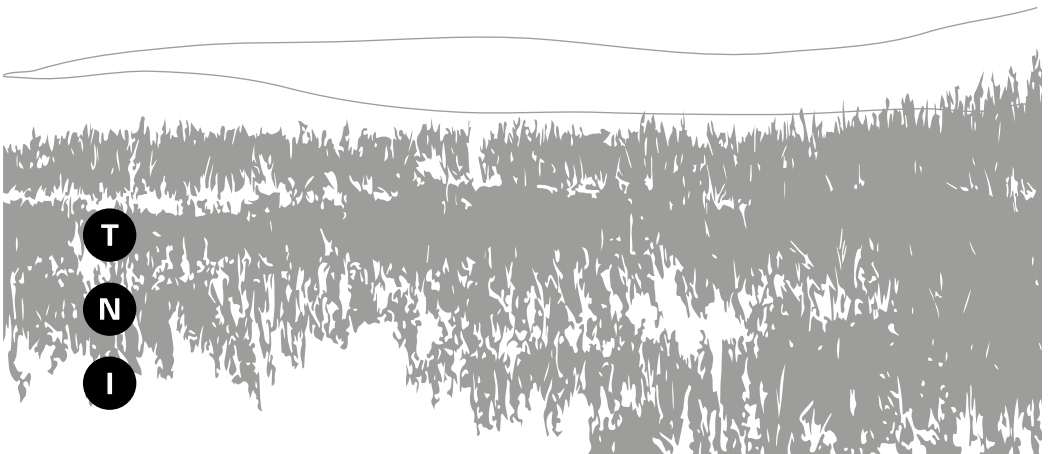


TRANSNATIONAL INSTITUTE

PRO-BUSINESS OR PRO-POOR? MAKING SENSE OF THE RECENTLY UNVEILED DRAFT NATIONAL LAND USE POLICY

Preliminary assessment
23 October 2014



Summary

October 18, 2014 saw the official unveiling by the government of the Republic of the Union of Myanmar¹ of its much-awaited draft national land use policy. Once it is finalized, the new policy will guide the establishment of a new overarching framework for the governance of tenure of land and related natural resources like forests for years to come. As such, it is of vital importance. This preliminary assessment aims to shed light on the key aspects of the draft policy and its potential implications for the country's majority rural working poor, especially its ethnic minority peoples, although they are not the only ones whose future prospects hinge on how this policy making process will unfold. The scope of the policy is *national* and clearly intends to determine for years to come how land will be used – especially by whom and for what purposes – in lowland rural and urban areas as well. Focused critical engagement by civil society groups will likely be needed to ensure that the policy process addresses the concerns and aspirations of all rural working people system wide. Initial scrutiny suggests that those who see the land problem today as a problem of business and investment – e.g., how to establish a more secure environment particularly for foreign direct investments – are likely to be pleased with the draft policy. Those who think that the land problem goes deeper – e.g., implicating the social-ecological foundations of the country's unfolding political-economic transition – are likely to be seriously concerned. This suggests that focused efforts at trying to influence the content and character of the draft policy are needed. The government's decision to open the policy process to public participation is therefore a welcome one. Yet whether and to what extent this public consultation process will be truly free and meaningful remains to be seen.

¹ In 1989 the then military government changed the official name from Burma to Myanmar. They are alternative forms in the Burmese language, but their use has become a politicised issue. Myanmar is mostly used within the country and in international diplomacy, and is now also starting to be more commonly used in the English language abroad. For consistency, Myanmar will be used in this report. This is not intended as a political statement.

The draft policy and its importance

October 18, 2014 saw the official unveiling by the government of the Republic of the Union of Myanmar of its much-awaited national land use policy. Still billed as a draft, the policy is ostensibly now open for a limited time for comments from the public. Seventeen public consultation workshops, reportedly open to all representatives of stakeholder groups, are planned: 1 each in 14 states and regions; 2 additional events in Shan State; and 1 in Nay Pyi Taw.

The draft policy is just one step in a larger effort to improve land administration in Myanmar. The other steps are said to be: (i) enacting a new National Land Law; (ii) harmonizing existing legislation; (iii) undertaking a land resource inventory; (iv) undertaking national land use planning; and (v) undertaking sectoral policy and land use planning. The land policy making process will guide the establishment of the overarching framework for the governance of tenure of land and related natural resources like forests for years to come. As such, it is of vital importance.

Land and how it is governed is of fundamental importance to any and every society. Land, like water, is life. Yet land means different things to different people and peoples. This makes land policy *making* an inherently complex and often contentious undertaking. Not everyone will agree on what makes “good” land policy. Different members of society may hold dramatically different views, and so how to create (new) land policy is not obvious. Experience elsewhere in the world suggests that because land is fundamentally important, but subject to widely differing understandings, the process of making land policy is as important as the outcome.

How genuinely inclusive and participatory the process is will ultimately matter for how widely and deeply the product is accepted. In highly contested settings, the land policymaking process is likely to either enhance or undermine the very political legitimacy of the State more generally.

In Myanmar, the land, water, forest and fishery resources still under the control of many ethnic minority farming communities, as well as ethnic armed opposition groups, long coveted by powerful elites, are under increasing pressure today. The current national land use policy process therefore holds particular importance for their future prospects. But they are not the only ones whose future prospects hinge on how this policy making process will unfold. The scope of the policy is *national* and clearly intends to determine for years to come how land will be used – especially by whom and for what purposes – in lowland rural and urban areas as well.

Those looking for a more secure legal framework and institutional environment for investments, particularly foreign direct investments, are likely to be pleased. The draft that was presented by a representative of the Land Use Allocation and Scrutinizing Committee (LUASC) during the high level, invitation-only consultation workshop held at the Inya Lake Hotel in Yangon, seems to support this.

But for those who are more concerned about social justice, environmental sustainability, and democratization, the draft policy will likely dishearten; in fact, it should raise some serious concerns.

The policy consultation process

A brief overview of the draft policy and planned policy consultation process as presented on 18 October is useful. The document itself has twelve parts, each part dealing with a specific dimension of land policy; some parts go into deeper and more detailed discussion than others (see Box 1). In addition, a timetable for public consultation was also unveiled during the 18 October workshop in Yangon (see Box 2).

Box 1 Table of Contents

Preliminary

Part I Land Use Management

- **Chapter I** Basic Principles of the National Land Use Policy
- **Chapter II** The Situation of the Existing Land Management Mechanisms
- **Chapter III** Forming the National Land Use Council
- **Chapter IV** Land Classifications and Administrating Government Departments and Organizations
- **Chapter V** Information Management

Part II Planning and Changing Land Use

- **Chapter I** Planning and Drawing Land Use Map
- **Chapter II** Changing Land Use by Zoning
- **Chapter III** The Change of Land Use by Individual Application

Part III Granting Concession or Lease of State-Owned Lands

Part IV Procedures Relating to the Land Acquisition, Compensation, Resettlement and Rehabilitation

Part V Settlement of Land Disputes and Appeal

- **Chapter I** Settlement of Land Disputes
- **Chapter II** Appeal

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Part VII Land Use Rights of the Ethnic Nationalities

Part VIII Equal Rights between Men and Women in Land Tenure and Land Use Management

Part IX Harmonization of Laws and Enactment of New Law

Part X Monitoring and Valuation

Part XI Doing Research and Developmentt

Part XII Miscellaneous

Box 2 Timetable of public consultation process

Purpose	2014 October				2014 November				2014 December			
	1st	2nd	3rd	4th	1st	2nd	3rd	4th	1st	2nd	3rd	4th
Workshop with Development Partners and INGOs/NGOs												
Meeting With State and Regional Governments												
Distribution of Draft Policy to State and Regions												
Stakeholder Consultation												
Acceptance of Comments from the Public												
Data Analysis												
National Level workshop												
Finalizing the Policy												
Submission to the Union Government												

The draft policy is available online at <http://www.fdmoeaf.gov.mm/newdesign/>, in both Myanmar and in English. Civil society organisations are being encouraged to organize their own meetings with villagers and farmers to discuss the draft policy. People are being told that they can raise questions during the official public consultations, but anyone can also send feedback via email directly to LUASC at the following address: luasc.myanmar@gmail.com.

Feedback will reportedly be collected and analysed by a policy review team, who will discard “irrelevant” comments, deliberate on how to apply any “relevant” comments, and document their decisions. This latter phase may prove to be the most critical, depending on who submits comments, the nature of the comments received, and how these get either interpreted and rejected or interpreted and reformulated by the policy review team. A lot of content could change for the better. Or, it could even change for the worse. Either way, vigilance will be called for.

How the draft policy compares with the international standard

How does the draft policy compare to international standards? Our point of comparison is the 2012 Voluntary Guidelines for Responsible Governance of Tenure of Land, Fisheries and Forests (hereafter “TGs”). The TGs are an unprecedented product of intergovernmental negotiation and agreement with civil society participation through the United Nations (UN) Committee on World Food Security (CFS) based in the Food and Agriculture Organization (FAO) in Rome. The TGs currently stand as the highest international standard on issues of tenure in land, fisheries and forests.

Unlike Myanmar’s National Land Use Policy (draft), the TGs explicitly emphasize poor, marginalized and vulnerable people(s), and without excluding other groups and perspectives either. They acknowledge the importance of local food production systems, and acknowledge the importance of addressing historical injustices as well as land concentration. They acknowledge social, cultural, ecological and political values of land and give weight to international human rights law and principles in the governance of land.

In short, the TGs recognizes that land has crucial *social functions*, and for this reason, they explicitly call for safeguards to prevent the tenure rights of poor, vulnerable and marginalized peoples from being undermined in a variety of situations.

All of these points are extremely relevant for Myanmar today. Unfortunately, the draft NLUP appears to move in a different direction. What the draft policy stresses is the *economic function* of land (and associated resources). Land is seen as more or less exclusively a economic asset, as little more than something to be used and exploited for “economic development”. Myanmar is described primarily as an economically and strategically placed country with abundant natural resources, and as having “good fundamentals and environments to invest by the various countries of the world” (NLUP, Preliminary, Para.2).

The Preliminary section reminds the reader that the current government seeks to undertake land (policy) reform toward long- and short-term and

development plans. These plans are for “systematic” and “sustainable” development of the country’s natural resources; for “systematic” development of a land use policy and management system that will “not to cause land problems”; for coordinated undertaking of urban and rural development and investment plans; and for new laws related to land tax and custom duty administration in accordance with international standards (NLUP, Preliminary, Para.4, a-d).

However, little to no place is given in the draft policy to other goals or priorities that the TGs also call for. Among others, the TGs call for achieving food security for all, supporting the progressive realization of the right to adequate food, and promoting sustainable social development that can help eradicate poverty and food insecurity (TGs, Preface). They call for improving governance of tenure “for the benefit of all, with an emphasis on vulnerable and marginalized peoples”, and for a whole range of goals that include “poverty eradication, sustainable livelihoods, social stability, housing security, rural development” (TGs, Preliminary, p.1). And the TGs call for on States to strive for all these goals in a way that is “consistent with States’ existing obligations under international law, including the Universal Declaration of Human Rights and other international human rights instruments” (TGs, Preliminary, p.1). On these things the draft NLUP is silent.

This silence makes the document’s emphasis on changes in land tenure and land use stand out all the more. In particular, Part III elaborates conditions under which land concessions and land leases may occur – including, notably, calling for prior impartial environmental and social impact assessments and declaring that the awarding of such concessions or leases is “temporarily suspended” pending the completion and review of such an assessment. This is certainly positive. However, it does not negate the way in which the discussion seems to have a built-in presumption in favour of granting concessions and leases. The main idea of the policy seems to be to facilitate land concessions and leases, while mitigating the worst effects, rather than open up space for questioning them altogether.

It must be appreciated that this section also attempts to elaborate the conditions under which “transfers” can occur that could be seen as an attempt to safeguard the rights of occupants. While definitely commendable, this section could still go much further and onto more solid ground by specifically

referencing the international human rights law on the matter of development-related evictions and displacement. There is a clear international standard on this, which in our view sets the bar quite high, in terms of what must be done before land tenure rights are transferred and land use is changed, in the form of official UN guidelines. For example, in the UN guidelines, restitution is still part of the standard, whereas the draft NLUP makes no mention of restitution, although it does mention compensation, relocation and rehabilitation. The draft policy would do well to specify each and every one of these safeguards and explicitly embrace the standard in its entirety. These guidelines, a must-read for anyone concerned about this issue, are available at http://www.hic-sarp.org/documents/Handbook%20on%20UN%20Guidelines_2011.pdf.

More generally, although the draft NLUP does commit to some basic guiding principles, but these are contradictory and ambiguous. For example, it vows to conserve and protect land resources “for the interest of all peoples of the State” – but there is no clarity in the document on how this interest is defined or who gets to decide how it will be defined. Without such clarity of purpose, there is no guarantee that the interests, concerns and aspirations of the rural working poor, and other vulnerable and the marginalized groups, will be recognized or protected.

Meanwhile, the draft policy is set to become the main guide for a “harmonization” of existing land related laws across the whole country. This *might* be welcome under certain circumstances – for instance, if the final NLUP itself ended up explicitly prioritizing rural poor people, persecuted ethnic groups, including customary communities practicing shifting cultivation, and other vulnerable and marginalized groups, such as internally displaced peoples (IDPs) and refugees who were forced off their lands because of armed conflict or some natural disaster, for instance.

If “*harmonization*” is permitted to redress key injustices that the previous land laws established, then it could very well be a positive measure. The various land and land-related laws starting from 2012 have been heavily criticized especially for prioritizing foreign investment, for effectively excluding customary communities and upland farm households from the right to have land rights, and for flawed land registration procedures for those who do qualify for the right to have rights, among others.

Who has the right to have their land rights recognized by law?

A truly pro-poor and social justice oriented land policy is one that explicitly strives to: (a) protect, promote, and scale up democratic access to and control over land by rural poor people where it exists; (b) facilitate and enforce redistribution of land access/control in favour of the rural poor where poor people do not have secure access. Indeed, ultimately, *all land policy making across the globe necessarily answers the underlying question of who ought to have what rights, to which land, for how long and for what purposes?* Taking a look at the NLUP draft, some of the most interesting items in the current draft NLUP involve new recognition of certain categories of land rights that were previously not recognized under law.

For instance, Chapter V, paragraph 22-e says that in carrying out information management “it shall develop the update, completeness, precision and correctness of the existing land tenure records of Myanmar and firmness of the land tenure right of all men and women *taking special consideration of the recognition and protection of the long-term land user rights whether or not they have been registered, recorded or mapped*” (NLUP draft, pp.11-12). This suggests acknowledgement of what the TGs refer to as situations where “informal tenure” exists, and more importantly, an intention to provide recognition of the tenure rights of those who find themselves in such situations. Chapter V, paragraph 23-a calls for “establishing the clear process to enable to claim and obtain the regularly recognized land use rights by all men, women and communities who have the rights though the rights have not been recognized and registered” (NLUP draft, p.12).

Similarly, even more dramatically, the entire Part VII is dedicated to explaining how the updating of official land records will endeavor to “recognize and protect the traditional rights, land use, and land tenure right of ethnic nationalities who are using land whether or not the existing land use is mentioned in records and maps, and registered” (Part VII, paragraph 70-b, p.29).

On the face of it, this section appears to finally officially recognize the customary land rights and land tenure and land use practices of the country's ethnic minorities – including subsistence farmers practicing shifting cultivation in impoverished and war-torn borderlands. In sum, this statement *appears to extend the right of land (tenure) security to all ethnic nationalities system-wide*. This is clearly a statement of critical importance as one of the most burning social and political issues today in Myanmar. This section warrants a really very close and careful study – much more than what is possible now for this preliminary assessment. Some provisions definitely need clarification as to what is their meaning and intent.

For instance, there are a few provisions in this same Part VII (especially paragraphs 73-77) which refer to “alternative farming method”, to “traditional alternative taungya system”, and to reclassifying the latter as “permanent taungya”. These passages definitely warrant close scrutiny and clarification. Are these provisions meant to recognize and protect the traditional taungya system where it already exists and give people the space to return to using it in cases where they might have been dispossessed in the past? What is the meaning and intention of reclassifying the traditional system of rotating fallow taungya into “permanent taungya” – is to undermine or reinforce the traditional practice? This is not at all clear, but suggests cause for concern, hence the need to demand clarification.

More generally, what we can say here and now is of a more overarching character nature: that any optimism that might be sparked by the official recognition of long-persecuted ethnic groups' land (tenure) security, must be also seen and evaluated in a much longer and wider context.

First, it is crucial to know that with regard to land historically, “security” has meant different things to different actors; and in fact, can still mean anything – whether legitimate or not, whether truly pro-poor or not. Here, some quick background is useful. One response to today's cycle of land grabbing worldwide has been a growing call by many groups for greater land tenure security. It is based on a simple assumption: people are dispossessed

because they do not have formal property rights over their land; and so, the policy response should be to provide land tenure security to these people.

At first glance this appears to be quite appropriate to present day conditions. Yet a critical historical and international perspective on land issues and land policy frameworks is needed. In the land policy literature “security” means providing, promoting and/or protecting the property rights of the exclusive owners and/or users of land. It usually means individual and private rights including the right to alienate. It means commodification of land, and transforming it into something marketable. Titles are the chief expression of this so-called security. These interpretations reinforce a conservative view of land as a “thing” with only economic use-value.

But an even deeper problem with the notion of security is that it often does mean anything. It often means the property security of big “absentee” landlords living in the city and relying on tenants or farmworkers to make the land productive. It often does mean the property security of corrupt authorities who have made claims over vast tracts of far-flung public land through anomalous deals and for speculative purposes. Security in land property often also means security for the banks what are selling capital for profit, and need collateral in case of payment default.

And in the current context of global land grabbing, “security” very often mean primarily the security of (trans)national capital invested in land, for example, secure property rights to allow a secure 99 year lease or indeed an outright sale. In societies marked by inequality, formalization of land tenure usually formalizes insecurity. Without an explicitly pro-poor protection/redistribution guiding principle, formalization campaigns usually result in the poor losing out. Unfortunately, in practice, historically, it may not be an exaggeration to say that the term “land tenure security” has been captured to such a degree by elite state and social forces and institutions, that the concept behind it has largely lost any previous pro-poor connotation.

Second, in the case of present-day Myanmar, there is no clear indication that the fundamental problems that civil society groups have identified in the existing laws will be remedied or even addressed in ways

deemed relevant and appropriate from a social justice perspective during the “harmonization” process mandated by the (draft) NLUP.

In fact, reading further one finds that, *instead*, “harmonization” appears to be referring to a purely technical procedure – one geared to ultimately establishing a “complete, precise and correct” national land information system. This includes updating current official records on land, as well as making sure that there is agreement between the different sets of official data related to land management that are currently spread out across different ministries and departments. The section on “Forming the National Land Use Council” (Chapter III) establishes the functions and duties of various levels of land use councils and associated committees, and appears to involve mainly “Coordination, management and information sharing for harmonizing the existing land records, maps and registration systems of each ministry and department” (Ch.III, Para.18, No.1).

In the draft NLUP, one reason why “complete, precise and correct information” is crucially important has to do with land conflict resolution. The draft NLUP also commits to addressing land disputes “transparently” and in accordance with law (e.g., “rule of law” and the National Land Law). Again this is admirable, but should not be confused with settling land disputes *justly*. Unfortunately the pursuit of substantive justice in resolving land disputes is neither mentioned nor implied, as if transparency and procedural justice are the highest standards possible. The problem here is two-fold. First, transparency is not the same thing as substantive justice, and so applying a standard of transparency to land dispute resolution does not necessarily or automatically mean a dispute will be resolved justly. Second, saying something is legal is not the same thing as saying it is legitimate. Indeed, the standard of legality can (and often does) serve to facilitate terrible injustices that can be condemned as illegitimate even if they are legal under national law.

To illustrate, across the globe in recent years, many cases of land grabbing, water grabbing and forced evictions could also be described as “perfectly legal” – even though the victims of these resource grabs (as well as many observers and analysts) reject them as fundamentally

illegitimate. This is because “perfectly legal” grabs often flagrantly violate international human rights standards or customary law standards.

In the end, the draft NLUP, unfortunately, seems blind to social justice aspirations. Instead, it calls for “continued entry of the foreign direct investments, sustainable economic development, effectiveness of the environmental conservation and protection, social harmonization, firmness of land tenures, immoveable property right and settlement of land dispute” (NLUP, Part I, Ch. I, Para. 9). A far cry from justice, but even these objectives are left largely undefined. What do these different objectives mean and who gets to define them? How one relate to another? Indeed, what is the purpose of foreign direct investment? What is social harmonization and how does it relate to the land issues addressed in the policy? How can we know if foreign direct investment and social harmonization go together (or not)? What if they do not?

Ignoring these issues, the policy simply embraces “good land governance”. The draft policy seems to suggest that for all these purposes go well together will apparently require “good” land use management. Good land use management, in turn, according to the draft policy, means: “rule of law”, “clean” land management, “modernized” land information systems, “impartial” land dispute mechanisms, and “transparent stakeholder coordination” (Part I, Ch. I, Para. 9). This is the seemingly supreme logic of the policy. The draft policy’s emphasis on “good land governance” defined in this way suggests that, in the end, defining and allocating land rights is to be based more on principles of efficient technical land management, than on principles associated with international human rights law and social justice.

It is worth mentioning here that the framers of the TGs were explicit about what should be the guiding principles of responsible tenure governance (see Box 3). In addition to the general principles highlighted here, the TGs also call for a whole *set* of normative principles with regard to implementation, including: human dignity, non-discrimination, equity and justice, gender equality, holistic and sustainable approach, consultation and participation, rule of law, transparency, accountability, and continuous improvement.

Box 3 General principles of responsible tenure governance according to the Committee on World Food Security and the FAO

3A General principles

3.1 States should:

1. Recognize and respect all legitimate tenure rights holders and their rights. They should take reasonable measures to identify, record and respect legitimate tenure right holders and their rights, whether formally recorded or not; to refrain from infringement of tenure rights of others; and to meet the duties associated with tenure rights.
2. Safeguard legitimate tenure rights against threats and infringements. They should protect tenure rights holders against arbitrary loss of their tenure rights, including forced evictions that are inconsistent with their existing obligations under national and international law.
3. Promote and facilitate the enjoyment of legitimate tenure rights. They should take active measures to promote and facilitate the full realization of tenure rights or the making of transactions with the rights, such as ensuring that services are accessible to all.
4. Provide access to justice to deal with infringements of legitimate tenure rights. They should provide effective and accessible means to everyone, through judicial authorities or other approaches, to resolve disputes over tenure rights; and to provide affordable and prompt enforcement of outcomes. States should provide prompt, just compensation where tenure rights are taken for public purposes.
5. Prevent tenure disputes, violent conflicts and corruption. They should take active measures to prevent tenure disputes from arising and from escalating into violent conflicts. They should endeavor to prevent corruption in all forms, at all levels, and in all settings.

3.2 Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights. Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights. Business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved. States, in accordance with their international obligations, should provide access to effective judicial remedies for negative impacts on human rights and legitimate tenure rights by business enterprises. Where transnational corporations are involved, their home States have roles to play in assisting both those corporations and host States to ensure that businesses are not involved in abuse of human rights and legitimate tenure rights. States should take additional steps to protect against abuses of human rights and legitimate tenure rights by business enterprises that are owned or controlled by the State, or that receive substantial support and service from State agencies.

Some additional concerns

No policy is ever completely free from ambiguity. But in this draft policy, some especially urgent ambiguities arise in relation to the undefined use of the term “stakeholders” throughout the document. In the absence of any attempt to explain why this concept is used or who counts as a stakeholder, the policy risks being misinterpreted and becomes vulnerable to potential abuse in practice.

For instance, one of the functions of the National Land Use Councils is “Appropriating and deciding the volume of land which shall be used relating to land use for land use plan and investment for the development and environmental conservation works of the State, causing the stakeholders to have access transparently with the precise and correct information and to use them by themselves” (CH.III, Para.18, No.2). Who are the stakeholders in this situation? where do they come from? what gives them a stake in the matter? Does the concept include people who may have once occupied and made their living off the land until they were forced out by military confiscation, a flare up in armed conflict, or a natural disaster like Cyclone Nargis? Do all “stakeholders” have the same degree of entitlement to a given piece of land? What about power differences between different stakeholders and how will power differences be addressed when conflicts between stakeholders arise (as they are bound to do)? Whose “stakes” will be given priority?

Who counts as a stakeholder (and why) is a matter of critical importance that relates to deeper questions of who has what rights, to which land, for how long and for what purposes, and who gets to decide. These questions, often politically sensitive and contested, link directly to the issue of land disputes and how to prevent and resolve them. In this regard, the draft policy seems to take the possibility of attaining “complete, precise and correct information” as an article of faith, where ostensibly indisputable facts will be generated to become the final arbiter of conflict.

The following provision is perhaps revealing. The same land use councils tasked with harmonizing existing land information, are also tasked with creating land information “precise” enough to make possible *indisputable facts*. “Drawing maps with precise boundary to enable to carry out causing to obtain legal right, settling the land dispute easily, reducing the dispute relating to use, allow tenure, other uses of land in the State, and keeping and application of land classification official system” (Ch.III, Para.18, no. 3). Not only is “precise” and “correct” information assumed to be attainable, but having it is assumed to make land disputes, in effect, obsolete.

The problem here is that such an approach fails to take into account the fact that information and knowledge about land boundaries, tenure, use and management – is socially constructed. As such, it has been and likely always will be contested. What counts as “complete, precise, and correct” information about land is itself subject to diverse interpretations since land itself means very different things to different people.

To illustrate, what ought to count as evidence of ownership or use in the new Myanmar? Will the oral testimony of an internally displaced person be given equal weight to the tax receipts of someone who received the same land after a military offensive cleared the area of its previous occupants? What weight will the tax receipts of a poor farmer be given when the local military commander or national business tycoon is eyeing the same piece of land to make an oil palm plantation? This is the messiness of land in reality. A reliance on satellite technology to establish indisputable facts is bound to fail; it will simply obscure reality by stripping out messy social and historical facts from view. This may change one’s perception of the situation in a given landholding or landscape, but it cannot change the reality of that situation. Indeed, for the government, the risk here is that such an approach when applied, wittingly or not, in an already volatile situation, is likely to exacerbate land conflict, rather than resolve it.

A closely related – and potentially explosive – problem here is that the draft national land use policy applies a conventional land classification system and retains the category of “vacant, fallow and virgin land”, which is defined as “Vacant and fallow land discarded after having carried out agriculture and livestock breeding; vacant and fallow land where agriculture has not been carried out” (Chapter IV, Para. 19, c). The underlying issue is how the policy will classify plots of fallow land that are part of a rotation of land under shifting cultivation – a common practice in many upland areas of Myanmar, particularly in the borderland areas where ethnic minorities are most concentrated.

This issue has already come up in the context of the promulgation of the Vacant, Fallow and Virgin Land Law in 2012. As part of the envisioned “harmonization” process, will this 2012 law be reviewed

and amended to positively address the rights of upland shifting cultivators? Or will it simply be ratified by the new policy? As it is currently written, it is difficult to know for sure, unfortunately.

Whether to engage with the draft policy in the public consultation process

Historically, two broadly competing approaches to this question have emerged in land policymaking worldwide.

One approach sees land as primarily an economic asset that needs to be made “mobile” in the sense of tradeable/transferable via markets, supposedly to the most efficient users for the most efficient uses. In this view, the problem is said to be that “capital and labour are mobile, but land is not” and consequently, the task of policy is to “make land mobile” in this narrow economic sense.

The other approach sees land as having multiple dimensions of meaning – not just economic. In this view, land is also deeply social, ecological, spiritual, and political – and as such, is essentially tied to very essential questions of life and livelihood of individuals and collections of people, and therefore must be treated much more profoundly as a matter of human right.

In light of these two broadly competing approaches to land policy historically, how – and how well – does the draft policy address itself to some of the most burning – and therefore arguably the most difficult and challenging – land issues of the day in Myanmar?

The most burning questions include:

- To what extent does the draft policy recognize and protect existing customary land tenure systems, arrangements and practices – even when these are not recognized under existing national law?
- To what extent does the draft policy recognize, respect and fulfill the rights of indigenous peoples as elaborated under various international human rights law instruments?

- To what extent does the draft policy take on board the high standards regarding eviction set by international human rights law?
- To what extent does the draft policy address itself to remedying historical injustices related to past land grabbing, land confiscation, reallocation of land tenure, use and control of related natural resources – including the situation of internally displaced people and refugees who were compelled to give up their physical possession of land as a result of climate change, natural disasters, armed conflict (including occupation)?
- To what extent does the draft policy recognize and protect the distinct land rights of women?
- To what extent does the draft policy address itself to current situations of land concentration?

This preliminary assessment has tried to unpack some of the ideas and concepts embedded in the draft policy, with a view toward raising concerns that civil society groups may want to address during the public consultation. It is admittedly just a start and just a preliminary analysis, and more scrutiny of the document is needed and encouraged.

But whether any provision turns out to be positive or negative according to a social justice perspective will depend on many factors. For one, in some ways, the “devil” is most likely going to be in the details, how they develop and how they get written into policy. This is something that will have to be watched very closely and carefully in the consultation and revision process.

The draft policy also contains some contradictions and many ambiguities that will also need to be clarified. Its emphasis on “rule of law”, “transparency”, “correct and precise information”, “international best practices”, “participation and cooperation” is notable, and will likely have the affect of making the policy seem very acceptable to many readers. Yet each of these words and phrases conveniently conceals a lot of ambiguity and uncertainty, and where ambiguity and uncertainty persist, very often increasingly disciplinary forms of follow-up intervention are required to compensate. Similarly, there are some nice ideas, but a lot of ambiguity on the ethnic land rights issue, such that the policy seems to give recognition for some aspects. Yet in

such sensitive matters the “devil” is inevitably, most definitely in the details, and unfortunately, the relevant details are not provided – another loud silence, made harsher in light of the ongoing (faltering?) peace process.

In our view the core objective of the national land use policy seems to be to create the institutional environment needed to secure (large-scale) foreign direct investments. Such an institutional environment is also looked for by big (trans)national investors and even some big international NGOs, and are meant in no small measure to secure such investments from legal challenge and insulate them from any social unrest that will undoubtedly arise. They thus create a legal environment that is greatly beneficial for a small group of large national and international companies, but which has the potential to be hugely disadvantageous for millions small-scale farmers, who make up the majority of Myanmar’s population.

The draft policy ought to give more space and support to other models or visions of “development” – and not just “development” via commodification of land and other resources and large-scale foreign direct investment. The policy indeed would be better served by consulting the public on what vision or visions of development do people really want; instead the policy appears to have decided this already. Not only does the policy not acknowledge that other ideas for development currently exist, but it appears to leave absolutely no space for even considering alternative points of view. This is a core problem with the current draft, which, ironically, if it is accepted in the revised version, could end up being the NLUP’s worst nightmare – this is because one cannot simply assume that everyone in the society will accept such a narrow vision of the future, and doing so could be very risky for the government.

Indeed, in its overall orientation, the draft NLUP likewise raises many serious and fundamental concerns, many of which have the potential to undo some of its more positive provisions.

Nonetheless, the current draft also suggests an unprecedented attempt by central government authorities to include and balance diverse interests and actors, and to begin to address some of the most burning issues on the land front, thereby making it, arguably, more open to previously excluded voices than past land law or policy making processes.

What can be done to amplify and reinforce any positive provisions, while resisting and rolling back any negative provisions, is an open question. But how different groups and forces in society will seek to position vis-à-vis the official public consultation process remains to be seen.

Concluding remarks

Myanmar is in the middle of an unprecedented and uncertain national land policymaking process. This process remains to some degree open-ended such that where it will ultimately lead remains an open question for now. Powerful economic interests and influential political forces are undoubtedly at play in this process.

Yet this does not automatically or necessarily mean that civil society voices – and most especially the voices of those at the grassroots who constitute the most poor, marginalised and vulnerable and whose lives and livelihoods are most at stake – cannot or will not be heard. Sometimes, under certain conditions, even the slightest openings can unexpectedly become moments for previously excluded voices to be heard. Is this one such a moment in Myanmar? Inevitably, this remains to be seen.

Across the world, laws and policies have long been made and passed to govern ownership of access to, and management of land. Most of the time these are neither completely positive nor completely negative from a social justice point of view; and neither are they self-interpreting nor self-implementing, but rather they are implemented through political interactions by state actors and societal groups, by real people who themselves are embedded in existing power structures and subject to power relations. And yet history has also shown that the powerful cannot always, everywhere and all the time control every last detail of either policy formulation or policy implementation. In the absence of significant social pressure “from below” in a more social justice oriented direction, those openings when they do occur are unlikely to move in that direction on their own.

At the same time, it is also important to realize that disagreements even among “like-minded” friends and allies are inevitable because policy has differential impacts and different people even within the same community

are likely to experience policy impacts differently. For this reason, it is useful at some level and at some moments to “agree to disagree” because we will all see these things differently, however slightly. The glass will necessarily be half full *and* half empty, depending, for example, on who was given what rights to which land for how long and for what purposes and who got to decide (and who did not). Land policy in Myanmar will most likely continue to be an arena of struggle for a long time to come.

Finally, history has also shown that both phases of land policy making – policy formulation and policy implementation – generally require, well-organized and well-calibrated mobilization of civil society’s social justice oriented “voices from below” combined with independent initiatives of state reformists “from above”. But while in both cases, such efforts taken alone have their own strengths, they each taken alone also have their own limitations. They meanwhile can both find themselves confronted by the same state-societal alliance of those opposed to pro-poor, social justice oriented land policy outcomes. And so, it turns out, there ends up being, more often than not, at some moment a real need for the two – social justice voices from below and state reformist initiatives from above – to reach out and work together. This situation gives birth to what is sometimes called a “sandwich” strategy.

Stepping back, it is important to reflect on the language used in this document – the key words that were used or not used. It is not a question of semantics. It is about the politics of language. It goes beyond words – and implicates principles. A quick scan of the policy document tells us that completely missing are the terms: social justice, social function, redistribution, restitution, accountability, democratic control. Completely absent. These are the most important principles in any policy framework for truly pro-poor land policy. In contrast, the word “investment” features a dozen times. Pro-poor or pro-business? This is a very preliminary reading of the document. In raising concerns, it aims to contribute to what will hopefully be a vibrant discussion about the content of the policy document and the political process of policy formulation.

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MYANMAR PROGRAMME

The advent of a new quasi-civilian government in Myanmar has raised hopes for fundamental reforms and for an end to one of the longest running armed conflicts in the world. TNI's Myanmar programme aims to strengthen (ethnic) civil society and political actors in dealing with the challenges brought about by the rapid opening-up of the country, while also working to bring about an inclusive and sustainable peace. TNI has developed a unique expertise on Myanmar's ethnic regions and it is in its Myanmar programme where its work on agrarian justice, alternative development and a humane drugs policy comes together.

AGRARIAN JUSTICE PROGRAMME

In recent years, various actors, from big foreign and domestic corporate business and finance to governments, have initiated a large-scale worldwide enclosure of agricultural lands, mostly in the Global South but also elsewhere. This is done for large-scale industrial and industrial agriculture ventures and often packaged as large-scale investment for rural development. But rather than being investment that is going to benefit the majority of rural people, especially the poorest and most vulnerable, this process constitutes a new wave of land and water 'grabbing'. It is a global phenomenon whereby the access, use and right to land and other closely associated natural resources is being taken over - on a large-scale and/or by large-scale capital - resulting in a cascade of negative impacts on rural livelihoods and ecologies, human rights, and local food security.

In this context TNI aims to contribute to strengthening the campaigns by agrarian social movements in order to make them more effective in resisting land and water grabbing; and in developing and advancing alternatives such as land/food/water sovereignty and agro-ecological farming systems.

This publication is also part of TNI's work in the MOSAIC project.

The MOSAIC addresses the challenge of democratic land governance in the specific context of the intersection of climate change mitigation strategies, such as REDD+, and large-scale land acquisitions or land grabbing, and how the intersection produces conflict. The project uses research and advocacy to contribute towards achieving democratic land governance and transforming conflict and explores how international governance instruments shape these processes.

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