8. Fostering secure and well-defined land rights

This chapter provides an overview of Myanmar's regulatory framework on land rights and administration. It reviews recent policy developments and reforms, identifies key remaining obstacles contributing to land tenure insecurity and administration deficiencies and recommends a number of policy reforms for addressing these challenges.

Secure and well-defined land rights are a key building block of an enabling investment environment, notably one that supports a more inclusive and sustainable development path. Myanmar still needs to make considerable progress in this respect. The first OECD *Investment Policy Review* (OECD, 2014) already shed light on many land tenure and governance deficiencies affecting the investment climate and sustainable development more widely. The review also recommended a number of reforms that would contribute to strengthening land rights and administration.

Many of the land tenure challenges identified then still persist today, although it is to be hoped that the prospects are brighter for addressing these issues in the near future, given the adoption of the National Land Use Policy (NLUP) in 2016 (Government of Myanmar, 2016). The NLUP, which was finalised in the waning days of the previous Thein Sein government after extensive stakeholder consultations, represents a rather progressive land policy framework. Among other strategic orientations, it proposes the development of a National Land Law (NLL) to support the implementation of the various NLUP objectives. The current government, which took office in April 2016 subsequent to the NLUP publication, also restated the commitment to addressing land governance and increasing land tenure security in its election manifesto (NLD, 2015).

Subsequent events, however, have led some businesses and civil society organisations (CSOs) to take a more sceptical stance on the ability and willingness of the Myanmar government to pursue the vision established under the NLUP. The somewhat slow progress in advancing with the NLUP implementation – for example, the National Land Use Council (NLUC) charged with the implementation of the NLUP was only established two years later – and some rushed and parallel reforms to key land-related legislations in late 2018, which are inconsistent with the NLUP, have raised concerns of stakeholders. Many CSOs also voiced concerns about the lack of consultation so far around the development of the NLL. It is hoped that this will change after the formation in September 2019 of a dedicated working committee under the NLUC for this purpose and in involving representatives of a wide group of stakeholders.

Concerns have also been raised with respect to the 'Land and Property Bank' project announced in late 2019, under which it seems that government entities would list all the plots of land under their control and that could be potentially made available to investment projects. This way investors would have an upfront idea of possible land plots and locations for their projects. At this stage, the lack of official information about the initiative precludes a more thorough assessment of its potential impact, but considering the various deficiencies of the current land information system discussed below, there are likely to be significant risks and challenges in pursuing the initiative.

Until at least some of the core provisions of the NLUP are implemented, land tenure will remain confusing and often insecure for investors, smallholder farmers, communities and other landowners or users. The reasons include *inter alia*: *i)* the fragmented, complex and outdated legal and institutional framework, with dozens of laws in place and multiple agencies involved in land administration; *ii)* weak protection of land tenure rights, particularly of customary land use rights that are predominant in many of the ethnic states; *iii)* inaccurate or absence of land information systems (i.e. cadastre and property registry systems); *iv)* complex and burdensome land registration processes resulting in low land registration rates, notably in ethnic upland areas; *v)* absence of land use planning and complex land use change policies; *vi)* overly strict land use policies, including rigid land classifications that are used for land administration interventions including land registration that do not reflect the reality of existing land use on the ground; *vii*) unclear and costly land transfer procedures; *viii)* poor regime for compulsory land acquisitions by the state; *ix)* weak land disputes resolution system; *x)* challenges in addressing historical land grievances; *xi)* and, until recently, the promotion of large-scale land allocations without adequate safeguards.

The importance of secure access to land and natural resources cannot be overstated in Myanmar: it is the most important resource for rural households comprising two thirds of the population. A stark urban-rural poverty divide remains, with a still significant 23% of the rural population in poverty in 2015, compared to an urban poverty rate of 9% (Ministry of Planning and Finance, 2018). This means that millions of people

depend on access to farmland and rangelands, to fisheries and forests for their livelihoods. The way the government and society manage those resources has a direct impact on food security, poverty alleviation, investment and environmental sustainability (FAO and EU, 2018). Myanmar has been identified as one of the most vulnerable countries in the world to the effects of climate change, ranking 3rd out of 187 countries from 1998 to 2017 in the Global Climate Risk Index 2019 (Eckstein *et al.*, 2019). As such, effective use of land and the prevention of degradation of land and natural resources must also be factored into long-term land use planning.

With the agreement on the Sustainable Development Goals (SDGs) in 2015, global recognition of the critical importance of tenure, access to resources and their governance for achieving sustainable development has been secured within a broad, comprehensive framework. Within this context, Myanmar adopted its Myanmar Sustainable Development Plan (MSDP) 2018–2030 which consolidates the overarching national development vision and strategy, and serves thereby the purposes of facilitating the alignment of policies, co-ordination and co-operation across all ministries, states and regions (Ministry of Planning and Finance, 2018).

Despite explicitly noting that it results from the integration and distillation of existing plans and priorities, the MSDP fails to include a reference to the NLUP, which was dropped from its penultimate draft. The remaining section on land governance usefully focuses on sustainable land management to preserve the country's natural capital but is silent on other relevant land governance dimensions (Ministry of Planning and Finance, 2018). This omission adds to a number of confusing signals on the importance the government attaches to addressing the current complicated and conflicting land governance situation as mentioned above.

Anecdotal evidence suggests that the current situation is an important restraining factor on further investment as well as a source of continued frustration for smallholders, communities, and ethnic groups who must live with the vulnerability posed by insecure tenure. Land reform is often one of the most challenging areas of reform a government can face – it is tied up with long-held traditions of customs and use, more mundane but ever-present pushes and pulls of vested interests, both visible and hidden, and laden with economic and political implications. Those challenges are even more pressing in Myanmar given the deeply rooted interlinkages between land governance and the peace process.

Moving forward with this complex and highly contested process of land reform is essential for Myanmar to sustainably benefit from incoming investments that can contribute to improving the livelihood of its citizens.

Main policy recommendations

- Implement the NLUP through a structured and consultative process that involves a wide range of stakeholders and which is set out in a transparent and predictable manner, with a clear planning of activities and schedule for stakeholders' participation in the process. The establishment of the working committees under the NLUC for this purpose with participation of stakeholders goes in this direction. They should make sure that their work plans provide *inter alia* the opportunity for advanced considerations of draft documents, opportunities for oral and written input, and full and transparent access to relevant documentation by all stakeholders including beyond its active membership.
- Develop the National Land Law (NLL) and harmonise and rationalise existing land laws with the NLL:
  - Ensure that the NLL recognises and provides for the formalisation of all formal and informal land tenure rights and delineate a streamlined institutional framework and process for land

rights registration, transfers and acquisitions; and set this as the framework for the harmonisation and rationalisation of the remaining land laws;
    - Develop a comprehensive land law reform process and proposals that reflect the basic principles of the NLUP and harmonise existing land legislation with the NLL;
    - Take action on an interim basis to halt contentious amendments to the existing laws and regulations, for instance pause implementation of the 2019 Land Acquisition Resettlement and Rehabilitation Law, while adjusting implementing rules where feasible to address identified challenges and seek alignment with the NLUP;
- Develop a single administration system to improve policy and procedural consistency and avoid situations of regulatory and institutional voids as is currently the case. Key considerations are to improve the efficiency and reliability of land-related services (*e.g.* issuance of land documents, cadastral survey and mapping and registry services) and enhance land tenure security for all, including by:
    - simplifying land categories and allowing all to be registered, including individual and communal claims to customary land;
    - promoting women's rights over land, including through the systematic registration of conjugal titles under both partner names;
    - establishing a streamlined process for registering and regularising land tenure rights and transfers;
    - establishing a transparent process for the management of public land;
    - establishing pilot land offices in selected townships with a focus on the delivery of good quality land administration services to experiment and roll-out successful practices to other offices in the medium-to-longer term;
    - reforming the current inefficient and costly property tax system;
    - establishing the framework for updating and then digitising existing land records and information with the vision of moving to an unified cadastre and registry system in the future;
    - addressing the necessary institutional arrangement to bring land administration services under a single land administration authority;
    - and designating a lead land committee in each chamber of the Parliament to deal with land issues;
- Revise the 2019 Land Acquisition Resettlement and Rehabilitation Law to strengthen the framework and ensure compulsory land acquisitions by the state occur only in a non-discriminatory manner, for a well-delimited public purpose, under due process of law, and against prompt, adequate and fair compensation;
- Develop a land dispute settlement system that is independent, timely, affordable and effective and is widely accessible to all;
- Eliminate or at least restrict criminal sanctions concerning land-related offences to the most severe cases;
- Establish a land use planning framework to support a more sustainable and efficient pattern of spatial development;
- Set up monitoring and reporting mechanisms for large-scale agricultural land allocations to ensure their compliance with agreed performance requirements and allow for more informed policy-making, as well as to transparently respond to stakeholders' concerns about their social, environmental and economic impacts;

- Halt new large-scale land allocations in conflict-susceptible areas until land reforms are in place. Consider them only in areas where the risk of conflict is kept to a minimum, for instance in returned VFV land over which there are no existing claims (including of customary rights holders) or over which land legacy issues can realistically be addressed and there is no risk of infringing on customary rights of indigenous people and local communities;
- Address links to the peace processes/ceasefires, including restitution rights of refugees and internally displaced populations:
  - Land governance in conflict-affected areas, including land restitution, are wide-encompassing challenges, involving issues and policies well beyond the scope of this review. Other fora are more appropriate to discuss solutions to these specific complex matters. Nonetheless, it is important to recognise here that such challenges affect the climate for responsible investment and that an upgrading of the land regime and administration as suggested in this review would need to be carried out in a conflict-sensitive manner, recognising and incorporating land-related matters arising from the evolving peace processes and ceasefire agreements. Any institution and process established to address restitution rights of returning refugees and internally displaced persons (IDPs) should strive for the highest standard of transparency and accountability, and nurture the involvement of local communities at the policy and implementation level.

Key considerations for responsible investors

- *Detailed due diligence, including consultations and negotiations*: given all the challenges and gaps identified in existing Myanmar law, detailed due diligence is a necessary part of any investment involving land to ensure that investors are not involved in dispossession of existing users that does not comport with international standards. Companies should take a broad view in consulting and negotiating with occupiers and users of land, recognising that potential claimants or occupants may not have full documentation of their tenure rights, nor in some cases, tenure rights that are protected under current law. Ignoring claims based on long-standing occupancy and use, including customary use, or requiring current occupants or claimants to pursue them through the courts, is not a viable alternative for negotiating access to land in Myanmar. It is essential to recognise that even when claims cannot be upheld under existing legislation they are often legitimate for local communities and rural households. Nor is it practical, especially where claimants are already occupying the land. Efforts to involve smallholder farmers in the investor's business plan is strongly recommended, as communities traditionally involved in agriculture may have few other options to restore their livelihoods.

Overview of Myanmar's land regime and recent reform context

Few matters in Myanmar are as complex as land policy. Myanmar has dozens of laws governing land use with more than 20 different government departments responsible for some form of land administration, sometimes over the same type of land. Numerous laws date back to the colonial era but are still in force, like the Lower Burma Town and Villages Land Act 1899. In total there are about 22 categories of land, each governed by its own sets of laws and regulations (Table 8.1). A brief description of the main land use rights is available in the Annex 8.A.

Statistics on the prevalence of these classes are produced on an annual basis. A challenge is that the spatial representation of their prevalence (mapping these classes) is weak or inexistent. Hence rural people often do not know themselves on which land they establish their livelihoods. The lack of a consolidated and up-to-date land cadastre and registry system, among other issues discussed below,

makes it impossible to draw a more precise distribution of land by type in Myanmar. Nonetheless, official statistics can still give some sense of magnitude and predominance of the area occupied by each type of land.

Total land surface of Myanmar is 167 186 thousand acres (Table 8.2). About 30% is officially classified as forest reserved land under the administration of the Ministry of Natural Resources and Environmental Conservation (MONREC), of which a large portion is accessed and used by forest-dependent communities.

Table 8.1. Statutory authority assigned to different government departments/ministries in accordance with different land categories

Legal land categories		Governing law	Statutory authority
Farmland Paddy / lowland (*le*), 'dry' upland (*ya*), alluvial is- land land (*kaing kyun*), garden land (*u yin*), uphill land under permanent or shifting cultivation (*taungya*), nipa palm land (*nipa*), horticultural land and perennial crops land		Farmland Law (2012)	Farmland Administrative Body (FAB) Chaired by Ministry of Agriculture and Irrigation (MOALI)
Forest land	Permanent Forest Estate Reserve forest, public protected forest, protected areas, private commercial plantations	Forest Law (2018)	Forest Department, Ministry of Natural Resources and Environmental Conservation (MONREC)
Vacant, Fallow and Virgin Land	Virgin land; fallow and vacant land	Vacant, Fallow and Virgin Land Law (2012)	Central Committee for the Management of VFV Land, chaired by MOALI
Grazing land		Land and Revenue Act (1879)	General Administration Department (GAD), Ministry of Home Affairs (MoHA)
Leasable fisheries and aquaculture land		Freshwater Fishery Law Aquaculture Law	Department of Fisheries, MOALI
Mining land, gemstone land		Myanmar Mines Act	MONREC
Urban/ Town land		Town and Village Act / City Development Committee Law	City Development Committees (Naypyitaw, Yangon, Mandalay) MoHA
Village land; local public parkland; riverbanks; ponds; cantonment; village communal land		Town and Village Act	GAD
Dams, reservoirs and embankments		Channel Act	MOALI
Roads		Roads Act	Ministry of Transport and Communication (MoTC)
Religious land/cemeteries, religious building lands			Ministry of Religious and Cultural Affairs
Riverbanks and waterfront boundaries and land underneath the rivers and creeks		Conservation of Water Resources and Rivers Law	MoTC
Railways			MoTC
Airport fields		Myanmar National Airways Law	MoTC
Other government held land			Various ministries

Source: Adapted and updated from San Thein et al. (2018, p. 25).

VFV Land is not properly mapped and recorded by the government, but official estimates suggest that land falling within the VFV classification encompasses another 30% approximately (the sum of two land classes namely *i)* other wooded land and *ii)* cultivable waste other than fallow land, as per official MOALI/DALMS classification). But these estimates fail to adequately reflect the actual situation on the ground, typically including within the VFV land classification many areas of land that are under active cultivation by farmers or used by community groups as part of a rotational cultivation system (San Thein *et al.*, 2018). This is particularly the case in upland and hilly ethnic states. By comparing the officially recognised area of farmland of Chin state in 2017 with data on the area covered by agricultural activity using satellite imagery interpretation of 2010 by the International Centre for Integrated Mountain Development, FAO and EU

(2019) concludes that only 16% of agricultural land is being officially recognised as Farmland. Other estimates suggest that about 80% of the rural population is dependent on land under long fallow subsistence agriculture (FAO et al., 2017). Of the remaining land, about 20% is officially considered to be occupied for agriculture (net area sown and current fallow) and 24% is associated with other land uses, such as residential, commercial and industrial land.

Table 8.2. Area classified by type of land, 2017

Type of land			Thousand acres	Per cent
Reserved and protected forests			46 649	28%
Current fallow			1 149	1%
Net area sown			29 792	18%
	Paddy	15 673		
	Ya	10 331		
	Kaing	1 365		
	Garden	5 063		
	Dhani	117		
	Taungya	548		19%
Cultivable waste other than fallow			13 695	8%
Other wooded land			35 853	21%
Others			40 048	24%
	Grazing Grounds & Cattle Paths	738		
	Cannals, Reservoirs Tanks and Embankment	650		
	Residential Area and Town	501		
	Village Land	1 237		
	Road	675		
	Railway Land	67		
	Others	36 180		
Total area			**167 186**	**100%**

Note: total net area sown is exclusive of squatter, while the related breakdown is inclusive.
Source: Department of Agriculture Land Management and Statistics (DALMS), retrieved from the Myanmar Statistical Information System.

Recent reforms and current policy context

Since 2011, there have been a series of well-documented land reforms which have considerably changed the regulatory landscape. In 2012, the Farmland Law and the Vacant, Fallow and Virgin (VFV) Law were adopted, reinforcing the government's efforts to attract large-scale land investments into the newly opened country. The VFV Law allowed for the allocation of large tracts of land (up to 3 000 acres for a period of 30 years following its amendment in 2018) to be used for agriculture, livestock, mining or any other use permitted by the Central Committee for the Management of VFV Land. The land allocated can be expanded up to 30 000 acres at the rate of 3 000 acres at a time upon demonstration of adequate land use.[1]

The Farmland Law intended to provide secure tenure over farmland by issuing land use certificates (LUC) to farmers, making these a tradeable commodity for the first time in Myanmar since 1953 and enabling farmers to sell, lease, mortgage and transfer farmland on a land market (Woods, 2012). Approximately ten million LUCs were issued with each covering on average a farm holding size of one hectare and households typically holding two LUCs according to DALMS 2018 statistics. These reforms did not address many of the legacy challenges related to land tenure and administration, however (see next section).

More recently, there has been a renewed impetus for reform. The adoption of the National Land Use Policy (NLUP) in 2016 after extensive stakeholder consultations sent a positive signal about the government's willingness to adopt a more modern land policy framework in line with international standards, such as

FAO's *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT) (FAO, 2012). The renewed commitment, by the current administration when it took office in April 2016, to pursue the implementation of the NLUP further reassured investors and stakeholders, as did the adoption of the Agriculture Development Strategy (ADS) in 2018, which prominently addresses smallholder farmers and land tenure reform in its narrative. In principle, these two policies reflect the main policy orientation guiding land-related reforms (see Box 8.1 for a further discussion).

A few other reforms have also contributed to reinforce the government's commitment to improving its legal framework, such as the 2016 *Condominium Law* and the 2018 *Deed Registration Law*, although deficiencies of older style laws – vague terms and delays in developing required implementing measures – persisted even in these new laws.

Nonetheless, the slow but steady progress in advancing with the NLUP reform agenda and the sudden amendments, inconsistent with the NLUP, to the *VFV Law* in late 2018 and *Land Acquisition Act* in 2019 without proper consultation raised suspicions about the government's continued interests in pressing for reforms in a manner aligned with the policy stated in the NLUP.

Box 8.1. Key recent land policy developments

National Land Use Policy (NLUP) (2016)

The NLUP establishes Myanmar's long-term vision for land policy reforms, focusing on the sustainable management and use of land resources for the "livelihood improvement of Myanmar citizens and sustainable development of the country" (Government of Myanmar, 2016, p.1). Recognising the complexity and inadequacies of Myanmar's current land regime, the development of a National Land Law (NLL) is contemplated to support the implementation of the various NLUP objectives, namely: the government will promote responsible investment in land resources while strengthening land tenure security to improve the livelihoods and food security of people, including through the formal recognition of customary land tenure rights and related local customary land management practices of ethnic groups. The NLUP puts citizens at the heart of the policy, noting in its basic principles that it will prioritise the interest of public citizens over private companies in land use decision making.

The NLUP calls for a land use planning process that is participatory, transparent and accountable to provide the basis for systematic management and use of land resources, subsequent zoning and changes in land use. It calls for temporary suspension of land allocations on customary lands (though this does not seem to have happened). It also sets out the need for a revised and simplified land classification system, as well as the development of a land information system covering land maps, land records and other land information.

Given the significant difficulties and delays in resolving myriad land disputes to date, the NLUP calls for establishing impartial land dispute resolution mechanisms across the country, but sets out a complex system, starting with specialised land courts that currently do not exist as well as independent, tripartite arbitration processes comprised of the government, organisations (presumably CSOs), farmers and the private sector. The NLUP also calls for a right of appeal for land decisions, something absent from current legislation.

Lastly, it designated the National Land Use Council (NLUC) with the task of implementing the NLUP. The NLUC held its first National Land Use Forum together with civil society in October 2018 to set out short- and long-term work plans for the NLUC, including the development of the NLL. This appears to be the signal that the government is finally ready to move ahead on NLUP implementation. The NLUC held two subsequent meetings in 2019. While there has been a significant gap between the adoption of the NLUP and appointment of the NLUC, there have been various activities and strategic

interventions in the interim to implement the NLUP, including various projects on developing participatory land use planning processes, securing land resource tenure rights at the village or community level, developing local dispute resolution mechanisms and a government-managed open access spatial database (One Map Myanmar)(MOALI, 2018).

Agricultural Development Strategy (2018)

The Agriculture Development Strategy and Investment Plan 2018–2023 (ADS) is intended to operationalise Myanmar's agricultural policy and guide the sector over the next 5 years (MOALI, 2018). The sector is a high priority for the government, contributing 30% of national GDP, with approximately 68% of rural population relying on crop husbandry and livestock for their livelihoods and incomes, and about 25% of total exports by value.

The ADS puts smallholder farmers squarely at the centre of the country's agricultural strategy, signalling a sharp move away from MOALI's Master Plan for the Agricultural Sector 2000-2030 that promised to convert 10 million acres of "wasteland" for agricultural production. The ADS explicitly states that it does not exclude agribusiness but envisages the agribusiness role as linking farmers into global supply chains, providing inputs like fertiliser, being involved in processing and sales, but apparently not at the core of production. It specifically notes that the ADS will align agribusiness investment with the safeguards for smallholders under the Myanmar Investment Law. It does not indicate a government priority of allocating large-scale land tracts to agribusiness investors, in contrast to the signals and actions of the earlier administration, a signal that is welcomed by farmers' organisations and many civil society organisations concerned about land rights.

The ADS puts forward an initial framework to guide reforms, setting also important goals for improved service delivery of land administration to the public, including to women and the poorest: (i) accessible service delivery at the township village tract and possibly village level without excessive opportunity costs or out-of-pocket costs; (ii) user-friendly service that is responsive to specific demands of the public; (iii) transparent service that makes specific information on land acquisitions, land transfers and transactions, as well as broader information on outcomes of consultation processes, decision making on land restitution and land allocation publicly available; and (iv) formalisation of current unofficial practices for land leases, land rent, land tenancy, share cropping, depositing land as share into large scale block farming, land consolidation among farmers or farmer to farmer transaction (MOALI, 2018)

Critics have, nonetheless, expressed doubt that the strategy will be able to effectively combine the protection of smallholder farmers with the attraction of agribusiness, noting concerns about how smallholders and landless labourers will fare in global value chains (Bello, 2018). The ADS highlights a familiar pattern of land challenges that constrain productivity of the sector. It addresses long-standing issues of land rights, but it fails to establish clear accountability for pursuing such reforms. Critics have also voiced concerns against the lack of a clear prioritisation of land rights reform in the strategy, noting that "addressing the land ownership and tenure issue is the overriding task, the sine qua non of a successful agricultural development strategy" (Bello, 2018, p. 21).

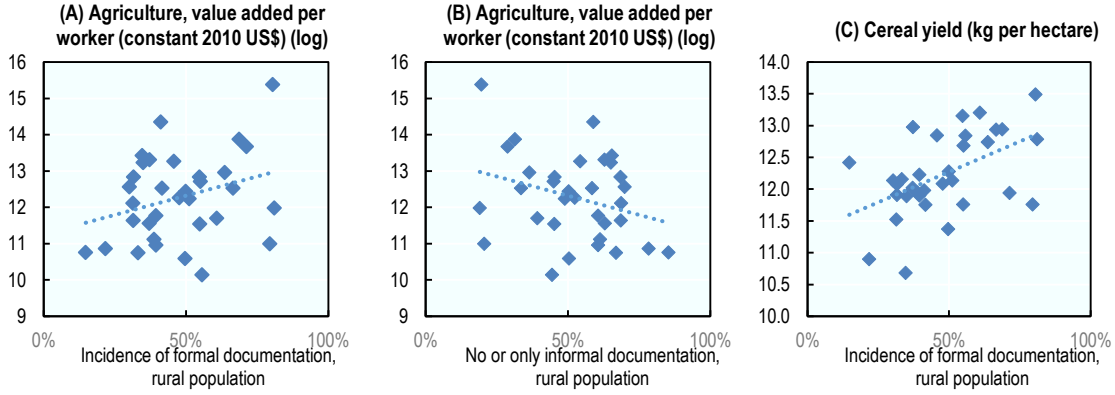
Key overarching challenges of Myanmar's land regime

Myanmar's land regime has two main overarching weaknesses entailing significant costs for Myanmar's sustainable development: *i)* it fails to provide adequate land tenure security and *ii)* land administration services, including transfers, inheritance etc. are plagued with institutional and regulatory voids and inefficiencies that render any process for securing and transferring land tenure rights a burdensome and uncertain endeavour. Underlying these challenges, there are a number of policy, legal and institutional deficiencies which either alone or in accumulation or interaction with other issues contribute to aggravate

the sense of land tenure insecurity in the country. The discussion below compartmentalises the main issues for clarity purposes, but in reality they interplay and reinforce each other.

In addition to its importance for combatting various economic, social and environmental challenges (e.g. poverty, hunger and malnutrition, gender equity, environmental degradation, protection of indigenous people and their cultural heritage etc.), secure land rights are an important condition for many types of investments, including agricultural investments by large-scale and smallholder farmers. A number of studies have documented the role of tenure security in incentivising investments, albeit to varying degrees across regions.[2] They play an equally critical role in incentivising the use of more efficient and sustainable land management practices by, *inter alia,* helping to increase land value, limiting transaction costs associated with land transfers, facilitating access to credit by allowing land to be used as collateral and helping to protect the appropriation of returns by investors.

Figure 8.1. Land tenure security and agricultural productivity



Note: Land tenure data refers to the percentage of people who say they have formal, legally-binding documents that demonstrate their right to live in or use their properties. Documents are split into formal and informal subsets based on what would be expected to be issued by official agencies in each country. The data is sourced from a survey of a representative sample of people from 33 countries in 2018. On average, 50% of all respondents had formal documentation for one or more of their properties, 43% had no documentation and the remainder (7%) had informal documentation. The average reporting having formal documentation rises to 68% for owners and renters, excluding respondents who stay with or without permission. Beyond documentation of tenure rights, the survey measures respondents' tenure security by posing nearly 60 questions across five additional themes: information on tenure rights over their main dwelling, perception tenure security, benefits of tenure security, tenure security of other properties, experience of tenure insecurity and perceptions of protection afforded by authorities. A range of additional data are collected to capture robust information on individuals' tenure situation, as well as key individual and household characteristics. Prindex is a joint initiative of the Global Land Alliance and Overseas Development Institute.
Source: World Bank Development Indicators and Prindex (www.prindex.net).

Not surprisingly, land tenure security is to some extent associated with higher agriculture productivity, particularly when tenure rights are formalised (Figure 8.1), although the literature suggests some heterogeneity in effects due to contextual factors and other policy complementarities (Lawry *et al.,* 2014). Recognition of the various forms of tenure rights, including of customary rights, and their formalisation are important means for land benefits to accrue to landholders and society at large. Yet, only a few countries adequately recognise and provide the means for registering customary land held by indigenous people and local communities (WRI, 2017). Some estimates demonstrate that about 65% of the world's land is indigenous or community land, with 1 out of 7 people relying on customary forms of land ownership, but only a small fraction is formally recognised. An analysis of 64 countries covering 82% of world's land suggests that indigenous people and local communities have government-recognised rights to only 18% of the land in their countries, of which about 8% is due to official land demarcated for these groups' use (RRI, 2015).

Not least because of the large social and economic implications that land tenure systems have, the Food and Agriculture Organisation (FAO, 2012) has developed internationally agreed guidelines on the governance of land tenure – *the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT) (Box 8.2). These guidelines advocate for the protection of legitimate tenure rights, whether those formally recognised in the national legislation or those which are socially legitimate – such as customary tenure rights – but not formally protected by law.

The consequences of land tenure insecurity are typically compounded by land administration weaknesses and voids that threaten the integrity and reliability of land-related institutions, procedures and documents, thereby raising transaction costs and further undermining confidence in the land tenure system. As such, besides adding to tenure insecurity, they may further contribute to an inefficient allocation of land, including by facilitating corruption and the capture of land by particular interested groups and inducing increased levels of informality.

Box 8.2. FAO guidelines on tenure rights – recognising customary tenure

The *Voluntary Guidelines on the Responsible Governance of Tenure* (VGGT) call for states to recognise and respect legitimate customary tenure rights that are not currently protected by law. To do this, national legislation should:

- Recognise and protect the full range of legitimate tenure rights within a country
- Make legitimate tenure rights equal in weight and stature to formal, certified rights
- Establish administrative processes that are simple, clear, streamlined, local and easy for rural communities to use to claim and defend their tenure rights
- Explicitly protect women's tenure rights and establish women's right to hold or own tenure rights
- Where tenure is shared or held in common, vest formal tenure rights in all community members as a coherent group
- Explicitly protect communal areas, customary rights of way and other shared resource use and access rights
- Balance protections for customary and indigenous tenure rights with provisions for gender equality and respect for human rights.

Source: FAO (2016e, p. 53).

Weak recognition of land tenure rights

Land tenure insecurity partly results from the limited recognition of land tenure rights in the national legislation. The Constitution of 2008 recognises and protects land use rights of legal and physical persons (with the state remaining the ultimate owner of all land), but many kinds of land tenure arrangements are not formally or only weakly recognised and protected in national laws, leaving particularly users of customary, ethnic or other traditional lands completely vulnerable.

Land tenure insecurity affects even those investors and farmers who have registered land use rights. This arises mainly in relation to the 2012 Farmland Law where non-compliance with its strict conditions imposed on land use, particularly on *paddy* land (a lingering characteristic from the military era where agricultural production was strictly controlled, with centralised policy-making imposing the choice of crops) and required administrative procedures can result in forfeiture. While the issuance of land use certificates (LUCs) to farmers in the lowland areas in 2012 was intended to improve farmers' tenure security, it has

also rekindled old conflicts (such as land transfers forced by farmers' incapacity to deliver the compulsory quota of crop to the government) and created new ones (notably between parties involved in mortgage arrangements). Some point to the 2012 VFV and Farmland laws as a legal method of furthering farmer disenfranchisement (Woods, 2014).

The 2018 amendments to the VFV land, requiring the rapid registration of previously un-registered VFV land and criminalising those occupying and utilising VFV lands without registration, also contributed to impair land tenure security. In addition, the amendment forces those who live on and use the land to make a choice between registering for 30 year-VFV land use permit and giving up all further rights to the land (including passing it on through inheritance) or being considered a trespasser. In principle, if there are people living or otherwise using land classified as VFV, sometimes for generations, it should be indicative of a likely misclassification of the land from the start. As such, there is a considerable risk that, instead of improving tenure security, such amendments may end up sparking new conflicts over land, potentially on a large scale, and result in forced evictions of those who are on the land, but did not manage to register or their arrest for trespassing.[3]

These risks have been amplified, for instance, in the context of mineral prospection and exploration projects. Mining companies have been required to apply for VFV land permits in areas included in their prospecting and exploration tenements even at prospection and exploration stages (Chau and Daudier, 2019). By not clearly distinguishing between rights to occupy and use the surface of the land and rights to exploit deposits located underneath, the application of the amended law in such contexts risks affecting existing land users by depriving them of the right to use land unnecessarily, while possibly aggravating land conflicts and dissuading more responsible mining investors from considering Myanmar as an investment destination.

The major source of land tenure insecurity, however, comes from the lack of recognition of customary rights, including in recent legislation. Land tenure insecurity is particularly acute for the many ethnic groups in the states with longstanding customary land and cultivation practices. The 2012 Farmland Law, for instance, does not recognise customary use rights or tenure or shifting cultivation/rotational farming arrangements. It allows for collective tenure only if requested by a legal person, such as an association of community members. Communal lands or collective management of land use are widely common in upland areas. The new Forest Law, adopted in 2018, also does not recognise customary rights.

Likewise, the land classification system under the VFV Law, which builds on earlier British colonial laws on 'wastelands', fails to recognise shifting cultivation, which is particularly problematic given the vast amount of area classified as VFV land. Because of these omissions, it is not uncommon for land which is being cultivated on a rotational basis, to be misclassified as VFV land and then allocated for use by private sector investors or government entities (Andersen, 2016). In India, which inherited similar legislation from the British colonial period, this problem has been minimised by more narrowly classifying 'wastelands' as only those lands unfit for cultivation, therefore making clear that cultivable land cannot just be reclaimed by the government and reallocated.

For these reasons, the NLUP which explicitly recognised customary land use rights, although not ownership rights, represented such an important milestone. The recent, but controversial, VFV Law amendments in 2018 denoted another step in this direction by excluding lands for hillside cultivation, ethnic nationalities' customary land and land used for religious, social, education, health and transport purposes from the purview of the Law. But while customary lands are excluded, they are not currently protected by any other law, nor are local authorities informed about the change and instructed on how to deal with it.

The institutional and regulatory complexity and opacity discussed further below – arising from the lack of harmonised legislation, overlapping responsibilities of land-related institutions, burdensome registration procedures, weak and oftentimes inaccurate registration systems, deficient land use change policies (*i.e.* the cumbersome process to change land from one category to another) and undeveloped land transfer framework – only serves to aggravate the situation of land insecurity by rendering any process for

transferring and securing land tenure rights a burdensome and uncertain endeavour. Land tenure security is further enfeebled by the limited institutional mechanisms and capacity for solving land disputes and seeking redress, particularly in relation to the numerous cases of land confiscations by the military or on behalf of military-linked companies or personnel, and other arbitrary land confiscations by the state.

Another important weakness of the current regime is that it fails to adequately protect women's tenure rights. Currently, both the Farmland Law and the VFV Law are gender neutral, but in practice they preclude women from tenure protection. For example, the Farmland law (Instructions) allows land use certificates to be registered under more than one land rights holder name, but the practice is to register it under the name of the head of household. Because men are typically seen as heads of households and because there is no explicit requirement for registering joint ownership of LUCs, women's rights to land are left vulnerable. Again it is hoped that this will change following the implementation of the NLUP, which explicitly states that joint registration is to be pursued (Namati, 2016).

Lastly, the land tenure situation in areas of the country affected by armed conflict historically or presently are even more complicated. Numerous ethnic armed organisations (EAOs) across the seven ethnic states, in other regions, and in self-administered areas operate separate systems of administration at the subnational level including on land governance. The United Nations High Commissioner for Refugees (UNHCR) estimates that, as of December 2018, there were over 1.6 million people in situation of concern, among internally displaced people (IDPs) and refugees from current humanitarian crisis, of which many may potentially have land restitution claims (Displacement Solutions *et al*., 2019). In this respect, the NLUP sets ambitious goals of systematically providing land use and housing rights to ethnic nationals who lost their land resources due to civil war, land confiscation, natural disasters or other causes, and that desire to resettle to their original lands, in accordance with international best practices and human rights standards. As such, the NLUP provides strong and appropriate signals for addressing one key challenge, which is likely to be one of the most challenging to implement.

A fragmented, complex and outdated framework…

Understanding the legal and institutional framework governing land in Myanmar is extremely difficult, making the secure and responsible acquisition of land for any project a particularly complicated and risky task. The legal system is constituted by a mosaic of laws, regulations, notices, directives and orders, of which some are quite dated. Not surprisingly, there are some important legal loopholes and numerous overlapping situations leading to legal confusion and limited or incorrect application of the laws (Mark, 2016). The resulting legal uncertainty significantly increases the risks associated with a land transaction.

To start with, there are 22 different types of land, with almost each being governed separately by its own set of laws and regulations (Table 8.1). In some cases, there may be various additional rules, guidelines, publications, directions and notifications – of which some are not published, but can be used by authorities to justify a decision or the inability to render a decision. While distinct rights and procedures may certainly be justified, there should be some consistency in treatment across land types.

In such a fragmented environment, simply understanding which laws apply to a particular piece of land and which of those take precedence is already complex. The lack of legal precision and clear responsibilities of some laws adds to the complexity of understanding which regime applies. The various classifications of land, for instance, are often poorly defined in the existing legal framework (Oberndorf, 2012) and some land categories overlap (for example overlaps between horticultural land, garden land, and *ya* land). In some cases, there is split administration of the same land – areas of virgin land (also known as public forest, uncategorised forest, woodland area) falls under the VFV Law but the trees and forest on the land remain subject to the Forest Law (San Thein et al., 2018). There is also often a mismatch between how government maps categorise the land, how different township offices administer the land, and the actual on-the-ground use of the land by local communities (Woods, 2015). For example, forest

land that has been partly or completely converted to agricultural use can remain classified as forest land and administered by MONREC instead of the MOALI.

This situation is compounded by more general problematic legislative practices that (i) do not typically include exclusion clauses – *i.e.* clarifying the scope of application of provisions for particular activities; (ii) fail to clearly repeal old laws when adopting new ones; (iii) provide no clarity on the hierarchy of laws sometimes, *i.e.* beyond laws there are regulations, notifications, etc.; and (iv) overlap in subject matter among other laws by different ministries.

Lastly, the outdated framework leaves important policy gaps vis-à-vis internationally recognised principles and best practice, though the NLUP signals an intention to fill many of these gaps. In particular, as mentioned above, the NLUP specifically recognises FAO's VGGT, which sets out the accepted international framework on land tenure and that should underpin the government's next steps on recognising customary tenure. The NLUP also signals an intention to clarify an important gap on women's rights. Furthermore, the NLUP has also signalled the intention to address the absence of a resettlement framework until recently, as well as to update the outdated and fragmented approach to compulsory land acquisitions by the government (eminent domain). This is important given the government's ambitious infrastructure plans that will inevitably involve the exercise of eminent domain.

The government is willing and is advancing with reforms to improve the framework for acquisitions and resettlement. In August 2019, the parliament approved a new Law on Acquisition, Resettlement and Rehabilitation, repealing the previous law which dated from the colonial era (Land Acquisition Act of 1894). The law is not yet effective until it is assented by the President. It is not clear when this may occur. As further discussed below, the new law positively seeks to develop and tie together the frameworks for acquisitions and resettlement and rehabilitation, but it is not without weaknesses of its own. In many ways, the new law falls short of the principles and directions established in the NLUP and of international standards on the related matters.

The consolidation and simplification of Myanmar's land framework would significantly contribute to reducing existing policy and institutional voids and inconsistencies (discussed below). The policy goal set in the ADS and the NLUP of simplifying land classification along a few categories, as well as the NLUP's objective to bring the governance of various existing land laws under the umbrella of new a National Land Law (NLL) are welcoming steps for improving land tenure security and administration in Myanmar. At the moment, there is no consensus on the expected classifications: the two policies are not fully aligned, differing particularly with regards to retaining or not the VFV land classification. But their underlying goal of simplifying the current regime is important. The NLUP also foresees an easier and more transparent process for revising land classifications, which could be retained in the future NLL.

Numerous inconsistencies and governance failures

The fragmentation and complexity of the land framework in Myanmar facilitates the existence of inconsistencies and inefficiencies at all levels, from announced policies to the laws and their implementation.

Lack of clarity and coherence on strategic direction at the policy level

At the policy level, investors and civil society still feel that there is a lack of clarity on the broader policy direction the government will take as it moves ahead with land reforms. One emblematic example is the recent piecemeal amendments to existing land laws that have led to continued confusion and frustration of business and civil society organisations with the government's land policy reform process. Despite the NLUP explicitly recognising customary tenure and promoting inclusive public participation and consultation in decision making processes related to land use and management, the 2018 amendment of the VFV law

failed to secure ample consultation and did not adopt adequate language to avoid weakening the rights of those legitimately occupying and utilising VFV as explicitly proposed in the NLUP.

The recent reform to the regime on compulsory land acquisitions by the state, passed in August 2019, raises similar concerns. The law aims to provide a land acquisition framework that protects the interests of the people affected by land acquisition, notably by imposing conditions related to resettlement and rehabilitation. As such, it expects to promote a transparent and inclusive approach for land acquisition and prevent related adverse social and environment impacts. However, the revised law fails to adopt a clearer and narrowly defined language on some key provisions, including for instance in relation to the definition of public interest, which remains overly broad and ambiguous. It also incorporates some more problematic provisions, notably one allowing urgent acquisitions for public purposes in some poorly defined situations, which could potentially lead to cases of forced evictions. This would be inconsistent with Myanmar's commitments under the International Covenant on Economic, Social and Cultural Rights (see related section below for more details).

The resulting lack of policy and regulatory predictability has a dissuasive effect on investors – from the smallest local investor who cannot obtain sufficient assurances of tenure security in the future to justify making even modest investments, to larger-scale investors who are put off by the significant risks associated with land investments in all but limited urban areas.

Lack of clarity on the applicable regime and legal loopholes

Inconsistencies and inefficiencies also occur at the level of the law, with the lack of clarity about which legal regime and which authority has the final say on a certain matter being a prominent issue. At best, this leads to burdensome procedures where it is necessary to go back and forth among different ministries. In the worst case, it leads to conflicting procedures that no ministry has the authority or initiative to resolve.

Where there are overlapping tenure arrangements on existing land, for instance, none of the laws have clear processes to resolve the overlapping issue. Likewise, while there are generally procedures to change the designated use of certain types of land, these are not harmonised across the various types of land, each with different procedures requiring specific government permission with complex and lengthy procedures to complete the process (VDB-Loi, 2017).

A complex land administration: institutional voids, overlaps and burdensome procedures

Another important root cause of inconsistencies and inefficiencies is the multi-layered land administration that has emerged in combination with the current legal complexity. Currently, land sector services are formally spread across a number of ministries, departments and three City Development Committees (Box 8.3). Their activities are usually not well co-ordinated and their land records are not shared, exchanged or harmonised (see below).

The lack of standard operating procedures for land-related public services, and occasional disagreements among authorities about which procedures should apply, generate considerable uncertainty for land transactions. It also renders reforms more difficult as there is no clear procedural baseline to start with.[4] For example, the Myanmar Investment Law (MIL) states that it prevails over other laws and as such, long-term leases foreigners are possible for MIC-endorsed projects. But stakeholders have reported the unwillingness of Office of Registration of Deeds to register long-term leases due to policy disagreements about whether foreigners should be able to lease land or lack of clarity for administrators who are supposed to register the leases (or both). This is currently a major hurdle for foreign investors.

Box 8.3. Current land administration bodies

Inter-Ministerial Bodies

National Land Use Council (NLUC) is responsible for overseeing implementation of the NLUP. It was established in January of 2018 to provide much-needed cross-ministerial coordination on land issues, and has met three times up to July 2019. Its membership includes representatives from relevant ministries and public-sector entities only. Civil society and other stakeholders are represented at the technical advisory group and working committees responsible for advancing with the various NLUP's priorities. Three of six expected working committees were established in July 2019 including civil society participation.

Farmland Administration Bodies (FABs) were created under the 2012 Farmland Law and are responsible for: approving farmland use rights registration and transactions and submitting those to the DALMS for registration; revoking farmland use rights if conditions are not fulfilled; resolving disputes over the allocation and use of farmland; valuing farmland for tax, acquisition and compensation purposes and ensuring fair compensation for those expropriated; and approving farmland transfers for other purposes. The FAB, also called land management committees are composed of various representatives from MOALI (DALMS) and GAD and exist from the national level down to village tract level. At central, state/region level, the FABs are chaired by MOALI whereas at the district and township level the FABs are chaired by GAD (San Thein et al., May 2018). Farmers are not represented at some of the higher levels of the FABs such as the Central Management Body, which is responsible for resolving disputes and is authorised to approve, issue, and revoke land use rights.

The *Central Committee for the Management of Vacant, Fallow and Virgin Lands* (CCVFV) manages VFV lands, and is responsible for approving requests for land use rights regarding VFV land for agriculture, mining and mineral production and 'allowable other purposes' under the law. It also co-ordinates with MONREC to prevent the damage or destruction of forests and natural ecosystems, fixing the rate of security fees to be deposited and the annual land revenue rate and suitable period for tax exemption; resolving disputes in co-ordination with other government agencies (Oberndorf, 2012). It is also a multi-ministerial committee chaired at the national level by MOALI and including GAD, MONREC, MoPF, Ministries of Hotels and Tourism, Defence and Religion and Culture. The CCVFV also has region or state committees and lower levels as needed. The 2018 VFV Law amendments required that they include "representatives of local ethnic groups, farmer representatives, CSO representatives and appropriate experts" which could create much needed balance in land administration in addressing VFV land issues.

Central Reinvestigation Committee for Reinspection of Farmlands and Other Land Acquisition, headed by Vice-President U Henry Van Thio, was created by a presidential instruction to resolve historic land confiscation claims. It has a mandate to accelerate the resolution of land expropriations by (i) investigating cases, (ii) deciding whether land should be returned or compensation paid, and (iii) monitoring the release and return of land to rightful owners. The Committee is replicated at each administrative level (state/region, district, township, village tract). It is an inter-ministerial committee including MOALI, MONREC and GAD. Except for the Union (Central) level, each Committee comprises government officials and farmer representatives who serve as advocates and conduits for local information. The government has attempted to streamline the committees' case review process, but a reported lack of transparency, duplication of efforts, resource constraints, and lack of written documentation from the complainants have slowed down resolution of cases (LIOH, 2017). It was meant to settle all land disputes within the first six months of the NLD-led government but is still operating with a significant caseload still to resolve. This is one objective indicator of the challenges of land reform in the country.

Ministries

Ministry of Agriculture, Livestock, and Irrigation (MOALI) is the main government body responsible for land administration and agricultural policy and is responsible for many land resource-related issues, including agricultural policy, land use planning, water resources, livestock, fisheries (especially land-based aquaculture), and land administration.

Department for Agricultural Land Management and Statistics (DALMS) is responsible for the majority of land administration services but its mandate does not cover all land tenures. It has branches down to township level. It is responsible for: (i) updating of Kwin maps to show farm holdings; (ii) surveying and registering farmland through the farmland register (though it does not survey VFV land); (iii) deed registration; (iv) creation of village block maps of land plots; (v) update of block maps in towns and cities; (vi) maintain the urban register of grant leases; (vi) recording other land tenures for agricultural land; (vi) maintaining the third order survey control network. It has branches at the state/region, district, and township levels and is supported by FABs at various government levels. It is considered to have inadequate resources to cover its wide mandate.

Ministry of the Office of the Union Government's General Administration Department (GAD) is responsible for various categories of land, including village land, town land, grazing ground, etc. It provides land leases (and other less common urban titles) to town and village lands. Significantly, GAD administers (i) public forest or virgin land (unclassified or public forest land) that gives GAD a significant role in agro-industrial developments, (ii) land classified as vacant and fallow lands, where it exercises control over agro-industrial developments, as well as over community land use, including grazing land and other transitional uses; and (iii) with respect to farmland, GAD controls existing applications for and records of LUCs, and the ability to rescind LUCs or acquire land for other public and non-public purposes. GAD, which has branches at the village tract, township, district, and state/region levels, acts as the representative of the central government at those levels. The most senior GAD Official in each district, the District Administrator, is responsible for all compulsory acquisition of land. Payments for VFV Land leases are made to GAD township offices. The GAD was transferred in December 2018 to the Ministry of the Office of the Union Government under civilian control. Previously it was under the Ministry of Home Affairs, under military control as per Myanmar's constitution. In May 2019, the government unveiled the new ministry's reform plan for the GAD, including revisions of staff manuals and code of conduct, but GAD remains staffed by the same officials.

Ministry of Natural Resources and Environmental Conservation (MONREC) is responsible for environmental protection, natural resources, and forests (permanent forest estate (reserve forest and protected public forest)).

- The *Survey Department* produces all official topographic maps in a range of map scales; though under MONREC, it reports directly to the Chief Commander of the Tatmadaw within the Ministry of Defence.
- The *Forestry Department* issues rights to forest land in the form of Community Forest Certificates and Concessions and has the power to degazetting forestlands from the permanent forest estate.
- The *Environmental Conservation Department* has an important role in the environmental (and social) impact assessment (EIA) process, including project proposal screening and approvals of EIA and management plans.

Ministry of Investment and Foreign Economic Relations' Directorate of Investment and Company Administration (DICA) is the secretariat of the Myanmar Investment Commission (MIC) and is the primary interface between businesses and the government. Land leases of more than one year for foreign-owned companies (other than in SEZs) require Permits or Endorsements from MIC, as do

investments from Myanmar companies using more than 1 000 acres of land, involving displacement of 100 people, or with significant environmental and social impacts.

City Development Committees of Yangon, Mandalay and Nay Pyi Taw manage all land use and ownership-related activities within their cities and serve as a separate and distinct delegated land administration authorities instead of GAD and DALMS. These committees enjoy a broad range of authority in the reclassification of use, acquisition of land and buildings, and transfer of titles of ownership.

Lack of unified and updated land information and registry systems

No harmonised and unified land information and registry system covering the full range of land types and tenure currently exists. Without a centralised land registry (who legally owns?) and cadaster (what is legally owned and where?) it is a daunting task to undertake appropriate due diligence for land transactions. At present, different registries exist and are held by different ministries for different purposes. Most land records are old, dating back to the colonial period, and do not reflect the reality on the ground as land boundaries have not been updated for years. Very little is computerised and available to public access. As a result, inconsistencies in the land maps and records are widespread (LIFT, 2015).

Even the recent cadastral maps (*Kwin* maps), issued in lower and central Myanmar following the adoption of the 2012 Farmland Law, are likely to be inaccurate and need to be revised (Boutry *et al.,* 2017; World Bank, 2018). Official estimates suggest that 9.3 million LUCs were issued to farmers in 2013-14, out of a total of 16 million potential farmland parcels (FAO and EU, 2016). The World Bank (2018) reports about 8 million LUCs being issued to farmers in the same period, noting that these were based on fairly outdated maps. The Bank estimates that at least 80% of farmland must be re-surveyed and approximately 45 000 block maps in rural villages covered by grant land will need to be created. An important challenge for this is the lack of established procedures for renewal or updating the cadastre.

Beyond the possible cadastre inaccuracies, there are also important weakness in the registry system. In the case of farmland for instance, while the Farmland Law requires that any change to a land use right (e.g. when transferred, inherited or encumbered with debt) be properly registered, and new procedural directives were issued in May 2019 for this purpose, land transactions before 2012 were not formalised. These still need to be recorded. VFV land registry is less problematic as it cannot be transferred, only returned to the government, although the legislation provides for a VFV land (certificate) to be converted into farmland (LUC).

The lack of accurate cadastral and registry information is not unique to rural land. The expansion of towns and villages over the past 50 years has also created informal settlements outside the legal town limits, resulting in sometimes poor formalisation of grant leases (i.e. the urban land use rights). Even for town land, the surveys, block maps and deed registers are often inaccurate (World Bank, 2018). For example, it is unclear whether adverse possession land use rights[5], recognised under the Lower Burma Town and Village Land Act (1899), are routinely registered and acknowledged. As noted by the World Bank (2018), *"*deed registration is barely operational in towns […] Grant leases and their registration to the deed registry in town land have been out-of-date for many years" (World Bank, 2018). A similar situation exists in rural settlements. An FAO-EU (2016) report points to some 5-6 million residential properties in rural villages which were converted from farmland into residential plots over time without any formal registration. These situations reinforce the need to rationalise the functions of land-related agencies, such as DALMS and GAD on town land matters and, simultaneously, on village land as they maintain a duplicate of the Register of Grant Leases and other urban titles.

This current situation highlights the complexity of formalising land tenure with top-down policies that do not match local realities of land use (Boutry *et al*, 2017). The push to provide farmers with documentation of

use rights following the 2012 Farmland law was in principle admirable – the law requires LUCs to be issued to all farmland with cadastral maps (*Kwin* maps) – but the resulting situation has created uncertainty for those left with inaccurate documentation (LUCs were mostly issued based on outdated maps and sometimes assigned to wrong landholders) and greater tenure insecurity for those who did not receive LUCs (and which may have seen their land entitled to someone else by errors in the registered information). This problematic situation is now possibly repeating itself with the 2018 amendments to the VFV law, which pushed for the registration of VFV land (further discussed below).

By favouring registration rates over reliability, these policies risk undermining whatever progress has already been made in building trust in a land registration system through important pilot programmes, such as the (i) OneMap (an initiative started in 2015 to develop an open, online spatial data platform bringing together land data from various sources)[6]; (ii) Land Administration and Management Project (LAMP) including to develop digital cadastral system, and iii) the upcoming project on Reallocation and Development of Unused Concession Land Programme (REAL DEV) supported by the Livelihoods and Food Security Fund (LIFT).

Giving adequate consideration to accuracy of information in mapping and registration exercises and their proper maintenance thereafter is key for the success of future land reforms. It is important for the recently created *National Mapping System Establishment and Implementation Working Committee*, which is tasked with guiding the further development of OneMap as part of the implementation of the NLUP, to reflect on interim measures to help secure the reliability of registered information carried out before the full completion of the OneMap initiative.

The World Bank (2018) estimates that with proper planning, one land register could be established at the township level to record all rights in all tenures and that the rollout across townships for the rejuvenation of records and services can be realised on a priority area basis over a 10-year period. In the interim, steps can be taken before adopting new laws, such as testing model land administrative offices. For example, while many land records are held at the township level, the distance and process involved in accessing these records still proves to be an obstacle to the average farmer. Myanmar may consider other options, such as the village or village-tract level for better accessibility (World Bank, 2018).

A complex and long registration process

While over 96% of the households owning parcels of land officially classified as farmland in the Delta Zone, and about 80% of the landowners in the Central Dry Zone, had been issued a farmland LUC by November 2014 (Alleverdian, 2016), many parts of the upland areas are not titled at all. Reasons vary, from the complexity of the registration process and the lack of perceived benefits of registering land use rights (if not drawbacks) to more structural issues, such as *(i)* a significant part of land used for agriculture failing to meet the official classification requirements to be eligible for titling under the Farmland law; *(ii)* absence of cadastral information (*kwin maps*) as many upland areas have never been surveyed; and *(iii)* lack of information and interest of informal occupants of VFV land in upland areas.

Rights to use farmland under the Farmland Law, for instance, are recognised through the issuance of LUCs, which can only be obtained upon completion of a multi-step approval process. If a farmer's LUC is approved, the farmer must pay a registration fee and register with a District Agricultural Land Management and Statistics Department before a district-level Farmland Management Body issues the LUC. This approval and registration process must be completed every time the LUC is transferred, sold, inherited, leased, or mortgaged. Similarly, the application to obtain the use of and register VFV land is also a multi-layered, time-consuming process with files going up and down through the various layers of VFV Committees. Although both processes involve rather low official costs, these are typically burdensome and imply large opportunity costs.

The process for registering urban land is equally burdensome and complex. As reported by the World Bank (2018), the current process to register grant land leases, for instance, requires several visits to GAD and DALMS offices, as well as the Department of Finance. For foreign investors, this has proven even more complicated if not impossible. The Office of Registration of Deeds (ORD) is reported to be refusing to register leases involving foreign investors without any written explanation that can be appealed, even though this is expressly provided for in the Investment Law. Investors report this practice to be a major challenge for all large infrastructure and real estate projects requiring significant debt financing. For this and other reasons, the World Bank Ease of Doing Business Index 2020 ranks Myanmar's performance in registering urban property in the 125th position among 190 economies.

Numerous other types of land are not even eligible for registration because they are not legally recognised. These would need to be first defined and recognised in the law before they can be registered. This is the case of customary land for instance. Data on the extent of land under customary tenure are unavailable although such land is widespread throughout the country and the norm in upland areas (FAO and MRLG, 2019). Other types of land – communal grazing land, water rights, forest rights, national government land and local government land and informal urban settlements – each with their own unique set of rights, restrictions and conditions also need to have their rights regularised/registered and secured in the land register.

In addition, the registration of land use rights in some case may not necessarily lead to higher land tenure security, particularly with regards to VFV and farmland, whose land use rights may be withdrawn if the numerous conditions and administrative procedures are not respected. Altogether the framework provides limited incentives for landholders to seek registration, with the exception of better access to credit by Farmland holders (LUCs can be given as collateral against seasonal credit from the Myanmar Agriculture Development Bank and other commercial banks).

Absence of land use planning and complex land use change processes

At present no law governs land use planning in Myanmar and hence no process exists to co-ordinate land planning at the regional level or with sectoral plans such as mining or infrastructure. The NLUP anticipates that the future National Land Law will cover a "participatory, transparent and accountable land use planning process." It anticipates developing land use plans starting with participatory land use planning at township, town, ward, village-tract and village levels, with those plans being amalgamated at each higher level – district, region/state, then union level.

Until a clear land use plan and management framework is in place, procedures to change the designated land use remain specific to each type of land (e.g. under the Farmland or VFV law). Currently, these are typically long, complicated and expensive. One emblematic example is the case of the Farmland Law by which farmland cannot be used for any other purpose than agricultural crops. As such, even if only a small plot of land is to be used for a different purpose (e.g. a telecommunications tower or livestock or fish production (fishponds) for instance), a land use change process must be followed before the lease can be granted and registered. This is a typically lengthy and expensive process requiring ministerial level approval in some cases (e.g. conversion of paddy land) and regional approval in others. Even if the land use change is approved and the lease becomes registrable, it may likely be subject to late registration penalties or even time-barred from registration. While investors may have deeper pockets to endure the higher costs associated with such inefficiencies, local community members with limited understanding and resources often find their resources depleted by repeated trips to far off government offices (Kapoor *et al.*, 2018).

The conversion of VFV land is equally burdensome. The VFV law permits application by local farmers to secure a Permission Order for use of VFV land not already used, which can then be re-classified as farmland, for instance, if it is determined that the land is being used for stable crop production (Farmland Law, rule 34). This is, however, a long and complicated process that is not clearly set out in the VFV Rules.

A more detailed procedure is established in Farmland Law Instructions, but the hierarchy of the legal regime is not clarified in any of the laws. In addition, in many cases, efforts to follow the necessary steps for reclassification are not followed due *inter alia* to the complexity and perceived lack of legal authority to complete a reclassification process. As such, practitioners report that vacant land reclassifications processes typically result from negotiation and discussion with the authorities involved, rather than as a result of following a clear pre-established process (Landesa and Namati, 2015).

Overly strict land use policies

As noted earlier, Myanmar's land regime imposes very strict conditions on land use, notably for paddy land, which in some cases contributes to weakening land tenure security. If land use rights holders fail to respect such conditions, their land use rights may be withdrawn and, in some cases, they may be charged with criminal penalties for non-compliance. Additional restrictions on land use rights apply to foreign investors (discussed further below).

- *Restrictions on use*. Farmland use, in particular, remains heavily regulated. The relevant Farmland Administration Body (FAB) needs to grant permission for farmland to be cultivated, used to grow other crops than initially permitted or to be used for non-agriculture purposes, as well as if the land sold, mortgaged, leased, exchanged or given to foreigners. It also cannot be left fallow without a sound reason. If the permitted land use conditions are breached, the land use right holder may be required to pay a fine or remove the buildings built without permission or even face eviction. In the case of failure to comply with such requirement, the land holder may be imprisoned for a period ranging from six months to two years.
    - In the case of VFV land, the land needs to be cultivated within four years – 15% of the allocated land within the first year, 30% in the second year, 30% the third year and 25% the fourth year – and within only two years for smallholders. Otherwise, land use rights may be confiscated. This renders it impossible to practice shifting cultivation on the land. In this respect, the ADS has sent a positive signal by calling for the abolition of these measures restricting farmer's crop choices and techniques.
- *Restrictions on the size of landholdings* applies for certain types of activities on VFV land. The 2018 amendments to the VFV Land Law significantly reduced the land that can be allocated to companies. Instead of allocating 5 000 acres at a time for perennial plants and industrial crops up to a maximum of 50 000 acres (with the possibility to grant more than 5 000 acres at a time with cabinet permission), the new limits for perennial plants, orchard and industrial crops are 300–3000 acres at a time, up to a total of 30 000 acres. 75% of the existing land must be cultivated as a condition for access to additional acreage. As before, the limit (now 3 000 acres at a time) can be exceeded with cabinet permission. The acreage limit for other types of agricultural activities remained unchanged. Rural farmers can be allotted land not exceeding 50 acres for family-sized farms.
    - The size of holdings of farmland is not limited in the Farmland Law. Holders of LUCs, however, typically have smaller plots of land so leasing land from farmers to make up a large-scale plantation would require a series of negotiations with individual farmers in the same area to lease their land. While possibly too burdensome for large-scale investors, this approach may mean that plantations that would otherwise trigger the requirement for an ESIA under the EIA Procedures would not be properly scrutinised for their environmental impacts. Related concerns have, for instance, arisen in relation to banana and watermelon plantations and merit further policy action by the government to fill this loophole (Frontier Myanmar, 2019; Boutry *et al.*, 2017).
- *Restrictions on transfers, mortgages*: While farmland use rights can now be sold, mortgaged, leased or used as collateral, VFV land cannot be mortgaged, sold, sub-leased, divided or otherwise

transferred without the approval of the Union Government. In reality, however, much VFV land has reportedly been sold by grantees (San Thein et al., 2018).

- *Time limits*. While farmland use rights are granted as long as required conditions are not breached, land use rights on VFV land are limited to 30 years for perennial and orchard crops, livestock and aquaculture but can be extended for another 30 years. They are unlimited for seasonal crops, unless conditions are breached, and for government-approved projects (OECD, 2014[2]).

Lack of clarity and costly land transfer procedures

National and foreign investors can acquire land use rights in Myanmar in numerous ways. The process varies across the different types of land, but typically consists of long and complex procedures with various administrative bodies from multiple ministries and layers of administration. Numerous conditions are also imposed on land transfer, including additional ones when such transactions involve foreign persons.

Unclear relationship between the Myanmar Investment Law and other land laws

The Myanmar Investment Law (MIL) of 2016, which unified the investment regime for foreign and domestic investors, includes specific provisions with respect to land. A Permit or Endorsement from the Myanmar Investment Commission (MIC) may be required for an investment in the following two circumstances:

1. The investment is on the list of land transactions that trigger the requirement to apply for an MIC permit, whether or not foreign investors are involved (Box 8.4). Projects with a significant land footprint need to apply for a MIC Permit;
2. The investor would like to obtain a long-term lease of land or building. This is particularly relevant for foreign investors who are constrained to short-term (1 year) leases under the relevant legislation (The Transfer of Immovable Property (Restriction) Act – TIPRA). In this case, the investor must apply for a MIC permit or endorsement as a condition for obtaining a Land Rights Authorisation (LRA) under the MIL. The LRA entitles the investor to an extended period for a lease for land or buildings – up to an initial period of 50 years, either from the government or private entities, with an extension of two consecutive periods of 10 years (up to 70 years total) with the approval of the MIC. Investments in least developed and remote regions can get even longer-term leases with the permission of the parliament. The MIL imposes requirements as part of the LRA process to ensure that land authorised for investment for extended time periods will be used responsibly (Box 8.4).

Box 8.4. Land-related requirements under the Myanmar Investment Law

The following investments require a MIC Permit:

(a) Businesses / investment activities that are strategic for the Union (many of these may include a substantial land footprint):

- investment exceeding USD 20 million in any business in the area of communication and information technology, pharmaceutical technology, biotechnology, similar technologies, energy, infrastructure and urban development, extraction of natural resources and media;
- a concession or contract with a government authority with an expected investment value exceeding USD 20 million
- investment by foreign investors or investment exceeding USD 1 million by a Myanmar citizen investor along the border or in conflict affected area

- cross-border investment by the foreign investor or investment exceeding USD 1 million by Myanmar citizen investor
- investment across the Regions or States within the Union
- investment in agriculture involving more than 1 000 acres of land
- investment to carry out other business except agriculture on more than 100 acres of land

(b) Large capital-intensive investment projects over USD 100 million

(c) Projects which have large potential impact on the environment and the local community, including projects that:

- Require an EIA (see EIA Procedure Notification 616 / 2015, Annex I) for the list of types of projects that require an EIA
- Are located on a designated protected or reserved area or major biodiversity area or areas selected and specified to support the ecosystem and cultural and natural heritage, cultural commemoration and unspoilt natural areas
- Includes the rights to occupy or use land that:
  - has been or is likely to be acquired through expropriation, compulsory acquisition procedure or by agreement in advance of such expropriation or compulsory acquisition procedure and will either: (i) cause the relocation of at least 100 individuals permanently residing on such land or (ii) comprise an area of more than 100 acres
  - comprises an area of more than 100 acres and would be likely to cause involuntary restrictions on land use and access to natural resources to any person having a legal right to such land use or access
  - comprises an area of more than 100 acres and which is the subject of a pre-existing bona fide claim or dispute by a person regarding rights to occupy or use such land in a way which would conflict with the proposed Investment
  - would otherwise adversely affect the legal right of at least 100 individuals occupying such land to continue to occupy such land

(d) Uses state-owned lands and buildings

MIL land rights authorisation process

A land rights authorisation (LRA) application can be submitted concurrently with the application for a MIC permit or endorsement. The MIL does not specify the type of land that an investor can lease. The State and Regional Investment Committees can assess and accept LRA applications up to USD 5 million, following the procedures below (MIC Notification 25/2017).

An investor must complete a number of steps concerning land to apply for a MIC Permit:

- Investors will need to identify the land that is of interest, its current classification, its ownership, and whether a change in land use is required.
- The investor will have to enter into a draft lease for the land as this must be submitted as part of the MIC process.
- If the land use classification must be changed, the investor must obtain a recommendation letter or approval of the proposed land use change from the relevant land authorities.
- If the investor intends to enter into a lease or joint venture agreement with a state entity, such as MOALI, the draft must have been presented to the Attorney-General's office and the recommendations from the Attorney-General's office must be attached to the MIC application.

- The project should be screened by ECD for whether it requires an EIA or Initial Environmental Examination (Chapter III of the EIA Procedure), and if so, a proposal/plan for an EIA (but not the EIA itself) will need to be submitted to the MIC.
- A number of documents an investor must be submitted with respect to land as part of an application to the MIC, including:
- information on the land and buildings, the landlord and the requested period for the LRA
- If there must be any proposed change in land use of the land necessary to carry out the investment, the investor must submit a recommendation letter or similar document or approval from a state or regional government or other governmental department and governmental organisation endorsing any proposed change in use of the land to carry out the investment
- A draft of the lease from the private owner or, if it is government land, from the respective line ministry or department.
- If the land title for the land is not owned by the investor or the current owner, the investor can submit 'sound ownership documents' that MIC can accept 'if it reasonably believes these to be true.' Given that Myanmar does not have a unified cadastral system and that proof of land ownership can be demonstrated with a variety of types of documentation (tax receipts, different forms, etc.) this provision provides the flexibility to take into account different types of documentation.
- The MIC or a state/regional MIC screens the application according to a set of criteria and with respect to land those include whether:
- The land over which the investor has applied for a LRA is able to be used for the purposes contemplated in the investment under applicable laws, whether presently or following the completion of a change of use procedure
- If the investor's proposed use of the land will or may be likely to require any significant alteration of topography or elevation.
- Whether it is necessary to impose conditions in the LRA, although it is not stated what kinds of conditions may be imposed i.e. whether these could cover specific environmental conditions for example.

Once the investor has been issued with an LRA, it must submit details to the MIC of: (i) the land or building lease agreement; (ii) extending the term of the lease; (iii) the approval of change of land use, providing copies of the relevant documents. Furthermore, the lease agreement must be registered at the Registrar Office of Deeds and Assurances in accordance with the Registration Act.).

Source: Myanmar Investment Law and Myanmar Investment Rules.

Despite the level of detail specified in the MIL and the MIR, the MIL is missing some important points of clarification. Neither the MIL nor the MIR specifically address the relationship between the MIL and other land processes – a gap that has caused confusion to investors. DICA has explanations on its website about how labour law and environmental law requirements can apply to an investment, but it does not have explanations in relation to land law. Several dimensions could be clarified:

- The *relationship and sequencing between the MIL's LRA process and requirements for obtaining land use rights under Myanmar land laws*: DICA has clarified informally that the LRA process does not permit investors to bypass the complicated requirements of acquiring land use rights under land-specific laws. The LRA process solely allows the extension of the applicable lease period, thus permitting foreign investors to bypass the lease term restrictions under the TIPRA. A lessor will still need to obtain the specific approvals and follow the specific procedures for the specific type

of land in question before a lease can be legally concluded and registered, including complying with any possible restriction on foreign investors (discussed further below).

- *The relationship between MIL and obtaining land via a government agency process, such as a concession – i.e.* clarifying whether it is still necessary to go through the LRA process or the land use would be covered in the concession agreement. The experience of investors in power projects seems to suggest that land for use in concessions is typically not covered through by concession procedures and that investors must be prepared to source land on their own (VDB-Loi, 2018). In principle, the government can acquire land for public purposes under the new Land Acquisition, Resettlement and Rehabilitation Law (2019), which can include projects with private investors. Presumably land can also be leased from a government agency through a straightforward land lease without having a separate operating contract (such as a concession), but this could also be clarified. In addition, DICA could also clarify if a land lease with a government agency requires the Attorney General's approval and the sequencing for this (Box 8.4).
- *The relationship and sequencing between the MIL's LRA process and any land expropriation process – i.e.* clarifying whether it is still necessary to go through the LRA process or the relevant land use rights are automatically conceded to investors as part of a project's land expropriation process under the Land Acquisition Act (or other expropriation process).
- *The relationship between the MIL and other authorities in the case of mortgages on land use rights by foreigners*. Under the TIPRA, foreigners are not allowed to acquire immovable property by way of mortgage without special government permission. However, the MIC has the authority to make a case-by-case evaluation on the ability of foreign investors to provide security over land and buildings pursuant to the MIL, but requires the prior approval of the Central Bank of Myanmar. The right and procedures to mortgage a property will also depend on the specific provisions of the land laws. The entire process of mortgaging land use rights could be further clarified.

Inefficient property tax system

Myanmar's current property tax system fails to stimulate property transactions and efficiently collect revenues for the government. The World Bank (2018) notes that in rural areas, the administrative costs exceed the revenue collected. This is because taxes are levied on agriculture land based on historically low rates established in a schedule that is more 70 years old now. In cities, there is no proper value-based property tax. Instead, there is a building tax fixed at 10% of the 'standard rental rate' in the Yangon region. The proper application of this system is onerous as it requires the systematic collection of rent value transactions of properties being rented. Most countries rely on value-based property taxes, particularly in urban areas.

Myanmar has one of the highest property transfer taxes in the world according to the World Bank (2018), which creates an additional disincentive for registering transactions and induces the under-declaration of property prices. Taxes on property transfers apply as follows: (i) the buyer of the property is taxed progressively between 3% to 30% depending on the property value; (ii) in addition, a 2% stamp duty is levied on property located within the three City Development Committees or 5% if located outside; and (iii) the seller is taxed at a 10% flat rate. These rates are in stark contrast to those levied in neighbouring economies and elsewhere (e.g. up to 2% and 3% in Thailand and Malaysia, respectively). The World Bank (2018) suggests eliminating or reducing the tax to no more than 2% (in line with ASEAN neighbours), and granting amnesty to past informal transactions to encourage their registration.

Weak regime on compulsory land acquisitions by the state

A new Land Acquisition, Resettlement and Rehabilitation Law was approved by the Parliament in August 2019. Once effective (it still needs to receive presidential assent to become effective), the new law will repeal the current regime which dates from the colonial era (Land Acquisition Act of 1894).

Early commentators have praised the law's integration of land acquisition with resettlement and rehabilitation and the fact that it requires future land acquisition to include environmental and social impact assessments. It also provides for the rights of the local people to their historical and cultural heritage to be protected and imposes more transparency in the implementation of land acquisition, resettlement and rehabilitation processes by requiring the participation of the local communities and technical experts, in addition to Government officials and the landowners, throughout the process (VDB-Loi, 2019). However, without discrediting the merits of the law for pursuing these goals, the new law falls short of addressing many weaknesses of the previous regime.

Compulsory land acquisition by a state is an accepted state function. Most countries have constitutional or other legal provisions allowing for public expropriations for public purposes, public uses, or in the public interest, and these takings may occur for many reasons: transport infrastructure, public buildings and utilities, and defence purposes (military bases).

Myanmar's legislation to date, including the new law, fails to establish the necessary safeguards for compulsory land acquisitions by the state (land expropriations) to be carried out in a lawful manner consistent with internationally accepted standards, notably those stipulating that expropriations should occur only for a well-defined public purpose, under due process of law and against prompt, adequate and effective compensation. It also falls short of other domestic practices in this respect, such as the NLUP and MIL (see Chapter 2 for a discussion of the MIL).

Until the issuance of the new law, there was no comprehensive law on land acquisition by the public sector, compensation or resettlement; instead there was a patchwork of laws. Several rules applied in different circumstances. No standard methodologies were in place to ensure consistency in procedures, including for compensation. There was also no independent appeal body to which affected persons could have recourse, and there were no specific rules about resettlement.[7] Some specific relocation actions had been carried out at the Thilawa Special Economic Zone and Letpaduang copper mine, but these were much criticised.

The new law remains equally problematic in many aspects. Among other issues, it maintains a wide scope of application, allowing for compulsory land acquisitions by the state for loosely delimited "public purposes", including for instance for the "development of the country in accordance with the national economic policy". One can imagine the amplitude of projects that may fall within this consideration, notably because there is no accepted jurisprudence on what would qualify as 'public purpose'. The new law also establishes a specific regime for 'urgent acquisitions', essentially allowing the government to bypass the normal procedures without any clear delimitations. In some instances, such 'urgent acquisitions' may possibly constitute forced evictions, in contravention of the International Covenant on Economic, Social and Cultural Rights, to which Myanmar is a state party (MCRB, 2018; PILPG, 2017a).

The risk of abuses is aggravated by the lack of an independent review process. The law provides the government with wide discretionary powers to determine when 'public purpose' or 'urgency' situations hold and ultimately and solely to decide on the legality of its own expropriation actions. This is a clear impairment of due process. Complaints regarding an acquisition made under the law can only be brought to and decided by government bodies. The courts only have a role with respect to determining compensation and damages; the acquisition itself cannot be challenged in court.

The lack of clear definitions further adds considerable uncertainty with regards to who is entitled to rights provided for in the law. It adopts vague terminology with respect to who is entitled to compensation and damages under the law, notably 'landowners' being "a person and his household who owns the land with

strong evidence". While it provides for a non-exhaustive list of possible landowners which, to a certain extent, contributes to delimit what constitutes 'strong evidence' – recognising inclusively customary tenure holders in addition to those officially registered in the land record or that acquired the land in accordance with any existing law – it remains unclear how such a provision will be applied. As stated earlier, in many instances documentation is lacking or flawed and customary tenure is not fully recognised in other laws. It is unclear if there would be fair processes for determining 'strong evidence' by local governments as stipulated in the law.

Similarly, the definition of "persons related to the acquired land" is strangely narrow, raising questions as to the extent to which other persons would be entitled to damages arising from land acquisitions under the law. The inconsistent lexicon used throughout the law further thwarts legal clarity (e.g. 'landowner', 'person whose land is legally acquired', 'the relevant responsible person').

The new law also provides for the Land Acquisition Implementation Body, which is tasked under the law with undertaking all matters related to a land acquisition, to negotiate with landowners after a notification declaring the need and intent of land acquisition has been issued by the Central Committee. But there is no provision determining minimum standards for such negotiations (e.g. identifying and determining the relevant landowner-counterpart for the negotiations; defining what constitutes a 'negotiation' process, including *inter alia* with respect to minimum length of time, format and content of negotiations and other minimum standards needed to ensure an adequate and fair process is respected etc.).

The law also provides little incentive for the government to reach balanced negotiation outcomes, since it allows the acquisition to move ahead anyway even if landowners are not satisfied with the result. In addition, the law establishes strict penalties, including prison sentences, for offences which are not well delimited in the law, such as "obstructing, hindering or deterring the body or person performing the functions assigned under this Law", and which can potentially be used to pressure affected persons in negotiations. The lack of minimum negotiation attempt standards may render an already difficult process even more complicated, and may unintentionally lead to an excessive number of cases being appealed to the courts.

Provisions concerning compensation and damages are equally unclear and have little resemblance with international standards of prompt, adequate and effective compensation. The measure of compensation is the "local market value of the acquired land and building" plus relocation and resettlement expenses. The law does not explain what "local market value" means or when and how it should be assessed, nor does it provide for this to be disciplined by rules yet to be established. Some provisions take into account the value of seasonal crops grown on the land, but other possible income-generating assets, *e.g.* natural resources, forestry, lakes and rivers, are not contemplated. The law is also silent on the modalities of payment, notably in relation to the form and time that compensation and damages are to be paid.

Generally, compensation should be paid without delay prior to the actual taking of the property by the state, and paid in easily convertible or freely useable currency. It should also reflect the 'fair market value' of the property concerned immediately before or at the time when the expropriation was publicly announced, or when the expropriation occurred, whichever is applicable, as property normally loses value after the expropriation. Such an assessment typically takes account of all the possible income-generating aspects of the land, if any. It sometimes considers the present value of potential future profits lost by the investor due to the acquisition, which may at times be higher than the land value computed through backward-looking valuation methods (e.g. sunk costs or replacement value methods). Such a standard formulation of the measure of compensation for lawful expropriation ('fair market value') is, for instance, the language adopted in the ASEAN Comprehensive Investment Agreement to which Myanmar is a party (see Chapter 2 for more details on investment protection in Myanmar).

For investors, this means that additional steps are necessary to supplement expropriation carried out by the government to ensure projects better align with international standards (e.g. IFC Performance

Standard No 5 on Land Acquisition and Involuntary Resettlement and No 1 on Environmental and Social Management Systems).

Until the NLL is adopted, several laws will continue to lay out rules for land acquisition by the government and compensation:

- The *Land Acquisition, Resettlement and Rehabilitation Law* commented above. Under the previous law (Land Acquisition Act of 1894) there was no clarity about which laws prevailed with respect to expropriation when there was overlap with specialised land laws. The new law addresses this to some extent by exempting Farmland or VFV Land from its disciplines on payment of compensation and damages, but its relationship with other laws remains unclear. Concerns also persist in relation to possible implementation inconsistencies. The new law repeals the previous law from 1894 but the rules and orders issued pursuant to the old act will remain applicable if they do not conflict with the provisions of the new law, which may to add to more confusion and fragmentation.
- The 2011 *Special Economic Zone Law* places the burden on developers and investors to transfer and pay for compensation costs associated with land-based investments in SEZs.
- The 2012 *Vacant, Fallow and Virgin Lands Law* permits the state to reclaim VFV land: (i) for public purposes such as the discovery of cultural heritage or minerals or other natural resources, and for infrastructure. In these circumstances, compensation is calculated by current value to cover the actual investment cost of the legitimate owner, but this must be agreed with the cabinet; and (ii) permission to use VFV land can be revoked for failure to meet the strict conditions of use, with compensation but also with forfeiture of security deposit. The VFV Law and Rules set out only limited provisions on compensation and do not provide guidance on how to calculate or pay compensation.
- The 2012 *Farmland Act* (2012) permits FABs to revoke the LUCs if any of the strict conditions of use or administrative procedures are not complied with in full. No specific safeguards are provided and no access to independent judicial review of decisions. The government has the right to retake possession of land for state or public interests if citizens are adequately compensated, including compensation for improvements and construction on the land. The law does not define state or public interests, nor does it provide any principles and methods for determining land valuation or compensation, nor does it provide for judicial review of decisions (PILPG, 2017).
- The 2015 *Environmental Impact Assessment Procedures* apply to any project that has the potential to cause any adverse environmental, social, socio-economic, health, cultural, occupational safety or health, and community health and safety effects. They specifically note that projects that involve involuntary resettlement must adhere to international good practice (as accepted by international financial institutions including the World Bank Group and Asian Development Bank) on involuntary resettlement, until specific procedures are issued by responsible ministries. As no such procedures have yet been adopted, these international standards are compulsory for any project covered by the EIA projects and involving involuntary resettlement.
- The MIL sets out specific requirements for the expropriation of investments: according to law, in a non-discriminatory manner, for a public purpose and providing fair and adequate compensation, based on the market value at the time of expropriation. At the same time, the MIL provides a broader balancing test, weighing up a number of other factors in deciding the final compensation (fair consideration of public interest and the private investor's interests, taking into account the investment's present and past conditions, the reason for expropriation, the profits acquired by the investor during the term of investment, and also the duration of the investment).

Lack of adequate dispute resolution mechanism for land-related disputes

Myanmar's fragmented land regime provides for three different bodies with some mandate to resolve land disputes (Central FAB, Central VFV Committee, the Central Committee for Re-inspection of Confiscated Farmlands and Other Lands), but as for other issues it lacks specific guidance on roles, responsibilities and authorities of government officials serving at different levels of these mechanisms or the procedures they are authorised or allowed to use – for the officials or those participating in the procedures. Lack of clarification of the authority often results in disputes or grievances being elevated to higher levels when they might be settled at lower ones (MyJustice, 2019[3]). There are some cases of land owners bringing cases to court, but the judicial system is slow, complicated and corrupt according to some (Kapoor *et al.*, 2018). In such a context, many conflicts remain unresolved (San Thein *et al.*, 2018).

The *Farmland Law* establishes a dispute resolution structure, but it is plagued with conflicts of interest and, hence, is said to lack impartiality. Farmers must bring their complaints to the FAB, which may be the same administrative body responsible for the contested decision. No mechanism exists for alternative dispute resolution or judicial review of FAB decisions, nor any provisions to hold decision-makers accountable (PILPG, 2017).

The *VFV Law* suffers from the same lack of impartiality as the Farmland Law, as decisions of the VFV Central Committee are final, and it is only with the 2018 amendments that representatives of local ethnic groups, farmers and CSO representatives, and experts are to be appointed to region or state committees. In principle, land governance has been highly concentrated in the hands of village tract headmen, who act as political brokers between the government and villagers. But in the absence of adequate checks and balances, corrupt practices have prevailed at the expense of the weakest and dispute arbitration decisions were often rendered in favour of the 'highest bidder' (Boutry *et al.*, 2017).

The *MIL,* on the other hand, has established a quite sophisticated dispute resolution mechanism, including a grievance mechanism that allows affected persons to complain to the Investment Assistance Committee established to prevent and resolve disputes before they escalate to a legal dispute. Such a measure, however, is not yet operational (see Chapter 2). It is also not clear how the MIL provisions interact with other provisions established in specific land laws. In principle, the MIL prevails over other laws on matters provided in the MIL, but it is not clear how this process takes place.

Concerns with land restitution processes and land in conflict-affected areas

Land restitution and land in conflict-affected areas are broad challenges, involving issues and policies well beyond the scope of this *Investment Policy Review*. Other fora are more appropriate to discuss solutions to these specific complex matters. It is important to recognise here, however, that such challenges affect the investment climate too. In particular, the current situation increases the perceived risks and transaction costs for potential responsible investors who are committed to avoiding and addressing adverse impacts arising from or associated with their operations, supply chains and other business relationships (see section below).

Land restitution and reinvestigation

Myanmar has had a long history of land conflicts, and a principle source of land insecurity has been the lack of rule of law as evidenced by the various instances of land confiscation. Many were irregular, occurring without explanation or compensation during decades of military rule for military settlements, military linked businesses and private businesses of military personnel. In February 2019, the Re-investigation Committee stated that they have received 7 119 complaints cases, of which 3 168 have been resolved, but other sources estimate the number of complaints to be as high as 15 000 (LIOH, 2017). The process has demonstrated the multifaceted challenges of dealing with land return issues – such as powerful political and military forces, complicated procedures, a civil service tradition of avoiding making decisions and administrative bottlenecks.

Solutions to such ingrained challenges typically require a range of policies developed in close consultation and collaboration with affected parties and civil society. The experiences of other countries may be useful to inform the design of such policies in Myanmar. A review by Landesa and Namati (2015) brings forward some successful policies implemented elsewhere that could be considered in Myanmar given some of the challenges of the policy currently in place: "Addressing past grievances in land should not begin as a zero-sum approach in which the aggrieved party receives the land, and the present user-claimant must vacate. Other more effective approaches to restitution programmes include: a mix of ownership (or long-term rights) in which the disputed land is divided, and one party provides support to the other; or states may add to the pot through compensation either in cash, new land, or shares in development. In mainland China, [Chinese Taipei] and South Korea, […] providing equity shares in non-agricultural development was an effective approach in compensating for land acquisition, and in South Africa cash compensation was successfully used for those who had suffered from past evictions [though in Myanmar in-kind land compensation may be needed to restore livelihoods]" (Landesa and Namati (2015, p. 24).

Land in conflict affected areas

Numerous ethnic armed groups across the seven ethnic states, in other regions, and in self-administered areas operate separate systems of administration at the subnational level, including on land governance. This can include: formulation and public presentation of land policies for their ethnic national areas; land registration and administration efforts; support for community documentation efforts; research and demarcation of boundaries; and, training and public education on land documentation (USAID, 2017). The presence of two land administration approaches poses a real challenge to responsible investors in determining whom to consult and which authority should be dealt with – ideally both. In these areas, investors need to consider carefully their ability to conduct business in a conflict-sensitive manner that is in line with expectations of responsible business conduct. This requires enhanced due diligence and careful consideration of the investor's capacity to manage such a complex operating environment.

In general, in areas affected by conflict, historically or presently, investors need to be aware of potential restitution claims by refugees and internally displaced populations (IDPs) who may have been forced off the land but retain legitimate claims. In such areas, investments may have to be reconsidered not only because of the legal risks involved in land transactions, but also to act responsibly by avoiding aggravating situations of conflict. The recent displacements in Northern Rakhine State and takings of lands of displaced populations, for instance, makes it very difficult to address the situation in ways that can be considered to recognise the rights of displaced populations.

In Myanmar, the scale of land dispossession resulting from the long-running conflicts is enormous, involving millions of acres of land and millions of people forced to flee from conflict over the past several decades. Many will seek to exercise their restitution rights in the context of their eventual return. Such processes are complicated but not unprecedented. Many other countries have addressed land rights in their peace processes and engaged in restitution programmes (Displacement Solutions and Norwegian Refugee Council, 2018).

Control over land and resources is intimately intertwined with the on-going conflicts and negotiations to end them. The Panglong 2 peace talks held in mid-2017 resulted in agreement of ten basic principles developing a people-centred, progressive land policy based on justice and fairness (Box 8.5). In addition, the 2016 Nationwide Ceasefire Agreement between the government and the Ethnic Armed Organisations addresses a range of housing and land property rights issues. Nonetheless, commentators have warned that "there is a significant risk in Myanmar that because of the deep vested interests […] housing and land property issues may be perceived as too sensitive or complex to be properly addressed in any eventual agreement" so continued attention and effort are needed (Displacement Solutions and Norwegian Refugee Council, 2018, p. 5). Others have raised concerns that the 2018 VFV Law amendments will further exacerbate risks of increasing land conflicts and challenges in formal peace negotiations (Gelbort, 2018[4]).

Box 8.5. Land and the Panglong process

Panglong 2 - Ten principles on land and the natural environment:

1. A countrywide land policy that is balanced, gender inclusive, and supports people-centred long-term durable development.
2. Based on justice and appropriateness
3. A policy that reduces central control
4. Include human rights, international, democracy and federal system norms in drawing up land policy.
5. Policy on land matters should be transparent and clear.
6. In setting up policy for land development, the desire of the local people is a priority and the main requirements of the farmers must be facilitated.
7. All nationals have a right to own and manage land in accordance with the land law. Women and men have equal rights.
8. Both women and men have equal rights to manage the land ownership matters in accordance with the land law.
9. If the land right granted for an original reason is not worked on in a specified period, the nation can withdraw the granted right and concede it to a person who will actually do the work.
10. To aim toward protecting and maintaining the natural environment and preventing damage and destruction of lands that were social, cultural, historical heritages and treasured by ethnic nationals.

A recent review of what would be needed to ensure that housing and land property restitution rights are incorporated into the ongoing peace process and within broader national legal reform efforts, including work towards a national land law, noted that the Central Committee for Re-inspection of Confiscated Farmlands and Other Lands alone is not sufficient. It recognised that there have been positive measures to address questions of housing, land and property restitution for refugees and IDPs within the context of the peace process and within broader governmental initiatives and legislative measures concerning land, but that more needs to be done. The review provides a detailed overview of steps to be taken to address the issue within the peace process and beyond, building on the "growing awareness that the resolution of housing, land and property restitution claims and disputes can be a vital contributor to economic and social stability, as well as broader reconciliation efforts within post-conflict peace building efforts within the country" (Displacement Solutions *et al.,* 2019, p.37).

The NLUP article 38 usefully recognises the issue and states that "when managing […] rehabilitation and restitution related activities that result from […] displacement due to the civil war, clear international best practices and human rights standards shall be applied, and participation by township, ward or village tract level stakeholders, civil society, representatives of ethnic nationalities and experts shall be ensured."

Weak monitoring of large-scale land allocations

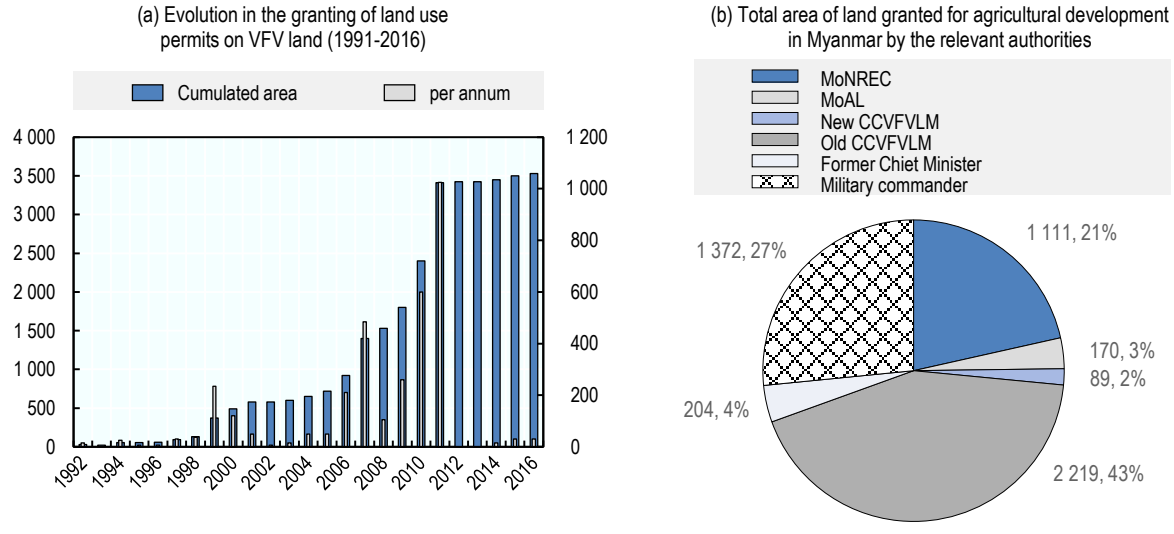
As mentioned earlier, following the political transition and economic opening in 2011, the Myanmar government established a policy oriented towards attracting large-scale private investments in agriculture, arguing that it would bring the necessary expertise, financing capacities and marketing networks to enhance the competitiveness of agricultural production and value chains. The recent policy approach under the ADS signals a departure from this previous large-scale agriculture orientation, placing smallholder farmers squarely at the centre of the new agriculture strategy.

There remains, nonetheless, a legacy of problematic large-scale land allocations carried out over recent decades. Many of the allocations of large land areas for agribusiness, extractives, energy, forestry, infrastructure, SEZs, etc. were carried out without respecting the existing land use rights of local communities. Under weak governance frameworks, large-scale investments may lead to adverse social impacts, particularly displacement, the loss of livelihoods, and a more limited access to land for the local population, resulting in social polarisation and political instability. Besides being a productive asset, land plays a multifaceted economic, social, cultural and religious role (LIOH, 2015; Oberndorf, 2012).

In addition, there have been numerous allocations of large plots of VFV land, which have not always been properly put to use by the new holders. The ADS notes that large-scale land allocations for private investment in the agricultural sector have often failed to result in tangible development of these areas. As little as 20-25% of land allocated under the VFV Law is actually being used according to contractual lease contract agreements (MOALI, 2018; Woods, 2015; San Thein *et al.*, 2017). An assessment of palm oil and rubber plantations in southern Myanmar, using geographic spatial information including data generated by the OneMap project, revealed that only 15% of the total land allocated for palm oil plantations in the studied area had been used for such purposes or remained planted with palm oil as of early 2019, while 35% of the concession area was reported to have been used for palm oil as planned in 2015 (Nomura *et al.*, 2019). While there are a number explanations for such large differences, the degree of compliance with concessional terms remains limited.

Most VFV land allocations took place between 2006 and 2011 during the last years of the military government but also at the peak of the food crisis. More recently, allocations have resumed, but the majority of the large-scale agricultural schemes visible today are a legacy of that particular period (Figure 8.2). VFV land allocations were spread throughout the country but were particularly concentrated in Kachin State – the third largest state – principally to military commanders (1.4 million acres, 34% of the total). Allocations in Kachin State were typically large, more than 50 000 acres, followed by Sagaing Region, Tanintharyi and Shan Regions. In general, large VFV allocations were located in peripheral regions and smaller ones in more central areas (in the dry zone and delta). Regions such as Sagaing and Magwe have VFV land grants that are mainly under 5 000 acres (San Thein *et al.*, 2018).

Figure 8.2. Large-scale land allocations for agriculture (thousand acres)



Note: Underlying data from Department of Agriculture and Land Management Statistics (2017), "List of land transactions on VFV land in the Union of Myanmar from 1991 to December 2016 (database)", Ministry of Agriculture, Livestock and Irrigation; and Forest Department (2013), "Large scale concessions in reserved forests and protected public forests", Ministry of Natural Resources and Environmental Conservation.
Source: Reproduced from San Thein et al. (2018).

With low levels of utilisation, there have been cases where local farmers have opportunistically occupied or re-occupied the land, leading to localised conflicts. Land conflicts also occur when the government resettles communities displaced by infrastructure, mining or other large-footprint projects on land already occupied, thus creating conflicts between the newcomers and those already on the land (San Thein *et al.*, 2018).

The major challenge to ensure the social sustainability of private investments, particularly large-scale investments lies in developing land legislation that benefits both large investors and local communities. The responsible governance of land tenure would minimise the risks of social conflicts, thereby increasing the long-term profitability of investments. Where possible, new models of business partnerships between large investors and smallholders (such as contract farming) could be considered.

Contract farming

Given the importance of agriculture to the Myanmar economy and the significant role played by land policy, the government is looking at alternatives to large-scale land acquisition, and the NLUP and ADS signal that the policy will shift towards more clearly supporting smallholder farmers. MOALI is currently preparing standard operation procedures for contract farming with the idea that these may evolve into a contract farming law in the future. The NLUP specifically acknowledges contract farming and joint venture farming, but requires specific reviews of the work records of companies, mandatory pilots to determine if the contractual approach is appropriate for the local situation and defining and agreeing on mutually beneficial arrangements from the contractual situation (Government of Myanmar, 2016).

This recognises that no single model emerges as the best solution and investments may involve a combination of various models; the success of a specific model is context-specific, and contingent on tenure, culture, history, and biophysical and demographic considerations. The advantage of contract farming as compared to plantation models is that farmers normally cultivate their own fields, while the contractor is released from having to direct control the land or acquire land. In any case, one important condition for success is to adequately share the risks between companies and smallholders depending on the capacity of each party to shoulder them. The FAO *Guiding Principles for Responsible Contract Farming Operations* can help frame the buyer-seller relationship to ensure mutual benefits of arrangements (FAO, 2012a; OECD, 2014).

There has been increased attention to two increasingly prevalent examples of contract farming recently, in watermelon and banana plantations, which may explain the NLUP's caution in noting that models need to be tested (Frontier Myanmar, 2019; Boutry *et al.,* 2017). In the two emblematic cases, land acquisition was not carried out through regular, formal channels. Instead, investors used local brokers to acquire land and establish contact with farmers and village tract administrators (VTAs). While not explicitly prohibited, such arrangements may have sometimes by-passed prudential social and environmental requirements provided in the MIL. The farmers rented their land for a period of time, paid in advance. The investors were responsible for cultivating the land, which was generally done by contracted labour, often foreign. Farmers were typically prohibited from visiting their fields. These arrangements have attracted much attention due to the heavy doses of chemical fertilisers and pesticides used during the rental period, which caused significant environmental pollution (San Thein *et al.*, 2018; Boutry *et al.*, 2017).

A National Land Law to update and consolidate the current framework

The 2016 NLUP clearly signalled the development of an umbrella National Land Law (NLL) to implement the policy and harmonise all existing laws related to land, which provides an opportunity for the government to address many of the weaknesses in the current system. Despite some delay in moving ahead with this reform, the government finally announced in July 2019 the establishment of the National Land Law Formulation and Law Harmonisation Working Committee. According to the authorities, the Office of the

Union Attorney General, the Ministry of Natural Resources and Environmental Conservation, the Ministry of Agriculture, Livestock and Irrigation and other relevant agencies, including the General Administration Department (GAD), are all involved and currently co-operating in the drafting of the new law.

At present, indications are that the NLL will be aligned to the NLUP although the Parliament is currently considering whether to review and revise the NLUP. If this revision process goes ahead, the Attorney General's office has stated that this will not delay the drafting the NLL which will be based on the current NLUP. The government has indicated that the NLL will be an umbrella framework law that sits on top of other land laws, rather than being a comprehensive law that incorporates and supersedes existing land laws. The Attorney General has also confirmed that the NLL will not harmonise existing laws – i.e. address the existing overlaps and contradictions in existing laws. That will be taken care of as part of the subsequent amendment of existing laws to conform to the NLL.

The initiation of the process to develop an NLL is a positive step towards addressing many of the challenges alluded to above. It provides the opportunity to set out a clear framework of principles and rights concerning tenure security, use and transfer of land. The next section proposes a range of policy recommendations addressing many of issues and challenges discussed here. They reflect measures to be considered either in the process of developing such an umbrella NLL or in the substantive provisions of the law and its subsequent bylaws.

Key policy recommendations to improve land tenure security and administration

Implement the NLUP through a structured and consultative process

The NLUP, which has gained widespread (though not universal) acceptance among stakeholders, provides a clear framework and direction for land reforms. It addresses many of the key challenges set out in this review. In particular, it provides strong and positive signalling with respect to customary land, one of the most pressing challenges of tenure security in Myanmar and one that affects a large part of the population dependent on land resources for their livelihoods.

Because the NLUP is so comprehensive, it makes sense to break it down into key building blocks to structure implementation efforts. The EU/FAO FIRST Partnership Programme has proposed the following five distinct but interconnected land reform clusters for the NLUP's implementation, complemented by four crosscutting themes (Figure 8.3).

Figure 8.3. FAO Proposed Structure of NLUP Implementation

Source: reproduced from FAO and EU (2018).

The NLUC has established five work streams and related committees tasked with the NLUP implementation, which generally align with the above components. Four working committees have been formed so far with the following responsibilities: *(i)* NLL Formulation and Law Harmonisation (a drafting supporting team has been formed to support the committee work); *(ii)* National Mapping System (OneMap Myanmar) Establishment and Implementation; *(iii)* Land Use Planning and Co-ordination; (iv) and Agriculture Development Committee, responsible mainly for co-ordinating and implementing outcome 1.6 of the ADS, "Strengthening farmers' land rights and enhanced capacity of institutions involve in agricultural land".

In addition, the NLUC has also decided to establish land use committees in regions and states (and Nay Pyi Taw council) and a National Technical Advisory under MONREC's responsibility. Dispute resolution seems to be an important component missing from the current NLUC committee structure. It may possibly be addressed in the committee responsible for the NLL, but it is important that the topic receives sufficient attention in the reform process, notably considering that the NLL Formulation and Law Harmonization committee already has a very significant workload and given the significant backlog of land disputes. The creation of a dedicated committee or sub-committee that would co-ordinate with the committee on the NLL may be an alternative. There are a number of substantive improvements needed with regards to dispute solution (see related recommendations below).

Once the NLUC has its final committee framework in place, committees will be tasked with coming up with medium and long-term plans. This would provide the much-needed clarity on the process that has been missing to date.

Establish an open, multi-stakeholder process for involvement in the NLUP implementation process and in particular the NLL

It is important that the work of the committees be developed in a similar fashion to the development of the NLUP itself. The NLUP established a solid precedent for multi-stakeholder consultation across the country and could usefully serve as a starting point for the implementation process, including developing the NLL. Given the magnitude of the proposed changes that are likely to affect many livelihoods, potentially for generations, the deeply cultural attachments to land, the potential for political capture, it is important to engage with a wide range of stakeholders: farmers' unions, civil society organisations, communities, ethnic nationalities, women and other vulnerable groups.

On a positive note, the government has sought the participation of various stakeholders in the working committees and Technical Advisory Group established to implement the NLUP, although some argue this resulted from strong stakeholder pressure. The current membership of the four working committees and the TAG involve civil society, private sector, farmers' representatives, parliamentary members including several ethnic state members of the ethnic affairs committee.

The government is to a certain extent starting from a trust deficit, given the significant gap between the adoption of the NLUP and the first Land Forum, the lack of transparency about the process to date and an approach to consultations with stakeholders that is often based on last minute invitations and that leaves little time for participants to plan or prepare. Setting out a commitment and a specific plan for multi-stakeholder consultation helps to start building trust. The government should consider adopting a White Paper that would set out a structured consultation process, including commitments to providing drafts in Burmese and English well in advance of meetings, through a website that is accessible to all, that identifies questions the government seeks feedback on as part of the consultation, and provides a mechanism for providing oral and written feedback. Such a process is necessary for policies to be legitimate and sensitive to stakeholders' perspectives and realities.

Develop the National Land Law and harmonise and rationalise existing land laws

The NLL Committee has three important, inter-linked tasks in taking forward the revision of the legal framework.

The NLL should clearly recognise all formal and informal land tenure rights and delineate a streamlined institutional framework and process for land rights transfers and acquisitions

It is now clear that the NLL will not be an all-encompassing law, but instead an umbrella law that sits on top of other laws. As such, it must set out a clear framework of rights and principles that provide the basis for simplifying and harmonising all other land laws. Building on FAO and EU (2018), the NLL should set out a clear and simple framework of rights as follows:

- *Nature of rights* recognised in Myanmar: this would establish a small number of land classifications and identify, recognise and define a definite set of categories of land rights for: public, private, customary, ethnic nationalities; secondary rights (lease); others. This is the place to recognise *inter alia* customary land tenure rights and any land tenure rights of ethnic nationalities that have been missing for so long from the Myanmar legal framework. It also the place to affirm equal rights of men and women to land to avoid current practices that are biased against women's rights.
- *How these rights are acquired:* identify a clear and defined set of pathways for acquiring land rights: *i.e.* requests to the government, purchase of land use rights, customary occupation, good faith occupation that matures into a legally recognisable claim (adverse possession).
- *Conditions attached to holding the rights*
- Modalities for *transfers of land rights*
- *Extinction of rights,* including through expropriation (see below)
- *Institutional responsibilities in administering land rights*
- *Dispute settlement* (see below)

Develop a comprehensive land law reform process and proposals to update, harmonise and rationalise existing land laws

In parallel, the NLL Committee needs to take on the complex job of developing a plan to harmonise the country's confusing existing suite of land laws. This would entail at a minimum: *(i)* cataloguing and reviewing all existing land laws; *(ii)* proposing replacement laws that simplify the existing framework and harmonise them with the NLL; *(iii)* proposing amendments to any laws that will remain in place to conform with the NLL; *(iv)* developing a clear hierarchy of laws, in particular in the transition period to deal with conflicts among laws until the law revision process is complete; and (v) developing a realistic work-plan and timeframe that includes structured consultations at appropriate points in the process (see above a related discussion in the section on the NLUP). Many stakeholders have highlighted that this process should also build on fieldwork to compare with the actual practices on the ground – particularly in light of the considerable mismatch between existing laws and realities on the ground.

Take action on an interim basis

The proposed land reform, especially when replacing a fragmented legal framework as in Myanmar, will take time. In the interim, making changes to the existing implementing rules and guidelines, or changing emphasis of implementation of the existing land laws can help to address some of the challenges highlighted above. The government has already done so, using the 2016 community forest instructions to allow for greater protections by customary users of forestland through a changed policy rather than an amendment to the law itself (World Bank, 2018). Examples of interim changes that

could be accomplished include: (i) using the VFV Law to improve land access to poor and marginal groups, farmers with small land holdings, and landless households; (ii) issuance by MOALI of instructions to clarify the rights of farmers under the Farmland Law and to address unnecessary restrictions on crop production as set out in the ADS (MOALI, 2018).

In the interim, a moratorium on amendments to existing laws would stabilise the system and prohibit development and implementation of contradictory provisions. Likewise, consistent with provisions in the NLUP that call for the temporary suspension of land allocation to any land user other than for public purposes on customary lands, a moratorium of large-scale land allocations in areas potentially used by local communities under customary practices would help to build trust in the government reform process and limit the potential emergence of new conflicts. An exception could be considered for returned VFV land over which there are no existing claims (including of customary rights holders) or over which land legacy issues can realistically be addressed and there is no risk of infringing on customary rights of local communities.

Strengthen the framework for compulsory land acquisitions by the state

A continuing concern involves land acquisition and expropriations involving large-scale investment developments, particularly where property rights are not well-established and where those living or working on the land have complained about inadequate consultation and compensation. Where such processes were inadequate and unfair in the past, they have accentuated civil discontent and mistrust in the government.

As discussed above, the new Land Acquisition, Resettlement and Rehabilitation Law (2019) sends some positive signals by tying rules on acquisitions and resettlement and rehabilitation, but it fails to establish the adequate safeguards for compulsory land acquisitions by the state to be carried out in a lawful manner consistent with internationally accepted standards. It also falls short of other domestic practices in this respect, such as the NLUP and the MIL (see Chapter 2 for a discussion of the MIL). As such, it is unlikely that it will provide much additional comfort to current and future investors and landholders.

The framework for land expropriations would benefit from further reforms aligning it with international standards in this matter. Notably, the framework should ensure that expropriations occur only in a non-discriminatory manner, for a public purpose, under due process of law, and against prompt, adequate and fair compensation if there are no other feasible alternatives. The regime needs to establish explicit and well-defined limits on the ability of the government to expropriate for public purposes and determine transparent rules on the process of expropriation and the process by which compensation should be determined. Key considerations in this respect relate to:

- ensuring ample transparency and disclosure of material information related to all stages of land acquisitions, from decision-making to implementation and operation, such as: assessments of public purpose and of any related economic, social and environmental impact; appraisals of excluded alternatives; implementation strategies to address any potential harm and any other negative economic, social and environmental impact; and other operational information, including public disclosure of public lease/concession contract terms;
- ensuring the conduct of meaningful, effective and good-faith consultations with land rights holders and affected communities, in particular indigenous peoples or local communities, for obtaining their free prior and informed consent;
- exploring feasible alternatives and solutions to avoid or minimise the physical and/or economic displacement of legitimate tenure right holders;
- where evictions are not avoidable, establishing clear requirements and procedures for negotiating resettlement with affected parties and host communities and protecting affected parties' rights to alternative land, fisheries, forests and livelihoods, while making sure relocations do not jeopardize the rights and livelihoods of others;

- ensuring that compensations are timely and reflect a fair valuation of rights, including of other non-market values, such as social, cultural, religious, spiritual and environmental values where applicable.

The NLUP already set out general principles for land acquisitions that go in this direction:

- Fair, equitable and systematic public participation processes;
- Prevention and control of corruption;
- Effective, consistent and fair valuation systems when providing compensation and relocation for people affected by land acquisitions;
- Rehabilitation of livelihoods for people affected by land acquisitions;
- Permitted investments in the project covered by the land acquisition by affected persons.

In developing these principles in more detail in its national framework, the government may consider following FAO's VGGT guidance on expropriation and the lessons from other countries, such as the experience of India (Box 8.6). The VGGT provide extensive guidance on expropriation and compensation, including developing national legislation that:

- Clearly delimitates the public purposes for which the government may acquire tenure rights on a compulsory basis;
- Sets out transparent, fair procedures for acquiring tenure rights and for providing equitable compensation;
- Establishes measures to guarantee that affected stakeholders are given voice throughout the process, including during the planning phase;
- Mandates that notice is given to all potentially affected persons well in advance of an anticipated project;
- Makes mandatory public hearings at which affected stakeholders may challenge aspects of the planned project and demand downward accountability from planners and government officials;
- Requires that compensation is granted for both registered and unregistered legitimate tenure rights;
- Provides all stakeholders with the right to appeal expropriation decisions.

Box 8.6. Expropriation legislation in India

In India, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act of 2013 regulates land acquisitions, including in connection with public-private partnership projects and provides for compensation, rehabilitation and resettlement for affected persons. One key aspect of the Act is the transparent and participatory nature of the process. There is a requirement to seek the consent of at least 80% of affected families whose land is acquired for private projects and of 70% of such families in the case of public-private partnership projects (Section 2). The process to obtain the consent must be conducted at the same time as a social impact assessment (SIA), undertaken in consultation with local municipalities (Section 4). There must be a public hearing (Section 5) and the SIA must be made available to the public (Section 6). The SIA must consider issues such as whether land acquisition elsewhere has been considered and found not feasible, as well as the impact that the project is likely to have on the livelihoods of local communities. The Act also includes detailed provisions setting out how compensation will be calculated (sections 26–30 and Schedule 1).

Source: reproduced from FAO (2016, p. 53).

Develop a single administration system

The complexity of the legal system is currently matched by the complexity of the land administration system. The current system is ineffective and inefficient, discouraging investors and failing to serve the Myanmar public. An overhaul of the system is needed, and should build on the diagnostic work that has been done with partners and in building the NLUP.

The consolidation and simplification of Myanmar's land framework needs also to encompass the re-organisation of land administration, possibly into a single land authority. The establishment of a single land administration system would help to improve policy and procedural consistency and avoid situations of institutional voids or weak co-ordination among land-related agencies as sometimes observed. This new institutional arrangement should also envision a process for updating and then digitising existing land records and information in a consistent manner (*e.g.* for instance based on the OneMap Myanmar model) with the vision of moving to an unified cadastre and registry system in the future. While many countries with separate cadastre and registry institutions have strong land administration systems, given Myanmar's outdated systems, there is an opportunity to leapfrog to a unified system almost from the start, instead of developing separate systems first and eventually looking to integrate them in the future. A unified system is in principle less prone to inconsistencies and entails lower transaction costs for users.

Such a reform could draw on the framework put forward in the ADS (see Box 8.1 above), which sets important goals for improved service delivery of land administration to the public, including to women and the poorest, in addition to proposing meaningful activities to improve land rights (outcome 1.6). Land administration offices would be mandated to: update and generate cadastral information, register land holding titles, document customary land rights, maintain land management systems, produce new *kwin* maps, resolve land conflicts, address land confiscation issues, inventory and audit VFV land, and implement land allocation and restitution programmes, among others (MOALI, 2018). The World Bank (2018) suggests establishing several model land administration offices with enhanced service delivery to demonstrate how such services could work as a preparatory measure for wider land administration reform.

The single administration system could be disciplined by a dedicated Land Administration Law. FAO and EU (2018) suggests developing a Land Administration Law that includes:

- Provision of public services: first registration, land tenure regularisation, registration of transfers; land use conversions
    - Registration of all categories of land, including 'new' agricultural lands: fishponds, village grazing lands, home gardens and rural settlement plots, land under agro-forestry, rotating cultivation. The registration of individual and communal claims to customary land should also be recognised, as well as women's rights over land should be explicit by systematically encouraging registration in their names on conjugal titles;
- Management of public land;
- Management of land records: updating *kwin* maps, updating LUC information, recording transfers, shifting to a digitised land system based on updated rather than existing land records etc.;
- A rationalised immovable property tax so as not to discourage official transfers of land as under the current system, while discouraging speculation.
- Address institutional arrangements to develop a single Land Administration Authority that would absorb all/many specific land related departments, divisions, committees, commissions: DALMS, VFV Committees, FABs, Survey Department, others
    - The single land administration agency would operate at the village level, dealing with registering land and land use rights transfers, land use rights subdivision and consolidation, land use change, with a set process and non-prohibitive fees. This would help accelerate land registration and streamline and simplify the payment of fees and taxes

- Immediately establish model land offices with a focus on the delivery of good quality land administration services to DALMS' clients to model and test in anticipation of longer-term reforms (World Bank, 2018).
- In parallel, designate one lead land committee in each chamber of the Parliament to deal with land issues.

Establish a land use planning framework

The OECD (2017) makes a number of general recommendations for establishing efficient land use governance systems that are highly relevant to Myanmar. Currently there is no overarching framework for land use planning in Myanmar which leads to inefficient spatial developments and situations of land degradation.

In filling this gap, Myanmar could envisage developing a Land Use Planning Law that would help to ensure a more sustainable and efficient pattern of spatial development, while appropriately balancing public and private interests. Adequate advance planning is essential because once land is built-up it becomes much harder to change its use. For avoiding potential inefficiencies in spatial development (e.g. residential area next to an airport or office buildings far away from public transport networks), there must be high levels of co-ordination across branches of government at all levels of the administration.

Higher levels of government may retain the responsibility over the broad framework setting the planning system and the general environmental and social legislations that help to avoid any negative externalities of different land uses, and establishing rules for protecting historical patrimony. Likewise, they should co-ordinate territorial development across regions and establish the overarching framework to allow the co-ordination of land use planning with other public policies, such as tax, environmental and social policies, as well as with sectoral policies, such as infrastructure development, agriculture and extractives. In various cases, other policies will play a crucial role in supporting or hampering land use planning decisions.

Because land use is highly engrained in the local context, it requires a certain level of decentralisation to local authorities who can better grasp local realities and engage in consultations with the local community. Local authorities should be given more flexibility to decide about detailed land-use plans, including the development of zoning for instance. Some zoning flexibility is important to shape development and allow neighbourhoods to change over time, so regulation and planning decisions should rather address nuisance levels instead of restricting land uses, except in some specific cases (e.g. hazardous industrial areas). For land use planning to work, there must also be appropriate planning procedures, with special attention to information sharing and consultation with local communities, and appeal processes in place.

In line with what has been proposed by FAO and EU (2018), it is also important to develop a land use planning policy and legal and institutional framework that allows the above points to materialise. For this, the government could consider developing a Land Utilisation Policy establishing an inter-sectoral land use vision that brings together land use needs and plans of different sectors and addresses current and future economy-wide challenges such as climate change, livelihoods support, nutrition, environmental conservation (FAO and EU, 2018). Implemented in isolation, land use policies risk generating avoidable negative externalities and inefficiencies (e.g. allocating land for agro-businesses in areas of high biodiversity, such as reserved forests and protected areas).

Develop a land dispute settlement system that is timely, affordable, effective and widely accessible to all

The current means for addressing land disputes is weak and needs complete revamping. A new dispute settlement mechanism could partly draw on the formal system adopted in the MIL and be enshrined in the new NLL (see Chapter 2). It is important for such a system to provide timely, affordable and effective means for settling disputes over tenure rights either through impartial and competent judicial and

administrative bodies or through alternative dispute resolution mechanisms, including arbitration, mediation and conciliation. The latter may allow settling disagreements between parties at reasonable costs and delays where recourse to the judiciary system may often be slow and expensive.

The new system should also formally provide for a mechanism to avoid or resolve potential disputes at a preliminary stage, either within the implementing agency or externally through an independent body. In contrast to the current system, the new mechanism needs to be shielded from conflicts of interest, providing for the involvement of stakeholders in their governance and allowing decisions to be appealed to an independent judicial or administrative body with power to review and if necessary overturn agency decisions.

The new system should also recognise customary and any other established forms of informal dispute settlement in Myanmar, but where such systems exist they should provide for fair, reliable, accessible and non-discriminatory ways of promptly resolving disputes over tenure rights. The government can contribute to strengthen such systems by issuing guidelines and establishing clear mandates for local providers. Some evidence suggest, for instance, that while Ward/Village Tract Administrators play a central role as mediators, resolving disputes at the community level, with very few dispute proceeding beyond this level, they are nonetheless detached from the judiciary, having no system of appeal and referrals, nor clear mandates for dealing with cases (MyJustice, 2018; DIIS, 2017).

The quality of the system also depends on the capacity of its agents to decide and process in a fair, instructed and efficient manner. This requires staff with the necessary skills and competencies in land tenure rights and resolutions issues. For this, capacity building activities are important. In addition, the government may consider establishing dedicated land tribunals or independent bodies to deal with land-related disputes. Alternatively, it may introduce specialised units within the implementing agencies, independent bodies and at the courts to ensure efficient and high-quality decision-making. In all instances, rulings need to be timely, transparent and fully explained.

Wide access to dispute settlement also requires the promotion and facilitation of complementary legal assistance services that help to bridge the awareness and information gap of parties involved in land transactions and disputes, notably of vulnerable and marginalised populations.

Addressing links to the peace processes/ceasefires, including restitution

The NLL process should also be mandated with considering how land issues from the evolving peace processes and ceasefire agreements could be incorporated into the evolving legal framework and other processes and vice-versa – how strengthening tenure security, including customary tenure rights in conflict areas, can catalyse the ongoing peace process (World Bank, 2018). This would include specifically developing or modifying existing systems to address restitution rights of the returning refugees and IDPs or developing one-off restitution measures. In doing so, Myanmar should give due consideration to the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons (the 'Pinheiro Principles'). Any institution or process established for such purposes shall aim for the highest standards of transparency and accountability, and nurture the involvement of local communities, including in the design of policies and their implementation, such as in the development of procedures for re-integration of IDPs and in dispute resolutions mechanisms.

Set up monitoring and reporting mechanisms for large-scale agricultural land allocations

Numerous stakeholders and the ADS have called for priority enforcement of the provisions of the VFV Law with respect to large-scale agricultural allocations. As mentioned above, only about 20-25% of the land allocated under the VFV Law is actually being used according to contractual lease contract

agreements (MOALI, 2018; Woods, 2015; San Thein *et al.*, 2017). The current legal framework provides for land that remains unused for four years to be returned to the state.

In line with Outcome 1.6 of the ADS, this process could include:

- Inventorying issued VFV land focusing on agricultural concessions exceeding a certain acreage (larger than 50 acres for instance);
- Auditing allocated VFV land to assess whether the lands are being adequately used, if they are still in the hands of the initial grantees; review tax incentives and revenue payments;
- Reclaiming VFV land that does not comply with the contractual agreement for land use development (almost some 3 million acres) and *(i)* returning the undeveloped agricultural land to their legitimate, mainly customary rights holders, *(ii)* allocating the land to smallholder farmers and effectively landless farmers; and/or *(iii)* creating social land concessions (MOALI, 2018). While the returning of land to individuals could be pursued, notably in cases where a legitimate individual holder can be easily identified, it may prove more practical to return land to communities as community land. For this, the legal framework would need to be updated to properly accommodate collective forms of tenure and farming;
- Establishing a moratorium on new large-scale land allocations until land reforms are in place, unless it relates to returned VFV land over which there are no existing claims (including of customary rights holders) or over which land legacy issues can realistically be addressed and there is no risk of infringing on customary rights of local communities;
- Improving the collection, management and analysis of data related to large-scale land acquisitions in order to inform day-to-day decision making and policy making. The OneMap project has made some advancements in mapping land concessions in selected areas, providing a good basis model for achieving this at a larger scale;
- Disclosing contracts of any large-scale land acquisitions over a certain acreage (larger than 100 acres would align with some of the requirements in the MIL);
- Reviewing the experience with large-scale agricultural development to assess their efficiency and sustainability, including against criteria on the prevalence of conflicts, local employment, productivity and environmental protection (FAO and MRLG, 2019).

Eliminate or at least restrict criminal sanctions to the most severe cases

Myanmar land laws are replete with criminal sanctions for a wide range of actions that are overly punitive, in many cases counter-productive, and misaligned with international standards, such as the VGGT that seek to strengthen rather than weaken tenure security. The widespread condemnation by farmer's and community organisations, investors and donors of the 2018 VFV Law amendments that criminalise the occupation of VFV land by people who may have been occupying the land for generations is emblematic of the mistrust these kinds of provisions create, just as the government is about to launch a consultation process that will already be challenging.

The legal review as part of the NLL process should include a review and catalogue of all the sanctions across land laws – fines, imprisonment, forfeiture, etc. – and specifically reconsider a more balanced approach to the limited circumstances in which sanctions are necessary. Sanctions should also be reviewed from the perspective of their impact on livelihoods and food security.

Key considerations for responsible investors in agriculture and other land-intensive projects

Detailed due diligence, including consultations and negotiations

Detailed due diligence is a necessary part of any investment involving land to ensure that investors are not involved in dispossession of existing users that does not comport with international standards, given all the challenges and gaps identified in existing Myanmar law. Tenure rights over land are reflected in existing international RBC standards now referenced in the NLUP, such as the VGGT. Companies should take a broad view in consulting and negotiating with occupiers and users of land, recognising that potential claimants or occupants may not have full documentation of their tenure rights, nor in some cases, tenure rights that are protected under current law. Ignoring claims based on long-standing occupancy and use, including customary use, or requiring current occupants or claimants to pursue them through the courts, is not a viable alternative for negotiating access to land in Myanmar. Nor is it practical, especially where claimants are already occupying the land.

Given the lack of a centralised land registry, land due diligence requires on-the-ground consultations and negotiations with land rights holders, their neighbours, village heads and relevant land committees. Consulting with local communities and local authorities will give the investor an insight into their situation, their existing or potential rights and their views and concerns about using the land and to discuss how to prevent or mitigate particular impacts. For larger-scale projects, this may open the possibility of involving local small holder farmers present on the land into the investor's plans for developing the land, as land-connected communities traditionally involved in agriculture may have few other options to restore their livelihoods. Several of Myanmar's laws reinforce this consultation imperative.

The MIL includes changes to existing land use as one criterion for requiring an investor to apply for an MIC approval. While the MIR does not set out how the consultations in these situations must be carried out, investors should be actively involved in the consultation and negotiation process. As noted above, the MIR (Rule 5) requires investors to seek an MIC permit if land users are affected in the following ways:

- The land has been or is likely to be acquired through *expropriation, compulsory acquisition procedure* or by agreement in advance of such expropriation or compulsory acquisition procedure and will either: (i) cause the relocation of at least 100 individuals permanently residing on such land or (ii) comprise an area of more than 100 acres
- comprises an area of more than 100 acres and would be likely to cause *involuntary restrictions on land use and access to natural resources* to any person having a legal right to such land use or access
- comprises an area of more than 100 acres and which is the subject of a *pre-existing bona fide claim* or dispute by a person regarding rights to occupy or use such land in a way which would conflict with the proposed Investment
- would otherwise adversely affect the *legal right of at least 100 individuals occupying* such land to continue to occupy such land

Both the *Farmland Law and the VFV Law* provide for a 30-day window for those with competing claims to land to object to an application for land. The VFV Rules require that the applicant verify whether or not the land is actually vacant; while there is no similar provision in the Farmland Rules. The local FAB and VFV land administrator are supposed to publish notices of the application for land acquisition in the area where the land is situated and the township office. This process should help in identifying possible competing claims to land but operates on the assumption that notices are posted, that occupants see them, can read them, and have the capacity to respond to them. The VFV Rules include the possibility of an on-the-ground inspection to resolve any objections raised. Investors should therefore be proactive in establishing existing use and identifying any potential for competing claims, including during the 30-day window period.

In addition, the *VFV Law* contains specific provisions covering farmers cultivating the land "even if they do not have the legal right to cultivate". They must be negotiated with and it must be ensured that "they are not unfairly or unjustly dealt.". While these terms have not been clarified, together they provide a sufficiently clear indication that those on the land who can show a history of long-term use must be recognised and addressed through negotiations.

For land that is covered by the *EIA Procedures*, those procedures also include a consultation process as part of the EIA. MONREC has developed detailed draft Public Participation Guidelines that are not yet officially issued but are widely available in draft form. While the EIA consultation process focuses on potential environmental and social impacts of projects, it also provides an occasion for understanding how local communities use and access land and local resources.

Neither the *Forest Law* nor the *draft Forest Rules* contain specific requirements about verifying existing land use or consulting existing land users.

MIC may itself carry out consultations on investments that require a MIC permit or endorsement, in particular circumstances: (i) where it considers that stakeholders and persons that may be affected by its determination or have information relevant to its determination; and (ii) if Article 5 of the 2015 Law on the Rights of Protection of Ethnic Nationalities is relevant to the investment. The MIL provision underlines that such consultations with local ethnic nationalities should begin at an early stage in the process, before taking the project to the MIC. It also suggests that the MIC permit may be issued conditional on negotiations having been successful, although this has not yet been tested (MCRB, 2019).

Due diligence should also establish whether there are any land-related *legacy situations*. This could include historic displacements of local communities by the military, suppression of protests around land issues, allocations of land to companies or military affiliates that local community members considered unjustified and that have not been addressed. While governments since 2011 have established commissions and inquiries on land restitution (see related section above) not many of the complaints raised have been resolved yet and therefore cloud related land allocations. While these legacies may date back decades, and be unrelated to the incoming investor, investors may find that these situations raise tension and distrust and are better recognised and addressed, including by government.

Where ethnic minorities are present, investors should also consider the requirements to negotiate with local ethnic communities under Article 5 of the 2015 *Ethnic Nationalities Law* that says for projects which affect *ta-ne tain-yin-tha* (*i.e.* 'indigenous peoples' although not defined by Law): they "should receive complete and precise information about extractive industry projects and other business activities in their area before project implementation so that negotiations between the groups and the government/companies can take place." The process could be considered an embryonic form of free, prior and informed consent (FPIC) for indigenous peoples as included in the UN Declaration on the Rights of Indigenous Peoples. The aim is to recognise communities' rights (formal or customary) and engage in a process of dialogue and negotiation that results in an agreement about the conditions under which an investor will (or will not) have access to the land. The Rules implementing the law, adopted in August 2019, provide more detail on the process to be followed, including the requirement to submit consultation plans as well as the final outcome and undertakings to the Ministry of Ethnic Affairs (MCRB, 2019)

Where companies are not able to reach agreement with those on the land, they should consider pausing investment decision-making until land claims are effectively resolved – which may be through a process they help co-create with community members and local authorities to resolve the disputes. Community members may also choose to raise claims through other mechanisms – such as the MIC or the land dispute commissions. Companies should not interfere with, or try to block, those processes.

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Annex 8.A. Main types of land use rights in Myanmar

Land categories	Key characteristic
Freehold land	Can only be owned by Myanmar nationals. It can be used for any lawful purpose and may be inherited, leased, transferred or sold. Freehold ownership of parcels is a rarity rather than the norm.
Grant land	At the disposal of the government that can be leased for residential or business purposes to public agencies, private individuals and companies for periods of 10, 30 or 90 years, extendible upon application. It is the most extensive type of land in urban areas. Holders of grant land are subject to an upfront land fee at the signature of the lease agreement. Holders of grant land can lease, transfer, mortgage or sell their interests in the land. Grant land is the most extensive type of land.
Agricultural / farmland	Land at the disposal of the government that can be leased to Myanmar nationals for the sole purposes of cultivating paddies or any type of crop respectively. Holders of a Farm Land Work Permit (Form 7), which states the legal right to use farm or agricultural land, may freely lease, sub-lease or transfer the whole or a part of the land, except to a foreign company where the approval the government is required.
Forest land	Demarcated and administered by the Ministry of Natural Resources and Environmental Conservation (MONREC) It may only be converted into other types of land upon approval by the Cabinet.
Grazing land	Land assigned by Village Tract Peace and Development Councils for the grazing of cattle in their respective village tracts. It may only be used for such purposes by the cattle of the people who are residents of the villages permitted access to it.
Vacant / Fallow / Virgin land (VFV)	Land that has never been cultivated or has been abandoned by its owner. Citizens may obtain, from the Central Committee for the Management of VFV lands, the right to cultivate up to 5 000 acres of VFV land for a period up to 30 years. This can be expanded up to 50 000 acres at the rate of 5 000 acres at a time upon demonstration of adequate land use. VFV land can be used for agriculture, livestock, mining or any other use permitted by the Central Committee. Holders of VFV land may lease, sub-lease or transfer their interests in it only with the permission of the government. Approval from the Myanmar Investment Commission is required for permitting a foreign company to use VFV land for purposes other than the cited above.
Government leased land	Not an official classification but merits a dedicated entry because it is often the basis for foreign-invested projects. Government leased land is land owned by the state and administered by a municipal or government authority, such as a Union Ministry or a state or region body. Holders of government leased land can use the land only for the purposes stated in the lease and need the permission of the lessor to transfer and mortgage the land.
Military land	Land designated by the Ministry of Home Affairs as 'Cantonment Area' for military use. The land is to be surrendered to the government if it is not required anymore for military use.

Source: VDB-Loi (2017) and FAO et al. (2016).

Notes

[1] For the sake of comparison, the average farm size in the United States in 2018 was 443 acres (USDA, 2019).

[2] See Lawry et al. (2014) for a systematic review of the literature on the impact of land property rights interventions on investment and agricultural productivity in developing countries.

[3] There could be many reasons for not registering, starting with the law's underlying definition of "vacant land" that clashes with current ethnic practices, lack of awareness of the requirements, it is difficult if not impossible for people to know if their land is considered VFV land because of the state of records, many states have thousands of displaced people who will not be able to return in time to complete the necessary paperwork, overlaps with unresolved returns of land etc.

[4] Some efforts are, however, underway to establish standard operating procedures (SOPs) for land administration processes. According to the authorities, the GAD, for instance, is currently working to establish SOPs for issuing of land leases and grant certificates with the support of the Regulatory Reform Unit (RRU) of the Minister's Office. Draft SOPs have been prepared and distributed to branch offices and senior practitioners' association for review and collection of recommendations to help improve and harmonize the current situation of the different parts of the country. Once implemented, these SOPs are expected to reduce the complexity and inconsistencies of current processes, ultimately improving the situation for investment and the public in general.

[5] Adverse possession rights, colloquially known as 'squatters rights', refers to the legal process of obtaining ownership through possession (from the ancient Roman law 'usucapio'). Essentially, it refers to the acquisition of title to someone else's property by continually possessing or residing in his/her property for a specific period of time without the legal owner receiving any compensation or engaging in any contract.

[6] The OneMap initiative aims to update, unify and make accessible all government held, land-related spatial data sets for government and public use. It brings together government authoritative data on land use, cover, and tenure, and combines them with participatory maps developed by local communities and crowdsourced public contributions. The initiative currently involves 25 land-related government agencies, civil society organizations and academia.

[7] A gap analysis conducted in 2015 comparing the Myanmar legislation against the IFC Performance Standard No 5 on Land Acquisition and Involuntary Resettlement (PS5), which is generally viewed as the most relevant standard on involuntary resettlement in the context of private sector investments, as well as against the IFC Performance Standards No 1 on Environmental and Social Management Systems (PS1), revealed that there were "significant gaps between the contents of PS1 and PS5 and Myanmar domestic law and practice regarding land acquisition, both historically and under the current reformist government" (Displacement Solutions, 2015, p. 21).