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Myanmar Centre for  
Responsible Business

# Briefing Paper

# Land Rights and Business in Myanmar

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## 1. Introduction

This paper is part of the Myanmar Centre for Responsible Business (MCRB) Briefing Paper series targeted at businesses investing in Myanmar concerned about land issues, and stakeholders working with them, to assist in human rights due diligence in line with the UN Guiding Principles on Business and Human Rights (UNGPs).<sup>1</sup>

The first edition of MCRB's land briefing paper was published in April 2015<sup>2</sup>; this paper is updated to include regulatory, political and societal developments concerning land since then, and their impacts on responsible investment as well as findings from the field research conducted for the five sector-wide impact assessments which MCRB has undertaken (see Box 1).

The paper seeks to provide an understanding of the current landscape from a human rights and responsible business perspective. It is based on an extensive literature review, including Myanmar government sources; reports by development and aid agencies; international non-governmental organizations (INGO) and local non-governmental organizations (NGO) reports; information from the UN; and a review of national legislation; as well as conversations with land experts in Myanmar and meeting reports. It is not intended as a substitute for legal advice.

The Briefing Paper sets out challenges faced by local communities regarding land rights; summarizes developments since the National League for Democracy (NLD) came to power in early 2016; highlights key governmental bodies which have a remit on land governance; and briefly reviews the current legal and policy framework for land acquisition. It also examines Special Economic Zones and industrial zones, rural land issues, urban land, as well as ethnic minorities and land. The briefing concludes with a set of recommendations to companies, based on international standards, including the UNGPs, the International Finance Corporation's Performance Standards 1, 5, 7, and 8, and the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.

The issue of land in Myanmar is particularly complex, governed by a patchwork of over 50 different laws from the British colonial period, socialist era, successive military governments, and the previous government in power from 2011 – March 2016. These land laws are not harmonized and sometimes contradict one another. The laws typically classify land into categories that are out-dated and/or overly complicated. They do not accurately reflect how the land is currently being used or has been used in the past. Decades of armed conflict, and displacement of people in border regions including most recently Northern Rakhine State further contribute to the lack of clarity.

In addition, a variety of government ministries and parliamentary committees are involved in managing and administering land and resolving land disputes, which can lead to confusion and overlap among them.<sup>3</sup> Moreover, there is a general lack of administrative capacity to deal with land legacies and emerging issues and recent governments have adopted confusing policy messages and laws.

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<sup>1</sup> [UN Guiding Principles on Business and Human Rights](#).

<sup>2</sup> See [Briefing Paper on Land Issues in Myanmar](#), MCRB, April 2015.

<sup>3</sup> [Special Economic Zones and the State Duty to Protect Human Rights](#), page 33, International Commission of Jurists, February 2017.

Most businesses need land to conduct their operations, whether as a site for an office, factory, warehouse, agricultural project, or natural resource extraction. But land is often one of the few assets of rural households, even if they do not have or cannot gain legal title to land they have customarily owned and used, perhaps for generations. While many protests in the last five years about land concern earlier expropriations by the military government, not all relate to legacy projects. There is frustration with the laws and processes in place and a backlog of unresolved complaints. By undertaking better due diligence and ensuring land acquisition and resettlement meets Myanmar and international standards, including income and livelihood restoration, the private sector can help to prevent or minimise new disputes arising and adding to this backlog.

## **2. Challenges for communities – land rights and livelihoods**

Land rights came to the forefront of human rights concerns after wider reforms commenced in 2011, thanks to the legacy of land expropriations by previous governments for both public and private sector development. Despite the attempts of both the U Thein Sein USDP government (2011-2016) and Daw Aung San Suu Kyi's NLD government (2016-present) to resolve land disputes, many communities throughout the country, both rural and urban, are still struggling to reclaim their land and homes in the face of unresolved land complaints. In losing their land, many people also lose their livelihoods, whether in farming, fishing, or small scale retail shops and other businesses. These expropriations have also led to greatly increased landlessness among rural people, rural-urban migration, and widespread informal settlements with no security of tenure in urban and peri-urban areas.

As the authorities showed greater tolerance for criticism after 2012, farmers and others began to publicly protest against land expropriations that had taken place under previous governments. The Thein Sein government formed various bodies to receive these complaints, but most did not have the authority to follow through on or enforce resolution of the large numbers of complaints submitted.<sup>4</sup> As a result, many land disputes and expropriations remain unresolved and protests have continued. These bodies were disbanded under the NLD government, which established a new committee to deal with complaints about land (see below).

According to the 2014 Census, 70% of Myanmar's population of 51.5 million people live in rural areas.<sup>5</sup> Most rural people are dependent on land and the biodiversity and ecosystems services it provides for their livelihoods, whether they are farmers, fishers, or others in the agricultural and fisheries sectors (see Box 2).

Many rural people are from ethnic minorities known as 'ethnic nationalities' under the Constitution (and may be considered 'indigenous peoples' according to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)).<sup>6</sup> They are 'land-connected', farming the land in a communal fashion under customary land tenure arrangements. Both ethnic minorities and the majority ethnic Bamar rural population, whether or not they farm the land under customary tenure arrangements, are at risk of land expropriation because they often do not have documentation of user rights. (See Section 11 below for further information on ethnic minorities).

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<sup>4</sup> Ibid, pages 21 -22.

<sup>5</sup> The Republic of the Union of Myanmar, [The 2014 Housing and Population Census](#), May 2015.

<sup>6</sup> See [Indigenous Peoples' Rights and Business in Myanmar](#), MCRB, IHRB, DIHR, February 2016 including glossary for a fuller analysis of definitional issues.

Protests by farmers have sometimes taken the form of 'plough protests' on land that they believe is rightfully theirs but which is being farmed or otherwise used by others.<sup>7</sup> Many of protesters have been arrested and charged under Sections 441 and 425 of the colonial era Penal Code, which provide for punishments for criminal trespass and 'mischief' respectively. Companies' tenant farmers also sometimes sue the original farmers for trespassing.<sup>8</sup> Such cases illustrate the difficulties faced by farmers in Myanmar when they try to resolve past land expropriations and secure land tenure rights. They also present challenges for companies when they attempt to ascertain the rightful owners of a plot of land that they wish to use for their operations.

While Myanmar law is gender-neutral on issues related to land and property ownership, women farmers experience difficulties because of the male-dominated system of decision-making about land at the community level and at all levels of government. Most agricultural land ownership is registered under the head of household, typically a male. Registration of joint ownership is rare.<sup>9</sup> Rural women farmers generally experience difficulties in participating in community forums and accessing training about land issues. Yet women perform most of the tasks related to cultivation (planting, weeding, transplanting, harvesting, threshing, and marketing), which represents a high burden of work in addition to caring for children and other tasks.<sup>10</sup> Moreover, in the customary practices of some ethnic groups, inheritance of land passes to male children.<sup>11</sup> In particular, ethnic minority women living in conflict-affected areas are among the most marginalized groups in Myanmar, often excluded from using and owning land and from participating in consultations and decision-making processes, due to armed conflict, discrimination, and cultural and linguistic barriers.<sup>12</sup>

The urban population also faces challenges in obtaining land rights. There are hundreds of thousands of people living in informal settlements in urban areas who either have been displaced from their original land; cannot afford the rents in cities; or have relocated from the countryside in order to seek employment. They generally do not have written documentation of land use rights and are thus at risk of being forcibly evicted.<sup>13</sup> The government and UN Habitat are cooperating to address scarcity of affordable urban housing.<sup>14</sup>

In the context of the ongoing reform process and protests against past land expropriations, since 2011, civil society organizations (CSOs) have been able to play a greater role in land rights documentation and advocacy than they did under the military government (1988-2010). Many CSOs focus on land rights, particularly past expropriations of land, the lack of land tenure security, and the need for legal reform. The Land in Our Hands Network, a consortium of grassroots organizations working on land, also conducts research and advocacy around land expropriations.<sup>15</sup>

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<sup>7</sup> In plough protests, farmers occupy and use land that has been taken from them.

<sup>8</sup> [Evidence is not sufficient to secure land rights in Myanmar: Impartial and transparent procedures are critical](#), Namati, January 2017, see page 7-8 for an illustrative case.

<sup>9</sup> [Gendered Aspects of Land Rights in Myanmar: Evidence from Paralegal Casework](#), pages 2-6, Namati, April 2016.

<sup>10</sup> Draft 4, Agricultural Development Strategy, page 9, on file with MCRB.

<sup>11</sup> Briefing Paper: Myanmar's First Female Farmers Forum: Reflections and Findings for Women's Land Governance, Land Core Group, March 2017, on file with MCRB.

<sup>12</sup> [Linking Women and Land in Myanmar](#), pages 5-6, Transnational Institute, Feb 2015.

<sup>13</sup> See for example [In Myanmar, slum eviction highlights Suu Kyi's military challenge](#), Reuters, 12 Feb 2016.

<sup>14</sup> [Myanmar celebrates UN Habitat Day](#), UN Habitat Myanmar, 5 Oct 2016.

<sup>15</sup> See for example [Destroying People's Lives: The Impact of Land Grabbing on Communities in Myanmar](#), Land in Our Hands Network, Dec 2015.

The Land Core Group, established in 2011, is a network of civil society groups and others working on land governance issues, which also serves as a hub for information about land. Its aim is to promote and ensure equitable land and resource rights, in particular for smallholder farmers, ethnic minorities, women, and the poor.<sup>16</sup> There are many other organizations, both local and international, which focus on land rights issues in Myanmar (see Linked Initiatives/Contacts in Annex 2).

*Box 1: Findings on Land in MCRB's Sector Wide Impact Assessments (SWIAs)*

MCRB has published four Sector Wide Impact Assessments (SWIAs) on the mining, oil and gas, ICT, and tourism sectors, each with a chapter on land, based on information gathered during field research. This Box summarises each SWIA's field assessment findings with regard to land. Findings are indicative of countrywide problems regarding land rights regardless of sector.

**Mining SWIA (2018):** Mining takes place in rural areas, where most households rely on agriculture as their main source of income. Impact on land resulting from mining activities was found to be a critical issue for the right to livelihood. There was also limited ownership or usage over the land where people live, farm and mine and correspondingly weak bargaining positions when confronted with land transfer or transactions.

Resettlement was found to be poorly conducted. People were often given very short notice and relocated to unsuitable sites e.g. land not suitable for similar or better habitation and crop cultivation, or too far from essential services. Ad hoc compensation rates did not cover actual costs. The field research also found strong evidence of forced evictions in several instances. Numerous livelihood impacts associated with land were also found. For example, damage to land, crops and water sources essential for agricultural activities were reported at many of the sites visited, in some cases even resulting in people moving and/or becoming daily mine workers as a result of losing their land for livelihood-sustaining agricultural activities. Informal subsistence miners, often internal migrants, were found to be particularly at risk with regard to land-related impacts as they usually had no formal ownership or usage rights over the land on which they lived and mined.

**ICT SWIA (2015):** The field research focused on parts of the ICT value chain where land acquisition processes were most significant (infrastructure and roll-out) and where land owners and users were most at risk – e.g. rural communities. Several communities reported a lack of informed consultation and participation about land leasing for tower or fibre projects. The field assessment findings also affirmed the complexity and opacity of the land lease process and regulatory framework, and the problems this caused for business.

**Tourism SWIA (2015):** Tourism development, in particular the development of so-called 'hotel zones' – large areas of land designated and acquired by a private company or consortium for intensive hotel construction, often at odds with the needs of the tourism market – contributed to land acquisition processes characterized by inadequate compensation, displacement of communities and loss of livelihoods. There was also a lack of consultation on existing and future projects affecting acquisition of villagers' land. Compensation processes for land acquisition were inconsistent and communities were unable to express their views during negotiations, which were not transparent.

**Oil and Gas SWIA (2014):** There was inadequate informed community consultation and participation about projects and land acquisitions having an impact on communities' livelihoods, particularly concerning pipeline projects. Communities reported inadequate compensation for land, housing, or crops. Most villagers expressed concern or fear about making complaints about land acquisition processes or compensation; others noted that complaints were futile due to many layers of bureaucracy.

### 3. Government institutions involved in land

Although a wide-ranging set of government bodies is working on land administration and management, there is no cross-ministerial committee or body specifically mandated to oversee land issues<sup>17</sup>, resulting in confusing and overlapping mandates. These include:

- The **Ministry of Agriculture, Livestock and Irrigation (MoALI)**, the main body responsible for land administration and agricultural policy. MoALI's Department of Agricultural Land Management and Statistics (DoALMS) is responsible for maintaining the land registry and cadastral maps and has branches down to township level.<sup>18</sup> Lack of accurate land mapping and government information makes the resolution of land disputes and the initiation of new development projects difficult. It may be difficult for companies to obtain accurate or reliable information about land ownership because of the outdated and inaccurate land cadastre. The OneMap project is intended to support mapping and cadastral reform.<sup>19</sup>
- The **Ministry of Natural Resources, Environment and Conservation (MONREC)**, responsible for environmental protection, natural resources, and forests. The Environmental Conservation Department (ECD) under MONREC has an important role in the environmental (and social) impact assessment (EIA) process, including project proposal screening and approvals of EIA and management plans. According to the 2015 EIA Procedure<sup>20</sup>, all investment projects must be screened by ECD to determine if an assessment of some form is required under Chapter 3 of the Procedure (see Update on Policy and Legal Framework below).
- The **Ministry of Home Affairs (MoHA)**, one of the three ministries controlled by the military. It exerts significant control over land issues through its General Administration Department (GAD), which has offices down to village tract level. All land considered at the disposal of the Union Government is technically under the GAD<sup>21</sup>. It decides on applications for farmland land use rights, and records the outcome. The most senior GAD Official in each district, the District Administrator, is responsible for all compulsory acquisition of land. Payments for Virgin, Fallow, or Vacant Land leases (see Update on Policy and Legal Framework below) are made to GAD township offices.
- The Directorate of Investment and Company Administration (DICA) under the **Ministry of Finance and Planning**, supports the work of the Myanmar Investment Commission (MIC), which is chaired by the Minister of Finance and Planning. Land leases of more than one year for foreign owned companies (other than in SEZs, see below) require Permits or Endorsements from MIC, as do investments from Myanmar companies using land of >1,000 acres, involving displacement of 100 people, or with significant environmental and social impacts.<sup>22</sup>

The government established the inter-ministerial National Land Use Council in January 2018, to '...implement the objectives, guiding principles and basic principles

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<sup>17</sup> [Special Economic Zones and the State Duty to Protect Human Rights](#), page 27, International Commission of Jurists, Feb 2017.

<sup>18</sup> [Land Stakeholder Analysis: Government Structures and Actors in Myanmar](#), pages 1, 4, Robert Oberndorf, USAID, May 2017.

<sup>19</sup> For further information, please see [Centre for Development and Environment, OneMap Myanmar](#).

<sup>20</sup> [Environmental Impact Assessment Procedures](#), MCRB, 25 January 2016.

<sup>21</sup> See also [Public Services and Land Procedures: Managing Town and Village Lands by General Administration Department](#), Ministry of Home Affairs website.

<sup>22</sup> [Land Stakeholder Analysis: Government Structures and Actors in Myanmar](#), pages 9–10, USAID, Robert Oberndorf, May 2017. (Needs checking – is this complete/uptodate)

of the approved National Land Use Policy, the National Land Use Policy and related laws (sic)'. Its duties include the establishment of State and Region Land Use Committees and the formulation of a National Land Law (Article 2(a) and (b)), in line with the National Land Use Policy.<sup>23</sup> However the extent to which it has been operating is not known. Four upper house committees and four lower house committees in the Union Parliament focus on land issues.<sup>24</sup>

#### *Developments of institutions for land administration under the NLD Government*

The NLD government has made a public commitment to land reform, in particular the return of land that had been taken from farmers and others by previous governments. Its 2015 Election Manifesto called for 'the fair resolution of land disputes' 'the establishment of land tenure security', and the return of farmers' land that had been illegally expropriated.<sup>25</sup>

In order to address these concerns, in May 2016 the government established the **Central Reinvestigation Committee on Confiscated Farmlands and Other Lands**, headed by Vice-President U Henry Van Thio with a mandate to accelerate the resolution of land expropriations.<sup>26</sup> The Committee is replicated at each administrative level (State/Region, District, Township, Village tract). Except for the Union (Central) level, each Committee comprises government officials and farmer representatives, the latter of whom serve as advocates and conduits for local information. The Committee mechanism has three roles: (i) to investigate cases, (ii) to decide whether land should be returned or compensation paid, and (iii) to monitor the release and return of land to rightful owners. The government has attempted to streamline the committees' case review process; however, a reported lack of transparency, duplication of efforts, resource constraints, and lack of written documentation from the complainants have slowed down resolution of cases.<sup>27</sup>

As of November 2017, only 10% of the over 5,700 complaints received by the Committee were reported to have been resolved.<sup>28</sup> However, other sources estimate the number of complaints at 15,000.<sup>29</sup> Moreover, local paralegals trained by Namati, a global legal advocacy movement, identified a common complaint among farmers whose land had been expropriated by the military government beginning in 1989. The farmers had failed to fulfil the rice production quota set by the government, resulting in their land being given to companies or tenants. While the current government is in principle committed to returning the land, the lack of response to such complaints means that these farmers are still without their land almost three decades later.<sup>30</sup>

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<sup>23</sup> Formation of the National Land Use Council, Notification 15/2018, 17 January 2018, Unofficial Translation, on file with MCRB.

<sup>24</sup> [Special Economic Zones in Myanmar and the State Duty to Protect Human Rights](#), page 27, International Commission of Jurists, February 2017.

<sup>25</sup> [NLD 2015 Election Manifesto](#), Articles i, 5 and ii, 1, d.

<sup>26</sup> [Vice President pushes for resolution of land grabbing issues](#), The Republic of the Union of Myanmar President Office, 27 May 2016.

<sup>27</sup> [Myanmar's foray into Deliberative Democracy: Citizen Participation in Resolving Historical Land Grabs](#), pages 1 -2, 5, Namati, June 2017, and [Evidence is not sufficient to secure land rights in Myanmar: Impartial and transparent procedures are critical](#), page 1, Namati, January 2017. See also [A Promise Unfulfilled: A critique of the Land Reinvestigation Committee](#), December 2017.

<sup>28</sup> [Only 10pc of land seizure complaints settled](#), Myanmar Times, 12 December 2017.

<sup>29</sup> [A Promise Unfulfilled: A critique of the Land Reinvestigation Committee](#), December 2017.

<sup>30</sup> [Regional perspectives on paralegal models for land conflict resolution in Myanmar](#), Mekong Region Land Governance, 13 Oct 2017.

#### 4. Policy and legal framework governing land acquisition and use

The 2008 Constitution provides that the State is the ultimate owner of all land in Myanmar, but also provides for ownership and protection of private land property rights.<sup>31</sup> The Government can carry out compulsory acquisitions for a public purpose (see below). A private investor may acquire land or land use rights from either the government or from a private land rights owner. A foreign investor can only lease land.

In January 2016 the previous government endorsed the relatively progressive **National Land Use Policy (NLUP)**, which was developed during a lengthy and wide-ranging consultation process, including with ethnic minority and farmers' groups. Article 6(b) of the NLUP provides for the strengthening of land tenure security and Article 6(d) provides for an independent mechanism to resolve land disputes. Article 7(d) states that one of its guiding principles is '*To recognize and protect private and communal property rights of citizens as included in the constitution;...*', thereby acknowledging communal land use rights. Article 68 provides that customary land of '*ethnic groups...shall be transparently reviewed, registered, and protected as "customary land"*'. Article 70 calls for formal reclassification, recognition and registration of customary land rights relating to shifting or rotating cultivation, commonly used by indigenous peoples.<sup>32</sup> Article 75 provides for equal land tenure and management rights for women and men.<sup>33</sup>

The formal adoption of the National Land Use Policy is the first step in land law reform. However many laws relating to land will need to be reviewed, revised and then enacted by Parliament in order to bring them in line with the Policy. The Policy appears to provide protection of customary and communal land tenure rights for ethnic minorities/indigenous peoples, and recognizes their use of swidden (shifting) agriculture. However, whether these provisions will translate into adequate protection for land rights in practice remains to be seen. The current status of the NLUP is unclear amidst concerns that protections under the Policy may be weakened.<sup>34</sup> Reports indicated that the Commission for the Assessment of Legal Affairs and Special Issues<sup>35</sup> has proposed significant amendments to the NLUP, including the removal of protection of customary land tenure governance and gender equality provisions.

The government is undertaking a reform of land laws focussing on three main laws:

- 2012 Farmland Law
- 2012 Vacant, Fallow and Virgin (VFV) Land Management Law
- 1894 Land Acquisition Act.

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<sup>31</sup> [Constitution of the Republic of the Union of Myanmar \(2008\)](#), Articles 35, 37, 356, and 372.

<sup>32</sup> Customary land is often defined as land owned by indigenous and other rural people that is administered according to custom by their institutions. Communal ownership is one form of customary land ownership. Tenure systems may be collective/communal, for example when a village comes together to work on a contiguous area of land.

<sup>33</sup> The Republic of the Union of Myanmar, [National Land Use Policy](#), Jan 2016.

<sup>34</sup> See [Land in Myanmar: The Year in Review](#), Tea Circle Oxford, 20 Jun 2017.

<sup>35</sup> The Commission, chaired by former General, and former Speaker, Thura Shwe Mann, most of whose members are former MPs and government officials, was established by Aung San Suu Kyi. It plays a significant and controversial role in law and policy review. Its mandate was extended for 12 months in February 2018 [Military opposes former general U Shwe Mann's commission, again](#), Frontier, 1 March 2018.

At the time of writing, these laws had not yet been amended by Parliament, although drafts are under discussion. All three draft revised laws are considered by a range of land rights experts to be more problematic and regressive than the original laws.<sup>36</sup>

### *1894 Land Acquisition Act*

All compulsory land acquisition undertaken by the government, including for the private sector is governed by the colonial era **1894 Land Acquisition Act (LAA)**. The Act provides that the government can carry out land acquisitions for a company when the acquisition is '*likely to prove useful to the public*' (Article 40(1)(b)).

Land acquisition in this case does not refer to a transfer of usage or ownership rights, which are governed by other laws, including the 2012 Farmland and VFV Land Management Laws. The Land Acquisition Act (LAA) sets out basic procedures governing the acquisition of land, including undertaking preliminary investigations on the land, and a procedure for notification of, and objections to be raised by, persons interested in the land (Article 5A).

Part 7 of the Act governs the acquisition of land for companies. The agreement between the company and the government is to be disclosed in the National Gazette; notice is to be given to the public (Article 42); and notices are to be posted publicly in the locality of the land (Article 4 (1), Article 9 (1)). Notice to the occupier of the land must be given (Article 9 (3), but only once there is a declaration of intended acquisition. Although there are provisions for objections to the land acquisition (Article 5A (1)), the President's decision on the objection is final (Article 5A. (2)), giving wide discretionary powers to him/her. The government has responsibility for carrying out the acquisition and distributing compensation but the funds for compensation are to be provided by the company acquiring the land (Article 41(1)). Land in kind can be provided in place of monetary compensation (Article 31(3)). If an interested person<sup>37</sup> has not accepted or received a compensation award, the Act prescribes a procedure for them to submit an objection to the court (Article 18(1)).<sup>38</sup>

The 1894 Act focuses on compensation processes but does not contain provisions on involuntary resettlement processes to protect those who have had their land expropriated under this law, including replacement land with security of tenure.

The LAA is currently under discussion in Parliament. Provisions for involuntary resettlement in the EIA Procedure which reference international standards, are not incorporated in the draft revised Act. Other problematic provisions in the draft revised Act include an overly broad and ambiguous definition of 'public interest' and provisions allowing for urgent acquisitions after 48 hours that would likely constitute forced evictions (see International Standards applicable to Companies below).<sup>39</sup>

### *Vacant, Fallow and Virgin (VFV) Land*

An amended version of the **2012 Vacant, Fallow and Virgin Land Management Law** was also being discussed in Parliament at the time of writing.<sup>40</sup> The Vacant

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<sup>36</sup> All three draft revised laws and emails from land experts on file with MCRB.

<sup>37</sup> 3(b) of the Act defines 'interested person' as including 'all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act;....'

<sup>38</sup> [Special Economic Zones and the State Duty to Protect Human Rights](#), page 29, International Commission of Jurists, Feb 2017.

<sup>39</sup> Email from legal expert, 6 Dec 2017, on file with MCRB.

<sup>40</sup> Articles 27 and 28 of the draft amendment to the VFV Law have expanded definitions of trespassing; these provisions are problematic.

Fallow and Virgin (VFV) Lands Management Law and Rules are clearly aimed at providing a legal framework for implementing government land policies to maximise the use of land as a resource for generating agricultural income and tax revenues. Tenure security is deliberately circumscribed to allow the government the flexibility to do what they believe is needed for development. CSOs and farmers' organizations have pointed out that land regarded as VFV may in fact be occupied by people or subject to shifting cultivation according to traditional farming practices, but which the Government classifies as VFV. The complicated registration procedures under the 2012 Farmland Law (see below) and the VFV Law mean that smallholder farmers, who comprise most of Myanmar's population, struggle to register their land tenure claims and are at risk of having their land registered by more powerful interests. Potentially developers could register their tenure claims as land users of farmland and designated VFV land that has in fact long been occupied by others. By not recognising informal land rights in law and practice, and by formalising land rights through titling, despite pre-existing informal claims, the 2012 laws reinforce existing inequality and/or create new injustices, potentially creating or exacerbating tensions or even conflict.<sup>41</sup>

Moreover, much of the VFV land granted to companies in the past has subsequently not been used. In July 2017 MOALI reported that some 2.33 million acres of VFV land was granted to companies for their use, yet more than 1.3 million acres of this land is inactive, with the government reportedly intending to take it back.<sup>42</sup>

With respect to land designated as VFV, investors may acquire land by applying to the government for land rights over VFV lands. Foreign investors with Myanmar Investment Commission (MIC) permits, those in joint ventures with Government bodies, or citizens and Myanmar citizen investors are permitted by the 2012 VFV Law to apply to the Central Committee for the Management of VFV Lands for the rights to cultivate and use VFV land (Article 5(a), (d), and (e)). Foreign investors without MIC permits do not appear to be permitted to do the same. These VFV land rights are temporary and not transferable. As noted above, the 1894 LAA governs all acquisition procedures in Myanmar, so in this instance the VFV Law and the LAA have overlapping provisions. The VFV Law governs permitting processes for land designated as such, through application to a specially created body.

Article 55 of the **2012 VFV Rules** gives the Central Committee for VFV Land Management the right to repossess VFV land that had been granted to others for, among other things, the '*implementation of basic infrastructure projects or special projects required in the interests of the state*', and also where natural resources are discovered on VFV lands. Compensation is based on current value (Article 56). The 2012 VFV Law and Rules do not provide for procedures for objections to be made to the acquisition or to the compensation provided and no procedures for judicial review, which has been widely criticised. As noted above, Article 5A(1) of the 1894 LAA provides for objections to land acquisition; however it is not known which of these two laws are applied in each case. While the 1894 LAA governs *acquisition*, Article 55 of the VFV Rules governs *repossession*.

The VFV legislation is strict in prohibiting and criminally penalising persons that 'encroach' on VFV land without permission, 'obstruct' VFV land rights owners, and 'destroy the benefit' of immoveable property on VFV land. These criminal provisions

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<sup>41</sup> See for example [Access Denied: Land Rights and Ethnic Conflict in Burma](#), Transnational Institute, May 2013.

<sup>42</sup> [Companies Rush to Use Inactive Lands After Government Announces Seizure](#), Irrawaddy, 25 July 2017.

may be abused if used against protesters peacefully seeking reform or remedy in respect of VFV land.

### *Farmland Law*

Amendments to the 2012 Farmland Law are being discussed in Parliament.<sup>43</sup> Myanmar civil society has expressed concern that there have been inadequate opportunities for consultation with farmers on them. These groups are also concerned that both the Farmland Law and the VFV Land Management Law were enacted by Parliament in 2012 with no consultation process.<sup>44</sup>

With respect to farmland, the **2012 Farmland Law** makes clear that applicants for Land Use Certificates from the Farmland Management Body who are individuals must be Myanmar citizens (Articles 6 (a) (v), 7 (a), (iv)). As with the VFV Law, the Farmland Law establishes a new permitting process, in this case for farmland registration under the Farmland Management Body. The Law also states that 'organisations' include Government departments or organisations, non-governmental organisations, associations, and companies (Articles 6(b), 7(b)), all of which are also permitted to apply. These provisions do not specify that a company must be a Myanmar company; however other laws prohibit purchase of land by foreign companies. The Myanmar Investment Law permits long-term leases to foreign companies.

Farmland rights under the 2012 Farmland Law are freely transferable (subject to discrete restrictions such as transfers to foreign investors, discussed in greater detail below). This has been seen as problematic, since it exposes poor farmers to the temptation to sell their land use rights for short term gain, potentially leaving them landless and without a livelihood.<sup>45</sup> The problem is not that farmland rights may be transferred through private negotiations and agreements; this gives land rights owners the ability to convert their property assets into cash value when they choose. The issue is to what extent protection should be provided to sellers. In many countries, contract laws provide protections against unfair terms and conditions and agreements made under duress or undue influence, mistake, or misrepresentation. Moreover, the process for registering land and obtaining a Land Use Certificate is protracted and complicated, making it difficult for smallholder farmers to obtain security of tenure.<sup>46</sup>

Like the VFV Law, the 2012 Farmland Law allows for the '*repossession of farmland in the interests of the state or the public*' provided that suitable compensation and indemnity is to be paid; the farmland rights holder must be compensated '*without any loss*' (Article 26). As with the VFV law, the Farmland Law and Rules do not provide for procedures for objections to be made to the acquisition; to the compensation awarded; or for judicial review. Chapter VIII of the law does provide for a process for resolving 'disputes' over farmland, but not for objections to land acquisition or compensation. The 1894 LAA provides for objections to land acquisition, so the same ambiguities arise for both farmland and VFV land about whether or not the LAA is applied in particular cases.

### *Law Protecting Farmer Rights and Enhancing their Benefits (2013)*

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<sup>43</sup> Article 37 of the draft amendment to the Farmland Law has been expanded to include punishment for anyone without tenure rights who trespasses on legally occupied farmland to punishment with up to two years' imprisonment, or a fine, or both. Amendment on file with MCRB.

<sup>44</sup> See [Objections to farmland law changes draft bill](#), Myanmar Times, 28 Jul 2017.

<sup>45</sup> [Myanmar at the HLP Crossroads](#), Displacement Solutions, Oct 2012.

<sup>46</sup> [A Promise Unfulfilled: A critique of the Land Reinvestment Committee](#), page 11, Dec 2017.

The 'Farmers Protection Law' was enacted in October 2013, and aims to protect farmers' rights; support farmers to improve their livelihoods; and protect the rights of smallholder farmers (see *inter alia* Chapter II, Objectives). It provides for the formation of a governmental leading body to carry out these aims (Chapter III). Its duties include the protection of farmers against land acquisition that is 'unfair' and not in conformity with existing laws (Article 9d).<sup>47</sup> There are no further details about how this would be carried out, nor is it known if this law is being enforced; however, given widespread insecure land tenure rights, this law should offer important protections to farmers.

#### *Laws impacting use of land by non-Myanmar citizens*

In December 2017 Myanmar enacted the **Companies Law** to replace the 1914 Companies Act. The 2017 law provides for foreign companies/individuals to own up to a 35% stake in a Myanmar company. Companies with more than 35% foreign ownership are classified as foreign.<sup>48</sup> This significantly changes the definition of a foreign company; under the 1914 Act, a company was defined as foreign if had any foreign ownership. The 2017 Law has important implications for foreign investors in Myanmar with regard to land (see below under the Myanmar Investment Law and Rules). Byelaws are under consultation, including for an electronic company registry, and the Law will take effect on 1 August 2018.

With respect to foreign investors, the **Restriction on the Transfer of the Immoveable Property Law (1987)** restricts foreign companies and foreigners from buying land or leasing land for a term exceeding one year, except for those who apply for a permit from the Myanmar Investment Commission.<sup>49</sup> Private investors may acquire land rights from private persons through ordinary contractual agreement, subject to certain restrictions. First, land ordinarily cannot be sold or transferred to a foreigner through private transaction.<sup>50</sup> Second, private investors cannot acquire VFV land rights or farmland through private transactions without the permission of the Government (Article 16(c) VFV Law) (Article 14 Farmland Law).

#### *Myanmar Investment Law and Rules*

The October 2016 **Myanmar Investment Law (MIL)** repeals the 2012 Foreign Investment Law and the 2013 Myanmar Citizens Investment Law and put foreign and Myanmar investment on an equal footing. In March 2017 the government adopted the **Myanmar Investment Rules (MIR)** to implement the new law.

Investors needing a long-term (>1 year) lease of land or buildings will need at least to obtain an Endorsement under the MIL and may require a Myanmar Investment Commission (MIC) Permit depending on their scope. Article 36 of the MIL, elucidated by Chapter II of the MIR, sets out the types of investments that require a Permit from the Myanmar Investment Commission, namely those that are:

- a) essential to the national strategy. Concerning land, Chapter 2 of the MIR, Rule 3 defines this as:

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<sup>47</sup> [The Law of the Protection of the Farmer Rights and Enhancement of their Benefits](#), 8 October 2013.

<sup>48</sup> [Myanmar Companies Act approved](#), Myanmar Times, 7 Dec 2017; see also [Myanmar Companies Law](#), Unofficial Translation.

<sup>49</sup> [Special Economic Zones and the State Duty to Protect Human Rights](#), page 26, International Commission of Jurists, Feb 2017.

<sup>50</sup> [The Transfer of Immoveable Property Restriction Act](#), 1987, Articles 3 – 5.

- projects related to agriculture which include the rights to use or occupy more than 1,000 acres of land (Rule 3f);
  - projects not related to agriculture which include the rights to occupy or use more than 100 acres (Rule 3g);
- b) large capital intensive investment projects (>\$100 million – Rule 4);
- c) projects which are likely to cause a large impact on the environment and the local community. Concerning land, Rule 5 further defines this as projects which may require an EIA and/or:
- include the right to use or occupy land which has been or is likely to be acquired through expropriation or compulsory acquisition, which will cause the relocation of at least 100 people or comprise an area of more than 100 acres (Rule 5c.1);
  - comprise more than 100 acres and are likely to cause ‘involuntary’ restrictions on land use and access to natural resources to anyone having a legal right to such land use or access (Rule 5c.2);
  - comprise more than 100 acres subject to a pre-existing bona fide claim or dispute by someone regarding land rights use or occupancy of such land in a way which would conflict with the proposed investment (Rule 5c.3); or
  - otherwise adversely impact the legal right of at least 100 individuals occupying such land to continue to occupy the land (Rule 5c.4).
- d) investment activities which use state-owned land and buildings; and
- e) otherwise designated by the government to require the submission of a proposal to the MIC.

Chapter IX of the MIR sets out the process for investors who already had a valid Permit or an Endorsement (or were in the process of acquiring same) to obtain a Land Rights Authorization from the Myanmar Investment Commission (Chapter 12, MIL). Under Article 134 of Chapter IX, Myanmar citizen investors and Myanmar companies do not need to apply for a Land Rights Authorization.<sup>51</sup>

Article 50(a) provides that an investor who obtains a Permit or Endorsement under the MIL may obtain a long-term lease of land or buildings. Citizen investors may invest in their own land or buildings. Article 50(b) and (c) provide that a foreign investor may lease land or buildings for an initial period of up to 50 years, with two 10-year extensions, on receipt of a Permit or Endorsement from the MIC. Article 50(f) provides that the MIC, with approval from the government, may grant a longer period for the right to lease land or buildings and the right to use land to investors who invest in least-developed and remote areas (which are often inhabited by ethnic minorities/indigenous people). Under Article 71, an investor must carry out ‘health, cultural heritage, environmental, and social impact assessments according to the type of investment in accordance with relevant laws, rules, regulations and procedures’ (sic).<sup>52</sup>

It is important to note that the 2016 MIL clarifies earlier confusion about whether DICA/MIC has responsibility for receiving and approving EIAs and makes it clear that they do not. The EIA process is the responsibility of MONREC, and should be pursued in parallel to submission to MIC Permit applications, starting with ‘Screening’, although investors may wish to wait until MIC has permitted the application, conditional on other permits being obtained, before embarking on what can be a lengthy and costly EIA process.

<sup>51</sup> [Myanmar Investment Rules](#), March 2017.

<sup>52</sup> [Myanmar Investment Law](#), October 2016. In practice, the Myanmar EIA Procedure (Article 2(g) includes all these aspects which should not be treated as separate assessments.

*Law on the Protection of the Rights of Ethnic Nationalities (2015)*

The Constitution of Myanmar uses the term ‘ethnic nationalities’ to include the majority ‘Bamar’. However there is no consensus in Myanmar on use of the terms ‘ethnic minority’, ‘ethnic nationality’ and ‘indigenous people’ or their Burmese language equivalents.<sup>53</sup>

Many ethnic nationalities/minorities in Myanmar could be considered to be indigenous peoples, that is, socially and economically marginalised people with a strong connection to their land and different social, cultural and economic conditions from the mainstream group (the majority Bamar). Indigenous peoples are at particular risk of adverse human rights impacts connected to business activities and are often excluded from decision-making processes.

A growing body of international law calls for special measures to protect Indigenous Peoples’ collective rights, particularly the right to Free Prior and Informed Consent (FPIC) with respect to decisions concerning access to land and natural resources. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) provides for FPIC: ‘*Indigenous Peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.*’ (Article 10). UNDRIP further provides for the right to redress for indigenous peoples whose traditional lands have been ‘*confiscated, taken, occupied, used or damaged without their free, prior and informed consent...*’ (Article 28).<sup>54</sup> Although the Myanmar Government has no national legal requirement or framework for free, prior and informed consent (FPIC), indigenous peoples and Civil Society Organizations (CSOs) working with them are increasingly aware of the concept.

As a result of CSO advocacy in Parliament at the time of the law’s adoption, Article 5 of the **2015 Law on the Protection of the Rights of Ethnic Nationalities** provides for an incipient form of FPIC. It says that for projects which affect *ta-ne tain-yin-tha* (which is the Burmese word often translated as ‘indigenous peoples’ although the Law does not define it): ‘*ta-ne tain-yin-tha should receive complete and precise information about extractive industry projects and other business activities in their area before project implementation so that negotiations between the groups and the Government/companies can take place*’.

There is limited awareness of this Law, and *ta-ne tain-yin-tha* is not defined in it. It may not even be defined in the by-laws currently being drafted by the Ministry of Ethnic Affairs, in consultation with legal experts and ethnic minority rights groups.<sup>55</sup> It is possible that the by-laws will interpret Article 5 as referring to ‘locally based ethnic nationalities’. This could be interpreted as close to the concept of ‘land-connected’ people and should encompass anyone who would be considered an indigenous people, as well as majority Bamar.

Article 61 of the Investment Rules mentions the Law, and provides that where the investment ‘may be’ subject to the Law on the Protection of the Rights of Ethnic Nationalities, the Investment Commission will consider any specific consultations that may be required with the State/Region authorities or ‘other stakeholders’, as part of

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<sup>53</sup> For further information, please see [Indigenous Peoples’ Rights and Business in Myanmar](#), MCRB/IHRB/DIHR, 8 Feb 2016.

<sup>54</sup> See also [United Nations Declaration on the Rights of Indigenous Peoples](#), Articles 11, 19, and 32.

<sup>55</sup> See for example *The Global New Light of Myanmar*, p 1, 1 February 2017.

the assessment process or in connection with conditions which must be met to obtain a Permit from the Commission. This underlines that such consultations with local ethnic nationalities should begin at an early stage in the process, before taking the project to the MIC. It also suggests that the Permit may even only be issued conditional on negotiations having been successful, although this has not yet been tested.

Article 5 of the Ethnic Nationalities Law is therefore an important opportunity provided for in Union Law for communities in ethnic minority areas to have a voice in, and negotiate to obtain local benefits from mining and other investment projects. However, it appears to be little understood, including by those participating in the peace process, and awareness at all levels of government is also absent.

## 5. Environmental Impact Assessment

The then Ministry of Environmental Conservation and Forests (MOECA, now MONREC) adopted an **EIA Procedure** in December 2015 under its powers conferred by the 2012 Environmental Conservation Law. Certain projects that use land require an EIA as part of the overall approval process. However, as mentioned above, it is not necessary for a company to conduct or complete an EIA *before* obtaining an MIC Permit.

Article 2(g) of the EIA Procedure defines *adverse impact* as ‘Any adverse environmental, social, socio-economic, health, cultural, occupational safety or health, and community health and safety effect suffered or borne by any entity, natural person, ecosystem, or natural resource...’. Article 2(h) of the EIA Procedure defines ‘environmental impacts’ to include occupational, social, cultural, socio-economical, public and community health and safety issues. Social impacts are impacts that involve people, and therefore in Myanmar ‘environmental impact’ includes any effects on individuals and communities, including those as a result of land acquisition or resettlement.

Chapter 3 (Screening) and Annex 1 of the Procedure lists the types of projects requiring approval by MONREC’s Environmental Conservation Department (ECD) before project activities e.g. construction can begin. Depending on the size and nature of the project, MONREC may require the Project Proponent to undertake an Initial Environmental Examination (IEE) or an EIA, both of which should be accompanied by an Environmental Management Plan (EMP). The IEE differs from an EIA largely due to not involving a ‘Scoping’ stage. Simpler or smaller projects may still be required to submit an EMP. If an EIA is required, the Proponent must engage a qualified and registered third party to conduct the assessment. There are four phases in the EIA process:

- **Screening** – Proponent submits project proposal to ECD who determine if an EIA or IEE is needed, or if the project does not require an environmental assessment.
  - Timing: It make senses for companies to submit a proposal for Screening at the same time or prior to preparing the project proposal for an MIC Permit, if a Permit is needed. Furthermore, if a project has been or is likely to be determined under Screening as requiring an EIA – thereby indicating that it is ‘likely to cause a large impact on the environment and the local community’ - an application for an MIC Permit is compulsory (Article 36c MIL and Rule 5a). This means that Screening with ECD is therefore ideally undertaken at an early stage before submitting a proposal to MIC.

- **Scoping** – qualified third person/organization develops a Scoping report and Terms of Reference (ToRs) for the Investigation.
  - This is an important stage for undertaking field visits and community consultations, identifying potential negative impacts and considering possible project alternatives e.g. reduced size, different technology, design or timing. The scoping report must provide details about the information disclosure and consultation which has been undertaken, and is submitted to ECD to approve the ToRs.
- **Investigation** and drafting by the third person/organization of the **EIA Report and Environmental Management Plan**.
  - Details of the issues to be investigated, including any baseline data acquisition, should have been identified and approved in the ToRs, and a broad list of topics is contained in the EIA Procedure. The investigation report must include consideration of the views and concerns of the project-affected people and information about the consultation process.
- **Review** of the EIA Report and determination of issuance of an Environmental Compliance Certificate (ECC) by MONREC, following a Public Disclosure and consultation process.

The participation of people affected by the project in consultations and consideration of impact avoidance and mitigation measures is crucial to any EIA process. The EIA Procedure provides for mandatory legal procedures requiring information disclosure and public participation throughout the process. The government has developed guidelines for public participation in EIAs, and ECD is encouraging companies to refer to them although they are still in draft.<sup>56</sup>

For companies seeking to acquire land which entails involuntary resettlement of people or which may potentially have adverse impacts on indigenous peoples, Article 7 of the 2015 EIA Procedure is currently the main legal reference point pending adoption of relevant national procedures. Article 7 says that '*Projects that involve Involuntary Resettlement or which may potentially have an Adverse Impact on Indigenous People shall comply with specific procedures separately issued by the responsible ministries. Prior to the issuance of any such specific procedures, all such Projects shall adhere to international good practice (as accepted by international financial institutions including the World Bank Group and Asian Development Bank) on Involuntary Resettlement and Indigenous Peoples*'.

The 1894 LAA as it does not cover resettlement and therefore could not be considered adequate as a specific procedure. The 2015 Ethnic Nationalities Law is also silent on indigenous peoples' rights, other than broad mentions in Article 5.

Since the ADB advised the Myanmar Government on drawing up the EIA Procedure, and taking into account their three Safeguard Policies (Environment, Indigenous Peoples, and Resettlement), these are therefore referred to in Article 7, in addition to those of the World Bank Group, which includes the IFC. However ADB's Safeguard Policies are less complete and less private sector-focussed than those of the IFC. MCRB therefore advises companies to use IFC Performance Standards and associated Guidance Notes as a first point of reference, and in particular, [IFC Performance Standard 1](#) on Assessment and Management of Environmental and

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<sup>56</sup> [Draft Guideline on Public Participation in Myanmar's EIA Process](#), Vermont Law School, 31 May 2017.

Social Risks and Impacts; [IFC Performance Standard 5](#) on Land Acquisition and Involuntary Resettlement; and [IFC Performance Standard 7](#) on Indigenous Peoples.

Additionally, Article 102 of the EIA Procedure provides that the Project Proponent shall bear full legal and fiscal responsibility for adverse impacts on Project Affected Persons (PAPs) *'until they have achieved socio-economic stability at a level not lower than that in effect prior to the commencement of the Project, and shall support programs for livelihood restoration and resettlement in consultation with the PAPs, related government agencies, and organizations and other concerned persons for all Adverse Impacts'*. This principle of livelihood restoration of PAPs is an important part of international standards for resettlement, and needs to be reinforced by inclusion in a revised Land Acquisition Act.

International standards such as IFC Performance Standard 5 on resettlement require a Resettlement Action Plan (RAP). Preparation and studies for the RAP, which is often a responsibility of government, should be started early.<sup>57</sup> Many of the socio-economic baselines and impact studies needed are common to both the RAP and the EIA, which is usually undertaken by the project proponent i.e. company and its 3<sup>rd</sup> party consultant. The RAP should therefore be undertaken concurrently with the EIA and the two processes should inform one another. Baseline studies for the RAP such as an initial census of numbers of PAPs who may have to be resettled should then influence identification of project alternatives, such as changes to roads and infrastructure to reduce the need for resettlement. Other alternatives or changes to the project which emerge from Scoping or subsequent stages of the EIA should be reflected in the RAP before it is finalised. The figure below shows how the RAP and EIA process interact, including the studies required for each. For example, a thorough EIA requires social and health baseline study, assessment of social and health impacts, and relevant social management plans as part of the overall EMP. Resettlement action planning (RAP) requires a Land and Asset Inventory to establish eligibility, and a Socio-Economic Census. Ideally the social baselines studies undertaken for these should be coordinated to serve both purposes, and consistent.

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<sup>57</sup> [Handbook for Preparing a Resettlement Action Plan](#), IFC 2002

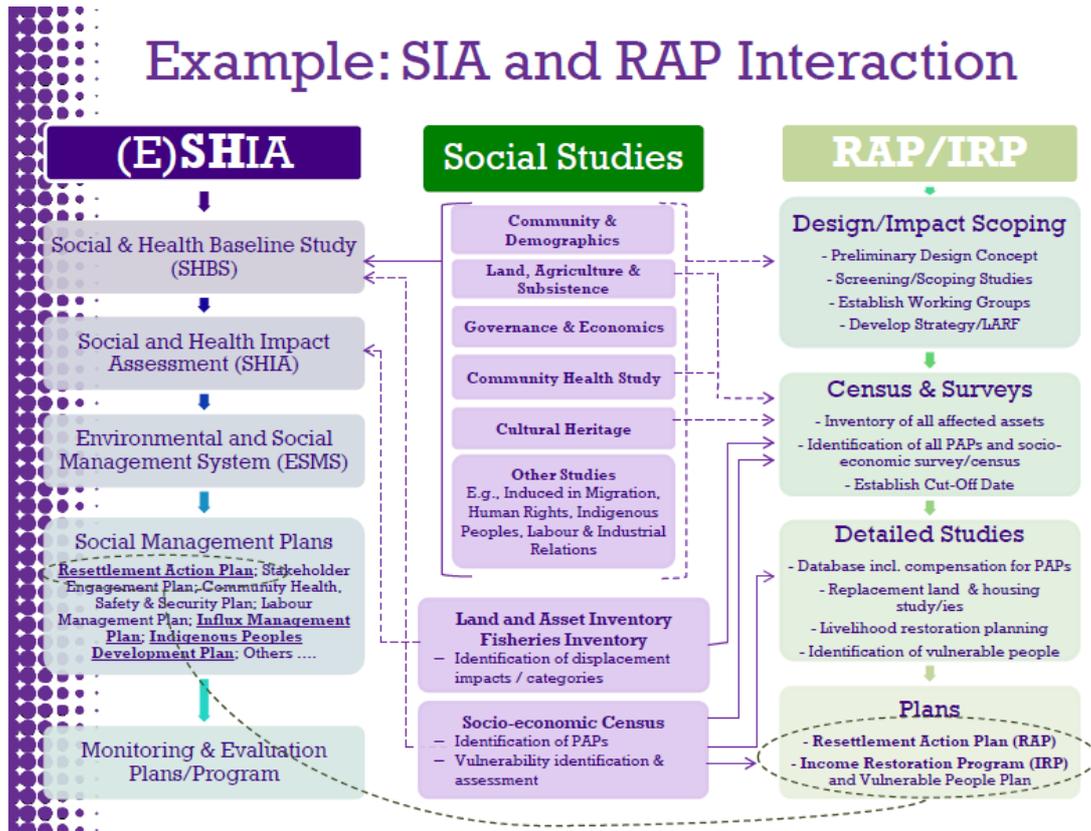
*Box 2: Land, biodiversity and impacts on communities*

Use of land can adversely impact biodiversity and ecosystem services, which in turn can impact human rights, and in particular the rights to livelihoods and health. The UN Special Rapporteur on Human Rights and the Environment has stated that the full enjoyment of human rights depends on ecosystem services (i.e. the benefits provided by ecosystems that contribute to both making human life possible and worth living).

In March 2018 MCRB published a draft **Briefing Paper: Biodiversity, Human Rights and Business in Myanmar** to assist businesses that want to understand how their activities may adversely impact on biodiversity, and how this may in turn undermine their responsibility to respect human rights. The paper identified risks to biodiversity in Myanmar, including unsustainable land-use practices (notably land clearing for agribusiness projects) and unplanned and uncoordinated development. It also identified threats to biodiversity, including habitat clearance and degradation, resulting in loss of forests and coastal mangroves. This accelerated after Myanmar's natural resources were increasingly put under pressure following the 1988 military coup, with an increase in logging and fishing concessions. The MCRB Briefing Paper makes a number of recommendations to companies about the EIA process (see below) including:

- Addressing biodiversity aspects at the EIA Screening phase;
- Ensuring that the Scoping Study fully addresses potential biodiversity impacts and assesses alternatives, so that adverse impacts can be avoided wherever possible.
- Using the Scoping Study to identify and engage stakeholders likely to be affected by business activities, so that the company can begin to understand community dependence on biodiversity and ecosystem services and the potential for business activities to infringe on any related human rights.
- Incorporating mitigation measures into environmental and social management systems.<sup>1</sup>

# Example: SIA and RAP Interaction



(Source: Angela Reeman, 2017)

## 6. Concerns with the Current Legal Framework

Weaknesses and lack of clarity in the legal framework have implications for companies and for the people who live on and use the land. Companies want a reliable applicable framework; land-users are not fully protected. For as long as the law lacks clarity on protection of customary land rights, companies committed to respecting human rights will need to conduct specific due diligence and engagement with customary land owners/users to understand their claims to the land and agree with them on arrangements for use.

The current legal framework raises the following human rights concerns:

- There is a lack of detailed procedures on land acquisition, and use of an outdated (1894) law previously used across Britain's Asian colonies. The legal framework does not reflect the changes that have been made in other common law countries to define procedural and substantive protections, let alone the more recent international principles on the security of tenure led by the Food and Agricultural Organization.<sup>58</sup>
- The current legal framework, including even the more recent Farmland and VFV Land Management Laws, provides only general authorizations on expropriation 'in the public interest' with no further procedural or substantive restrictions, leaving the process open to abuse. The government has wide discretion to expropriate land 'in the interests of the public' or even if 'likely to prove useful to the public' (Article 40(b), Land Acquisition Act). The 1894 LAA permits expropriation because the government 'is or was bound' to provide land under an agreement with a company, with an overly broad definition of public interest.
- The laws and rules provide limited specificity on the expropriation process, and limited safeguards for those whose property is being acquired. Only under the 1894 LAA is there a process for objections to acquisition. There are no procedures for objections to acquisitions or compensation for VFV Land or Farmland, other than the provisions of Chapter VIII of the Farmland Law on land disputes (see above).
- Myanmar currently does not have an overarching law or policy on voluntary or involuntary resettlement. Article 7 of the EIA Procedure is the only legal provision for involuntary resettlement. Its reference to the use of internationally recognised frameworks pending national procedures being adopted is welcome. However if international frameworks are not reflected in Myanmar procedures (e.g. a revised LAA), the current protections provided by the EIA Procedure could be reduced and furthermore, companies with commitments to international standards may have problems in delivering on these if the Myanmar government is operating to a lower standard of protection, thereby discouraging responsible investment.
- Myanmar does not have detailed regulations defining specific compensation levels for each type of land, or criteria for what should be covered in compensation. This means these issues have to be negotiated in each circumstance. This leads to a lack of transparency and consistency in land compensation processes that provides opportunities for abuse.
- The new land laws<sup>59</sup> do not sufficiently recognize customary land rights or the rights of informal land occupiers or users who lack formal documentation of their

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<sup>58</sup> [Voluntary Guidelines on the Responsible Governance of Tenure](#), FAO.

<sup>59</sup> The Vacant, Fallow, and Virgin Lands Management Law (2012) and Farmland Law (2012). See [Legal Review of Recently Enacted Farmland Law and Vacant, Fallow, and Virgin Lands Management Law](#), Land Core Group, November 2012.

'usufruct' rights.<sup>60</sup> Although the National Land Use Policy recognizes customary land rights, its provisions are not yet enshrined in law.

- As noted above, the government may be declaring land vacant that in reality is not. This impacts those whose land use does not appear in any government records but who may in fact have occupied so-called vacant, fallow or virgin land for years or even generations.
- The interaction between Myanmar land and environment laws and establishment and regulation of SEZs is unclear, leading to confusion for investors and communities.
- Myanmar ratified the International Covenant on Economic and Social Rights (ICESCR), which came into force on 6 January 2018. This includes the obligation to align laws with its provisions and General Comments. The Comments state that land acquisitions should also not result in forced evictions.

## 7. Industrial Zones

Unlike Special Economic Zones (see below), there is no specific law governing industrial zones (IZs), but the military government began to establish them during the 1990s to encourage private sector investment in labour-intensive manufacturing, move industry out of residential areas and foster industrial clusters.<sup>61</sup> Land for Industrial Zones is apparently issued by the GAD as a 'Lease of town lands with power of Renewal in Perpetuity', i.e. on the expiry of the original or in special cases. For Industrial Zones, the GAD issues 'Industrial Grants or economical grants and the rent fixed for the land shall be not less than 6% and not more than 12% of the land market value'.<sup>62</sup>

Each industrial zone is managed by an Industrial Zone Committee, typically comprising investors and government officials. Investors can enter into a land leasing agreement with the individual management committees but cannot buy land.<sup>63</sup> There are reportedly 29 industrial zones in Yangon, which has the most developed infrastructure in the country.<sup>64</sup>

Since many plots in IZs remain unused, the NLD government has pledged to scrutinize plots of land in industrial zones that are not being used, in order to crack down on land speculators who acquired the plots for land-banking or to 'flip' the lease later at a higher price.<sup>65</sup> According to the Ministry of Construction rules and regulations, landowners/tenants must begin business operations within three months after obtaining approval from the government. The Urban Housing Development Department has the power to take the land back from owners who have not complied with these rules.<sup>66</sup>

A 2013 parliamentary report recorded 63 complaints about 109,634 acres taken from farmers in several townships for urban area expansion and establishment of IZ

<sup>60</sup> Ibid, pages 15-16, Land Core Group: '*...the written and unwritten rules which have developed from the customs and traditions of communities...*'.

<sup>61</sup> Yangon Industrial Zones: Challenges and Recommendations, DaNa Facility/UK Aid, Tractus Asia, 1 June 2017, on file with MCRB. There is an Industrial Zone Law which has been pending for four years in Parliament.

<sup>62</sup> [Public Services and Land Procedures: Managing Town and Village Lands by General Administration Department](#), Ministry of Home Affairs website

<sup>63</sup> [Myanmar Rising: Industrial and Special Economic Zones](#), HKTDC Research, 16 August 2016.

<sup>64</sup> Yangon Industrial Zones: Challenges and Recommendations, Tractus Asia, DaNa Facility, 1 June 2017, on file with MCRB.

<sup>65</sup> [Myanmar's second industrial wave](#), Colliers International, 19 December 2017.

<sup>66</sup> [Government Renews Pledge to Reclaim Industrial Land from Speculators](#), Consult Myanmar, 25 May 2017.

projects,<sup>67</sup> only a fraction of land actually taken for IZs. A September 2017 report noted that over 1,000 families from 14 villages in Mandalay Region lost their land when the authorities expropriated land for the Myohta Industrial Park. Farmers were unable to purchase replacement land, as the amount of compensation was well below market rates at the time.<sup>68</sup> Land rights experts note that peri-urban development in Myanmar, often comprising planned industrial zones, is a significant driver of land expropriations.<sup>69</sup> There is a risk that land left unoccupied following the exodus of Rohingya from Northern Rakhine State will also be converted to industrial zones, although the Kanyinchaung economic zone in Maungdaw promoted by government pre-dates the recent violence and exodus.<sup>70</sup>

## 8. Special Economic Zones (SEZs)

Special Economic Zones (SEZs) in Myanmar are delineated areas with a special legal regime governing investment and business activities, and the Ministry of Commerce as focal point. Although the SEZ investment regime and governance structure differs from non-SEZ areas (see below), national laws relating to land, labour and environment still generally apply.<sup>71</sup> SEZs are intended to offer more organised industrial sites linked to infrastructure such as ports, tax incentives and a one-stop shop for business in obtaining permits and customs clearance.

The sheer size of planned SEZs means they have a major potential for human rights and environmental impacts. Myanmar has three sites designated as SEZs: Thilawa near Yangon, by far the most advanced SEZ; Dawei in Tanintharyi Region in southeastern Myanmar; and Kyaukphyu in Southern Rakhine State in the west. Thilawa is the only SEZ which is currently operational. Plans for Dawei and Kyaukphyu include the construction of deep sea ports, and preparation has begun for both of these SEZs, including land acquisition, dams, and roads.<sup>72</sup> Thilawa SEZ comprises 2,400 hectares; Kyaukphyu 1,600 hectares; and Dawei was originally intended to be 20,000 hectares but has now been scaled back, and plans have changed significantly since it was first announced.<sup>73</sup>

All three SEZs have attracted criticism from local communities and civil society organizations as well as international human rights law experts, who have called for better dispute resolution procedures between investors and local communities and increased accountability and transparency in SEZ governance.<sup>74</sup> People living on land acquired for the SEZs were displaced without proper planning for involuntary resettlement and before EIAs were conducted or approved, and for Dawei and Kyaukphyu, plans for the zones and the process for land acquisition remain unclear.

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<sup>67</sup> Report of the Investigation Commission for Easing Sufferings of People Whose Farmlands and Other Lands were Confiscated, Part 2, Pyidaungsu Hluttaw, on file with MCRB.

<sup>68</sup> [Land of Sorrow: Human rights violations at Myanmar's Myohta Industrial Park](#), Executive Summary, pp 4 – 5, FIDH, September 2017.

<sup>69</sup> Conversation with land rights expert, 5 February 2018.

<sup>70</sup> [Rakhine government forges on with Maungdaw economic zone](#), Irrawaddy, 13 September 2017

<sup>71</sup> In some other countries, e.g. China, SEZs were used as a testing ground for new market economic policies. In Myanmar, this is not the case, and the main advantage the only operating Zone, Thilawa, offers to investors is improved management compared to old industrial zones.

<sup>72</sup> [Special Economic Zones and the State Duty to Protect Human Rights](#), page 1, International Commission of Jurists, February 2017.

<sup>73</sup> Need to get confirmed and up-to-date figures for each of these. E.g. <http://www.globalnewlightofmyanmar.com/dawei-special-economic-zone/>

<sup>74</sup> See for example [Govt urged to bolster local community protections on SEZ projects](#), Frontier Myanmar, 23 October 2017.

## *The 2014 SEZ Law*

The Special Economic Zone Law creates a separate legal regime for SEZs, independent of arrangements under the 2016 Myanmar Investment Law. The SEZ Law and Rules provide for benefits for investors, including extendable 50-year land leases and tax and customs benefits. As with areas outside of SEZs, the Ministry of Home Affairs is responsible for the acquisition and transfer of land in an SEZ. Companies are required to cover the cost of resettlement and ensure that people's standard of living does not deteriorate as a result of displacement. However the law/rules<sup>75</sup>, as with the 1894 LAA, are silent on duties, functions, and procedures for the involuntary resettlement of people living in zones designated for SEZ, and on the resolution of disputes involving these residents.

Moreover, there is a general lack of clarity in the law/rules, which contributes to legal uncertainty about the functions, duties, and accountability of the government and companies.<sup>76</sup> The SEZ Law affirms the applicability of environmental laws, something confirmed by legal experts<sup>77</sup> An over-arching (sometimes known elsewhere as a 'planning') EIA should therefore be conducted for the establishment of an SEZ, and set limits for emissions and overall water use for example. This EIA, together with those conducted for supporting infrastructure outside the zone such as power plants, roads and ports, are the occasions when land acquisition issues are most likely to be relevant, and Resettlement Action Plans possibly necessary. As mentioned above, the 1894 LAA supplemented by Article 7 of the EIA Procedure on involuntary resettlement should apply to land acquisition in these cases.

Investors looking to lease land inside the SEZ fence should conduct human rights due diligence on how land was acquired the Zone (Annex x gives more details on land and human rights issues in the three SEZs). They should also submit their proposed investment for Screening, since an EIA/IEE/EMP may be required in line with the 2015 EIA Procedure. Projects should not commence construction without receiving an Environmental Conservation Certificate (ECC, see above) under Article 83 of the EIA Procedure. However, the SEZ Law/Rules do not make this explicit. Due to the late adoption of the EIA Procedure in December 2015 and inability of ECD to meet the deadlines in the Procedure, the Thilawa SEZ Management Committee went ahead and established its own SOPs for environmental approval of individual projects.<sup>78</sup> These are not consistent with Myanmar's Environmental Conservation Law which provides only for the Environment Minister to approve EIAs. The inconsistency needs addressing to provide legal certainty for investors, not just in Thilawa, but to ensure that these problems are not repeated in Dawei and Kyaukphyu.

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<sup>75</sup> See [Myanmar Special Economic Zone Law, 2014](#) and [the Ministry of National Planning and Economic Development, Notification No. \(1/2015\)](#).

<sup>76</sup> [Special Economic Zones and the State Duty to Protect Human Rights](#), pages 19 and 21, International Commission of Jurists, February 2017.

<sup>77</sup> Comment from a legal expert, on file with MCRB.

<sup>78</sup> See <http://www.myanmarthilawa.gov.mm/environmental-protection-ecpp-iee-and-eia>

## 9. Urban Land

Both companies and local communities face challenges with regard to urban land.<sup>79</sup> As with rural land, it may be difficult for companies to establish who owns the urban land that they want to use for their projects. Moreover, transferring ownership rights for urban land can be time-consuming and complicated. A document by the Myanmar Business Forum noted *inter alia* that businesses must interact with at least three different government offices to transfer land rights in Yangon, and that the majority of land owners in Myanmar have an incomplete or unregistered chain of ownership documentation and thus cannot register leases.<sup>80</sup>

Although Myanmar is primarily agriculture-based and rural, 30% of the population is urban. This is likely to increase as the manufacturing and service sectors expand and the country develops economically. This increase has already put pressure on urban areas, including on transportation and other infrastructure, which have not been upgraded for several decades. Moreover, there is a lack of low cost housing throughout the country. The Department of Urban Planning and Development estimated that over 440,000 people in 110,000 households live in informal settlements in the Yangon area alone.<sup>81</sup> World Bank figures from 2014 indicate that 41% of the urban population in Myanmar live in slums.<sup>82</sup> Land speculation is one of the biggest problems as economic development in Yangon and other urban areas increases. Land in urban and peri-urban areas throughout Myanmar is often held as an investment and hedge against inflation because financial institutions in Myanmar are not well-developed, which fuels speculation and drives up land prices.<sup>83</sup>

Yangon is expanding rapidly, both in area and population.<sup>84</sup> The UN is supporting Yangon City Development Committee (YCDC) Planning Department and the Department of Human Settlements, which is also involved in urban planning. Municipalities in Myanmar's major cities (Yangon, Mandalay, and the capital Naypyitaw) have the power to reclassify the designation of land parcels, acquire land and buildings, and transfer ownership titles. For urban areas and the three large cities all land use and ownership-related activities are managed by respective Development Committees (municipal councils/committees or *si-bin-tha-ya*) that are distinct land administration authorities with delegated statutory powers. The Yangon City Development Committee (YCDC) is Yangon's administrative body, with the Mayor as its Chair. It is an independent body responsible for city planning, land administration, tax collection, and development.<sup>85</sup> The Mandalay City Development Committee is also involved in revenue collection, land administration, city planning, and urban development. Its Chairman serves as Mayor. The Naypyitaw Development Committee reports directly to the President.<sup>86</sup>

Although the draft 2016 Myanmar National Building Code would apply to construction projects throughout the country, it is particularly relevant to urban and peri-urban

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<sup>79</sup> For further information please see [Socio-Economic Atlas of Myanmar, 2017](#).

<sup>80</sup> [Land Working Group – Issues Matrix](#), Union of Myanmar Federation of Chambers of Commerce and Industry, Myanmar Business Forum, Urban Land Working Group, March 2017.

<sup>81</sup> [For Yangon's squatters, a better life is still out of reach](#), Frontier, 26 September 2017.

<sup>82</sup> [Demographic Indicators](#), The World Bank.

<sup>83</sup> [On the Frontier of Urbanization, Informal Settlements in Yangon, Myanmar](#), in Independent Journal of Burmese Scholarship, Eben Forbes, August 2016.

<sup>84</sup> For more details of Yangon region development plans, including for new industrial zones, see [Presentation by U Than](#), YCDC Secretary, Myanmar Investment Forum, May 2018. See also [Strategic Urban Development Plan of the Greater Yangon](#), 2014, JICA, which is being updated

<sup>85</sup> [Placeholder for update on YCDC law, under consideration Feb 2018](#)

<sup>86</sup> [Land Stakeholder Analysis: Government Structures and Actors in Myanmar](#), page 22, Robert Oberndorf, USAID, May 2017.

areas. The Code defines ‘owner’ as a person or body having legal title in the land or building, including leaseholders, freeholders, or sub-lease holders (Definitions, 1.1.2). All major land use developments which *inter alia* entail new construction or changes in usage of land/building need a Planning Permit (1.3.1.1) and must be in conformity with zoning classifications (1.3.1.2). Finally, developers and other qualified persons must abide by the 2012 Environment Conservation Law and other land bylaws of regional authorities (1.3.1.4).<sup>87</sup> It is not known when the Code will be finalized and implemented.

## 10. Rural land

Rural land includes land used for cultivation and animal husbandry; inland fisheries; and forest and coastal land. Although 42% of Myanmar’s workforce is in agriculture, as of 2014 agriculture accounted for only 27.9% of the gross domestic product (GDP). Agriculture is largely unmechanized, characterized by mostly small-scale and/or subsistence farming.<sup>88</sup> 80% of farms comprise less than 10 acres.<sup>89</sup> 85% of poverty is concentrated in rural areas and 54.2% of those engaged in agriculture, forestry, and hunting fall below the poverty line.<sup>90</sup> Many rural households have no access to land whatsoever and the estimated landless rate for rural Myanmar is the highest in the Mekong Region.<sup>91</sup>

In addition to the lack of mechanization, foreign direct investment, and financing from banks,<sup>92</sup> farmers are constrained by provisions in the 2012 Farmland Law that restrict crop choices, production systems, and the ability to use fallow land, a legacy from rice-based policies designed to ensure rice self-sufficiency, which is no longer a risk.<sup>93</sup> The law also prohibits growing alternative crops and fallowing land without government permission.<sup>94</sup> Moreover, the current legal framework governing land has no classification for seasonal or communal land use. For example rural communities frequently use forest land to graze livestock and obtain forest products, but this land can be allocated to people or businesses outside the community because of communities’ lack of formal security of tenure.<sup>95</sup>

A report published in December 2015 by a Myanmar grassroots network highlights farmers’ lack of tenure security and examines land expropriation throughout rural Myanmar.<sup>96</sup> Three quarters of the over 2,000 cases originated from 1990 – 2009, with the others occurring after that time; none of them had been resolved. In some cases farmers had their land taken by the authorities; in others farmers were allowed to farm the land but had to pay rent or share crop on their original farmland. Many of them struggled to meet basic needs, such as shelter, food, healthcare, education, and inheritance, after their land was taken. Most of the farmers did not receive

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<sup>87</sup> Myanmar National Building Code, 2016 Draft, on file with MCRB.

<sup>88</sup> [Foreign Direct Investment and Economic Transformation in Myanmar](#), page 4, ODI, March 2017.

<sup>89</sup> Agriculture Development Strategy and Investment Plan, 3<sup>rd</sup> Draft, page 14, 27 December 2016, on file with MCRB.

<sup>90</sup> Agriculture Development Strategy, 4<sup>th</sup> Draft, page 9, on file with MCRB.

<sup>91</sup> [Land Tenure in Rural Lowland Myanmar](#), page 33, GRET, October 2017.

<sup>92</sup> For further information about lack of foreign investment and bank loans, see [Why agriculture is ailing and how best to revive the sector](#), Myanmar Times, 9 August 2017.

<sup>93</sup> [Towards a Sustainable Land Administration and Management System in Myanmar Draft](#), pages 2 - 3, World Bank, September 2017.

<sup>94</sup> [World Bank 2017 Paper: Freedom to farm: agricultural land use, crop selection, fallowing, and recommended changes to the Farmland Law to strengthen land tenure security](#), p1, Landesa, 22 Mar 2017.

<sup>95</sup> [Towards a Sustainable Land Administration and Management System in Myanmar Draft](#), page 3, World Bank, Sept 2017.

<sup>96</sup> [Destroying People’s Lives: The Impact of Land Grabbing on communities in Myanmar](#), page 3, Land in Our Hands Network, Dec 2015.

compensation for lost land. The possession of written documentation did not appear to afford protection from land expropriation: in 42.5% of the respondents reported having documentation, while 39.8% reported having no documentation.

The then Ministry of Agriculture's 30-year Master Plan for the Agriculture Sector (2000/1 to 2030/1) set the target of converting 10 million acres of 'wasteland' to agribusiness. As of April 2014, the Ministry of Agriculture estimated that 2.3 million acres had been granted to private companies. Between 2010 and 2012, there was almost a 100% increase in land granted for large-scale agribusiness, reportedly for development of rubber, oil palm and rice, but also for jatropha, sugar and cassava. At the same time, foreign investment in agriculture remains low.<sup>97</sup> The Mekong Region Land Governance organization noted in early 2017 that according to Ministry of Agriculture figures, almost 4 million acres of VFV land was allotted for large-scale agribusiness from 1992 – 2016 and that almost 55% of this land was acquired by companies.<sup>98</sup>

The Ministry of Agriculture, Livestock and Irrigation (MOALI, renamed under the NLD administration), supported by the Asian Development Bank (ADB), the UN Food and Agriculture Organization (FAO), and the Livelihood Food Security and Trust Fund (LIFT) has been preparing an Agriculture Development Strategy (ADS) since August 2016. As part of this process, consultations took place with civil society and a wide range of other stakeholders, including the private sector.<sup>99</sup> There were 17 public consultation events in all States and Regions, with additional support from local organizations including the Food Security Working Group, the Land Core Group, and other CSOs. The draft ADS was then revised by a group of experts,<sup>100</sup> but it is not known when it will be made public. [update needed]

Agriculture in Myanmar is dominated by the production of paddy rice and other important crops including pulses, rubber, and oil seeds. As stated in the ADS, MOALI views agriculture as key to ensure food and nutrition security, increase export earnings, and contribute to rural development. As part of this goal, smallholder farmers as 'the backbone of Myanmar agriculture' should be integrated within competitive value chains. The ADS also recognizes that secure land rights are necessary for increased investment in agriculture; and that the 1894 Land Acquisition Act, the Farmland Law, and the VFV law have led to land expropriations from farmers, with investments exacerbating such expropriation. Finally, the ADS states that it is essential that land laws recognize customary land rights, which are often of a communal nature, a practice occurring mainly but not exclusively in ethnic minority areas.<sup>101</sup>

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<sup>97</sup> [Whose crops, at what price? Agricultural investment in Myanmar](#), pages 13, 17, Oxfam, Feb 2017.

<sup>98</sup> [Agro-business Large Scale Land Acquisition in Myanmar: current situation and ways forward](#), Mekong Region Land Governance, Feb 2017.

<sup>99</sup> ADS team response to comments on ADS draft No 3, on file with MCRB.

<sup>100</sup> Email correspondence with Myanmar land expert, 11 Jan 2017, on file with MCRB.

<sup>101</sup> Agriculture Development Strategy and Investment Plan, 3<sup>rd</sup> Draft, pp 9-10, 17-18, on file with MCRB.

## 11. Minority Populations, Land and Conflict

Ethnic minorities, sometimes known as ethnic nationalities, who include indigenous peoples, make up an estimated 30% of the population, although the ethnic breakdown of the 2014 Census has not yet been published. Ethnic minorities live primarily in the seven States surrounding the centre of the country, each named for the largest majority in the State. The Mon and Rakhine live mostly in valleys whereas the Chin, Kayah, Kayin, and Kachin live mostly in the uplands. Many of these States comprising an estimated 57% of the total land area are rich in natural, including minerals and gems, hardwoods and hydropower.<sup>102</sup> These areas have long been plagued by internal armed conflicts between the army and ethnic minority armed groups for over six decades, leading to mass internal displacement of the civilian population and under-development.

Shifting cultivation, or swidden agriculture, where some plots of land are cultivated and some left fallow on a rotating basis, is common in the uplands of ethnic minority areas. Most of these farmers do not have formally recognized titles for land they have traditionally occupied. Like many parts of rural Myanmar, these areas operate under customary and communal land use rights. Customary land is often defined as land that is owned by indigenous and other rural communities and administered according to custom by their institutions. Communal ownership is one form of customary land ownership. Rural people who practice communal farming generally do so under customary land ownership systems. Tenure systems may be collective, for example when a village comes together to work a contiguous area of land or to manage a collective forest or grazing lands.<sup>103</sup>

However, as mentioned above, the current legal framework does not recognize customary and communal land tenure arrangements, which are therefore not adequately protected. For example one 2017 survey indicated that while 88% of people in Kayin areas claimed ownership of their land, more than 73% reported having no land title.<sup>104</sup> A recent report on Mon areas noted that among the challenges facing customary land users are land expropriations that often accompany Foreign Direct Investments and mega projects.<sup>105</sup>

As with other parts of rural Myanmar, ethnic minority areas are characterized by land expropriation from smallholder farmers for the private sector. As ceasefires hold and new areas become available for economic development, this trend becomes particularly acute. An October 2017 report found that large-scale development by the private sector in Kayin areas, often undertaken with armed groups, led to the most complaints by local villagers compared to other abuses.<sup>106</sup>

Internal armed conflict between ethnic minority armed opposition groups in border areas and the central Bamar-dominated government broke out shortly after independence in 1948. Bitter and protracted conflict has continued since then. Ethnic minority grievances have centred around human rights abuses in the context

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<sup>102</sup> [Access Denied: Land Rights and Ethnic Conflict in Myanmar](#), Transnational Institute, May 2013. There are seven States and seven Regions in Myanmar; the majority of people living in the States are ethnic minorities and the majority of those living in the Regions are the majority ethnic Bamar.

<sup>103</sup> [Indigenous Peoples' Rights and Business in Myanmar](#), page 19, MCRB/IHRB/DIHR, 8 February 2016.

<sup>104</sup> [The Karen in 2017: Resilience, Aspirations and Politics \(Part 2\)](#), Tea Circle Oxford, 19 July 2017.

<sup>105</sup> [Customary land practices in Mon State and Mon areas under threat, according to new report](#), Human Rights Foundation of Monland, 12 February 2018.

<sup>106</sup> [Foundation of Fear: 25 years of villagers' voices from southeast Myanmar, Executive Summary and Introduction](#), Karen Human Rights Group, 30 October 2017.

of the conflicts; the lack of self-governance and resource-sharing with the central government; discrimination and marginalization; religious freedom; and lack of education in ethnic minority languages.

The previous government initiated a peace process, the centrepiece of which became the October 2015 National Ceasefire Agreement (NCA) signed by the government and eight parties to the conflicts. The majority of the ethnic minority armed groups, including the largest and most powerful, did not sign the Agreement, and armed conflict in Kachin and northern Shan States has significantly increased since 2011. In February 2018 under the NLD administration, the New Mon State Party and the Lahu Democratic Union signed the NCA, bringing the number of 'ceasefire groups' to 10.<sup>107</sup> As of August 2017, there were generally considered to be 21 ethnic minority armed groups in Myanmar, excluding militias and Border Guard Forces allied to the Myanmar army in ethnic minority areas.<sup>108</sup>

The NLD-led government has launched its own peace initiative, called the 21<sup>st</sup> Century Panglong Peace Process. During the May 2017 21<sup>st</sup> Century Panglong Union Peace Conference, armed ethnic minority groups and the government agreed to 37 Basic Principles, ten of which relate to land. These principles *inter alia* call for a countrywide land policy that is balanced and supports people-centred long-term durable development, with the 'desires of the local people' and farmers taking priority. They also call for a decentralized land policy that is transparent and clear, and for equal land rights for men and women. Finally, they call for the protection of the environment and the protection of lands of social and cultural significance to ethnic nationalities.<sup>109</sup> However these principles remain aspirational and do not have the force of law.

Decades-long internal armed conflict in other areas of the country has led to successive waves of internally displaced people (IDPs) within Myanmar and refugees fleeing to neighbouring countries, most notably Thailand and Bangladesh. In Kachin and northern Shan States, almost 100,000 displaced people were living in IDP camps at the end of January 2018.<sup>110</sup> A May 2017 report estimated that 1.1 million people are either IDPs in Myanmar or refugees in other countries.<sup>111</sup>

All of these people have lost their land and homes, and whether they will be able to return to their original areas remains unknown. Waves of displacement can lead to competing claims over land as new people may move into areas formerly occupied by the original inhabitants.<sup>112</sup> A report on Kachin people displaced by armed conflict found that very few Kachin IDPs had official land use titles and that one of their main concerns was anti-personnel mines planted on their lands. Some of their original land was being used by people who had remained in the area or by businesses that had received concessions for land or resources.<sup>113</sup> In past decades, the army took land

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<sup>107</sup> [New Mon State Party and Lahu Democratic Union sign NCA](#), Ministry of Information, 13 February 2018.

<sup>108</sup> [Beyond Panglong: Myanmar's National Peace and Reform Agenda](#), page 33, Transnational Institute, 21 September 2017.

<sup>109</sup> [37 points signed as part of Pyidaungsu Accord](#), State Counsellor's Office, 30 May 2017.

<sup>110</sup> [Myanmar: IDP Sites in Kachin and Northern Shan States \(31 Jan 2018\)](#), UN Office for the Coordination of Humanitarian Affairs.

<sup>111</sup> [Re-Asserting Control: Voluntary Return, Restitution and the Right to Land for IDPs and Refugees in Myanmar](#), Transnational Institute, 23 May 2017. This figure does not include the Rohingya who fled since August 2017

<sup>112</sup> [Re-Asserting Control: Voluntary Return, Restitution and the Right to Land for IDPs and Refugees in Myanmar](#), Transnational Institute, 23 May 2017.

<sup>113</sup> The Impact of armed conflict and displacement on land rights in Kachin State, page 6, Trocaire, December 2016, on file with MCRB. Forthcoming: Displaced and Dispossessed: Conflict Affected

from other ethnic minority communities during armed conflict, including the Mon and Kayah people in eastern Myanmar.<sup>114</sup>

Box: MCRB's Draft Sector Wide Impact Assessment (SWIA) on Oil Palm in Tanintharyi Region

A forthcoming MCRB SWIA on oil palm examines *inter alia* the issue of land and the impact of oil palm plantations on local villagers in Tanintharyi Region, south-eastern Myanmar. Palm oil concessions in this area have been associated with the displacement of communities and land expropriations without due process. In the 1980s and 1990s vast tracts of land were granted by the government to Myanmar corporations and some foreign investors for the purpose of palm oil cultivation in this area. In 1993 the industry was effectively privatized when government estates were leased to private companies. However, some plantation land is owned by smallholder farmers, estimated at 10,000 acres in 2015.

The granting of concessions took place without considering the land tenure rights of local populations, land suitability, conservation of forest reserves, water sources or endangered species.<sup>115</sup> This has led in some cases to land disputes. For example two Myanmar companies are suing villagers who had been internally displaced by fighting between the Myanmar army and the KNU in the 1990s, and then returned to their land when fighting ceased. In 1999 a company was granted 611 acres for an oil palm concession in one village, and when villagers returned, the company sued them for trespass in 2016. Another company was granted over 9,000 acres for palm oil in two villages and sued villagers for trespass when they returned to their land after being internally displaced.<sup>116</sup> Moreover, field research for the SWIA suggests that the villagers' lack of written documentation of land tenure rights makes it difficult for the local government to return land to them.

It is likely that most of the oil palm areas in Tanintharyi Region are home to ethnic minorities who could be considered indigenous peoples, including the Karen. As such, Article 5 of the Law on the Protection of the Rights of Ethnic Nationalities, which requires that these groups receive complete and precise information about business activities, would apply to this population.

Many local CSOs are advocating for indigenous rights in Tanintharyi Region and in early 2017 a group of them jointly produced a report and film on an oil palm concession holder. Key impacts and issues raised in the report include loss of customary land that resulted in displacement, loss of cultural heritage, and loss of livelihoods. In general, past practices and the failure to respect human rights by oil palm companies have meant that many local people do not welcome oil palm investment. Companies investing in the area should ensure that they adhere to IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement.

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communities and their land of origin in Kachin State, Myanmar, May 2018 Kachin Baptist Convention//Metta/Naushawng Development Institute/Nyein Foundation/Oxfam/Trocaire.

<sup>114</sup> See for example, [I still remember](#), pp 37 – 42, Human Rights Foundation of Monland, December 2017.

<sup>115</sup> Flora and Fauna International, [Myanmar Oil Palm Plantations: A Productivity and Sustainability Review](#), p.12-13, Jan 2016

<sup>116</sup> [Asia World and Shwe Padonmar Companies Sue Returning IDPs for Trespass](#), Karen News, 5 Oct 2016.

To varying degrees, ethnic minority armed groups control territory and have influence over ethnic minority populations, but this is not demarcated. Some of them, most notably the Kachin, Mon, and Karen armed groups, have developed civil administration structures in their areas, including for health, education, and land. For example the Karen National Union (KNU, which agreed a ceasefire with the government in 2012) has a written land policy. The KNU's Land Use Policy provides more room for a customary tenure system than current Myanmar laws. According to this policy, all land belongs to the people, contrary to Myanmar Law where all land belongs to the state. The KNU also has its own land designation and registration system for registering land<sup>117</sup> which is not recognised by Naypyidaw. These dual administration systems can lead to confusion and disputes. For example, Karen villages in one contested area of Tanintharyi Region are under mixed-administration by both the Myanmar government and the KNU, with both the government and the KNU accusing each other of responsibility for a private company's oil palm plantation's negative impacts. Since 2011 the company reportedly cleared more than 6,000 acres, including betel nut and cashew orchards that villagers depended on for their livelihoods. Moreover, because of past armed conflict and displacement, the villagers were unable to register their land.<sup>118</sup>

## 12. Land and Northern Rakhine State

Myanmar has also been afflicted by inter-communal violence between ethnic minority Rakhine Buddhists and the Muslim minority Rohingya<sup>119</sup> in Rakhine State, as well as fighting between the security forces and armed groups. Violence erupted during 2012, displacing tens of thousands of people, many of whom remain in camps. In late 2016 fighting broke out in northern Rakhine State (NRS) when a new armed group, the Arakan Rohingya Solidarity Army, attacked police outposts in October 2016, and again in August 2017 and January 2018. This has led to further displacement and unprecedented mass refugee outflows to Bangladesh. Since late August an estimated 688,000 Rohingyas have fled to Bangladesh; the total number of Rohingyas there is over 900,000, a number that reflects people who had previously fled.<sup>120</sup> As of February 2018, there were an estimated 6,500 refugees stranded on the Myanmar-Bangladesh border<sup>121</sup> and more than 5,000 people fled to Bangladesh in early 2018.<sup>122</sup> In addition, tens of thousands of people have been newly displaced within Rakhine State due to fighting and other violence during August and September 2017.<sup>123</sup> When and if Rohingya refugees and internally displaced people are able to return home, their land may have been claimed by others.

As a recognition of the need to address the ongoing problems in Rakhine State, in August 2016 Aung San Suu Kyi announced the establishment of the Advisory Commission on Rakhine State, chaired by former UN Secretary General Kofi Annan. The Commission was tasked with making recommendations focussing on conflict prevention, humanitarian issues, access to basic services, the assurance of basic

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<sup>117</sup> KNU Land Policy, December 2015, on file with MCRB.

<sup>118</sup> [Green Desert: Communities in Tanintharyi renounce the MSPP oil palm concession](#), pages 11 - 12, Dec 2016.

<sup>119</sup> Rohingya is not a group recognized by the government or listed in the official list of 135 'national races' of Myanmar (a list which is contested by some other minorities such as the Chin). The term Rohingya is generally not accepted by Myanmar people who claim them to be 'Bengali' immigrants from Bangladesh.

<sup>120</sup> [IOM Bangladesh: Rohingya Refugee Crisis Response – External Update, 19 – 15 January 2018](#), International Organization for Migration, 25 January 2018.

<sup>121</sup> [Myanmar, Bangladesh to verify 'zero line' refugees, says MOFA official](#), Frontier, 22 February 2018.

<sup>122</sup> [Bangladesh: Activities update on Cox's Bazar](#), Medecins Sans Frontieres, 15 March 2018.

<sup>123</sup> See for example [Bangladesh/Myanmar: Rakhine Conflict 2017 – WHO Situation Report 03, 25 September 2017](#).

rights, and the security of the people of Rakhine State.<sup>124</sup> The final report, published on 24 August 2017, described a threefold ‘development crisis’, ‘human rights crisis’ and ‘security crisis’ in Rakhine. With regard to the economy and investments, the Commission called on the government to ensure that local communities benefit from natural resource extraction; ensure adequate compensation for appropriated land; and invest heavily in infrastructure, lending and agricultural credit.<sup>125</sup>

Over 350 Rohingya villages, comprising tens of thousands of houses, were partially or totally destroyed by fire since the fighting in August.<sup>126</sup> The government is clearing and managing the burned lands under what it claims are the provisions of the 2013 Natural Disasters Management Law.<sup>127</sup> It should be noted that this law, whose definition of ‘natural disaster’ includes ‘man-made accidents’ makes explicit reference to ‘violence and armed insurgencies’ as a listed cause of a natural disaster. It goes on, under Article 18, to outline the procedure to minimise losses and includes both short-term and long-term emergency response measures. This includes keeping records of damages and losses and stipulates that the government has a positive obligation towards ‘rehabilitation to restore agriculture, livestock breeding and other vocations required for victims’.<sup>128</sup>

Recent reports indicate that since October 2017 the authorities have embarked on a major operation, in partnership with some large Myanmar companies, to bulldoze and clear burned villages and build new homes and infrastructure, including roads, mines and a port in NRS.<sup>129</sup> The government is also developing an economic zone in Maungdaw township, NRS, where scores of villages have been burned down, to promote trade, manufacturing and services once the situation there has stabilized.<sup>130</sup>

The history of destruction of villages and the displacement of people from their homes in Northern Rakhine State (Maungdaw, Buthidaung and Yathedaung townships), coupled with the unclear status of the land, make it highly unlikely that any land for to be used by a company in Northern Rakhine State, including in industrial zones, would pass human rights due diligence.

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<sup>124</sup> [Establishment of the Advisory Commission on Rakhine State](#), Global New Light of Myanmar, 23 Aug 2016.

<sup>125</sup> [Overview of Key Points and Recommendations, Final Report of the Advisory Commission on Rakhine State](#).

<sup>126</sup> [Burma: 40 Rohingya Villages Burned Since October](#), Human Rights Watch, 17 December, 2017.

<sup>127</sup> [Govt Says It Is Ready to Register, Resettle Muslim Refugees](#), The Irrawaddy, 28 September 2017.

<sup>128</sup> The implications of this law for land restoration in other areas of Myanmar affected by conflict are addressed in the forthcoming report: *Displaced and Dispossessed: Conflict Affected communities and their land of origin in Kachin State, Myanmar*, May 2018 Kachin Baptist Convention//Metta/Naushawng Development Institute/Nyein Foundation/Oxfam/Trocaire.

<sup>129</sup> See for example [Remaking Rakhine State](#), pages 3 and 21, Amnesty International, 12 March 2018. The report is based on satellite imagery, photographs, and interviews.

<sup>130</sup> [Rakhine to construct Maungdaw economic zone](#), Myanmar Times, 1 September 2017.

### 13. Recommendations for Companies Seeking to Use or Acquire Land

The following recommendations reflect good practice in undertaking human rights due diligence. They are intended to assist companies operating in Myanmar to address issues that they may face when acquiring or leasing land for their operations, which are outlined above in the Briefing Paper. This include land laws which do not protect human rights; deficiencies in the land cadastre and titling; lack of remedy and suppression of protest and dissent; lack of full recognition of customary ownership; the significance of land-based livelihoods and attachment to ancestral lands; and legacies of conflict and displacement.

Be aware of the history and context of land use and acquisition in Myanmar and respond to it responsibly

There is increased scrutiny of how companies address land rights, particularly in Myanmar, which underlines the importance of businesses entering or doing business there undertaking human rights due diligence if they intend to invest responsibly. This means:

- Studying the complexities of land rights, regulation, registration, and legacies.
- Considering what this means for time-frames, business partnerships, and approaches to leasing or acquiring land.
- Seeking to respect the rights (legal or customary) of those historically owning or using the land;
- Negotiating a fair deal that does not seek to exploit the potential lack of information, experience or documentation of local owners in a one-sided transaction that leaves them without livelihoods or benefits;
- Exploring different options for land use arrangements that limit land footprints and provide ongoing income flows to traditional users;
- Recognising that particularly for businesses in rural areas, land use is likely to be an ongoing discussion;
- Making full use of international standards and guidance (see Annex) and encourage the Government to do so as well, both in reforming laws, and in practice.

Understand how customary title is being addressed in national land policy reform, as well as international standards

The 2016 National Land Use Policy indicates a trajectory of increasing recognition of customary land tenure, and the strengthening of security of tenure. This is in line with the development of international guidelines concerning land. Businesses should therefore engage early with those who claim customary title or usage rights, and factor this into their land acquisition/use strategies. This is important to ensure investment is responsible. It also allows business to get out ahead of potential changes in Myanmar law and policy that will affect land transactions.

Minimise land use

Given the lack of clarity on ownership, the high levels of shifting cultivation in some areas, and the high levels of landlessness, there are clear risks of land transactions impacting people without any compensatory measures. Companies should use their EIA process, and the mitigation hierarchy (avoid, minimize, mitigate compensate/offset) and try to reduce their impact. This means limiting footprint to the minimum possible, returning land when it is no longer used for operations, and seeking alternatives to outright purchase, such as leasing land – where the law and

land classification permits – thereby providing a steady source of income to landholders.

Aim to influence any government-led resettlement processes so that they meet international standards

As noted above, Article 7 of the 2015 Environmental Impact Assessment Procedure currently constitutes the basis for Myanmar's resettlement framework, although this may change depending on progress toward creating a new Land Acquisition Law that may incorporate rules regarding resettlement arrangements. Article 7 requires that companies seeking to acquire land adhere to international standards when there is involuntary resettlement of people or when there may be potential adverse effects on indigenous people. Companies should avoid and minimize displacement; provide compensation of lost assets at full replacement costs; provide restitution of livelihood losses; respect different tenure systems; establish an effective grievance mechanism; and ensure consultation and engagement with the project-affected communities. Companies will need to address the two groups of people affected by involuntary resettlement: people who are physically displaced (loss of shelter and/or land) and economically displaced (loss of means of livelihood).<sup>131</sup>

Ground truth the land history, and do not rely on assurances from government or lawyers

Human rights due diligence requires extensive 'ground truthing'. This entails prior desk research on media and human rights reports from the area which might have a connection to land acquisition legacy issues, followed by visits to the area, and discussions with villagers, community and religious leaders, as well as with local authorities and community organisations. This may be best conducted informally and one-on-one, by local experts, but should be well documented.

As outlined above, neither Myanmar records, nor Myanmar land laws provide sufficient certainty that rights-holders will be recognised and protected. It cannot be assumed that land acquired or re-allocated by the government has complied even with national law (such as the 1894 Land Acquisition Act), let alone international standards and community expectations. Furthermore, documentation supplied to substantiate a claim to land use rights, or that the land-user agreed to compensation may have been procured through coercion or illicit payments.

Where the acquisition has been carried out by the government, due diligence should also focus on identifying whether there have been deficiencies in government information provided to and consultations with communities (or indeed, any consultations at all). For example compulsory land acquisition is rarely 'Gazetted' despite this being a Myanmar legal requirement. There may well have been deficiencies in expropriation and compensation processes, including poor documentation, as well as failure to recognise customary owners or users of land, and landless individuals who nonetheless rely on the land for livelihoods (e.g. day-labourers, or for forest products).

Do not rely solely on cadastral records, including for compensation

As some form of cadastres are usually maintained in paper form at the township level, local authorities are often relied upon to identify who is the recognized owner of land. However, many cadastral maps are out of date, so accuracy of land records is

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<sup>131</sup> For further information please see [Resettlement is Easier with a Consistent and Transparent Set of Rules](#), MCRB; the Thilawa SEZ Management Committee, JICA Expert Team, 19 December 2016.

a major problem. In some cases land users will have unofficially 'sold' land use rights to another user many years ago, but as it was unofficial, the tax receipts for use of the land – often used as proof of ownership – may be in the name of the registered, rather than the actual user. Cases have occurred of compensation being paid to family members of those who have not used the land for decades, with the actual user missing out.

Also, the current legal framework and cadastre does not recognise customary ownership and use that may stretch back many generations. Due diligence will be required to understand ownership, occupation and actual use patterns, including temporary use such as pasture or collection of forest products. While local landowners and users may not have formal legal title, customary rights should be recognised, and rights holders should be dealt with on the same basis as more formal land owners with respect to any consent, negotiation, compensation, ongoing permission for use, etc.

Ensure that due diligence address the risks or existence of speculation, and new arrivals

It is common in Myanmar for speculators move in to acquire land in areas earmarked for development. They seek to acquire land cheaply from local people who are unaware of the developments, either before or after the cut-off date, and hope to profit either from compensation payments or rising land prices. This can create tensions with the original users, who may feel cheated when compensation is subsequently paid. Alternatively, it creates a conflict dynamic in compensation negotiations in which the speculator who has 'bought' the land after the cut-off date encourages the original land-user (who has already informally but illegally 'sold' his title) to hold out for higher rates of compensation, to benefit the speculator.

In other cases, where news of a development starts to circulate, squatters with no title may move onto the land in the hope of obtaining compensation. This too can create tensions with those who have been originally using the land. In addition, there have been cases of existing land users planting additional trees or crops in order to benefit from compensation. Projects should establish an early baseline of land use, prior to the cut-off date, including through photographic/drone evidence, as a support for determining who qualifies for what in the Eligibility Matrix (see for example '[IFC Handbook for Developing a Resettlement Action Plan](#)').

Pay particular attention to at-risk groups during any land processes

Due diligence should also consider the impact of acquisition of land on the landless, since they may rely for their livelihoods on farming the land of others as day labourers. Moreover, due diligence should also consider the land rights of women, as their names may not appear on registration documents. Companies should include female members of the community when holding consultations about land use and expropriation of land, and may want to consider having separate all-women meetings.

Consider carefully how best to address legacies and past impacts, drawing on international good practice

The legacy problems relating to land acquired by the government through expropriation that is then re-allocated to companies many years later may not be the legal responsibility of incoming companies. However failure to recognise and address those leaves tension and distrust that risks escalating if ignored. Thilawa SEZ is an example of this (see Annex).

Companies may decide that it is necessary to address legacy issues directly, in order to move forward with operations. This is particularly true where requests to the government to address deficiencies go unheeded. There should be a time-bound action plan to resolve outstanding grievances.

A draft ADB Working Document<sup>132</sup> on resettlement recommends that when addressing 'past impacts' which are not the result of anticipation of the current project, a retrofitted resettlement plan to address the outstanding issues, including compensation payment, may be advisable. However, as the Working Document notes, appropriate compensation for past grievances may not always mean cash. Projects should hold meaningful consultations directly with the community to find a workable solution that is agreed upon and documented. Ideally, the government should be involved in the design of the solution, both for learning purposes, and because the agreed plan may set precedents for other projects.

Solutions may include an emphasis on training and employing local people for participation in the new project, and/or funding community development projects e.g. to improve health facilities which are potentially useful to all ages and both sexes in the community. Such a strategy does not directly address past personal grievances except where it targets employment of the youth of those families who may have directly suffered, but the entire community can benefit.

Establish relationships with the communities, and organisations advising them, as soon as possible

Companies should seek to develop longer-term relationships with the communities in their areas of operation, as well as with local CSOs and INGOs working on land rights. These relationships can be influenced early on, positively or negatively, by processes for land acquisition and use. Investing in community engagement and land acquisition processes that are respectful, fair, and meet international standards, is likely to pay off for the company and the local community in the long run.

However, given experiences over recent decades, there may still be fears among community members, some of which may still be tied to concern about the Myanmar military or ethnic armed group responses. They may also be concerned about reprisals for exposing corrupt land transactions. This may mean that concerns remain hidden and unresolved, or shared only with trusted organisations, and not the company.

Employing a 'trusted 3<sup>rd</sup> party' such as a local community group may be helpful in ensuring community members are aware of their rights, that due process is followed, and that compensation payments are transparently documented. However some Myanmar CSOs are unwilling to serve in this role.

Develop accessible and effective operational level grievance mechanisms to address land issues

International human rights standards require remedy for harms. International standards and good practice recognise that engaging with communities early and resolving real and perceived concerns effectively is an essential part of operating successfully. Accessing remedies in Myanmar is difficult if not impossible in many

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<sup>132</sup> [Involuntary Resettlement Safeguards: A Planning and Implementation Good Practice Sourcebook – draft working document](#), ADB, 2012.

cases. There is – with good cause – little or no faith that the judicial system can currently deliver this.

Operational grievance mechanisms – i.e. processes that allow concerns to be raised and remedied at the operational level (rather than at far away headquarters) – are therefore even more important in Myanmar, where there are few other outlets to resolve concerns. Such grievance mechanisms should be implemented according to the criteria established in the UN Guiding Principles on Business and Human Rights<sup>133</sup> while not impeding access to other remedies, judicial or non-judicial.

Operational level grievance mechanisms may not be well equipped to deal with land issues that require action by the authorities such as disputes around formal title. Therefore mechanisms should be equipped to deal with complaints around informal land claims or other grievances around operational impacts on land or be prepared to work with local governments to help resolve issues that involve them.

Understand the additional considerations, standards, laws and expectations that apply in ethnic minority and/or contested areas, and be conflict sensitive

The challenges for companies seeking to use land in ethnic minority areas are particularly acute due to the difficulty in establishing tenure rights under customary communal systems in the absence of official land registration documents and accurate land cadastres

As mentioned, above, the 2015 Law on the Protection of the Rights of Ethnic Nationalities requires that *ta-ne tain-yin-tha* receive complete and precise information about business activities in their areas before project implementation so that negotiation between the groups and government/companies can take place. At the time of writing, the Ministry of Ethnic Affairs was drafting by-laws to implement this provision that should provide further guidance. In the meantime, whether or not a company has a policy commitment to strive to achieve the FPIC<sup>134</sup> of indigenous peoples, every step a company takes towards understanding the concerns of indigenous peoples and respecting their rights, drawing on international standards such as IFC Performance Standards, will reduce the chance of local opposition, project delays or outright suspension.<sup>135</sup>

In addition, where the ethnic minority area is affected by armed conflict, there are further challenges:

- some ethnic armed organisations such as the KNU do not recognise Union-level laws and administration, and have their own policies on land governance which may be contradictory to national law;
- legacies of conflict and displacement, with the risk that land may originally have belonged to IDPs or refugees;
- heightened security risk for both company staff and communities which impacts on ability to access the area and conduct consultation processes.

Companies should consult with ethnic minorities using conflict-sensitive public participation processes. This means:

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<sup>133</sup> See [UN Guiding Principles on Business and Human Rights](#), Principle 31.

<sup>134</sup> For further information on FPIC, see [Respecting free, prior and informed consent, FAO Technical Guideline](#), 2014.

<sup>135</sup> Please refer to MCRB's briefing paper on indigenous peoples in Myanmar: [Indigenous Peoples' Rights and Business in Myanmar](#) for further information.

- Conflict analysis and planning: companies should inform themselves about the conflict dynamics, by mapping out the different ethnic armed groups operating in the area, the different ethnic groups, and identifying contacts and intermediaries. The company should consider engaging with experts on conflict-sensitive business practices.
- Consider unintended consequences: companies should recognize that choices made around how and where consultation is undertaken are political.
- Access to a full range of stakeholders: these include Region/State governments; local communities; ethnic minority armed groups; and, if possible displaced communities and refugees.
- Prioritise security of communities: be aware of and address security threats to those involved in the public participation process (including its own staff).
- Build trust: there will be heightened suspicion of private sector projects in conflict-affected areas, and of processes for license acquisition, and who will – or is perceived to – benefit from the proposed project.
- Balance views: Given the potential challenges accessing relevant stakeholders, companies should nonetheless try to ensure that all perspectives are represented, and in particular, to ensure that those who may be impacted by the project are also heard amongst those with potentially more powerful voices in the process, such as government officials and ethnic armed groups.
- Provide information: this includes information about the company's identity and plans, and includes leaving information behind after consultation meetings, and providing an accessible contact point (e.g. a local representative or community group) for follow-up questions.
- Address expectations: there may be unrealistic expectations about timing, employment, compensation etc. Assume low levels of understanding about processes and impacts.
- Plan for sufficient time and resources - there will be more parties to consult and discussions are likely to be longer and more complex given the circumstances. Therefore additional time, resources and expertise should be planned for.<sup>136</sup>

Undertake enhanced due diligence for investments in Rakhine State involving land

Businesses should exercise extreme caution in considering any land transaction in Northern Rakhine State, given the exodus of the Muslim population fleeing violence and wider displacement, and exercise enhanced due diligence. Companies should obtain advice from UN agencies and organisations which are mapping and documenting land-use change. Companies should establish whether there is any possible connection between land on offer and displaced people or refugees. Since displaced populations should be entitled to return to their homes, it is important for companies to avoid contributing to the problem, or appear to give tacit support to, or benefit from, the activities which have resulted in the displacement.

For elsewhere in Rakhine State, where conflict between Rakhine and Bamar is more relevant, the above recommendations on conflict sensitivity and ethnic minority areas are a guide to good practice. The Rakhine Advisory Commission's report led by Kofi Annan also provides a good guide for companies with regard to land use. The Commission has called on the government to ensure that local communities benefit

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<sup>136</sup> [Draft Guideline on Public Participation in Myanmar's EIA Process](#), Vermont Law School, pages 32 – 36, 31 May 2017.

from natural resource extraction; ensure adequate compensation for appropriated land; and invest heavily in infrastructure, lending and agricultural credit.

DRAFT

## *Annex 1: Relevant International Standards*

The [UN Guiding Principles on Business and Human Rights](#) recognize the State's obligation to respect, protect, and fulfil human rights and fundamental freedoms. They were endorsed by the UN Human Rights Council on 16 June 2011. The UNGPs are grounded *inter alia* in the recognition of the role of business enterprises to respect human rights.

[IFC Sustainability Framework](#) includes [the Performance Standards](#) which are available in [Burmese](#), each of which should be read with its associated [Guidance Note](#) which gives more details on practical interpretation.

[IFC Performance Standard 5](#) sets out standards for physical and/or economic displacement resulting from project-related land acquisition and/or restrictions on land use that is involuntary. The Performance Standard covers the process and scope of actions that should be taken to address land acquisition and any resulting resettlement by both the government and companies. It goes beyond national law but reflects international human rights standards and international best practice.<sup>137</sup>

[IFC Performance Standard 7 on Indigenous Peoples](#) recognizes that indigenous peoples, as social groups with identities that are distinct from mainstream groups in national societies, are often among the most marginalized people there. It sets out processes and standards to anticipate and avoid adverse impacts of projects on communities of indigenous peoples, or when avoidance is not possible, to minimize and/or compensate for such impacts.

[IFC Performance Standard 8 on Cultural Heritage](#) sets out processes that companies should follow to ensure they protect cultural heritage in the course of their project activities. This includes intangible cultural heritage such as unique natural features or tangible objects that embody cultural values, such as sacred groves, rocks, lakes, and waterfalls.

The Asian Development Bank (ADB) [Safeguard Policy Statement \(2009\)](#) is less complete and less private sector-focussed than the IFC, as it is addressed to ADB projects which are generally undertaken with governments. However there are some useful [resources on Resettlement](#) such as a [Handbook on Resettlement, A Guide to Good Practice](#) (1998) and [Involuntary Resettlement Safeguards: A Planning and Implementation Good Practice Sourcebook \(Draft Working Document\)](#) (2012).

The Food and Agriculture Organization's (FAO) [Voluntary Guidelines on the Responsible Governance of Tenure](#) set out standards to improve the governance of land, fisheries and forests with the goal of achieving food security. The guidelines cover both government and non-state actors, which include businesses.

Under international human rights law, land acquisitions should also not result in **forced evictions**. Forced evictions are defined by the UN Committee on Economic, Social and Cultural Rights as "*the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection*" (General Comment No.7, Paragraph 3). The UN Committee has

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<sup>137</sup> See also [Handbook on Resettlement, A Guide to Good Practice](#), Asian Development Bank, 1998.

identified procedural protections that must be in place before any evictions are undertaken (General Comment No. 7, Paragraphs 14, 16, and 17).<sup>138</sup> These include:

- genuine consultation with all affected persons on feasible alternatives to evictions;
- due process safeguards such as adequate prior notice; and provision of remedies and legal aid;
- payment of compensation, and provision of adequate alternative housing for those who cannot provide for themselves.

Any land acquisition process that would result in the eviction of people from their homes, farmlands or other lands that they occupy should meet these requirements.

**The UN Basic Principles and Guidelines on Development Based Evictions and Displacement** were developed to respond to adverse human rights impacts occurring in the implementation of large development processes. They set out standards to be followed by States and other parties responsible for displacement, with the following requirements: fully exploring alternatives to displacement; ensuring an appropriate planning process with sufficient opportunities for meaningful and informed participation; ensuring that displaced persons do not experience a deterioration of their standard of living, including by ensuring appropriate compensation and alternative livelihood options; and prohibiting all forced evictions. These are available in Burmese.

#### *ANNEX 2 USEFUL CONTACTS*

#### *ANNEX 3 (or separate) LINKED INITIATIVES*

*To be completed* – a list of land rights related projects

#### *(DEVELOPMENT PARTNERS, NGOS ETC)*

OneMap Myanmar/CDE

The Centre for Development and Environment (CDE), a research centre at the University of Bern), which is the lead implementing agency for the OneMap Myanmar initiative. OneMap Myanmar is an open access spatial data platform to improve the quality of land-related spatial data and establish an online system drawing on both government and non-government data in one location for the public and decision-makers. To achieve this goal, CDE partners with over 20 government agencies, civil society organizations, and ethnic nationality groups and communities

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<sup>138</sup> [UN Committee on Economic, Social and Cultural Rights, General Comment No. 7 on the right to adequate housing.](#)