of ‘vacant, fallow and virgin lands’; application of free, prior and informed consent as a condition for such leases; and stronger environmental and social safeguards, amongst other things.

In Indonesia, the Indonesian Peasants’ Union (SPI), a national federation of peasant organisations, has carried out advocacy on a proposed Food Law. To influence this process, SPI invited parliamentarians to a workshop to debate the Bill, visited each political party to present concerns and aspirations of SPI members, attended the meetings of the parliamentary committee responsible for discussing the Bill, and convened press conferences and public seminars. Attending parliamentary meetings as observers enabled SPI to identify those members of parliaments that sympathised with SPI’s perspectives and demands. Whilst SPI do not feel entirely satisfied with the content of the law as adopted by parliament, they also feel that important parts of the law reflect the concerns of SPI members. The law explicitly refers to the principle of food sovereignty, for example, a principle that SPI fought hard for.

3. Obendorf, 2012

In addition to lobbying for law reform, civil society organisations have used a range of other tools to strengthen local rights. In Indonesia, where the Constitutional Court has the power to strike down legislation inconsistent with the Constitution, a national federation of peasant organisations has challenged the constitutionality of laws capable of affecting the rights of peasants (see Box 2).

Box 2. Challenging the constitutionality of national legislation in Indonesia

The Indonesian Peasants' Union (SPI) has thousands of members at the village level and representative structures at the district, provincial and national level. SPI's legal work involves consulting its membership on new laws and the development of proposed laws to protect the rights of peasants and shape investment towards better responding to the needs and aspirations of rural citizens.

In 2007, SPI worked with a coalition of CSOs to analyse and promote public consultation, including amongst their own extensive membership, on the new Investment Law. The consultation resulted in a number of concerns being raised. One concern was about the allocation of very long-term leases (95 years and renewable) to investors. Other concerns with the new law related to the provisions that allowed repatriation of profits and use of foreign labour.

After the consultation, the coalition brought the matter to the Constitutional Court, arguing that the new law violated the national Constitution because it undermined the capacity of the government to manage resources in the interest of its citizens (as required by Article 33.3 of the Constitution). The Court issued a decision partially in favour of their complaint, forcing a removal of references to lease periods and to rights of renewal of leases in advance. Not all their concerns were fully addressed through this challenge but SPI see the change as a major improvement to the law.

A number of factors limited a bigger impact by civil society in this case. The coalition themselves believe they put emphasis on the issue of lease duration and renewability at the expense of tackling provisions on capital flight and rights of employment of foreign workers being afforded to investors. Financial constraints also limited the groups' capacities to bring human rights experts to the capital, to help build the human rights case against the law and to testify in court. The coalition agreed that a priority for future cases is to mobilise adequate resources from the outset to make the court case worthwhile.

Nevertheless, the gains made in the Investment Law case mean that the Constitutional Court will continue to be an important legal instrument that enables citizens to keep a check on new laws.

International treaties, declarations and standards can provide inspiration and ammunition for national-level advocacy. In Indonesia, SPI proposed a Peasants' Rights Bill modelled on the developments at the United Nations; namely, discussions about a proposed international declaration on the rights of peasants and other people in rural areas. SPI are pushing for the same principles that are being discussed in the emergent international declaration. The Peasants' Rights' Bill is being debated by the Indonesian legislation board. Also in Indonesia, Sawit Watch are drawing on international norms and standards to influence national law-making. To protect the

rights of indigenous groups affected by palm oil developments, Sawit Watch are pushing for domestication into national law of the standards applied by the Roundtable on Sustainable Palm Oil (RSPO) and of the norms contained in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP).

In pushing for or contributing to reforms, CSOs have also drawn on progressive legal texts from across the region. For example, CSOs in Laos drew on the Philippines' Indigenous Peoples' Rights Act of 1997, to develop proposals for land and forest law reforms that would protect customary tenure systems and rights-holders. Particular concerns included strengthening recognition for collective land rights and establishing legal requirements for effective consultation and consent prior to land allocations.

Formal public consultations on the drafting of laws offer important opportunities for civil society to formulate proposals for reforms that would strengthen local land rights and improve accountability. Some workshop participants also highlighted the risks associated with engaging in formal consultation processes, however. Even in the case of extensive collaboration between CSOs, expert lawyers and ministries in the development of drafts, legislation may be adopted that does not take account of citizens' concerns. In more politically closed spaces, donors have been instrumental in helping to improve public participation in land law reforms. But there are few guarantees that the resulting law will incorporate CSO proposals.

The relatively extensive dialogue on a new land law in Laos, for example, is not generating confidence that policy or practice will be reoriented in the way some civil society and development partners are proposing. Similarly, in Cambodia, a legal aid outfit and international environmental impact assessment (EIA) experts have been working closely with the Ministry of Environment, to draft a new EIA law that adequately deals with the management of environmental and social risks associated with agricultural investments. Workshop participants felt that they ultimately have no control over the process, however, or over whether the outcome of the collaboration will be reflected in the final text. Uncertainty also surrounds the likelihood of effective implementation of the new EIA law. Environment ministries tend to be under-resourced or sidelined from the investment process and powerful interests may be at play when it comes to granting permissions to proposed investment projects. This highlights the fact that, for citizens and CSOs, engagement with legal reform processes cannot and does not stop at the passing of a bill. Translating law reform into real change requires continuous monitoring of implementation.

Diverse interest groups may need to engage in different legal and institutional arenas to secure local land rights. Women's rights to land and natural resources are unlikely to be advanced without the representation of women in national and local government institutions. The same applies to indigenous peoples' rights. In the Philippines, the National Rural Women Coalition (PKKK) developed a women's agenda for change. This has pushed for recognition of women as agrarian reform

beneficiaries; women's rights in ancestral domain; recognition of women fishers; access to basic services and food security; participation and representation in local governance system; and protection of women in relation to climate change. Strategic and multi-pronged campaigns on these different issues have made some gains possible, for example in women's rights to register as fishers and equal rights to acquire a land title. PKKK believes that their focus on extensive mobilisation of rural citizens across the country and the tactic of organising under one national coalition have been important ingredients of these advances.

In addition to promoting better national laws, civil society actors in the region have developed a wide range of tools for making existing law work better. Indeed, some Southeast Asian countries have adopted progressive legislation that, if properly implemented, would go a long way towards enabling local communities to have greater control over investment processes. In the Philippines, for example, the Indigenous Peoples' Rights Act of 1997 enshrined the principle of free, prior and informed consent (FPIC) into national law. This has provided opportunities and leverage in investment processes, although as with other progressive laws discussed, implementation has still fallen below expectations (see Box 3).

Box 3. Making FPIC work in the Philippines

The Indigenous Peoples' Rights Act (IPRA) of 1997 enshrines the principle of free, prior and informed consent into national law. The IPRA defines FPIC as consent "generated in accordance with the respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community." FPIC is required for all agricultural investments that would impinge on the ancestral domains claimed by indigenous peoples.

Workshop participants felt that FPIC has been used in several cases to the advantage of local citizens. They also emphasised, however, that questions remain over its effectiveness, in particular whether its spirit gets lost in the details of the implementation of the legal provision. Public awareness about the IPRA remains limited, especially among indigenous communities.

Other challenges raised by workshop participants include the pressures that companies and government agencies are exerting on the National Commission on Indigenous Peoples (NCIP), the body responsible for certifying that there is written consent or rejection by the affected communities. Some CSOs feel that NCIP has become less clear on its role: firstly, on whether it has a role to certify in the case of a rejection, but more broadly on whether it is a broker, a regulator or a facilitator for investors.

Integrating FPIC into national legislation appears to provide an important safeguard. But for FPIC to make a real difference, it needs to be used effectively. There is a need to emphasise the strength of the IPRA as a powerful piece of social justice legislation, rather than a procedural technicality or a box to be ticked.

The Philippines experience has generated important lessons for making FPIC work in practice. If FPIC is understood as customary decision-making processes – or even as a right – to be translated into national legislation, for example, the bill needs to undergo

thorough and broad consultation among all relevant parties, particularly the most vulnerable. There also needs to be a shared understanding by all parties of what FPIC involves, including the fact that it entitles communities to say 'no' if the proposed project runs counter to their aspirations.

In addition, there needs to be understanding by all involved, especially government, of the culture and practices of a particular community or people, including their internal decision-making processes. In terms of implementation, the government agency responsible for facilitating FPIC processes must be clear on its role and be separate from those who handle the financial matters associated with the process. Mechanisms must be available to assist the 'weaker' party, to ensure a level negotiating table, and all parties must have recourse to clear, impartial and effective mechanisms for redress of grievances.

Many of the challenges faced in the Philippines in administering consultative and consent procedures are relevant in other contexts too. In Malaysia, national law establishes a process in many ways comparable to FPIC, but there too, implementing the legislation has been difficult.

In several Southeast Asian countries, civil society has been making effective use of public interest litigation to promote accountability in large-scale land deals, bringing cases to national courts. In Myanmar, there has been substantial experience with public interest litigation, leading to some successes but also failures. In some other countries, use of public interest litigation in relation to land conflicts remains more limited, but experience is growing. For example, workshop participants shared experience from Cambodia, where villages affected by large land deals have filed lawsuits before national courts.

People affected by large agricultural investments face significant barriers on access to court. Therefore, support from civil society organisations is usually critical in helping villagers have their case heard. While legal action has led to some successes and can help to catalyse community mobilisation, workshop participants also expressed frustration with court proceedings. In some cases, proceedings were derailed by long delays.

Workshop participants shared experience with ways to deal with this problem. In disputes associated with investments controlled by Thai companies, villagers and CSOs supporting them have filed complaints with the Thai National Human Rights Commission. In one case, this commission found that it had jurisdiction to hear the complaint. This development could have far-reaching implications for the potential of transnational litigation in the region.

4. Harnessing international human rights law

If not properly designed, agricultural investments can adversely affect the enjoyment of fundamental human rights by people in or around the project area. The work of the UN Special Rapporteur on the Right to Food has highlighted the direct repercussions that large land deals can have for the realisation and enjoyment of the right to adequate food. Although international human rights instruments offer opportunities for citizens to harness redress mechanisms at regional and global levels, the effectiveness of these strategies is often hampered by weak enforcement mechanisms or sanctions for offenders.

At the regional level, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established in 2009. In 2011, an ASEAN Human Rights Declaration was adopted, spelling out fundamental human rights. The declaration is not a binding document, however, and the AICHR is not empowered to investigate or report on individual cases. A working group for the establishment of an ASEAN human rights mechanism is exploring ways to strengthen potential for the protection of human rights at the regional level.

Yet the ASEAN Human Rights Commission provides an opening for strengthening public and corporate accountability in agricultural investment processes. A network of CSOs organised public hearings on corporate accountability and human rights in the ASEAN region. These hearings assessed and raised awareness of the human rights implications of a number of investment cases in the region, highlighting failures of the state to protect human rights and failures of businesses to respect human rights.

The resulting report made a powerful case for a shift from voluntary corporate social responsibility (CSR), in which businesses can 'pick and choose' from a multitude of guidelines and face no enforcement mechanisms, to a human rights-based approach to corporate accountability. The report also provided specific recommendations for governments, businesses, ASEAN, the AICHR and national human rights institutions on how to promote this shift.

In addition, civil society groups have engaged with regional processes to strengthen the role of national human rights commissions. In 2011, representatives of national human rights institutions from Southeast Asia, academics, representatives of indigenous peoples, and national and international CSOs adopted the Bali Declaration on Human Rights and Agribusiness in Southeast Asia. The Declaration commits participants:

"To work with governments, legislatures and corporations in Southeast Asia to ensure that they take urgent steps to reform or reinforce national laws and policies relating to land tenure, agrarian reform, land use planning and land acquisition so

that they comply fully with their countries' human rights obligations, including the right to food, the right of all peoples to freely dispose of their natural wealth and resources, and the right not to be deprived of their means of subsistence."

The Bali Declaration process aims to promote tighter regional standards in relation to agribusiness. Next steps involve working with national human rights commissions to promote their engagement with the corporate accountability agenda, and also to clarify their mandate and relationship to the new ASEAN Intergovernmental Commission on Human Rights.

These efforts have helped sensitise national human rights commissions to the human rights issues raised by agribusiness operations. As discussed, the Thai National Human Rights Commission is now investigating the conduct of Thai companies investing in Cambodia, Laos and Myanmar.

Civil society organisations in the region have also been leveraging opportunities provided by global human rights instruments. Several human rights treaties linked to the United Nations (UN) require governments to submit regular reports on implementation to UN committees. Some CSOs in the region have submitted 'shadow' reports, bringing human rights violations to the attention of those human rights bodies. For example, in 2009 Cambodian civil society submitted parallel reports to the UN Committee on Economic, Social and Cultural Rights, detailing alleged human rights violations and forced evictions resulting from land concessions. The Committee made specific recommendations to the government. While this mechanism is ultimately not assisted by effective sanctions, recommendations by a UN body can provide valuable fuel for civil society advocacy.

Similarly, Sawit Watch has submitted complaints to the UN body monitoring compliance with ICERD. The complaints provided information on alleged violations of the convention as part of the expansion of palm oil operations in Indonesia. The ICERD committee has issued recommendations to the Government of Indonesia in response to the complaints.

In addition, civil society groups in Indonesia have invited UN Special Rapporteurs to visit the country and conduct field investigations, including the Special Rapporteur on the Right to Food, the Special Rapporteur on the Rights of Indigenous Peoples and the Special Rapporteur on the Right to Water. Reports by the UN Special Rapporteur on Cambodia have also raised awareness on the human rights dimensions of economic land concessions in the country.

These activities have not provided direct redress for alleged violations but they do add momentum and weight to citizen grievances and advocacy efforts. Indeed, they create important loops of information that result in it reaching higher levels of authority. There is potential for mutual reinforcement between different advocacy initiatives for example when a UN human rights report is submitted to or cited by national courts or human rights bodies.

Harnessing international human rights mechanisms can be time-consuming, however, relative to the weak enforcement options offered by those mechanisms. Also, engagement with international human rights processes requires commitment from civil society organisations to stay engaged in the long term.

5. Scrutinising and strengthening agricultural investment contracting

Government-investor contracting

In large agricultural investments, contracts between the investor and the host government can define important aspects of applicable rules. Contracts critically influence the distribution of the risks, costs and benefits created by an investment project. Scrutinising the contracts is an important ingredient of effective civil society advocacy on agricultural investments. This is not only in order to push for better contracts but also to challenge some of the claims made about benefits the investment may bring. For example, are the promises of jobs and public revenues backed up by enforceable contractual commitments on the part of the investor? Has the government established the systems and processes to ensure that these commitments are honoured?

For non-legal experts, scrutinising contracts can be a challenge. Contracts can be long and technical documents, written in languages that are not spoken locally. Importantly, contracts are not self-contained documents, because their implications can only be fully understood in relation to other documents, such as business plans, EIAs and national laws. Yet there is much that civil society and rights advocates can do.

A high-profile civil society campaign led by Cameroonian civil society, which included a thorough interrogation of the terms of a large palm oil deal in Cameroon, provided the basis for a participatory training session where workshop participants scrutinised and debated a model contract from Cambodia.

Some simple guidance on key lenses and elements to look for can assist lay persons. Citizen groups can start by asking whether the contract violates national law. For example, does the institution that signed the contract have the legal authority to do so? And do the terms of the deal conflict, directly or indirectly, with the Constitution or applicable law? Another set of questions relates to the benefits that the host country and communities can realistically expect from the investment, given the terms of the contract. For example, are provisions on job creation specific, linked to clear timelines and enforceable? What taxes is the investor expect to pay, and are safeguards in place to ensure that taxes due are paid? Equally important is to scrutinise what the investor secures through the contract, such as the nature, scope and duration of land rights, or their degree of control over production and marketing.

Civil society advocacy that interrogates these and other contractual aspects can help challenge the stated rationale for government decisions, and also raise international awareness about a proposed investment. Challenges include difficulties in getting hold of contracts where these are not publicly available.

Scrutinising contracts is just a first step. Conducting advocacy based on contract scrutiny requires identifying the targets of the advocacy, for example home or host government, a company or lenders; developing a communications strategy; and building alliances and partnerships that bring particular expertise, build legitimacy or facilitate access to the targets or relevant media.

Investor-farmer contracting

Some agricultural ventures involve direct contracts between the company and the farmers. Under commonly used 'contract farming' arrangements, the company provides farmers with inputs and agrees to purchase produce. There is huge diversity in contract farming arrangements. Power imbalances are a recurring challenge in contract farming negotiations. For farmers to negotiate fair contracts directly with investors, they need certain capacities and access to information and services.

It is often difficult for urban-based CSOs to reach large numbers of rural people. But civil society actors have developed effective outreach programmes to support farmers in these negotiations, focusing on contract farming 'hotspots'. In Laos, for example, non-governmental organisation Helvetas has developed a set of extension materials under the banner 'Think before you sign'. The materials were designed to enable farmers to negotiate a better deal (see Box 4).

Box 4. 'Think before you sign': developing farmer capacity for contract negotiation

In Laos, contract farming is commonly used to grow crops as diverse as rubber, sugar cane and maize. To help farmers get a better deal, non-governmental organisation Helvetas has launched an awareness-raising campaign using short videos, radio messages, mobile phone messages, posters and other communications channels. Government extension services are also an important channel for the dissemination of information.

The materials were developed through a process of analysing communication needs, bringing together expertise in multiple areas, and piloting, adapting, disseminating, monitoring and evaluating the different materials. For example, media experts worked with lawyers from the Lao Bar Association to identify relevant legal rights and ways to communicate them.

The materials cover key issues for farmers to think through before signing any contract. They also set out key provisions that should feature in the contract, such as who purchases the crops, when and at what price. The materials also include discussion of conflict resolution mechanisms, for example, village level, legal aid providers and phone number for registering complaints.

In addition to strengthening capacity to negotiate fair contracts, there is also growing experience with the use of remedies, in relation to existing farming contracts. Thai farmers took complaints concerning unfair contract farming arrangements to the

Prime Minister. As a result, the government established a national committee to address the concerns of farmers in relation to contract farming.

Other strategies used by farmer networks include: linking with the Ministry of Justice; working with the Ministry of Labour to recognise contract farmers as informal sector workers, who should be protected by relevant labour legislation; raising awareness among consumers through media campaigns, to improve options for farmers to sell directly to consumers and move out of contract arrangements altogether; and developing a bill specifically to recognise the rights of contract farmers.

Two mutually reinforcing strands of work with farmers on this issue therefore include: support for building farmer networks and platforms to influence legal and policy frameworks, and to negotiate with companies on a collective basis; and the development and provision of technical and legal information. The government has a major role to play in developing standardised contract templates that place local farmers in a strong position and ensuring compliance. But there is also a need for independent monitoring of contracting and for stronger farmer associations. The latter is difficult in countries where political space is limited.

6. Shaping international guidelines, principles and standards

At the international level, concern over local impacts of large agricultural investments has led to the development of guidelines, standards and mechanisms, designed to ensure responsible behaviour amongst companies and governments. These instruments are not legally binding. In practice, however, they can be more effective in enabling people to seek justice than national legislation, international human rights law and formal legal channels.

Some international standards go significantly beyond requirements under national law. And some complaint mechanisms are backed up by effective incentives for compliance. Examples include several commodity roundtables, such as the Roundtable on Sustainable Palm Oil, the Roundtable on Sustainable Biomaterials and Bonsucro. These roundtables typically involve third-party certification processes that can provide certain checks and pathways for recourse, including through a grievance mechanism for affected citizens. The experience with the RSPO grievance mechanism with regards to the practices of palm oil growers is promising but smallholders and civil society also face limitations (see Box 5).

Box 5. Successes and challenges in raising the bar in the oil palm sector – the role of the RSPO

Under the principles and criteria of the RSPO, any conversion of land to oil palm requires a full social and environmental impact assessment and a 'high conservation value' assessment. The RSPO is a multi-stakeholder forum of 1,000 members, dominated by processors and traders, but also including smallholder growers. Nine social or development organisations are now represented. The standards are reviewed every five years and a recent review has included references to human rights.

The RSPO's Dispute Settlement Facility (DSF) operates a complaints procedure. Currently, 18 complaints are listed on the RSPO DSF site, just four of which are outside of Indonesia and Malaysia.⁴ In 2013, four complaints have been filed against palm oil growers; three are by conservation NGOs, concerning the clearing of high conservation value and orang-utan habitats, and just one concerning issues relating to customary land claims.

There has been no systematic evaluation of the impact of the RSPO on the ground. One key challenge is ensuring compliance with the standards in practice. Concerns have also been raised about the robustness of certification and the effectiveness of sanctions for non-compliance, and a new mechanism to audit the certifiers is being brought in. CSOs therefore continue to have an important watchdog and monitoring role.

Participants also felt another limitation to be that the premium incentive for certification has not materialised, and consumer demand for certified products in the region is low.

4. There may be cases when disputes are not disclosed. Criteria for this are given on the site.

For those companies that are not members of the RSPO (including a large number of companies operating in Southeast Asia and selling on local or regional markets, where consumers are not requiring certified products), citizens can still point to the RSPO standards as evidence of 'best practice', and work to 'domesticate' the standards into national law. Examples of this include Sawit Watch in Indonesia, and more recently a network of Palm Oil NGOs, PONGO, in Sabah, eastern Malaysia.

Lender standards, for example IFC performance standards and World Bank safeguard policies – which are applicable to projects receiving IFC and World Bank finance respectively – and potentially beyond, contain important social and environmental safeguards. Civil society can take alleged violations of these standards to bodies established to hear grievances. Civil Society in Cambodia have made use of the World Bank's independent Inspection Panel in one instance with respect to alleged violations of the Bank's involuntary resettlement safeguards, however this mechanism has not as yet been used in the Southeast Asia region in relation to an agricultural investment.

CSOs are also seeking to learn lessons from international standards on transparency. The Extractive Industry Transparency Initiative (EITI) is a major international framework for improving transparency in the mining, oil and gas sectors. Whilst Filipino CSOs are pushing for domestication of EITI rules into national law, workshop participants felt that the EITI does not go far enough in establishing 'responsible' practice in mining projects. Filipino civil society groups believe that the EITI's weakness lies in its voluntary nature and in its focus on 'post-investment' revenue transparency. They are pushing instead for a broader framework that incorporates transparency throughout the investment process and feel this is an important lesson for investments in the agricultural sector.

Civil society can also shape and harness standards and guidelines being developed in the investor's home country. China has been a rapidly increasing source of investment in Southeast Asia. China's "Going Out" strategy aims to expand its industries, explore new markets and access natural resources and energy supplies, yet agriculture reportedly currently only comprises one per cent of China's overseas stock. Considerable efforts to improve investment practices have resulted in standard-setting for Chinese overseas operations, although there are no standards specific to agricultural investment. The following guidelines developed between 2004 and 2013 all bear some relevance, however:

- China Export-Import Bank Guidelines for Environmental and Social Impact Assessment ;
- 'Green credit' guidelines;
- Guidelines on investments overseas;
- Guidelines on sustainable overseas silviculture by Chinese enterprises;

- Guidelines on sustainable overseas forest management and utilisation by Chinese enterprises; and
- Guidelines on environmental protection for China's outbound investment and cooperation.

These guidelines have arisen out of protracted dialogue between the state, academia and civil society. The development of these guidelines indicates progress in establishing home country accountability for good overseas investment practice, but their impact is mostly unknown. More stringent rules and regulations will take some time to establish. Continued collaboration between Chinese researchers and civil society organisations, and their counterparts in Southeast Asia on this issue will be critical to progress in this area.

7. Conclusion

A plurality of pathways

The exchange of engagement strategies offered in the workshop demonstrated the plurality of pathways to accountability. This includes the formal and the informal, and the twin-track processes of seeking accountability and redress in the case of individual investments, alongside building better accountability mechanisms across the board. Whilst this report has discussed strategies in different sections, the inter-linkages are important.

Workshop discussions showed that no single approach will suffice. There is a need for a plurality of strategies to engage with the multiple legal frameworks that shape investments. They also showed the critical watchdog and monitoring role that civil society is playing. This means looking at legal empowerment in an holistic way, as a set of processes to strengthen capacity at the community level but also to work with federations of producer associations, workers' unions, rights advocates and legal support organisations, to scrutinise investment treaties and contracts, and identify appropriate channels to ensure accountability.

Bridging law and politics

Workshop discussions also brought out the critical importance of politics in legal empowerment strategies. Political space shapes the relevance and outcomes of different legal empowerment strategies. The workshop brought together participants from Southeast Asian countries where political space is extremely diverse. Only one country in the region achieves 'free' in global freedom ratings, with four scoring as 'partly free' and five as 'not free'.⁵ All countries in the region fall below 125 in global press freedom rankings.⁶ But there are clear differences in the political space for citizen action. The Philippines hosts a vibrant civil society, enabled by democratic politics and credible courts. In Indonesia, a national federation of farmer associations is able to conduct campaigns and run court cases.

In other countries, particularly in the Mekong region, political space is significantly more restricted and so are options for legal empowerment strategies. In the more restrictive countries, clamping down on civil society and social justice campaigners comes in many forms, from shutting down media stations, to arrests or forced disappearances. In these cases, protection for land rights activists has become a high priority for civil society groups. In these contexts, legal empowerment strategies need to be tailored to very specific entry points and openings for influence.

5. Freedom House, 2012

6. Reporters Without Borders, 2013

Investment in research to develop evidence-based policy messages may be a more effective strategy than open campaigning or court cases. In Vietnam, high levels of respect for academic communities mean that published research can have an impact in policy circles. Equally, political space varies over time. In response to rising land conflict, reporting mechanisms have been set up in some countries. In Vietnam, for example, ombudsmen exist at both district and national levels. In Laos, a national helpline has been set up at the time of the sitting of the National Assembly. Both of these systems have reported high levels of complaints relating to land conflicts and large-scale land acquisitions, pushing the agenda to the national level and asserting it as a political issue. Getting remedies for specific conflicts, however, is more challenging.

Conversely, in countries where political space is more open, legal tools are commonly used as a component of wider advocacy strategies. SPI's combination of legal challenges and savvy politics in Indonesia illustrates this point.

The need for strategic alliances

The recognition that multiple levers need to be activated in a strategic way and that it is impossible to dissociate law from politics, reinforces the need for alliances among civil society and citizen groups with complementary mandates and skill sets. Collaborations between farmers, legal practitioners, political economists, campaigners, academics and sympathetic government decision-makers are key. Politically-aware legal professionals need to collaborate with legally-savvy citizens, and together may form an important alliance for educating parliamentarians and other key institutions. Alliances across borders are being seen as equally important in the move towards an ASEAN Economic Community. These span collaborative approaches to strengthening national human rights institutions, to building representation of different interest groups at the national and regional level, to regional agendas for legally binding and more enforceable corporate and public accountability.

References

- Freedom House (2012) *Freedom in the World 2012*.
<http://www.freedomhouse.org/report/freedom-world/freedom-world-2012>
- Obendorf N.D. (2012) *Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law: Improving the Legal & Policy Frameworks Relating to Land Management in Myanmar*. Food Security Working Group's Land Core Group, Yangon, Myanmar. http://www.forest-trends.org/documents/files/doc_3274.pdf
- Polack, E. (2012) *Agricultural Land Acquisitions: A Lens on Southeast Asia* Briefing Note. IIED, London, UK. <http://pubs.iied.org/17123IIED.html>
- Reporters Without Borders (2013) *Press Freedom Index 2013*. Reporters Without Borders, Paris, France. <http://en.rsf.org/press-freedom-index-2013,1054.html>

Annex 1. List of participating organisations

Equitable Cambodia
Community Legal Education (CLEC), Cambodia
Heinrich Böll Foundation (HBF), Cambodia
American Friends Service Committee (AFSC), Cambodia
Global Environmental Institute (GEI), China
Sawit Watch, Indonesia
Serikat Petani Indonesia (SPI), Indonesia
Forest Peoples Programme
Japanese Volunteer Centre (JVC), Lao PDR
Land Issues Working Group (LIWG), Lao PDR
Village Focus International (VFI), Lao PDR
HELVETAS Swiss Intercooperation, Lao PDR
Natural Justice, Malaysia
Universiti Malaysia Sabah, Malaysia
Independent Researcher, Malaysia
Independent Lawyer, Myanmar
Land Core Group (LCG), Myanmar
Transnational Institute (TNI), Netherlands
Legal Rights and Natural Resources Centre-Kasama sa Kalikasan/
Friends of the Earth-Philippines (LRC-KsK/FoE Philippines)
National Rural Women Coalition (PKKK), Philippines
Alyansa Tigil Mina (ATM), Philippines
International Development Studies Programme, Faculty of Political Science,
Chulalongkorn University, Thailand
EarthRights International, Thailand
Thai National Human Rights Commission, Thailand
RELUFA, Cameroon
International Institute for Environment and Development, UK
Oxfam International
Law and Policy of Sustainable Development (LPSD), Vietnam
Pan Nature, Vietnam

Agricultural investments in Southeast Asia:

Legal tools for public accountability

As trade and investment flows rapidly increase across Southeast Asia, several countries have experienced a surge in large land deals for plantation agriculture. Against this backdrop, civil society organisations have been using a wider range of legal tools to promote public accountability in investment processes. These include scrutinising the negotiation of international treaties, challenging national legal frameworks, raising local awareness about rights, and testing approaches for local consultation and redress.

This report distils key lessons gathered from a regional workshop where legal practitioners, civil society groups and academics shared experiences of using different legal tools for accountability in agricultural investments. Together, these experiences illustrate how working across scales and arenas of law, bridging legal and political strategies, and forming strategic alliances can legally empower citizens, build accountability and shape investments for sustainable development.

Land, investment and rights series

ISBN: 978-1-84369-992-7

ISSN: 2225-739X (print)

ISSN: 2227-9954 (online)



International Institute
for Environment
and Development

