

Land Tenure Security and Policy Tensions in Myanmar (Burma)

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I S S U E S

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SUMMARY After 50 years of military rule, in 2011 the Thein Sein government's reforms in Myanmar (Burma) entailed a reengagement with the international community, including major international financial organizations, donors, nongovernmental organizations (NGOs), and civil society organizations (CSOs). The government's social and economic development policies, which were strongly influenced by this engagement, encouraged private domestic and foreign investment in agriculture to create wealth and reduce poverty. Land legislation allied to these policies was designed to improve land tenure security, yet it had harmful effects on the majority of the population employed in agriculture, including smallholder farmers and ethnic communities. Developed and passed without public debate, the government's land reforms facilitated further land confiscation and formalized ongoing inequities. This experience contains lessons in future policy development for the National League for Democracy (NLD) government.

After almost 50 years of military rule in Myanmar (Burma), a series of progressive reforms were introduced by the country's new president, Thein Sein, after he took office in 2011. One of these reforms was new land legislation designed to improve farmers' land tenure security, while at the same time the government reengaged with international financial institutions (IFIs) and encouraged foreign investment. Yet the Thein Sein government (2011–2016)—which comprised both the military and the Union Solidarity and Development Party (USDP)—introduced its reforms in a context of poor legal capacity, coupled with a legacy of patrimonialism and the rise of business oligarchs encouraged under military rule. The dilemma of enacting reforms that both encourage foreign investment and safeguard the rural poor, who make up the majority of the country's population, led to policy tensions that were reflected in a series of conflicts over land.

Land Law Reform Under the Thein Sein Government

The legal framework for land in Myanmar was in need of reform. In 2009, there were between 73 and 96 active laws, amendments, orders, and regulations related to land that had been passed by different governments since colonial times—many of which overlapped or conflicted with each other.¹ This was further complicated by having different government departments, and their administrative bodies, handle overlapping areas and issues related to agriculture and forestry—the Ministry of Agriculture and Irrigation (MoAI) and the Ministry of Environmental Conservation and Forestry (MoECF). Since the 1947 Constitution and the 1953 Land Nationalization Act, the state has been the formal owner of all land in the country—this was reaffirmed by Article 37 in the 2008 Constitution. The 1953 Act barred land from the jurisdiction of civil courts except in matters of compensation, and to discourage absentee landlords it also gave the state the right to expropriate land categorized as “fallow.” In 1988, the State Law and

Order Restoration Council (SLORC) government introduced the *Foreign Investment Law* (1988)², and in 1991 it established the Central Committee for the Management of Cultivable Land, Fallow Land and Waste Land. Together, they would enable the large-scale appropriation of land in favor of government cronies and businesses.³ They also foreshadowed the Thein Sein government's approach to land reform more than two decades later.

The Thein Sein government's land law reforms were introduced in line with its acknowledgment of the strategic importance of the agricultural sector for growth and poverty reduction. In 2013, the government issued the final draft of its major policy Framework for Economic and Social Reforms (FESR), a document co-authored with the International Monetary Fund (IMF), which focused on people-centered development, addressing poverty, and the need for improved human development. Nevertheless the document also suggested a number of “quick wins” and included among its market-driven policy priorities the need to attract private sector development and foreign direct investment, as well as the establishment of special economic zones (SEZs). Sector-specific policies for inclusive growth and poverty reduction included a policy for agricultural and rural development driven by the opening up of the market system to the private sector and the affirmation of new land laws. Indeed, the FESR's bias toward industrial agriculture as a developmental panacea for poverty would come at the expense of impoverished farmers. The FESR also included a specific provision on improving governance, emphasizing President Thein Sein's commitment to good governance and clean government, and a section on rule of law geared toward improving the enforceability of contracts and the certainty of doing business for domestic and foreign firms.⁴

One of the quick wins mentioned in the FESR notes the importance of agriculture to the gross domestic product (GDP), and the commitment of the government to channel benefits of reforms toward

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helping improve the welfare and income of farmers, farm laborers, and their dependent families.⁵ The government's vision of poverty reduction in the FESR was fueled by agricultural and rural development—led by marketization and private investment. This also conformed to the MoAI's 30-year Master Plan for the Agriculture Sector (2000/2001–2030/2031), which saw the government converting 10 million acres of “waste land” for private industrial agricultural production.⁶ Together, these policies promoted development through investment (mostly foreign) in agribusiness and infrastructure, and followed the neo-liberal market reform policy advice of IFIs including the World Bank, the Asian Development Bank (ADB), and the IMF. Yet placing important reforms in the same category as quick wins and expediting them without proper local consultation—nor any working understanding of a more substantial rule of law—triggered a series of conflicts and fostered resentment among farmers.

Agriculture became a key platform for the government's growth strategy because of its economic importance—agriculture contributes approximately 40 percent of Myanmar's GDP and employs 66 percent of the population, and 19 percent of the land is used for agriculture.⁷ Agricultural land-use practices vary widely across the country's three major agroecological zones—the dry central zone focuses on livestock and vegetable production; the Irrawaddy Delta is home to rice production and fishing; while the uplands, which are populated by the ethnic minorities, produce irrigated rice and practice rotational farming, also known as swidden or shifting cultivation, or *taungya*, which accounts for 30–40 percent of all cultivation in Myanmar.⁸ In the uplands, some major land concessions were granted by the Thein Sein government and its predecessors under military rule, often for large-scale agribusiness projects funded by private (foreign) investment. One reason for the prevalence of concessions in the uplands is that it was easy for governments to reclassify land under shifting cultivation as fallow or waste land, to be appropriated and redistributed, usually for the benefit of

government-linked corporations and cronies.⁹ The reclassification of land in Myanmar as waste land for various political and economic reasons (rather than describing the quality of the land itself) has been practiced since the colonial period and it continues today.¹⁰ For generations, farmers across the country have also followed their own cultural norms with respect to land and agriculture, including customary laws related to acquiring land through succession, inheritance, and marriage. However, laws related to customary land-use practices have never been formally recognized by the government.

In 2011 and 2012, the parliament passed four laws that had a significant impact on smallholder farmers across the country. Two laws were specifically related to farmers and their land: the *Farmland Law* (2012) and the *Vacant, Fallow, and Virgin Lands Management Law* (VFVLM) (2012). The other two encouraged private investment in the land used by farmers: the *Foreign Investment Law* (FIL) (2012) and the *Special Economic Zones Law* (2011, repealed by the 2014 SEZ law). Both the Farmland and the VFVLM laws passed through parliament without open debate and, importantly, without any consultation with or input from farmers, civil society, or environmental groups.¹¹ The Farmland law creates private land-use (not ownership) rights for farmers, whereby land can be sold, exchanged, leased, inherited, and used to access credit. The law requires farmers to obtain Land Use Certificates (LUCs) from their local Farmland Administration Bodies (FABs) for a fee—these are approved by district-level FABs and registered by the State Lands Record Department (SLRD). The FABs may fine farmers or rescind their land-use rights if the conditions of use are not met. The VFVLM law resembles the rules of the 1991 Central Committee for the Management of Cultivable Land, Fallow Land and Waste Land. It allows the state, through the Central Committee for the Management of Vacant, Fallow and Virgin Lands (CCVFV), to lease land to Myanmar citizens, governmental and nongovernmental organizations, and private investors—including foreign

investors through joint venture arrangements in accordance with the Foreign Investment Law. This land may be leased for up to 30 years for agriculture, livestock, poultry, aquaculture, mining, or other purposes. Both the Farmland Administration Bodies and the CCVFFV are chaired by the minister of the MoAI. The FIL and the SEZ laws similarly encourage foreign investment in land, with land-use rights extended to 70 and 75 years, respectively. The Myanmar Investment Commission (MIC) may approve large-scale foreign investment in agriculture, and the SEZ law permits 100 percent foreign ownership. While the developer or investor must pay farmers for transfer and resettlement and provide compensation, there is no formal mechanism for calculating this compensation.

In addition, the new land laws suffered some fundamental flaws of basic justice which were felt most strongly by smallholder farmers. Although the Farmland and the VFVLM laws were ostensibly introduced to improve tenure security for farmers across the country, in many respects they had the opposite effect. The onus was on farmers to obtain LUCs from their local FAB and have their land registered by the Settlement and Lands Record Department. However, individuals could not apply for LUCs without a national ID card (which is not universally held, especially among ethnic minorities), the process of securing LUCs was not made explicit in the laws or their associated rules, and farmers received inadequate information concerning their rights and duties under the new laws. Moreover, the laws could not guarantee that even registered land was above state confiscation—not only in cases of an unapproved use of the land, but also because the *Land Acquisition Act* (1894) remained in effect and the state remained the ultimate owner of all land. This is a fundamental problem for a country adopting market solutions and private investment in its social and economic development plans.

Further, any disputes over the allocation or use of land under the Farmland law must be heard by

the same body that made the original decision on the allocation or use of land—either the village-level FAB or on appeal to a higher-level FAB—and not by a court of law.¹² The *Vacant, Fallow, and Virgin Lands Management Law* makes similar provisions for internal resolution of appeals, and the administration of both laws falls under the jurisdiction of the same department—the MoAI. This lack of an independent arbiter and the fact that the government can restrict farmers' economic freedom by making them grow certain crops under the stated terms of land use attracted the criticism that these laws were unconstitutional. Both the Farmland law and the VFVLM law continued to ignore or downplay the customary land rights, transfer laws, occupancy, communal tenure, and customary land use practices of farmers—particularly among the most vulnerable of ethnic minorities, because rotational farmland remained open to reclassification as vacant, fallow, or virgin land. Those returning to their lands after having been dispossessed by the military or through armed conflict would seem to have the weakest claims to title. Indeed, the kind of land titling encouraged by these laws superimposed formal land rights over any preexisting local claims, as the only legal claim to land. Thus, the formalization of land rights through titling also confirmed existing inequalities and created new injustices.¹³ Finally, the laws continued to ignore the rights of women to enjoy independent or joint ownership of land-use rights, as land can only be inherited by or transferred to male farmers.

Land Confiscation and Speculation

The combined effect of these laws was to formalize the pattern of land grabbing that had developed under the previous government and to encourage land speculation. Since 1988, when the SLORC introduced the modern state's first Foreign Investment law, a haphazard pattern of foreign investment has been encouraged, mainly in the extraction of natural resources.¹⁴ In the 2000s, the

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state encouraged foreign investment in agribusiness by granting large-scale land concessions to private developers as joint venture partners with government or military-linked entities, particularly in the troubled ethnic uplands and borderlands, with little or no compensation paid to farmers. By 2011, the State Peace and Development Council (SPDC, formerly SLORC) had seized and leased some 2 million acres of land to the private sector for agribusiness, aquaculture, mining, and other commercial ventures such as hotels.¹⁵ By mid-2013 under the Thein Sein government, over 5.2 million acres of industrial agricultural concessions had been awarded across the country, mainly for biofuel and rubber production, and the majority were located in the Tanintharyi region (1.9 million acres) and Kachin State (1.4 million acres).¹⁶

While the extent of the land confiscation has been well documented by civil society organizations (CSOs) and NGOs, the partial relaxation of controls over the press and public demonstrations meant that, for the first time, farmers were able to voice their concerns to the Thein Sein government. Consequently, ongoing protests occurred over several large-scale infrastructure and mining projects involving foreign (mostly Chinese) investors, government or military-linked enterprises, and the reclassification and confiscation of land from farmers. These include the Myitsonne hydroelectric project along the Irrawaddy River in Kachin State; the Letpadaung copper mine project in the Monywa District, where more than 7,800 acres of land had been grabbed from 26 villages to make way for the project; and a number of hydropower projects proposed along the Salween River in Shan and Karen States, and along the Thai border. The construction of SEZs with foreign (including Japanese) investment has also involved the large-scale confiscation of land since 2011—three SEZ proposals have undergone non-transparent tender processes (including Kyaukphyu in Rakhine State and Dawei in the Tanintharyi region), one (Thilawa in the Yangon region) was opened in late 2015, and

the Thein Sein government had plans for more SEZs in ethnic regions.

Private investment in agribusiness or infrastructure has not traditionally been the largest contributor to land confiscation, however. The military has routinely expropriated land for strategic purposes, to use as bases and to perform counterinsurgency operations, or to grow cash crops to raise revenue, often without compensating the farmers. In response to criticisms of ongoing land grabbing, in 2012 the Thein Sein parliament set up a bipartisan interparty committee to investigate land seized after 1988—the Farmlands and Other Land Acquisition Inquiry Commission (LAIC). The committee reported in 2014 that they had received over 6,000 complaints and accounts of unresolved problems from across the 14 states and divisions and that the vast majority were related to military seizures, although the government only recognized a fraction of these complaints.¹⁷ The Commission produced three reports for the executive branch, but their recommendations were not followed. One of the Commission's focus areas was addressing the problem of compensation, including for land seized for the Yangon-Mandalay expressway project, in which there were major discrepancies between the government's and the farmers' accounts of the amount and value of land acquired. A lack of commitment by local authorities to addressing compensation disputes, coupled with complicated land laws and a lack of clarity in the national government's land policy led to the eventual stagnation of the Commission's work in the parliament. A second committee was established in 2012, however, under the leadership of the MoECF—the Land Use Allocation and Scrutinizing Committee (Land Scrutinizing Committee). It was tasked with examining the issue of land reclassification and developing a National Land Use Policy (NLUP), and in contrast it adopted relatively transparent and inclusive processes.

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National Land Use Policy

The final draft of the NLUP was released by the National Land Resource Management Central Committee in January 2016, before the National League for Democracy (NLD) took office. The NLUP was meant to guide the drafting of a new and more harmonized Land Law. It did not address past injustices for ongoing land disputes, the problem of land grabbing, or the issue of decentralization. However, for the first time it acknowledged the land-use rights of the ethnic nationalities, including customary land tenure laws, and it addressed many of the farmers' grievances noted above. The inclusionary drafting process for the NLUP was almost the polar opposite of that for the Farmland and VFVLM laws. Working with the government and numerous CSOs, NGOs, aid donors (USAID, SDC, and the EU), and private sector groups, the Land Core Group of the Food Security Working Group convened a multi-stakeholder National Dialogue on Land Tenure and Land Rights, with recommendations included in the NLUP.¹⁸ The NLUP underwent six earlier drafts, incorporating regular feedback from public consultations and workshops organized by the MoECF.

Listed among the objectives, guiding principles, and basic principles of the NLUP are the need to recognize and protect the customary land tenure rights and procedures of ethnic nationalities; to develop transparent, fair, affordable, and independent dispute resolution mechanisms in accordance with the rule of law; to recognize the private and communal property rights of citizens as included in the constitution; to protect legitimate land tenure rights, as recognized by the local community, particularly those of vulnerable groups such as smallholder farmers, the poor, ethnic nationalities, and women; to provide easy access to judicial review; to ensure equal opportunities for men and women to obtain land tenure rights; and to permit freedom of crop selection. The NLUP also speaks

of maintaining a system of correct boundary maps, land types, and classifications; and allowing local farmers' organizations to resolve land disputes using customary dispute resolution mechanisms, independent arbitration, and tribunals, as well as the establishment of special courts to hear special cases related to land law with specifically trained judges and law officers. One of the basic principles of the NLUP is to "strengthen rule of law and good governance," signifying the influence of donors and other stakeholders in the drafting process.¹⁹

Lessons in Policy Development and Reform

When the World Bank Group reopened its office in Yangon in 2012, the Bank, along with its private investment arm—the International Finance Corporation (IFC)—identified three areas of initial engagement: increasing access to finance, improving the regulatory framework and business environment, and supporting investment in infrastructure. The Bank and the IFC shared the same strategies to attract responsible foreign investment, expand trade, and help the government to better manage its resources. The Bank's risk management policies aimed to provide a friendly regulatory environment for investors that enabled mobilization and accumulation of capital, and access to finance. Yet these strategies, which have been replicated in development policy circles across countless international organizations since the government's reforms began in 2011, led to conflicting policy development on the part of the Thein Sein government.

The legacies of military rule in Myanmar include a political economy dominated by cronies, oligarchs, and powerful regional commanders, established during the SLORC-SPDC regime in particular.²⁰ Their influence will not dissipate quickly, nor will the military presence in parliaments across the country. The Thein Sein government's reforms involved a reengagement with the international community, including the major

The inclusionary drafting process for the new National Land Use Policy was almost the polar opposite of that for the Farmland and VFVLM laws

international financial organizations, donors, NGOs, and CSOs. The government's social and economic development policy, which was strongly influenced by this engagement, would attempt to encourage private and foreign investment in agriculture to create wealth and reduce poverty. Yet the government's legal reforms allied to this policy would have potential deleterious effects on the majority of the population that is employed in agriculture, including ethnic minorities and the most vulnerable. Under pressure to improve farmers' land tenure security, the government's reform-inspired land legislation of 2012 simply formalized ongoing inequities and created new injustices.

Land reform legislation, ostensibly designed to secure land titles, was developed without any input or influence from farmers, CSOs, or NGOs. The formalization of new rules and procedures and the injustices that followed fueled resentment among farmers and added to the backlash against the government at the 2015 elections. However, one of the most surprising outputs of the same government was produced in 2016, after the USDP's electoral loss—the National Land Use Policy (NLUP). The government conducted two very different processes on land reform; the first concerned the laws of 2012, which passed without debate, and the second concerned policy developed with an eye to enacting a new national land law with the full engagement of donors and stakeholders.

Following their landslide election victory in November 2015, the NLD entered the parliament in 2016 with a mandate for change. While some experienced campaigners and ethnic party MPs were replaced by younger, inexperienced NLD members, there was also a solid cohort of NLD MPs who had been trained in environmental governance issues. However, important lessons can be learned from the Thein Sein government's policy dilemma if the NLD wishes to avoid repeating its mistakes—including the

development of a new National Land Law. In developing a new comprehensive land law, the full participation and discussion of all stakeholders is required—including farmers organizations, NGOs, and CSOs—to find the right balance between responsible domestic and foreign investment in agriculture and natural resources, and safeguarding the livelihoods of farmers and the rural poor. One possibility is to create a land use center, where further training on and investigation of the complex issues involved can be undertaken, including study of how to better integrate customary and communal laws and practices with state laws and land management practices, to avoid future ethnic-based conflicts. At the same time, the National League for Democracy government must continue to address the issue of land confiscations, returns, and reimbursements—an area that was woefully ignored by the previous national government and local officials.

Moreover, because land is a complex and highly contested issue in Myanmar, the state's capacity to implement future legal reforms should also be taken into account. Indeed, the legal system itself should be trustworthy before legal reforms are introduced, and it may be some time before judges and legal officers can be trained and trusted to perform their duties fairly and independently in special land courts—as recommended by the NLUP. In this context, future policy development should take place in recognition of, and collaboration with, efforts to improve the rule of law. The Thein Sein government in transition was stretched in both directions—toward introducing land reforms aligned with its social and economic policies and defending against claims for a more inclusive policy development process and a more substantive rule of law. Whether future land reform proposals and policy development become more inclusive and democratic will be tested as the country experiences life under the NLD-led government.

Future policy development should take place in recognition of, and in collaboration with, efforts to improve the rule of law

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- ⁹ The acquisition of land has taken place under the authority of the Land Acquisition Act (1894) which grants the state the authority to acquire any land it sees fit to acquire for public purposes or private development. This includes land the government deems to be vacant, fallow, or waste land.
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