



global witness

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Global Witness submission on the 6th draft of Myanmar's draft national land policy

Summary

After a welcome extension to public participation on the 5th draft of the national land policy, in June 2015 the Government of Myanmar released the 6th draft of the national land policy for further public consultation. The updated draft includes significant improvements in principle in terms of recognising and protecting customary land rights, protecting and promoting smallholder farmers, and promoting public participation in decisions around land use. However, strong improvements are needed in terms of the recognition of collective as well as customary land rights; allocation of land concessions, including full transparency around all land investments; the undertaking of Environmental and Social Impact Assessments (ESIAs); and the prevention of forced evictions.

In light of this, Global Witness therefore recommends that the Principles of the national Land Policy should include the principle that 'Land, water, and forests are for those who live on it and work it; and whose lives, livelihoods, and identities depend on it.' A reference to a public consultation process for the drafting of the national Land Law is a welcome step.

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 6th draft of the national land policy:

- *Some general overall comments*
- *Part II, Chapter II, Determination of Land Types and Land Classifications*
- *Chapter III, Changing Land Use by Individual Application*
- *Part IV, Grants and Leases of Land at the Disposal of Government*
- *Part V – Procedures related to Land Acquisition, Relocation, Compensation, Rehabilitation and Restitution*

General comments

- All key terms in the policy document should be given a definition in an accompanying annex
- The reference to the UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forestry and Fisheries (hereon referred to as the UN Voluntary Guidelines) is very much welcome. It is important that the specific international standards and best practices are also 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 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
 - UN Guidelines on Development-based Evictions and Displacement
 - The Pinheiro Principles: United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons

Part II

Chapter II, Determination of Land Types and Land Classifications

Paragraph 7 of Chapter II refers to the use of ‘market mechanisms’ to address speculation on land. However, it should be explicitly recognised that there is an important role for both market mechanisms and public policy measures to curb speculative behaviour. For example, the latter might include rules stipulating that any added value created by the transformation of agricultural land to development land automatically goes to municipal budgets instead of becoming private profit for the land developer; setting up an independent national land transfer oversight panel to scrutinise all deals involving land parcels over a certain size; or the establishment of community land trusts.

The existence of a comprehensive land classification system is an important pre-requisite before effective land-use planning can be undertaken. However, far from providing a clearer and more comprehensive classification of land types, the number of categories has been reduced from a list of ten in Draft 5, to just three in Draft 6: Agricultural land; Forest land and Other land. It is not specified whether sub-classifications under these land types will be determined under the Land Law. Furthermore, these three broad land classifications do not align with the seven land uses outlined under Paragraph 22, Chapter II, on Zoning and Changing Land Use, leading to a clear risk of inconsistent referencing of various land types and potentially conflicting claims on land use.

Paragraph 12 should therefore be strengthened by providing a comprehensive classification of land types, including a specific ‘customary land’ category. This classification system should be a multi-use, flexible classification, allowed to encompass sacred areas, protected forests, rotational upland agriculture, lowland permanent agricultural fields, forest gardens, village sites, etc. as determined by local communities themselves.

Paragraph 13 states that ‘the relevant government departments and organizations may transparently review and amend the existing land types and classifications in accordance with the rule of law.’ This Chapter could be strengthened by explicitly stating under what circumstances land types and classifications would be changed, how it would align with the objectives of the land policy and national targets (for, for example, Permanent Forest Estates), how it aligns with compensation processes if farmland is reclassified, and how multiple land uses will be dealt with. Paragraph 13 also needs to explicitly link to Paragraph 15 (e) with reference to the strengthening of land tenure security and include the adoption of an across-the-board land size ceiling and other redistributive mechanisms to address and prevent land concentration.

Part III, Planning and Changing Land Use

Chapter III, Changing Land Use by Individual Application

It is still not clear whether this Chapter refers to small-scale land users, large-scale, or both, and this needs clarification. This is particularly important in light of the language on ‘information-sharing’ in Paragraph 26 in terms of what information needs to be shared, with whom and how. The language in this Chapter has been strengthened by recognising not just tenure rights but wider land use rights (Paragraph 27 (a)) which is welcomed, and Paragraph 27 (f) adds a requirement for ‘public consent’ rather than consultation.

With reference to Paragraph 27 (b) on Environmental and Social Impact Assessments (ESIAs) it is crucial that the policy states that the decision around whether an application for individual land use will be granted *will be based on* the outcome of the ESIA. This is in line with international standards and the UN Voluntary Guidelines which state that the purpose of ESIA is not only to assess the impacts of potential projects but, as such, whether they should go ahead at all. As per the Voluntary Guidelines, any social impact assessment should also specifically reference Free, Prior and Informed Consent (FPIC), and the results of all assessments should be made public. Paragraph 27 should also reference the UN Guidelines on Development-based Displacements and Evictions in order to ensure strong safeguards for potentially impacted communities.

Paragraph 27 (d) is the first mention of shifting cultivation in the policy. As per the general recommendation on providing definitions of terms, ‘shifting cultivation’ needs to be defined and used consistently throughout the document.

Part IV, Grants and Leases of Land at the Disposal of Government

Paragraph 28 is a somewhat welcome addition to the chapter, stating that ‘the government shall provide prior notice, secure feedback from stakeholders, and conduct an ESIA in accordance with law.’ but remains too vague to be meaningful. ‘Prior notice’ needs to be strengthened to ‘Free, Prior and Informed Consent’, as per the UN Voluntary Guidelines.

Paragraph 29 states that ‘while implementing actions in accordance with paragraph 28, the granting and leasing of land at the disposal of government shall be temporarily suspended. It may be a translation issue, but it is hard to understand whether this paragraph means that projects will merely be suspended whilst ESIA’s are being carried out, and will go ahead regardless of the outcome, or whether it is a reference to a moratorium on land concessions. If it is the latter, this needs to be explicitly stated. It also needs to state when the moratorium will come into force and whether it will only apply to future land investments, or will also apply to existing applications which have yet to be approved, and to make all land concession applications to be made public and accessible. This is to avoid a loophole which would potentially allow an unspecified number of land concessions to be pushed through after the moratorium, thereby rendering it ineffective.

The previous clause on projects being pushed forward in the ‘interest of the State’ has been removed. However, this appears to have merely been reworded, and in fact diluted, as Paragraph 30 ((a) and (b)) references both relocation for ‘public purpose’ which is ‘unavoidable’ and relocation for ‘private purpose.’ None of these terms are defined which presents a major gap in the paragraph, particularly the latter.

The reference to stakeholders not being transferred against their will, i.e. forced evictions, which was included in the fifth draft of the national land policy, has also been removed, which presents a major concern and not only goes against what is stated in the UN Voluntary Guidelines, but also undermines previous articles on the recognition and protection of customary land rights. Paragraph 30 (b) states that if the ‘relocation is due to private purpose, then the preference of the stakeholders shall be given priority.’ As per previous recommendations, the term ‘stakeholder’ should be defined, preferably by using the term ‘land tenure rights holder’ or ‘locally affected communities.’

Paragraph (f) states that ‘arrangement shall be made to allocate land to landless stakeholders’ which is a welcome clause but lacks detail.

Paragraph 31 is in reference to ‘address(ing) the problem of land grabbing and speculation’ which includes provisions on ‘defining the maximum size limit for grants or leases of land that is at the disposal of the government’ which are to be included in the national Land Law. In addition, this paragraph needs to state that these limits will apply per each legal entity (rather than subsidiary) to avoid the use of shell companies to get around this threshold.

It is recommended that the following issues are incorporated into this section:

- 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;
- The importance of improved transparency of concessions and leases, and how much information concessionaires need to disclose publicly;
- Details on which areas/zones can and cannot be allocated on (as per articles 19 and 31);
- Details on which types of concessions this section applies to, e.g. agribusiness, mining, special economic zones etc.
- Details on what happens should the concession and lease contract terms and conditions be broken and what penalties, if any, are in place;

Paragraph 32 covers the issue of contract farming which is a welcome alternative to large-scale agricultural production. Language can be strengthened to highlight the fact that smallholders who have secure tenure to their land should be recognised as the best model for agricultural production. Provisions to protect farmers involved in contract farming schemes should be strengthened through the inclusion of environmental and social impact assessments which should also be carried out regularly throughout the implementation of contract farming projects, to understand and address potential impacts. Provisions should also be added on the rights by smallholder farmers to periodically review contracts as a safeguard against potentially adverse terms, e.g. fixed buying prices for farm produce during periods of price instability.

Part V – Procedures related to Land Acquisition, Relocation, Compensation, Rehabilitation and Restitution

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. This section should be substantially

rewritten outlining clearly the objectives and procedures for each section, as well as responsibilities of relevant government agencies.

Paragraph 36 states that 'When managing the relocation, compensation, rehabilitation and restitution related activities that result from land acquisition and allocation, unfair land grabbing or displacement due to the civil war, clear international best practices and procedures shall be applied...'. This should be strengthened by specifically referencing 'international standards and existing obligations under international law' and should link to relevant international governance instruments such as the UN Declaration on the Rights of Indigenous Peoples and ILO Convention 169, the UN Voluntary Guidelines on the Responsible Governance of Tenure, the UN Guidelines on Development-based Evictions and Displacement, and the Pinheiro Principles as outlined in the General Comments section above.

Paragraph 38 (b) mentions corruption for the first time in the policy document. Corruption deserves an entire section and as such, a new section should be written on corruption and how its negative impacts across all elements of the provisions of the national land policy, will be tackled.

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