

Access Denied

Land Rights and Ethnic Conflict in Burma*

The reform process in Burma/Myanmar¹ by the quasi-civilian government of President Thein Sein has raised hopes that a long overdue solution can be found to more than 60 years of devastating civil war. Burma's ethnic minority groups have long felt marginalized and discriminated against, resulting in a large number of ethnic armed opposition groups fighting the central government – dominated by the ethnic Burman majority – for ethnic rights and autonomy. The fighting has taken place mostly in Burma's borderlands, where ethnic minorities are most concentrated.

Burma is one of the world's most ethnically diverse countries. Ethnic minorities make up an estimated 30-40 percent of the total population, and ethnic states occupy some 57 percent of the total land area and are home to poor and often persecuted ethnic minority groups. Most of the people living in these impoverished and war-torn areas are subsistence farmers practicing upland cultivation. Economic grievances have played a central part in fuelling the civil war. While the central government has been systematically exploiting the natural resources of these areas, the money earned has not been (re)invested to benefit the local population.

Land confiscation for agribusiness has been on the rise since the late 2000s, with a total of nearly two million acres allocated to the private sector by the then military govern-

Conclusions and Recommendations

- The new land and investment laws benefit large corporate investors and not smallholder farmers, especially in ethnic minority regions, and do not take into account land rights of ethnic communities.
- The new ceasefires have further facilitated land grabbing in conflict-affected areas where large development projects in resource-rich ethnic regions have already taken place. Many ethnic organisations oppose large-scale economic projects in their territories until inclusive political agreements are reached. Others reject these projects outright.
- Recognition of existing customary and communal tenure systems in land, water, fisheries and forests is crucial to eradicate poverty and build real peace in ethnic areas; to ensure sustainable livelihoods for marginalized ethnic communities affected by decades of war; and to facilitate the voluntary return of IDPs and refugees.
- Land grabbing and unsustainable business practices must halt, and decisions on the allocation, use and management of natural resources and regional development must have the participation and consent of local communities.
- Local communities must be protected by the government against land grabbing. The new land and investment laws should be amended and serve the needs and rights of smallholder farmers, including all ethnic regions.

ment of the State Peace and Development Council.² Since the advent of the Thein Sein government in March 2011, land issues (among other pressing concerns) have risen to the top of the national political agenda, as easing restrictions on media and people's rights to organise have led to increased news reports on protests by farming communities across the country against land grabbing.

While some of the protests are aimed at past land grabs, others involve fresh cases happening amidst what appears to be a new wave of land grabbing on an unprecedented scale since a new round of government reforms. The reforms include several new laws on land and investment that change the legal basis for land use rights, especially in the uplands, while establishing a legal land market in order to encourage domestic and foreign investment in land.

There are serious concerns that these changes will further exacerbate land tenure and food insecurity for the majority population in Burma who rely on their farm fields and forests for their livelihoods. This is because the new laws do not take into account the existing land tenure situation in ethnic areas where shifting cultivation in the uplands is common and where few have formally-recognized land titles, not to mention national identity cards. Indeed, the new laws do not recognize customary and communal land rights at all. Nor do they consider the right of return of hundreds of thousands of ethnic villagers who have been displaced from their ancestral lands due to the decades-old conflict and economic marginalisation. Consequently, the new laws are seen as exclusively benefitting the private sector, particularly large foreign investors, at the expense of smallholder farmers, who make up three-quarters of the population.

At the same time the government has initiated a peace process in an attempt to finally resolve the country's long-standing ethnic conflicts. New ceasefire agreements have been signed with 13 ethnic armed opposition groups, most of whom already had a truce with the previous military government. But the new ceasefires have yet to lead to a political dialogue, and the recent large-scale government offensive against the Kachin Independence Organisation (KIO), an ethnic armed opposition group calling for ethnic rights and autonomy, raises serious questions about the goals of the government and its ability to control the national armed forces (Tatmadaw).³

THE NEW LEGAL LANDSCAPE

The Thein Sein government is moving to introduce a new economic development model for the country. In his inauguration speech in March 2011, the President declared his intention to invite foreign investment to develop the country and its people.⁴ Declaring poverty reduction as the cornerstone of its economic reform package, the government sees stimulating industrial agricultural production – especially for rubber, palm oil and paddy rice – through massive foreign investment as one of its main strategies to achieve this.

The government has yet to produce a detailed development plan. But the new land and investment laws are clearly key pillars, meant to facilitate the agrarian transformation from subsistence rural farm livelihoods to an industrial cash-crop economy. However, these laws passed through the parliaments very quickly, without benefit of broad public debate or serious consideration of their political, economic and social ramifications. They are widely seen as benefitting mainly, if not exclusively, local cronies and ex-generals – some of whom

were involved in drafting and/or passing these laws as newly-elected MPs.⁵

Passed in March 2012, the new land laws set the legal framework for further land grabs. The Farmland Law stipulates that land can be legally bought, sold and transferred on a land market with land use certificates (LUCs). This is significant because it signals the government's wholesale embrace of a Western-style (individual) private property rights regime that (re)values land and other associated natural resources as an economic asset, versus a more human rights based approach to the use, management and governance of land and natural resources. The legalisation of a land market without strong government safeguards is extremely problematic. First, anyone without an official land use title no longer possesses legal land use rights. Yet the highly restricted opportunities and mechanisms that were made available to get such a title have ended up excluding the vast majority of occupants. Second, the law puts monopolistic power over the allocation of farmland with the Farmland Administration Body (FAB), chaired by the minister of the Ministry of Agriculture and Irrigation (MOAI). Although centralising power to allocate land is not necessarily problematic, it is especially so in Burma because of the larger context of high inequality, combined with endemic corruption and extreme concentration of political power more generally. Third, the FAB is beyond the judiciary branch, meaning that aggrieved farmers are deprived of any legal recourse.⁶

The Vacant, Fallow, and Virgin Land Law (VFV Law) legally allows the government to reallocate villagers' farm and forestlands (both upland shifting land, especially fallows, and lowlands without official land title) to domestic and foreign investors. The national body that holds monopoly

LAND GRABBING

Land grabbing is understood here as the undemocratic capture or control of both the physical resource (e.g., land, water, forests etc.) and the power to decide how these will be used and for what purposes. Land grabbing needs to be seen in the “context of power of national and transnational capital and their desire for profit, which overrides existing meanings, uses and systems of management of the land that are rooted in local communities.”⁸ At the global level, land grabbing is an “ongoing and accelerating change in the meaning and use of land and its associated resources (like water) from small-scale, labour-intensive uses like peasant farming for household consumption and local markets, towards large-scale, capital intensive, resource-depleting uses such as industrial monocultures, raw material extraction, and large-scale hydropower generation – integrated into a growing infrastructure that link extractive frontiers to metropolitan areas and foreign markets”.⁹

Land grabbing thus not only includes *illegal* land confiscation from individuals or communities that results in forced relocation. It also entails other kinds of what some might consider *legal* shifts in control over land, whereby sometimes local communities can remain on the land but have lost effective control over its use. Other such cases include deals that lack free, prior and informed consent (FPIC – although this is also not without problems, see text box below), or through other undemocratic and/or non-transparent decision-making processes and deals involving corruption and abuse of power. According to the international peasants' movement Via Campesina: “Land grabbing displaces and dislocates communities, destroys local economies and the social-cultural fabric, and jeopardizes the identities of communities, be they farmers, pastoralists, fisherfolk, workers, dalits or indigenous peoples.”¹⁰

power to redistribute land to companies under this law is also chaired by the minister of MOAI. As very few farmers have official land use certificates, most farmers have no formal land use rights with the introduction of the VFV Law. It is meant to convert what the government labels as 'vacant, fallow and virgin land', which is often either actively cultivated or fallowed by local agricultural households, into industrial agricultural estates.⁷

Community-managed resources, such as village forests, waterways, fishponds and grazing lands are equally susceptible to confiscation, despite being crucial to local livelihoods and food security, particularly for vulnerable households.¹¹ Smallholder farmers have thus been labelled as 'squatters' under this law. The law allows for a total acreage for industrial crops for up to a maximum of 50,000 acres for a thirty-year lease, with the possibility for renewal.

The result from these two new land laws is that families and communities living in upland areas – now labelled 'wastelands' – have no legal land rights and land tenure security. This immediately puts ethnic upland communities under the real threat of losing their lands, which are precisely the areas heavily targeted by resource extraction and industrial agricultural concessions as well as infrastructure development. The two land laws dispossess farmers, especially upland subsistence farmers, of their right to farm, and more broadly their right to land and to decide how they will use and manage their farm and forestlands.¹²

Land grabbing and land speculation by domestic and international companies and local political elites are further incentivised by the new Foreign Investment Law, which was passed on 1 November 2012, after months of acrimonious debate in the coun-

try's parliaments and business associations. Although there are still several investment obstacles for foreign companies, the law has provided the legal measures for liberalisation to attract Foreign Direct Investment (FDI) into the country, especially in the natural resource extraction and agribusiness sectors.¹³

The Foreign Investment Law has ordered some sectors, including the agricultural sector, to be 'restricted' to large-scale (private) investment, and carry certain extra, although ambiguous, precautions.¹⁴ For the specific case of foreign investment in land, land use rights are up to a total of seventy years,¹⁵ which if for agricultural purposes contravenes the VFV land law which stipulates a maximum of thirty-year leases. If the investor wants a longer lease, the Union Government may give permission if the land concession is located in less developed and poor communication areas as it will be 'suitable for the economic development of the whole country', according to the Foreign Investment Law.¹⁶

The Union Government does not need approval from provincial governments (state and region-levels) for large-sized investments within their jurisdiction, although they have to be informed. The Myanmar Investment Commission (MIC), which was chaired by minister U Soe Thein who is also a Union Minister in the President's Office, can allow foreign investment in restricted sectors, such as for agriculture, if it considers that it is in the national interest, especially that for ethnic minorities – i.e., new ceasefire areas in the ethnic borderlands. The MIC thus retains considerable power over the approval and direction of foreign investment in the country, without providing recourse via formal-legal channels for those who may disagree. This situation is similar to that of the two national

bodies for the land laws that operate beyond the judiciary to allocate land to the private sector, both of which are chaired by the minister of MOAI.

The government enacted the Special Economic Zone (SEZ) Law on 27 January 2012 to provide the legal mechanism for SEZs in the country.¹⁷ The Law provides several incentives for foreign investors, including up to 75 years land use rights for large-scale industry, low income tax rates, exemption of import duties for raw materials, machineries and equipment, no restriction on foreign shareholding, relaxed foreign exchange control, and government security support.

Concerns about the SEZs have been raised in the national parliament regarding the lack of benefits to the country overall as well as to the local population surrounding the SEZs, and on grounds of environmental degradation and industrial pollution. Two large SEZs have already been established in ethnic regions causing massive land grabbing: the Dawei SEZ in Tanintharyi Region and the Kyaukphyu SEZ in Rakhine State. Five other SEZs are planned in ethnic regions.¹⁸

Other large-scale development projects by foreign investors have also led to land grabbing and displacement of local communities. Many of these deals were concluded by the previous military government. This includes the construction of a Chinese-owned gas pipeline overland from a new deep sea port at Kyaukphyu in Rakhine State on the Bay of Bengal to Kunming, the capital of China's Yunnan Province. The 1,100 kilometre pipeline will pass through Rakhine State currently embroiled in communal conflict, central Burma, and northern Shan State where armed conflict continues. Due to existing conflicts near the

pipeline as well as problems with how the Chinese company has handled communities in the pipeline's path, the project is being condemned by locally-affected communities.¹⁹

As the set of new foreign-investment friendly laws take effect, the widespread acquisition of land for large-scale industrial monoculture and agribusiness ventures is expected to become one of the biggest threats to local access to land and to people's livelihoods.²⁰ In addition to those already mentioned, it is likely to have serious short term and long term negative impacts on the country's water resources and their allocation. Land grabbing in northern Burma has also been driven by China's opium substitution programme. This scheme is promoting Chinese companies to establish mono plantations – mainly rubber – as an alternative for opium cultivation. However, the programme mainly benefits Chinese companies and local authorities and not (ex-) opium farmers. Instead Chinese government subsidies to Chinese agribusiness companies have resulted in sweeping land and livelihood dispossession for many communities, some of whom are upland farmers who previously cultivated poppies.²¹

There are several myths driving this development model and the subsequent massive land grabs.²² These include the idea that there are large amounts of 'wastelands' and non-used lands available in the country waiting to be developed through foreign investment. However, as argued above, the reality is that these lands are not vacant or empty, but have been cultivated for generations by communities who do not have any formal land titles from the central government. Most of the ethnic uplands – but also many areas in the central part of the country – fit this category. A second myth is that

the agricultural sector needs foreign investment to develop. Related to this argument is the idea that subsistence farmers are not productive and there is a need to focus on large-scale agribusinesses.

There is, however, ample evidence of the many advantages of promoting smallholder farming in the country, because if supported in the right way – and not just by large-scale private capital investment – it can be more productive than large-scale holdings and, in the long run, is much more sustainable and environmentally sound. It also guarantees protection of biodiversity of local species and seeds.²³ Other myths include that large-scale land deals are necessary to address food and fuel scarcity (to produce bio-fuel), and to support climate mitigation. Finally, there is a myth that land titling and property rights are the best way to improve land tenure security. However, as is argued below, in countries like Burma land titling itself is problematic and can itself lead to dispossession.

LAND LAWS, LAND GRABS AND RESISTANCES

Land rights of smallholder farmers and national land use planning are becoming increasingly important in Burma, given their implications for the well-being of local communities, ethnic peace and the sustainable economic growth of the country. Projects for the development of large-scale infrastructure and the production and extraction of resources entail large-scale land acquisition. Land acquisition and compensation procedures so far lack transparency and adequate and systematic regulation and monitoring, and have generated widespread allegations of corruption, irregularities and far-below market land rates. More generally, they signal a lack of

accountability to the majority rural population, especially the poor and most marginalised and vulnerable segments who stand to lose the most. But as recent events show, many of those who will be most negatively affected are not willing to just give up their lands. Resistance to land grabs is gaining broader support and gaining in strength.

Across the country, individuals have increasingly voiced their grievances with regard to land-confiscation procedures.²⁴ There is regular coverage of high-profile land grabs and land-rights issues in the local media, as well as heated debates among civil society and in parliament. Land acquisitions for development projects are causing widespread social, economic and political instability.²⁵

Newly-elected opposition politicians have tried so far unsuccessfully to amend the land laws, alongside civil society leaders as well as raising the land rights issues in parliament. “The law is a legal tool for land grabbing,” according to one ethnic MP. “The government sees the map of the country mostly as vacant land.”²⁶ According to a representative of a civil society organisation: “The law is unclear and thus needs to be interpreted. So who will win? The most powerful!”²⁷

In response to the growing criticism, in June 2012 the President established the Land Allocation and Utilization Scrutiny Committee, headed by the minister of the Ministry of Environmental Conservation and Forestry (MOECAF).²⁸ This committee is to advise the President on land use policy and land laws, and was partly created to offset the MOAI's monopoly of power over the land laws and land allocation. The committee has not yet been able to revise the land laws or adopt new legislature that would safeguard farmers' land rights.

FPIC Fever: Ironies and Pitfalls

Large corporate capital flows into ‘resource-rich, finance poor’ landscapes across the globe today are both threatening to and resulting in large-scale (re)allocations of land, water, forests and fisheries. This phenomenon is now widely referred to as ‘land grabbing’ (see previous text box). But while grabbing land and other natural resources for profit is not new, the rise of ‘corporate social responsibility’ (CSR) responses to it arguably is. Today’s proposals to regulate large-scale (trans)national land deals range widely from calls to prohibit them altogether, to calls for multi-stakeholder-type ‘codes of conduct’ or ‘principles of responsible investment’ around social and environmental concerns, to calls for greater transparency in land governance.

The range of proposals to address land grabs reveals the existence of fundamental disagreement over what ought to be the purpose of regulation. There are three broadly competing views: regulate to facilitate the security of large-scale land deals; or regulate to mitigate their potential social and environmental harms; or regulate to prevent such deals from happening at all. Each view implies fundamentally different answers to deeper questions about the meaning and purpose of ‘development’. Amidst intense public debate, many of those most concerned about land grabbing from across the spectrum are zeroing in on FPIC – an acronym for ‘free, prior, informed consent’ – as a key regulatory tool.

FPIC in principle is fundamentally a good idea, with roots in democratic theory and, more importantly, in practical thinking about democracy’s requirements and prospects in real life. At minimum, consent must be given freely (not coerced), and it must be given before any change starts (not after the project begins), and it must be given on the basis of informed discussion (not ignorance of the project). All three must be present for a decision to be considered valid according to the FPIC standard. But then several questions and dilemmas also arise.

First, who has the right to FPIC? Today FPIC is closely associated with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which enshrines the right of FPIC for indigenous peoples. Some may interpret this to mean that FPIC is applicable only to indigenous peoples, but limiting FPIC in this way brings its own ironies and pitfalls, not the least of which is that such an interpretation means the exclusion by definition of many extremely poor, vulnerable and marginalized groups and individuals who might not be considered as ‘indigenous’. Second, whose free, prior and informed consent is required? For the standard to have

any meaningfulness, the answer should be comprehensive or maximally inclusive, e.g. “all those who could be affected.” This is perhaps not a problem in some cases. But in many cases changing the use of land, water, fisheries and forests can have many spillover effects that can, in turn, affect a lot more people than those at first thought. Negative effects can go beyond the original time and spatial boundaries – e.g., water pollution moves downstream, mono-cropping degrades soil over time, etc. The application of FPIC to natural resource control issues is inherently more complicated than it looks.

Still, for many people, especially those most affected by a decision, FPIC enshrines all vitally important conditions. So the question is not whether or not to follow FPIC, but *how*. FPIC raises some of the same aspirations – and unleashes some of the same basic tensions – that have often marked actual efforts to deal with the difficult challenges of democratization on rocky terrain.

Several difficulties arise. For one, there is wide interpretation of the ‘C’ in FPIC, since some governments insist that the ‘C’ means the weaker “consult” instead of the stronger ‘consent’. If we accept that FPIC should set a high bar for practice, then what are the requirements for people on the ground to make this possible in practice? The answer is not obvious and is likely to require a process of consultation that is much longer, more extensive, and therefore more complicated, than many are ready to admit.

And last but definitely not least, even if these problems can be sorted out, FPIC will still be deployed in communities that are themselves highly differentiated by class, ethnicity, gender, generation and political status, where real people are embedded in actually existing power structures, which in turn can (and do) influence both the process and outcome of FPIC deployment. There is a reason that many companies, if they honor FPIC at all, do so often by relying on selected villagers (including chiefs, brokers, entrepreneurs and bullies) to organize consultations, and time and again, the results have proven to be disastrous for at least some members of the community who may not ‘count’ because of their difference.

How can we ensure that FPIC does not degenerate into mere ‘window-dressing’, especially in places where heavy restrictions still exist on freedom of association, freedom of expression, and a free press?³²

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In the same month the President established the Land Investigation Committee. This is composed of MPs and is headed by a representative of the military-backed Union Solidarity Development Party (USDP). The committee has no decision making power and is only mandated to investigate land grab cases, which must not go back before 1988 (the period before the previous military regime).²⁹ The committee will submit its findings to the President after one year. Its mid-year report, which was covered by national media, concluded that most land grabbing was done by the military, and provided space for civil society and media to discuss the role of the army in land grabs.³⁰

The most recent response to growing opposition to land laws and land grabs is the establishment of the Myanmar Farmers Association (MFA). Its leader, U Soe Tun, is connected to the Myanmar Rice and Industry Association (MRIA), a powerful rice business group under the government-backed Union of Myanmar Federation of Chambers of Commerce and Industry (UMFCCI). The MFA, which is backed by the same core group of local elite who helped push through the land laws, fashions itself as a national farmer's network but in reality represents the interest of middle and high-income rice agribusiness men.³¹

A new Farmers' Protection Act has been tabled to be passed as a law during the next parliament's session, pushed by UMFCCI and backed by U Soe Tun. The bill is framed as 'reforming' the land laws to address the marginalisation of smallholder farmers, but only focuses on increased access to credit and other inputs for middle to large-income rural households. It does not mention land rights or tenure security for smallholders. The MFA and the pend-

ing Farmer's Protection Act do not address land grabbing or land tenure insecurity problems for smallholder farmers. In opposition to these approaches, newly-emerging grassroots farmers' networks are organizing over common grievances, such as land grabs, lack of access to affordable loans, lack of freedom to crop, the land laws, and previous injustices.³³

Civil society leaders, farmers and their representatives are challenging the government's development model. The main complaint is that investors working with local authorities are not following international best practices. This includes concerns such as lack of transparency, not following FPIC principles (free, prior, informed consent – see text box below), no environmental or social or human rights impact assessment (E/S/HRIA), irregularities with often below-market compensation (if at all), corruption, coercion, and intimidation.³⁴ Furthermore, some local communities have rejected certain projects outright, as they refuse to lose their homes and farmlands. Several high-profile national cases have received international attention, such as Yuzana Company's cassava concession in Hukawng Valley and the Chinese-sponsored Myitsone Dam, both in Kachin State.

The most symbolic opposition by local communities broke out against the Letpadaung copper mine in Sagaing Region. They criticised the project for the confiscation of over 3,000 hectares from 26 villages. Some 200 households from four nearby villages have reportedly also been relocated. They also protested against the project for causing environmental destruction and the lack of transparency in the land deals, and say that people signed the contract for fear of getting arrested.³⁵ The government responded by temporarily detaining the

protestors, and later sent in the riot police, injuring 70 people who sustained severe burns, including monks, provoking widespread criticism of the governments' response. Subsequently, the government formed a commission headed by opposition leader Aung San Suu Kyi to investigate the violence and advise on the future of the mine. After the report's verdict to continue the copper mine expansion was released in March this year, Aung San Suu Kyi herself went to the protest site to tell villagers to stop their resistance, accept the compensation offered by the company, and make way for the joint venture between the military's conglomerate and a subsidiary Chinese weapons-making company.³⁶ To date the villagers are still protesting the land grab and most have refused the compensation, despite continued threats and actual violence against unarmed protestors.³⁷

NEW CEASEFIRES AND NEW LAND GRABS

Discussion on land conflict and land rights has so far been almost absent in the peace process. Securing land rights is one of the hallmarks of international post-conflict development. The ceasefire agreements should include clauses to protect and promote land rights of the existing, displaced and returning ethnic populations. In 2012, an estimated 400,000 people were internally displaced in southeast Burma due to the ongoing conflict. An estimated 142,000 ethnic minority refugees are also living in camps in the Thai-Burma border area.³⁸ Following the new ceasefires in these regions, some 37,000 of them moved back to their villages, although it remains unclear whether they will be able to stay.³⁹

The renewed fighting in Kachin State since June 2011 has also resulted in the displacement of another 100,000 people in north-

east Burma.⁴⁰ Although not essentially insurgency-related, a further 100,000 civilians – mostly Muslims – have been internally displaced in communal unrest during the past year in the ethnic minority Rakhine State where a ceasefire has been agreed by the government with an ethnic Rakhine opposition force. As these experiences show, ethnic minority populations are often at a further disadvantage to claim land rights as many are without Citizen Scrutiny Cards. This card confers citizenship rights, including the right to obtain formal land use rights. "Land ownership is difficult, as most of the villagers have documentation from armed opposition groups, not from the central government", explains a Karen community worker. "Their land tenure is based on these local documents. It is crucial that the Karen National Union [KNU – an ethnic armed opposition group] negotiates land titles in the peace talks, otherwise it will dissolve into a big mess. Many people who had documents lost them when they fled to the jungle."⁴¹

Inequitable distribution of resources between the Burman centre of the country and the resource-rich ethnic periphery is one of the key drivers of ethnic conflict in Burma.⁴² To address the long-lasting political and economic grievances that stem from this, land rights must be the cornerstone of the peace process. As a recent study on Karen State shows, the conclusion of new ceasefires in combination with the promulgation of the new land laws (in particular the VFV Law), land grabbing in conflict-affected ethnic areas has increased tremendously.⁴³ The ceasefires with armed groups have made the land more accessible to commercial interests backed by the central government and military. But the area remains highly militarized (and increasingly so *after* the ceasefires), with resulting very poor land governance, instability, and

continued fear. “In this context, where abundant resources provide lucrative opportunities for many, and a culture of coercion and impunity is entrenched after decades of war”, the Karen report states, “villagers understand that demand for land carries an implicit threat.”⁴⁴

In Karen areas, since the conclusion of a ceasefire with the KNU, private companies have been applying for permission from the central government in the capital Nay Pyi Taw to do business in areas where the KNU has been active. “Because of the conflict the original population has fled and their land has not been used for a long time”, says a representative of a Karen civil society organisation. “The government realizes this, and companies have started to apply for permission to use this land. Villagers coming back find their land occupied.” The land is being confiscated by the central government as well as by the Democratic Karen Buddhist Army, a breakaway group from the KNU that made a ceasefire with the government in 1995. “The upland areas have no record and demarcation of land use, so we do not know how much area has already been confiscated,” says the Karen civil society worker. “There is also no independent mechanism to address land conflicts. When IDPs and refugees return, maybe some people are living in their areas, and we need to think about this.”⁴⁵

Furthermore, there are concerns about business deals operating behind ceasefire negotiations, and fears that the present ceasefires will repeat past mistakes.⁴⁶ There has been no transparency about business deals with members of armed opposition groups as part of the ceasefire negotiations, nor about any government-promised development projects targeting these ethnic areas. Ethnic civil society organisations and political parties have raised concerns over

these backroom business deals, as they believe it is necessary to ensure that any so-called development projects benefit local communities. Some of them call for a temporary halt to these projects until ethnic peace and inclusive political agreements have been reached.⁴⁷

Participants at a people’s forum in Karen State in October 2012, for example, attended by thousands of Karen people affected by conflict, stated that the central government “is using the peace process to push forward unregulated development projects without proper safeguards or policies.” They called on both the government and the KNU to improve the ceasefire and peace process and include local organisations in the decision-making process to promote sustainable peace and development. “Large-scale economic investment must be suspended during the peace negotiations,” the statement said. “The government and the KNU must first address the issue of local ownership of natural resources.”⁴⁸

Should the conflict-affected areas now under nominal control of ethnic armed opposition groups come under government control in the future as a result of the new ceasefires, the new land laws would come into force that would empower the state to legally reallocate land without title (so-called ‘wastelands’, ‘vacant’ land, etc.) to private investors. This scenario could therefore further facilitate ‘legal’ – but clearly not legitimate – land grabs in war-affected territories, setting the stage for further social and political conflict in the years to come.

LAND TITLING: SOLUTION OR PROBLEM?

The two new land laws have given the impetus for land use titles to be issued by the

MOAI, with support from UN-Habitat, the Food and Agricultural Organisation (FAO) and several INGOs. However, private land use titles present many new problems and are not adequate to solve land conflicts, especially not in the ethnic upland conflict zones. Land titling may even lead to land dispossession. Calling for 'land tenure security' is therefore not an adequate response to secure people's land rights, as it legalistically privileges possession of paper (title) over actual occupancy ("land to the tiller") as evidence of legitimate tenure rights.

For example, it is impossible to give individual land titles for shifting cultivation land because these swidden plots move (not fixed in place as a land title demands) and most often they operate under customary law and communal land use rights. Land titles seek to formalise local land tenure, which criminalises previous local mechanisms of claims-making and further empowers state authorities in the land titling process. In settings marked by inequality (for example, ethnicity or gender), formalizing land rights through land titling may simply formalize existing inequality and/or create new injustices.⁴⁹

Land titling attempts to superimpose formalised land rights as the only legal land claim on top of any pre-existing local ones. However, in practice the shift of property rights from a multiple-user, moving, customary and/or communal entity to a single formal owner under statutory law does not erase the feelings of former informal land use rights by previous claimants.⁵⁰ Also by deciding where a permanent boundary for a land plot resides may spark conflict among adjacent land users. Therefore delineating a single land 'owner' often generates new land conflicts rather than erasing them.⁵¹ Land titling is never neutral. Rather, it is a political act and not merely a

technical exercise, with significant political implications and inequitable socio-economic impacts.⁵²

CONCLUSION

After decades of civil war and military rule, political exclusion and ethnic marginalization, the challenges for the new Thein Sein government are huge. The government has adopted new land and foreign investment laws as part of a strategy to achieve economic development and poverty alleviation. However, the new laws are mainly seen to benefit local and international companies and not the majority smallholder farmers, especially in Burma's ethnic borderlands. Furthermore, in combination with new ceasefires with armed ethnic opposition groups, the laws have already begun to facilitate land grabbing in conflict-affected areas.

Land grabbing has also taken place as a result of large-scale development projects in the resource-rich and strategically-located ethnic borderlands. The new laws do not take into account the land rights of ethnic minority communities. Recognition of existing customary and communal tenure systems in land, water, fisheries and forests is a crucial starting point for any discussion about how to eradicate poverty and build real peace in ethnic areas. This is important to ensure sustainable livelihoods for marginalized ethnic communities affected by decades of civil war, and for IDPs and refugees who wish to voluntarily return to their ancestral lands.

Socio-economic development is important to rebuild war-torn and neglected ethnic areas. However, economic development in itself will not solve ethnic conflict and, if carried out in inappropriate and inequitable ways, is even likely to bring about new conflicts. Large-scale unsustainable logging,

mining, dams, and agribusiness in conflict-affected areas in the past two decades have resulted in land grabbing and caused great damage to the livelihoods of local communities, as well as to the environment, fueling grievances among local populations. These issues are especially important now that several large-scale development projects, financed by foreign investment, are either already in progress or being planned by the government in ethnic areas. Many ethnic organisations oppose large-scale economic projects in their territories until inclusive political agreements are reached. Others reject these projects outright.

Local resistance to the new development model is growing, setting the stage for a broader national debate and confrontation. Economic and development programmes must benefit local peoples. Land grabbing and unsustainable business practices must halt, and decisions on the allocation, use and management of natural resources and regional development must have the participation and consent of local communities and representatives. Local communities should be protected by the regional and national governments against land grabbing by companies, the military and the state. The new land laws and the foreign investment law should be amended to ensure these serve the needs and rights of smallholder farmers, especially in Burma's ethnic border regions. How the peace process and ethnic land rights will be dealt with will largely determine what kind of 'peace' Burma will eventually end up with and who will be included – or not.

NOTES

* The information and analysis in this briefing is partly a reflection of the TNI-BCN Workshop 'Land Rights & Ethnic Conflict in Burma/ Myanmar', which took place in Chiangmai, Thailand, on 22-23 February 2013. It was attended by a group of representatives of civil society organisations, ethnic political parties and ethnic armed opposition groups working on or interested in land rights.

1. In 1989 the then military government changed the official name from Burma to Myanmar. They are alternative forms in the Burmese language, but their use has become a politicised issue. Myanmar is not commonly used in the English language. Burma will be used in this report and is not intended as a political statement.

2. Department of Agricultural Planning (DAP), Ministry of Agriculture and Irrigation (MOAI), Republic of the Union of Myanmar, 2011.

3. Franco, J. and J. Borras, *The Global Land Grab*, TNI, February 2013.

4. Franco and Borras, *The Global Land Grab*, 2013.

5. Via Campesina, "Stop Land-Grabbing Now!", Conference Declaration, Nyeleni, 19 November 2011.

6. For further details see: "The Kachin Crisis: Peace Must Prevail", TNI-BCN Policy Briefing Nr 10, March 2013.

7. New Light of Myanmar, "President U Thein Sein delivers inaugural address to Pyidaungsu Hluttaw", 31 March 2011.

8. The new land laws were first proposed by U Htay Oo, the former minister of MOAI and now a senior member of the Union Solidarity and Development Party (USDP), the military-backed ruling party. They were hastily passed through parliament, encouraged by U Myint Hlaing, an ex-general and former Northeast Regional Military Commander and current minister of MOAI, along with U Htay Myint, an elected MP, owner of Yuzana Company, and one of the country's largest non-military private land owners. Interviews with civil society representatives and ex-government officials, Yangon, January 2012 and July-October 2013.

9. See Farmland Law, Chapter XIII, Article 40.
10. Fallow land refers to land that has been left for a certain period of time to regenerate for soil fertility to improve through the process of forest regeneration as part of the cycle of shifting cultivation. After sufficient time has passed, the household returns to that plot to start the process again. Fallow land is therefore particularly vulnerable to be granted to a company as the household is not actively farming that land for ecological recovery reasons.
11. Food Security Working Group, *Land Tenure Security in the Uplands*, Yangon, Myanmar, 2011.
12. Woods, K., *Agribusiness Investments in Myanmar: Opportunities and Challenges for Poverty Reduction*, Yunnan University Press, Kunming, Yunnan, PRC China, 2013.
13. See Buchanan, J., Kramer, T. and K. Woods, *Developing Disparity: Regional Investment in Burma's Borderlands*, TNI/BCN, 2013, pp. 28-29.
14. Foreign Investment Law, Chapter 2, Article 4 (a-c, h, and k) and Article 5.
15. Ibid, Chapter 14, Articles 31-32.
16. Ibid, Chapter 14, Article 36.
17. Aye Thidar Kyaw and Stuart Deed, "SPDC signs Special Economic Zone law into effect on Jan 27", Myanmar Times, 7-13 February 2011.
18. Three more SEZs are planned in Karen State (Hpa-an, Myawaddy and Three Pagoda Pass) and one each in Rakhine State and Shan State. *Developing Disparity*, pp.30-31. See also: Elizabeth Loewen, *Land Grabbing in Dawei (Myanmar/Burma): A (Inter) National Human Rights Concern*, Paungku and TNI, 2012; Aye Sapay Phyu, "Farmland Confiscated for Kyaukphyu Airport Project", Myanmar Times, 4-10 June 2012.
19. See for instance, Shwe Gas Movement, *Sold Out: Launch of China pipeline project unleashes abuse across Burma*, September 2011; Ta'ang Students and Youth Organization, *Pipeline Nightmare, Shwe Gas fuels civil war and human rights abuses in Ta'ang community in northern Burma*, November 2012.
20. Woods, *Agribusiness Investments in Myanmar*, 2013.
21. Kramer, T. and K. Woods, *Financing Dispossession: China's opium substitution programme in northern Burma*, TNI, 2012.
22. For further details, see, Franco and Borrás, *The Global Land Grab*, 2013.
23. See Rosset, P. *The Multiple Functions and Benefits of Small Farm Agriculture*, First Food Policy Brief, no. 4, Oakland, Institute for Food and Development Policy, 1999; Altieri, M., "Agroecology, Small Farms, and Food Sovereignty." *Monthly Review*, July-August 2009; Altieri, M. and V.M. Toledo, "The agro-ecological revolution in Latin America: Rescuing nature, ensuring food sovereignty and empowering peasants", *Journal of Peasant Studies*, Nr 38 (3), 2013, pp. 587-612. This perspective has also been recognized by the UN Special Rapporteur on the Right to Food, Olivier de Schutter, as well as the UN Committee on World Food Security High Level Panel of Experts. See, for example, De Schutter, O., *Agro-ecology and the Right to Food: Report presented at the 16th Session of the UN Human Rights Council*, New York, United Nations, 2010; High Level Panel of Experts, *Land Tenure and International Investments in Agriculture*, Rome, UN Committee on World Food Security High Level Panel of Experts, 2011, p.43.
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27. Interview with representative of civil society organisation, 22 February 2013.
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TNI-BCN Project on Ethnic Conflict in Burma

Burma has been afflicted by ethnic conflict and civil war since independence in 1948. Ethnic nationality peoples have long felt marginalised and discriminated against. The situation worsened after the military coup in 1962, when minority rights were further curtailed. Their main grievances are the lack of influence in the political decision-making processes; the absence of economic and social development in their areas; and what they see as Burmanisation policies by governments since independence and repression of their cultural rights and religious freedom.

This joint TNI-BCN project aims to stimulate strategic thinking on addressing ethnic conflict in Burma and give a voice to ethnic nationality groups who have often been excluded. TNI and BCN believe it is crucial to formulate practical policy options and define concrete benchmarks on progress that national and international actors can support. The project will aim to achieve greater support for a different Burma policy, which is pragmatic, engaged and grounded in reality.

The Transnational Institute (TNI) was founded in 1974 as an independent, international research and policy advocacy institute, with strong connections to transnational social movements, and intellectuals concerned to steer the world in a democratic, equitable, environmentally sustainable and peaceful direction. Its point of departure is a belief that solutions to global problems require global co-operation.

BCN was founded in 1993. It works towards democratization, respect for human rights and a solution to the ethnic crises in Burma. BCN does this through facilitating public and informal debates on Burma, information dissemination, advocacy work, and the strengthening of the role of Burmese civil society and political actors in the new political system.

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