



global witness

November 2014

## Global Witness submission on Myanmar's draft national land policy

### Summary

As part of its transition to democratic reform, in October 2014, the Government of Myanmar released a draft national land policy and plans for a subsequent Land Law, for public consultation. The importance of this cannot be understated and Global Witness welcomes both the potential for a strong codified framework for land, and the opportunity for public participation. It is crucial, however, that consultation is meaningful and genuinely participatory, and the resulting feedback is incorporated into the policy and Land Law in a process that is fully transparent. What's more, the final land policy and subsequent land law should be robust and in line with international standards, most notably, the UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests<sup>1</sup>.

The guiding principles of the draft national land policy state that its objectives are to '*benefit and harmonize the land use, development and environmental conservation of the land resources of the State, to protect the land use right of the citizens and to improve land administration system.*' This aim is extremely welcome as an essential step in achieving the urgently needed reforms in the country's land governance. However what is notably absent from the policy is a clear roadmap of priorities to be addressed: genuine sustainable development should prioritise the land and user rights, livelihoods and food security of its population, followed by participatory land-use mapping to help guide decisions around the management and use of land. Only then should an assessment be made of what is required in terms of land investments and what, if any, areas of land should be allocated for commercial investment purposes. In its current form, however, the draft land policy makes no reference to poverty alleviation or food security, and instead appears to be openly promoting commercial investment in large-scale projects, potentially at the expense of Myanmar's rural smallholders – the majority of the population.

The draft land policy has come under criticism for being pro-business; however, industry should still remain cautious about the reforms being proposed. In its current form, the draft policy presents an uncertain legal landscape which requires much clarification, particularly on several contradictory articles on how land and user rights will be protected. Insecure land and user rights can present a financial risk to both governments and companies as demonstrated through recent research at the global level: both The Munden Project<sup>2</sup> - a global think-tank working on finance and sustainability - and the international coalition group Rights and Resources Initiative have demonstrated the financial risk to both governments and businesses associated with land investments in countries where tenure rights are unclear through a number of global case studies.

It is therefore recommended that the Government of Myanmar, with the assistance of its development partners, revise the current draft of the land policy to ensure it has clear aims and objectives, and is based on international standards in particular, the UN Voluntary Guidelines of the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.

---

<sup>1</sup> FAO, UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (2012) <http://www.fao.org/docrep/016/i2801e/i2801e.pdf>

<sup>2</sup> 'The Financial Risks of Insecure Land Tenure: An Investment View', The Munden project (2012) prepared for the Rights and Resources Initiative [http://mundenproject.com/wp-content/uploads/2013/07/doc\\_5715.pdf](http://mundenproject.com/wp-content/uploads/2013/07/doc_5715.pdf)

## **About Global Witness**

.Global Witness is an international NGO based in London which focuses on natural resource governance issues. We work to ensure that countries' resource riches do not lead to negative social or environmental impacts but instead are used to promote peaceful and sustainable development.

Global Witness has worked in Myanmar since 2000. Until 2009, we investigated and documented damaging and mainly illegal logging of Myanmar's forests. Following our exposure of the illegal timber trade between China and Myanmar, both countries took action instituting bans and trade control measures. Since 2012 we have worked to end the negative impacts of large-scale land concessions in Myanmar, as part of a Mekong-wide programme. In 2013, we launched a programme focused on strengthening management of Burma's oil, gas and mining sectors.

In light of this objective, Global Witness is providing feedback on key sections of the draft national land policy:

- *Some general overall comments*
- *Part I – Chapter IV: Land Classifications and Administering Government Departments and Organisations*
- *Part II – Chapter III: The Change of Land Use by Individual Application*
- *Part III – Granting Concessions on or the Lease of State-owned Lands*
- *Part IV – Procedures Relating to the Land Acquisition, Compensation, Resettlement and Rehabilitation*
- *Part VII – Land Use Rights of the Ethnic Nationalities.*

**Contact: Ali Hines, Land Campaign [ahines@globalwitness.org](mailto:ahines@globalwitness.org)**

## Gap Analysis:

### Overall comments:

- All key terms in the policy document should be given a definition in an accompanying annex
- Article 5 – It is important that the specific international standards and best practices are mentioned. This should include at a minimum:
  - International human rights law, particularly
    - International Convention on Economic, Social and Cultural Rights
    - International Convention on Civil and Political Rights
    - International Convention on the Elimination of Racial Discrimination
    - International Convention on the Elimination of Discrimination Against Women
  - International instruments and standards agreed by the UN
    - UN Declaration on the Rights of Indigenous Peoples and ILO Convention 169
    - Voluntary Guidelines on the Responsible Governance of Tenure for Land, Forestry and Fisheries (VGGTs)
    - Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security
    - Principles for Responsible Investment in Agriculture and Food Systems
- Article 9 – Only foreign direct investment is mentioned in this article; however we believe that it is important that domestic investors are also covered

## Part I – Chapter IV: Land Classifications and Administering Government Departments and Organisations

Article	Strength	Gap	Recommendation
<i>Article 19, p. 12</i>	Clear classification of land types is an important pre-requisite before land use planning can be done.	There are some overlapping land types which should be clarified and some other important land- use types are missing.	19.a – “forest plantations” needs to be defined  Land types missing from this list include: <ul style="list-style-type: none"><li>• Agricultural “concessions” (as described in Part III)</li><li>• <i>Taungya</i> (first mentioned in Article 34)</li><li>• Other community / public lands such as cemeteries and other areas of religious importance (not referred to in the document)</li><li>• Peatland and other areas of High Carbon Stock (not referred to in the document)</li><li>• Other types of large-scale development projects – hydro-power dams and special</li></ul>

			<p>economic zones</p> <p>The land types listed here should match the land- use zones listed in Article 31, but they currently are different.</p> <p>This section also needs to include an explanation of state-owned lands, as referred to later in the policy (eg. Article 35).</p>
--	--	--	--

### Chapter III, The Change of Land Use by Individual Application, and Part III – Granting Concessions on or the Lease of State-owned Lands

Article	Strength	Gap	Recommendation
<i>Article 33, p.17</i>	Promotes prior notice of application of investment; appears to prioritise the land use rights of existing land users;	It is unclear whether this article refers to changes of uses of land for small-scale (private) land users, or large-scale and commercial users which the following article (34) suggests it is.	<p>Clarification should be made as to whether the article refers to small-scale land users or large-scale. If the latter, it should link more closely to the following part (Part III) on concessions.</p> <p>Information related to land investments should be made public prior to contracts being secured, within a sufficient timeframe and in a language and format accessible to local communities.</p> <p>Agricultural companies should also disclose their beneficial owners, as Myanmar is already doing under the Extractives Industry Transparency Initiative.</p>
<i>Article 34, p.17 and 18</i>	d) specifically refers to <i>taungya</i> in the context of land being protected from land use change;	<p>This is the first mention of <i>taungya</i> in the draft policy document. <i>Taungya</i> is a very important traditional land management and tenure system and as such, needs to be more clearly defined.</p> <p>Article 34.f, it is unclear what this clause is referring to although appears to be an implicit reference</p>	<p>A clear definition of <i>taungya</i> should be provided and included consistently throughout the policy document;</p> <p>Article 34.f, if this clause is referring to grievance and redress mechanisms this should both be clearly outlined and given more</p>

		to grievance and redress mechanisms.	prominence, and should be linked and coordinated across the policy document;
<i>Article 35, p.19</i>		No reference in this section to existing relevant laws, policies or procedures also applied to concession and lease investments.	This section should start by referring to the existing and relevant laws pertaining to land concessions.  Clarification should also be provided on whether this section only relates to concessions on state-owned land as per the final sentence, or all concessions. If the former then a clear definition of State-owned land needs to be provided;
<i>Article 36, p.19</i>	Clear reference to Environmental and Social Impact Assessments (ESIAs) being carried out before the leasing of land for investment;	The language used in the draft policy and the concept of the aim of ESIAs is very concerning. The article states that <i>'the granting land concession for the State-owned land shall be temporarily suspended whilst it is being carried out..'</i> which gives the meaning that such projects will always go ahead, regardless of the outcome of the ESIA.  However, the purpose of ESIA's, as stated in international standards and the UN Voluntary Guidelines is not only to assess the impacts of potential projects, but as such, whether they should go ahead at all;	This article should clearly state that the decision to go ahead or not with a project should be based on the outcome of these assessments;
<i>Article 37, p.19</i>	Clear reference to stakeholders not being transferred against their will (a), as well as the amendment of the project if a stakeholder cannot be transferred according to his will (b), and clear reference to projects not negatively impacting the existing land users in the concession area (f).	This article makes no reference to provisions and definitions of ESIA processes in existing laws.  Clause (c) contains concerning language around projects being pushed forward in the 'interest of the State', thereby potentially over-riding the strong provisions to	The article should clarify how these provisions for ESIAs will compare and align with the recent drafting of ESIA laws.  The term 'stakeholder' should be defined, preferably by using the term 'land tenure rights holder' or 'locally affected communities'.  Provision 37.b should include the principle of

		<p>protect existing stakeholders in clauses (a) and (b) and (f);</p> <p>The reference to a grievance and dispute mechanism (h) is too vague, particularly given the importance of such a mechanism.</p> <p>The article makes no reference to compensation.</p>	<p>Free, Prior and Informed Consent as in line with international standards, or at minimum, reference ‘no involuntary resettlement’.</p> <p>The article should reference collectively owned and managed land and resources as well as individual owners and rights holders.</p> <p>In 37.c both projects in the ‘State interest’ and the process of resettlement should be clearly defined. A clear definition of the cases in which State expropriation can be used needs to be provided, as well as clear language that this will be done only for public purposes (rather than private purposes).</p> <p>Article 37.h, which references a grievance and dispute mechanism, needs to be fully detailed and provide explicit linkages to other forms of remedy and address listed throughout the document.</p> <p>Compensation should be included with a clear definition of the cases and the process through which it will be provided, in article 37.i.</p>
<i>Article 38, p.20</i>	<p>Includes provisions to prevent land-grabbing through:</p> <ul style="list-style-type: none"> <li>- determining the maximum size in granting concessions or allowing the lease of State-owned lands;</li> <li>- prohibiting land concessions in conflict zones;</li> <li>- prohibiting land-grabbing</li> </ul>	<p>The language in this article is too vague to be effectively implemented.</p>	<p>Such limits on the maximum size of land concessions need to be defined (article 38.a).</p> <p>The clause also needs to state that these limits apply per each legal entity (rather than subsidiary) to avoid the use of shell companies to get round this threshold (article 38.b).</p> <p>A clear definition of land-grabbing needs to be provided.</p>
<i>Article 39, p.20</i>	<p>Formally recognises contract farming as a beneficial model for agricultural production, as opposed</p>	<p>Language can be strengthened to highlight the fact that smallholders who have secure tenure to their land</p>	<p>39.b – environmental and social impact assessments should also be carried out regularly throughout the implementation of contract</p>

	to large-scale land acquisitions models.	should be recognised as the best model for agricultural production.  Provisions to protect farmers involved in contract farming schemes should be strengthened.	farming projects, to understand and address potential impacts.  39.e – the grievance and dispute mechanism available to families involved in contract farming agreements need to be added to this section, as does reference to the government authorities responsible for handling and resolving grievances.
<i>Article 40, p21</i>		The meaning of this article is unclear.	The standard terms and conditions of leases of State-owned land for businesses should be included in this article.
<i>Article 41, p21</i>	The reference to the need for environmental and social safeguards is important.	It is not clear which environmental or social safeguards this article is referring to.  More information is needed about how the policy shall be revised, once the pilot projects have been completed.	The environmental safeguards need to be clearly defined and their relationship with other procedures outlined in this section explained.  The relationship between the piloting of safeguards and the revision and finalisation of the policy itself needs to be explained.
<i>General comments on Part III – Granting Concessions on or the Lease of State-owned Lands</i>			It is recommended that the following issues are incorporated into this section: <ul style="list-style-type: none"> <li>• Details of the management of the concession over the long-term as well as what happens to the land at the end of the project life-cycle / concession lease;</li> <li>• The importance of improved transparency of concessions and leases, and how much information concessionaires need to disclose publicly;</li> <li>• Details on which areas/zones can and cannot be allocated on (as per articles 19 and 31);</li> <li>• Details on which types of concessions this section applies to, e.g. agribusiness, mining, special economic zones etc.</li> <li>• Details on what happens should the concession and lease contract terms and</li> </ul>

			conditions be broken and what penalties, if any, are in place;
--	--	--	--

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

Article	Strength	Gap	Recommendation
Article 42, p23		Land acquisition, compensation, resettlement and rehabilitation are all extremely important and complex areas of land governance. These would normally have at least once chapter of a land policy (or law) dedicated to them, rather than just one article.	Substantially re-write this section outlining clearly the objectives and procedures for each section, as well as responsibilities of relevant government agencies.
Article 44, p23	Harmonization of existing laws, rules and procedures with the national land policy and land law are an essential next step, once both have been enacted.	It is not clear if this section on legal harmonization is relating just to Articles 42 and 43, or the entire land policy.  This is the first mention of corruption, which deserves an entire article or section.  Article 44.c – the clauses pertaining to value systems mean little without the specific details of how such calculations will be made.	Clarify the application of this article.  Prepare a new article / section on corruption and how its negative impacts across all elements of the provisions of the national land policy, will be tackled.  The valuation systems for compensation need to cover broader resources than just land, for example loss of water rights, other environmental services or non-timber forest products. Add details for the calculations on which these valuation systems should be based.

#### Part VII – Land Use Rights of the Ethnic Nationalities

Article	Strength	Gap	Recommendation
Article 68, p.29		The article states that <i>‘the traditional land use system shall be provided in the land law for the awareness and compliance of the</i>	As these are two very different provisions, the language in this article needs clarifying.  Traditional land use rights need to be defined.

		<p><i>traditional land use practices of the ethnic nationalities..’</i> It is not clear from this language, however, whether this means that ethnic minorities are required to comply with their traditional land use practices, or other external groups are?</p> <p>The “traditional land use rights” which this article aims to protect are not defined.</p>	
<i>Article 69, p.29</i>		This article appears to contradict Article 68 as it does not mention traditional land use rights.	Clearly explain how the process of identifying and protecting traditional land rights (article 68), links with this article on preparing land use maps.
<i>Article 70, p.29</i>	Clear reference to participatory land-use mapping including the recognition and protection of the traditional land and user rights of ethnic nationalities, even if such rights are not currently registered (70.b);	<p>Clause (c) contradicts (a) and (b) as it implies only ethnic minority rights as in current laws will be recognised.</p> <p>It is not clear if both individual and collective land rights will be recognised in this process.</p>	<p>Clarification is needed as whether this includes private (individual) and collectively owned and managed land.</p> <p>Article 70.c, needs to be amended to support the provisions of 70.a and 70.b</p>
<i>Article 72, p.30</i>	States that land currently classified under the category of forest land, farm land and land determined as vacant, virgin and fallow land will be reclassified under the new land law, and will be temporarily suspended from concession allocation whilst ethnic nationalities register their land;	Unclear if this will apply only to concessions not yet allocated, or also to those which are already in operation.	<p>Clarification should be made as to how this article aligns with the provisions set out in the section on land concessions and allocations.</p> <p>The scope of the application of this article needs to be explained.</p>
<i>Article 73, p.30</i>	States that the provisions relating to the secure land tenure rights of ethnic nationalities contained in the new land law shall protect such rights from land investments;		Clarification needed on which ethnic minority rights will be recognised;

<i>Article 74, p.30</i>			Clarification needed on why this article does not mention ethnic minority rights;
<i>Article 75, p.30</i>			Terms such as ‘ <i>traditional taungya</i> ’ and ‘ <i>permanent taungya</i> ’ need to be defined through a public consultation process. This otherwise creates a loophole through which land rights under <i>taungya</i> systems can be ignored;
<i>Article 77, p.31</i>			Such recognition of traditional grievance and dispute resolution processes, and their implementation, should be given by the policy itself and not wait for the law to be introduced;
<i>General comments on this section</i>			<p>It is recommended that the following are incorporated into this section:</p> <ul style="list-style-type: none"> <li>• Explicit detail on what land rights ethnic minorities already have;</li> <li>• Detail on how <i>taungya</i> and other traditional and customary land tenure systems are going to be recognised by law;</li> <li>• Clarification on whether the policy recognises rights not yet recognised by law, or only recognises the rights in existing laws;</li> </ul>