

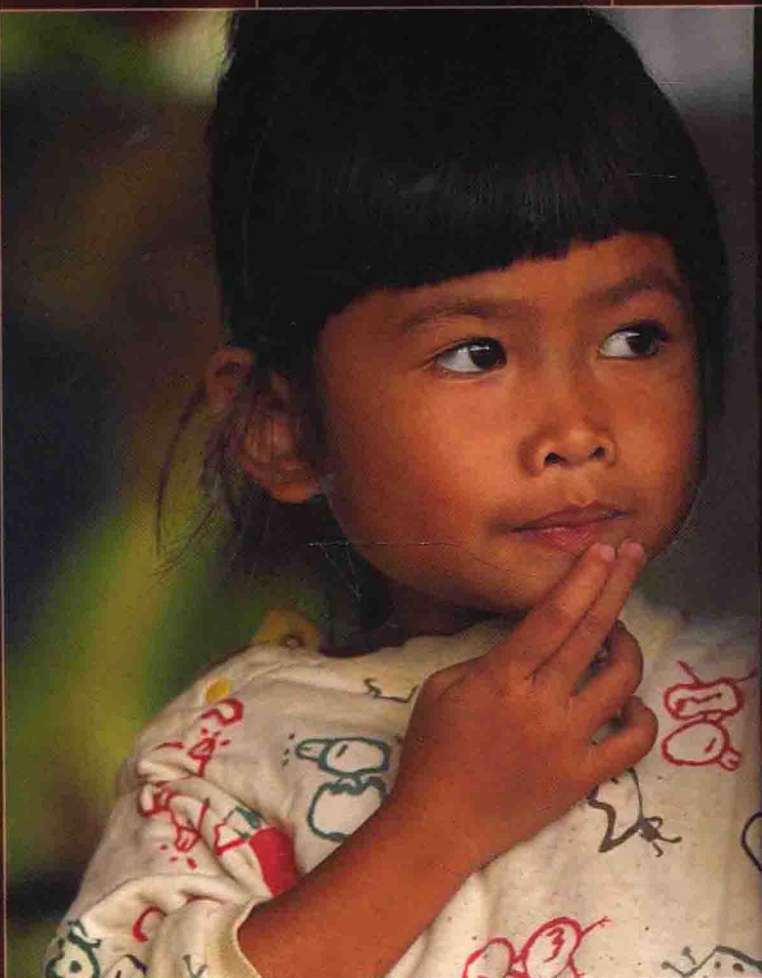
**LAND
TENURE**
JOURNAL

REVUE DES
**QUESTIONS
FONCIÈRES**

REVISTA SOBRE
**TENENCIA DE
LA TIERRA**

1·11

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**INTERMEDIATE LAND
TENURE**
Inferior instruments for
second-class citizens?

**BETWEEN REALITY AND
RHETORIC IN LAND
CONFLICTS**
An anecdotal anatomy of the
lawful, bona fide occupants
and customary tenants in
Kyenjonjo district, Uganda

**SPATIAL DATA
INFRASTRUCTURE AND
INSPIRE IN GLOBAL
DIMENSION**

**UNCONTROLLED LAND
CONSUMPTION VERSUS
RESOURCE-SAVING LAND
USE IN GERMANY**

**TOWARDS LAND
GOVERNANCE IN THE
MIDDLE EAST AND NORTH
AFRICA REGION**

**LA CUESTIÓN AGRARIA
BRASILEÑA NECESITA
GOBERNANZA DE TIERRAS**

**POR QUÉ LA IDEA DE
REFORMA AGRARIA ESTÁ
PERDIENDO VIGENCIA EN
AMÉRICA LATINA**



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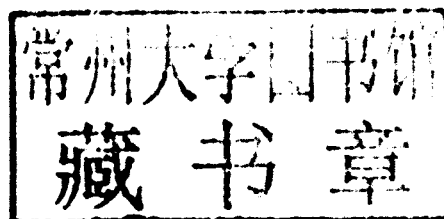
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LA **TIERRA**



FOOD AND AGRICULTURE
ORGANIZATION OF
THE UNITED NATIONS

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Preface

We are pleased to present the second issue of the *Land Tenure Journal*, which is now published in both hardcopy and in electronic formats and provides an open, impartial and practice-oriented global forum for promoting the latest knowledge in land tenure. This issue features five continents and subcontinents exploring common challenges including tenure governance, the legal recognition of customary tenures, land scarcity and redistributive reforms, and the increasing role of information technology in tenure systems.

The issue opens with an assessment of the efficiency and social legitimacy of intermediate instruments to improve tenure security in Laos and the Philippines. It is followed by an analysis on land legislation in Uganda and its ability to ensure the rights of lawful, bona fide and customary tenants. Building on trends in Europe, the third article focuses on the role of spatial data infrastructure in decision making and the fourth on the sustainability of land consumption in Germany. Searching for ways forward, the next two articles focus on governance. The first reviews the situation in the Middle East and North Africa and the second calls for new approaches to governing land markets and agricultural land in Brazil. The final

Préface

Nous avons le plaisir de vous présenter le deuxième numéro de la *Revue des questions foncières*, que nous publions désormais à la fois en version papier et électronique. Notre revue, qui a l'ambition d'être un forum mondial ouvert, impartial et pratique, vise à promouvoir les connaissances les plus récentes en matière du foncier. Ce numéro couvre cinq continents et sous-continentes pour y explorer un certain nombre d'enjeux communs comme la gouvernance foncière, la reconnaissance juridique des régimes fonciers coutumiers, la pénurie de terres, les réformes redistributives et le rôle croissant des technologies de l'information dans les systèmes fonciers.

Ce numéro s'ouvre sur un article consacré à l'évaluation de l'efficacité et de la légitimité sociale d'instruments intermédiaires mobilisés pour améliorer la sécurité foncière, au Laos et aux Philippines. Il est suivi par une analyse de la réglementation foncière en Ouganda et de sa capacité à garantir les droits des occupants légitimes et authentiques, ainsi que des locataires coutumiers. Le troisième article s'appuie sur les tendances observées en Europe pour examiner le rôle des infrastructures de données spatiales en tant qu'outil d'aide à la décision et le quatrième article se centre sur la durabilité de la consommation foncière en Allemagne. Explorant les voies du futur, les deux articles suivants

Prefacio

Ienemos el agrado de presentar el segundo número de la *Revista sobre tenencia de la tierra*, que ahora se publica tanto en forma impresa como en formato electrónico. La revista constituye un foro global abierto e imparcial, orientado a la práctica, que persigue promover los conocimientos más recientes sobre la tenencia de la tierra. En esta publicación se abarcan cinco continentes y subcontinentes, y se estudian temas que representan retos comunes; por ejemplo, la gobernanza de la tierra, el reconocimiento jurídico de las formas consuetudinarias de tenencia, la escasez de tierras y las reformas redistributivas, y la función siempre mayor de la tecnología de la información en los sistemas de tenencia.

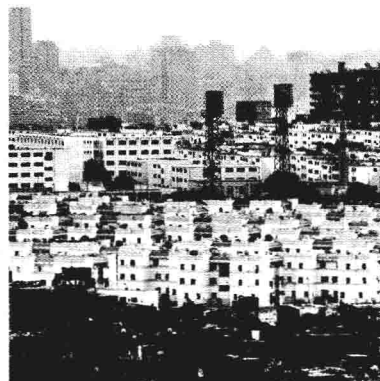
El número se abre con una evaluación de la eficiencia y legitimidad social de los instrumentos intermedios para la mejora de la seguridad de la tenencia en la República Democrática Popular Lao y en Filipinas. Se presenta a continuación un análisis de la legislación agraria en Uganda y su capacidad para asegurar los derechos de los arrendatarios tradicionales legítimos que actúan según el principio de probidad. Basándose en las tendencias observadas en Europa, el tercer artículo se centra en la función de la infraestructura de datos espaciales en la adopción



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article, on Latin America, looks into agrarian reform, stressing the importance to find a common platform between stakeholders.

Land tenure issues, including particularly those relating to large scale investments on land, are at the forefront of current political and economic debates. We are witnessing simultaneously an escalation of demand for land for food and energy production, and a reduction in the available supply owing to the expansion of urban and industrial areas coupled with the impacts of droughts, floods, degradation and migrating populations, some of which are climate change induced. There are opportunities – and threats, and land tenure issues are at the very center. The demand for discussion on the roles of tenure in meeting the challenges of today is

sont consacrés à la gouvernance. Le premier examine la situation au Moyen Orient et en Afrique du Nord et le second invite à de nouvelles approches en matière de gestion des marchés foncières et des terres agricoles au Brésil. L'article final examine la réforme agraire en Amérique Latine en insistant sur l'importance de trouver une plateforme commune entre les acteurs.

Les questions foncières, et en particulier les investissements foncières à grande échelle, constituent le cœur des débats politiques et économiques actuels. Nous observons simultanément une intensification de la demande de terres pour satisfaire les besoins en alimentation et en énergie et une réduction de l'offre disponible, en raison de l'expansion des zones urbaines et industrielles, conséquence des

de decisiones, y el cuarto en la sostenibilidad del consumo de tierras en Alemania. Buscando orientaciones hacia adelante, los dos siguientes artículos tratan de la gobernanza. El primero examina la situación en el Medio Oriente y África del Norte, y el segundo plantea la necesidad de encontrar nuevos enfoques para gobernar los mercados de tierras y las tierras agrícolas en el Brasil. En el artículo final, sobre América Latina, se examina la reforma agraria y se hace hincapié en la importancia de encontrar una plataforma común entre las partes interesadas.

Las cuestiones relacionadas con la tenencia de la tierra, incluidas en particular las que se vinculan con las inversiones en tierras en gran escala, están a la vanguardia de los actuales debates políticos y económicos. Somos testigos de una simultánea

higher than ever. The *Land Tenure Journal* is your avenue to contribute; we hope to hear from you.

Finally, we would like to take this opportunity to express our gratitude to the writers and many others, who have contributed to this issue of the new *Land Tenure Journal*.

Paul Munro-Faure
Principal Officer
Climate, Energy and Tenure Division

Mika-Petteri Törhönen
Editor, Land Tenure Journal
Climate, Energy and Tenure Division

sécheresses, des inondations, de la dégradation de l'environnement et des migrations des populations, certains de ces phénomènes étant eux-mêmes liés au changement climatique. Des opportunités – et des menaces existent à cet égard et les questions foncières sont au cœur de cette problématique. La nécessité d'un débat sur les rôles des régimes fonciers face à ces défis est aujourd'hui plus pressante que jamais. La *Revue des questions foncières* est à votre disposition pour y contribuer; merci de nous adresser vos contributions.

Nous souhaitons enfin profiter de cette occasion pour exprimer notre gratitude à tous les auteurs, ainsi qu'à tous ceux qui ont contribué à la réalisation de ce numéro de la *Revue des questions foncières*.

Paul Munro-Faure
Principal officer
Division du climat, de l'énergie
et des régimes fonciers

Mika-Petteri Törhönen
Editeur, Revue des questions foncières,
Division du climat, de l'énergie et
des régimes fonciers

escalada en la demanda de tierras para la producción de alimentos y energía, y de una reducción en el suministro de las tierras disponibles, debida a la expansión de las zonas urbanas e industriales junto con las repercusiones de fenómenos como las sequías, inundaciones, degradación y migraciones – que, en algunos casos, son inducidos por el cambio climático. Se presentan oportunidades pero también amenazas; y los asuntos relativos a la tenencia están en el centro de ambas. Es mayor que nunca la urgencia de entablar debates sobre las funciones de la tenencia a la hora de hacer frente a los desafíos que surgen en la actualidad. La *Revista sobre tenencia de la tierra* constituye el canal a través del cual podrá usted formular su aportación; quedamos pues a la espera de recibir noticias suyas.

Por último, deseamos aprovechar esta oportunidad para expresar nuestra gratitud a los autores y a muchas otras personas que han colaborado en la realización de este número de la nueva *Revista sobre tenencia de la tierra*.

Paul Munro-Faure
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**INTERMEDIATE
LAND TENURE**

**Inferior instruments for
second-class citizens?**

**DROITS FONCIERS
INTERMÉDIAIRES**

**Instruments au rabais
pour citoyens de
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INTERMEDIA DE
LA TIERRA**

**¿Instrumentos
inferiores para
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segunda categoría?**

ABSTRACT

INTERMEDIATE LAND TENURE INSTRUMENTS

CONTINUUM OF RIGHTS

EQUITY

SECURITY OF TENURE

An increasing number of intermediate tenure instruments has been identified, further developed and promoted, aimed at improving the tenure security of the poor in both urban and rural areas. For the poor, intermediate tenure instruments are generally easier to access and acquire, less cumbersome, faster and more affordable, than conventional methods. For the government, intermediate tenure instruments are generally simpler, cheaper and less contentious. In exchange for these advantages, the bundles of rights provided by intermediate tenure instruments are generally limited as compared to freehold titles. Nevertheless, the authors believe that the advantages of such a system outweigh its constraints. At the same time, the

RÉSUMÉ

INSTRUMENTS FONCIERS INTERMÉDIAIRES

ENSEMBLE DE DROITS

ÉQUITÉ

SÉCURITÉ FONCIÈRE

Un nombre de plus en plus important d'instruments fonciers intermédiaires ont été identifiés, élaborés et promus, dans le but d'améliorer la sécurité foncière des populations pauvres, dans les zones urbaines comme dans les zones rurales. Pour les populations pauvres, les outils fonciers intermédiaires sont généralement plus simples, plus faciles en termes d'accès et d'acquisition, moins lourds, plus rapides et économiquement plus abordables que les instruments conventionnels. Pour les gouvernements, les instruments fonciers intermédiaires sont généralement plus simples, moins chers et moins générateurs de contentieux. En revanche, l'ensemble des droits générés par les instruments fonciers intermédiaires sont généralement

SUMARIO

INSTRUMENTOS DE TENENCIA INTERMEDIA DE LA TIERRA

ESPECTRO CONTINUO DE DERECHOS

EQUIDAD

SEGURIDAD DE LA TENENCIA DE LA TIERRA

Existe un número siempre mayor de instrumentos de tenencia intermedia de la tierra destinados a aumentar la seguridad de la tenencia de las personas pobres tanto en las zonas urbanas como en las rurales que son objeto de un desarrollo y campañas de promoción. El acceso y adquisición de los instrumentos de tenencia intermedia por las personas de escasos recursos es por lo general un procedimiento más fácil y rápido y menos engorroso y oneroso que los métodos de tenencia convencionales. Para los gobiernos, estos instrumentos resultan por lo común más simples y baratos y dan lugar a menos contentiosos. A cambio de estas ventajas, los paquetes de derechos que proporcionan los instrumentos de tenencia intermedia suelen ser limitados si se los coteja



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authors would like to broaden the discussion to reflect human rights and equity issues in the policy debate. What do the poor think about these second level tenure instruments? Is it justifiable that poor people have to accept limited bundles of rights and lower tenure security than the rest of society? The authors explore these issues through two case studies on Laos and the Philippines.

plus limités que ceux qui découlent de la pleine propriété foncière. Les auteurs estiment néanmoins que les avantages d'un tel système l'emportent sur ses inconvénients. Par ailleurs, les auteurs souhaitent élargir le débat pour prendre en considération les questions relatives aux droits humains et à l'équité au sein du débat politique. Que pensent les populations pauvres de ces instruments fonciers de seconde catégorie? Peut-on justifier que les populations pauvres soient contraintes d'accepter un système qui limite leurs droits et leur confère une sécurité foncière inférieure à celle dont bénéficie le reste de la société? Les auteurs proposent une exploration de ces questions, à travers deux études de cas, au Laos et aux Philippines.

con los derechos de plena propiedad. Los autores sostienen sin embargo que las ventajas que supone este sistema tienen más peso que sus restricciones. Al mismo tiempo, los autores desearían ampliar esta discusión para que en los debates políticos quedasen reflejadas las cuestiones relacionadas con los derechos humanos y la equidad. ¿Qué piensan los pobres de tales instrumentos de tenencia de segundo nivel? ¿Es acaso justificable que, respecto al resto de la sociedad, ellos deban acatar un conjunto de derechos restringido y aceptar un grado inferior de seguridad de la tenencia de la tierra? Los autores analizan estas cuestiones a la luz de dos estudios de caso realizados en la República Democrática Popular Lao y Filipinas.

INTRODUCTION

For De Soto (2000), demystifying the mystery of capital means that property only becomes useful capital when it is recognized by a formal legal system. This sounds simple and indeed is simplifying the issue. It has even been made clear and simpler by de Soto's detractors. De Soto suggests that a detailed analysis of extralegal norms is necessary at the outset, in order to understand them and to include them in the new legal framework. The old framework has to be changed to reflect the entire reality of all assets and social contracts in a given society. De Soto's approach is threefold:

- first, an initial analysis of the situation
- second, changing the legal framework
- finally, introducing a suitable technology or system that allows extralegal or informal tenure to be formalized, reaching the same status as formal tenure while maintaining the characteristics of the extralegal norms.

In practice, De Soto's approach often results in simple land titling projects, without the initial analysis or the development of an appropriate system or technology as suggested above. On the ground at the outset, the system or technology is often found to be established already and in use. Generally this is a land registration system allocating land through land titles or deeds. However, such a system only works as long as comprehensive resources are available. Because resources are usually limited, this land registration system rarely reaches the poor. In effect, the very existence of the system often precludes the poor from gaining access to land, and it destroys their existing traditional tenure systems. The legal framework is normally adopted on a piecemeal basis, if at all, and an analysis of extralegal norms hardly ever takes place.

By contrast, De Soto's detractors favour intermediate tenure instruments and the 'continuum of rights' approach. This focuses on the development of adapted land tenure systems and instruments; the tenure solutions provided have lower status and lower security than those provided by full land titles. In practice, this approach is almost the same as De Soto's, at least in terms of its initial approach: fundamentally, a recognition by the legal system and/or legitimate authorities of the extralegal norms and social contracts

concerning land tenure rights. But while De Soto aims to provide the poor with the same level of rights as those provided by the existing system in a quick manner, others promote intermediate tenure instruments, mainly in consideration of the capacity constraints on the ground. These constraints include financial resources, and attempts to prevent the poor from becoming victims of market evictions by not allowing them the right to sell the land on the free market within a certain period but rather promoting an incremental approach to gain a more secure tenure while building their capacities.

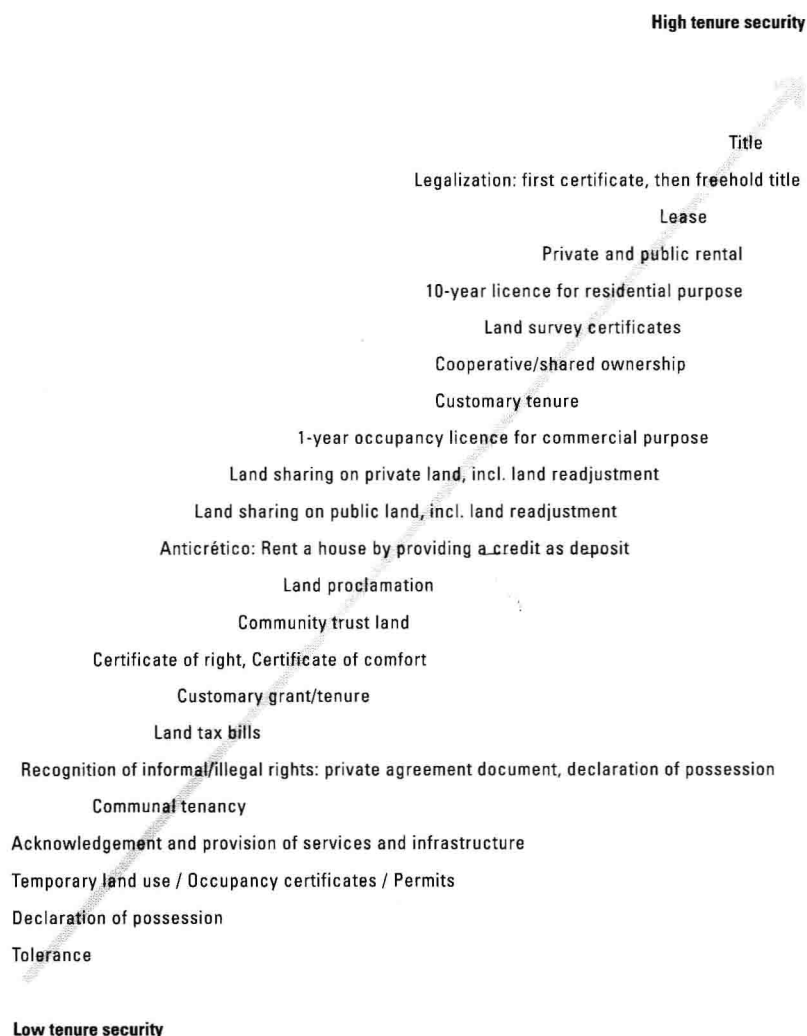
Most experts today agree that rights recognition is more important than land titles. What has not been studied in much detail to date is how poorer people react to the difference in status attached to intermediate tenure instruments as compared to freehold titles. Do these instruments make a real difference to these people in practice?

There are a wide variety of intermediate tenure instruments covering a broad range of demands, from very limited use rights to the full bundle of property rights (Payne 2001 and 2002, UN-HABITAT 2003, 2004 and 2008, Home and Lim 2004, Williamson et al 2010, Palmer et al 2009, Lemmen 2010, Wehrmann, Souphida and Sithipanhya 2007, Antonio 2007; see Figure 1). How do people feel about these rights, particularly the poor? Do the poor receive sufficient tenure security? Might outsiders deprive the poor of the opportunity to increase their incomes from their land (e.g. by selling or mortgaging it), by imposing these intermediate instruments on them, albeit with the good intention of protecting them from risks such as market eviction? Should the poor be treated as second-class citizens – only receiving instruments inferior to a freehold title? What can be done about these issues? We will explore these questions in the rest of this paper.

Two country cases have been investigated in an attempt to answer these questions: the land proclamations in the Philippines, and other associated tenure instruments and five different land possession documents in Lao PDR. The investigation has assessed:

- which forms of tenure have been granted to the people (de jure)
- which bundle of rights they can enjoy (de facto)
- how satisfied they are with their tenure status
- whether or not they would prefer another tenure, and if so, which one and why.

Figure 1
Examples of intermediate tenure
instruments



Sources: Payne (2001, 2002); UN-HABITAT (2003, 2004, 2008); Home and Lim (2004), Williamson *et al* (2010); Palmer *et al* (2009); Lemmen (2010); Wehrmann, Souphida and Sithipanhya (2007); Antonio (2007).

In the context of this article, the authors have carried out extensive research on land tenure, land markets and land administration in the Philippines and Laos, and worked with the Governments of these two countries (Antonio 2006 and 2007, Wehrmann 2009, Wehrmann *et al.* 2006 and 2007). The authors often discussed tenure issues with the urban and rural poor, and became aware of the psychological dimension of intermediate tenure instruments – particularly as research pointed out that the poor prefer freehold titles rather than intermediate tenure instruments. The authors found that these people simply wanted to receive the best options available under the existing legal framework – the best tenure instruments offered in their country – irrespective of whether additional rights were attached to these at all, and even if they would not make use of all the options that come with these instruments and frameworks.

These issues are described and explained in more detail below. Although the authors know from their own working experience that equity in tenure status matters to the poor in other countries as well (e.g. South Africa, see Wehrmann 1999), this may not be an issue in all countries. Hence, this article does not claim that status necessarily always matters. The authors merely wish to point out that in certain cases, this psychological dimension may be a crucial issue. Even within the same country, some poor people may worry about it while others may not.

CASE STUDY 1. LAND PROCLAMATIONS IN THE PHILIPPINES - ONE HUGE STEP BUT ONLY AN INTERMEDIATE SOLUTION?

In the Philippines as elsewhere, urbanization is unstoppable. Megacities are sprawling; alongside this development comes the challenge of the 'mushrooming' of informal settlements in and around cities. These settlements rapidly transform city landscapes and result in tremendous new challenges: not only to the practicalities of infrastructure, but also to ideas about land rights. Central to this urbanizing trend is how to secure adequate tenure for the urban poor, particularly those in 'slum' areas and informal settlements.

The Philippines' innovative response, initiated by former President Gloria Macapagal-Arroyo, has been to issue land proclamations. These proclamations are legal instruments issued by the President that reserve the whole or part of an idle government property for use as socialized housing by informal settlers. While UN-HABITAT (2004) has commented on the limitations of these proclamations with regards to scope (because they only focus on informal settlements on government land), it is believed that de facto, 60 percent of informal settlers are situated on government-owned or public lands. The proclamations have been a positive and pragmatic response that has encouraged poor households to improve their homes and neighbourhoods (Antonio 2006).

By the end of July 2006, the Government of the Philippines had reported that about 195 445 poor urban households had benefited from the issuance of 94 land proclamations, beginning in 2001 (HUDCC 2006). However, civil society groups immediately reacted to this press release by stating that empowerment comes with security of tenure and not by issuing land proclamations alone. These groups highlighted the fact that the more formal Certificate of Entitlement for Lot Award (CELA) had only been given to about 14 000 families over a span of five years at that time. CELAs are another form of intermediate tenure instrument issued to families after a land proclamation: they certify that a piece of land is reserved for a family within such a proclaimed area. However, CELAs are yet another instrument that provides perceived increased tenure security, yet hardly add any long-term true legal value to the land tenure process.

A closer look at the issuance of land proclamations reveals that political events – particularly the failed May 2001 Malacañang siege and the 2004 May Presidential elections – triggered a tremendous increase in the number of land proclamations issued for that year (Figure 2). However, the Medium Term Philippines' Development Plan (MTPDP) 2005–2010 decreased target beneficiaries of land proclamations from 150 000 households per year to just 35 000 (NEDA 2004), without the government elaborating the reasons behind the decision. It is also surprising that there is no existing report or public announcement on the number of individual titles issued, even if the intended final outcome of the process seems clear from the plan.