

WHOSE CROPS, AT WHAT PRICE?

Agricultural investment in Myanmar



After years of international isolation, Myanmar is liberalizing its economy and seeking to attract foreign investment. But while foreign investment can play an important role in developing the country's agriculture sector, in the current environment of limited transparency and accountability, an increase in agribusiness investments poses serious risks to the livelihoods of small-scale farmers and others dependent on land. This paper looks at the current level and types of agribusiness investment into Myanmar, outlines potential risks to communities posed by these investments, and explores state regulation of outbound investments as a potential way to promote responsible business practices in the sector. The paper makes a series of recommendations to the Government of Myanmar, foreign governments with investment interests in Myanmar and businesses investing in or sourcing from Myanmar on improving scrutiny and monitoring of investments, tackling land rights abuses and ensuring that companies honour their responsibilities to respect human rights.

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ACRONYMS

ACMECS	Ayeyawady–Chao Phraya–Mekong Economic Cooperation Strategy
ASEAN	Association of Southeast Asian Nations
AICHR	Intergovernmental Commission on Human Rights
BHRRC	Business and Human Rights Resource Centre
BIDV	Bank for Development and Investment of Vietnam
BIT	Bilateral investment treaty
CBRC	China Banking Regulatory Commission
CFS	Committee on World Food Security
COFCO	China National Cereals, Oils and Foodstuffs Corporation
CP	Charoen Pokphand Group
CSO	Civil society organization
DICA	Directorate of Investment and Company Administration
ESIA	Environmental and social impact assessment
FAO	Food and Agriculture Organization of the United Nations
FDI	Foreign direct investment
FPIC	Free, prior and informed consent
GDP	Gross domestic product
GoM	Government of Myanmar
ICJ	International Commission of Jurists
IFC	International Finance Corporation
IMF	International Monetary Fund
KNU	Karen National Union
KSL	Khon Kaen Sugar
LCG	Land Core Group
MCRB	Myanmar Centre for Responsible Business
MIC	Myanmar Investment Commission
MNHRC	Myanmar National Human Rights Commission
MOAI	Ministry of Agriculture and Irrigation
MOECAF	Ministry of Environmental Conservation and Forestry
MOFCOM	Ministry of Commerce of the People's Republic of China
MRF	Myanmar Rice Federation
MSU	Michigan State University
NHRC	Office of the National Human Rights Commission of Thailand
NLUP	National Land Use Policy
NSPAW	National Plan for the Advancement of Women

OECD	Organisation for Economic Co-operation and Development
SFA	State Forestry Administration of the People's Republic of China
UNGPs	United Nations Guiding Principles on Business and Human Rights
VFV Law	Vacant, Fallow and Virgin Land Management Law
VGGT	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests
VRG	Vietnam Rubber Group

SUMMARY

After years of international isolation, Myanmar is liberalizing its economy and seeking to attract growing levels of foreign investment. Agriculture currently plays a crucial role in the country's economy and more than 60 percent of the population depend on agriculture for their livelihoods. The Government of Myanmar (GoM) has acknowledged the need to support smallholders by improving access to credit and providing affordable fertilizers and seeds,¹ but it has also made it clear that attracting foreign investment is crucial to achieving its goals for economic reform and reintegrating Myanmar into the global economy.²

This paper looks at the current level and types of agribusiness investment into Myanmar, outlines some of the potential risks to communities posed by these investments, and explores state regulation of outbound investments as a potential way to promote responsible business practices in the sector.

The paper finds that while foreign investment can play an important role in developing Myanmar's agriculture sector, in the current environment of limited transparency and accountability, an increase in agribusiness investments poses serious risks to the livelihoods of small-scale farmers and others dependent on land for their livelihoods.

Although the agriculture sector accounts for a small percentage of overall investment into Myanmar, a very substantial amount of land has already been handed over to companies. As of April 2014, an area nearly 10 times the size of Hong Kong (939,683 hectares) had been granted to private businesses (both Myanmar and foreign) in the form of land concessions.³

Agribusiness investments are often hidden in Myanmar. Official statistics on investments are unreliable due to over-reporting (of projects that are approved but not implemented) and under-reporting (of projects that do not go through the formal approval channels). In many cases, land concessions that have been granted to private businesses are not being cultivated, but are instead being used to enable mineral extraction or logging.⁴

Some publicly available data do exist, but more information on agribusiness investments is required both from the GoM and from investing companies. Limited transparency creates blind spots in which corruption can flourish, and incoming investors risk worsening this situation if they do not act responsibly and publish investment details.

As of December 2015, China, Singapore⁵ and Hong Kong (China) rank as the top three foreign investors into Myanmar. Thai, Malaysian, Korean and Vietnamese companies are also significant investors, and all have invested in agriculture projects in the country. Where land concessions and investments are being used for agriculture purposes, foreign businesses are investing in rubber and palm oil, with smaller investments into corn, sugarcane, biofuels, fruits and other crops. Some companies have obtained large tracts of land for plantations, while others are purchasing from small- and medium-scale local farmers through contract farming agreements or brokers.

Both of these paths of investment – large-scale land acquisitions and contract farming arrangements – carry risks for smallholders and communities who rely on land. The granting of land for large-scale agriculture in Myanmar, as elsewhere in Southeast Asia, is frequently connected to land conflict and displacement and environmental degradation.⁶ Land dispossession has already reportedly occurred through Malaysian joint investments with the development of palm oil plantations in Tanintharyi.⁷

Poor rural women are often disadvantaged with regards to land access and ownership, and therefore investment that affects the land use of local people has a disproportionate impact on

women. Even in cases where investment generates employment, when those investments require large-scale land acquisition, the disadvantages may outweigh the benefits for local people in a context where land rights are unclear and insecure.

The number of land and agricultural investments in Myanmar is highly likely to rise in the near future, from foreign and domestic companies alike. Thailand and China have guidelines and mechanisms in place to promote socially and environmentally responsible behaviour of outbound investments, although it is unclear to what extent these guidelines are being implemented.

If investment in agribusiness is isolated from the broader development of Myanmar's agriculture sector, the potential benefits will be limited. Simply approving large-scale investments will not automatically translate into benefits for small-scale farmers unless targeted policies are put in place that focus on increasing smallholders' access to inputs, safe credit, training, markets and security of land tenure.

This paper sets out recommendations that businesses and governments could consider following to ensure that agriculture investments into Myanmar are transparent and follow international best practice regarding due diligence, upholding human rights and providing redress to communities for violations.

Recommendations to the Government of Myanmar

Land concessions

- **Cease granting large-scale concessions until the new National Land Use Policy is being effectively implemented and a Land Law is passed.** The laws currently being used to grant concessions are widely seen as failing to protect smallholders and ethnic groups. Until the new Land Law is passed, the GoM should suspend the granting of new concessions.
- **Review the implementation of existing concessions.** Existing concessions should be monitored against their development plans and agreements with the government, and if the company has not met its obligations, concessions should be frozen, or revoked if serious violations have occurred.
- **Ensure that decisions to grant additional land concessions in the future are based on a thorough and responsible assessment of proposals.** This must take into account existing land use, and no concession should be granted without a detailed assessment and mapping of existing land use rights.
- **Ensure that all relevant stakeholders are consulted on concessions, including, crucially, potentially affected communities.** No land use rights should be transferred from pre-existing land users without their free, prior and informed consent (FPIC).
- **Increase transparency and access to information regarding existing and future investments related to land.** The GoM should increase transparency in investment by making available reliable statistics, maps and other documents related to land-based investments. This includes releasing details of the locations and boundaries of existing land concessions. These data should be stored in an open database which includes project maps, names of investors, purpose of the project and status of implementation.⁸

Support for small-scale farmers

- **Reallocate the national budget to increase agricultural spending, particularly to improve the quality and reach of extension services and inputs;** this also means resourcing local government to focus on farmer-identified challenges and solutions.
- **Support the development of agricultural cooperatives and producer organizations based on an appropriate regulatory framework,** and empower them to link to and work with the local private sector.

- **Provide scrutiny of investment proposals and monitoring of approved investments to ensure that they protect smallholder interests.**
- **Use government bodies to provide support to farmers in the negotiation of contract farming arrangements,** and regulate and monitor ongoing contract farming agreements.

Recommendations to foreign governments

- **Recognize that, to be effective, the duty to protect must extend beyond national boundaries.** The duty to protect against business-related abuses is not confined to a state's own territory. In cases where a company's overseas operations are causing harm, both host and home states have a duty to act.
- **Promote the adoption of international standards, principles and guidelines by companies investing overseas.** Home governments should promote and encourage companies to implement international standards such as the UN Guiding Principles on Business and Human Rights (UNGPs), the OECD Guidelines to Multinational Enterprises and the UN's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT).⁹
- **Governments across the region and regional institutions such as ASEAN should develop guidelines related to social and environmental safeguards in overseas investment.** China has developed a number of guidelines for Chinese companies and financial institutions operating overseas. Although basic, they can serve as a foundation from which to promote improved conduct in overseas investment.

Recommendations to businesses investing in or sourcing from Myanmar

- **Ensure compliance with local laws and regulations and follow international standards,** including the responsibility to respect human rights as set out in the UNGPs, and the VGGT. Businesses have the obligation to follow local laws and regulations, but should go further by implementing higher standards that go beyond what is required under state law, using the International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability as a minimum. End-user companies should ensure that the companies with which they have business relationships adhere to these standards.
- **Consider alternatives to large-scale land investments.** Prioritize models of investment that do not require the transfer of land away from small-scale farmers and communities, and that are based on fair contracts.
- **Conduct thorough due diligence.** Before buying or leasing new land, expanding existing operations or developing existing holdings, investors must conduct robust due diligence. This enables the company to gain a clear understanding of the local context and of social, environmental and human rights risks and/or impacts. End-user companies should likewise conduct due diligence, looking into the policies and practices of the companies with which they have business relationships. According to the UNGPs (Guiding Principles 17–21),¹⁰ due diligence includes:
 - assessing the actual and potential impacts of human rights (including investigating impacts on existing land users);
 - integrating assessment findings into decision-making processes and addressing risks and adverse impacts identified;
 - tracking the effectiveness of the company's efforts to address adverse impacts;
 - communicating these efforts to stakeholders (such as local communities).
- **Assessments should also examine other environmental and social impacts, and must include the participation of potentially affected communities.** Assessments must be based on timely, transparent and meaningful consultation with affected communities, including women. Businesses should engage with and seek the input of those who could be affected by investment decisions. These assessments should be made public in an accessible format so that communities and civil society groups can engage with the findings.

- **Ensure respect for the free, prior and informed consent (FPIC) of indigenous peoples and local communities.** Before making major investment decisions, businesses must consult with local people, including women and marginalized groups. Any land acquisition or land use change must follow the principles of FPIC. Consultation should continue after a project becomes operational.
- **Make available operational-level grievance mechanisms, as per UNGP 29 and following the principles of UNGP 31.** Effective grievance mechanisms will enable investors to catch adverse impacts before they escalate, and provide potentially affected communities and workers with a means of redress.
- **Provide access to remedy in cases where the company has caused or contributed to adverse human rights impacts, as per responsibilities under the UNGPs.**
- **Improve transparency by disclosing project details.** Companies should disclose the locations of their investments, including maps showing the boundaries of plantations and processing plants, the purpose of the investment, periods of contracts and concession agreements. Businesses should also publish information on what processes they have in place to ensure respect for human rights, including access to grievance mechanisms. Publications should be presented in a form that is accessible to affected people, and this should be done in a manner that guarantees accessibility to affected communities (e.g. appropriate language, channels of communication for disclosing project details, and so on).
- **Adopt a comprehensive commitment to respect the land rights of women, communities and indigenous people;** including customary and usage rights. The policy commitment should cover the company and its suppliers, and should be based on existing guidance for such commitments.¹¹
- **Champion responsible land-based investments among government officials, peer companies, multi-stakeholder initiatives and other stakeholders.** Take an active role to foster a race to the top and strengthen sector-wide initiatives and regulations.

Further recommendations for governments, businesses and development actors can be found in the 'Conclusions and recommendations' section at the end of this paper.

1 INTRODUCTION

Agriculture plays a crucial role in the economy of Myanmar and is central to the lives of most of its population, 66 percent of whom live in rural areas.¹² According to the previous government's Ministry of Agriculture and Irrigation (MOAI),¹³ in 2013–14¹⁴ agriculture contributed 23 percent of the country's total gross domestic product (GDP), employed more than 61 percent of the labour force and accounted for over 20 percent of total export earnings.¹⁵ Most of the sector consists of small-scale and subsistence farming.

Despite the emphasis that the government has placed on attracting private investors into the agriculture sector, both domestic and foreign investment in agribusiness is minor compared with other sectors such as energy and extractives. But because of the importance of agriculture to the lives of so many people in Myanmar, the impact of agricultural investment when it does occur in larger volumes can be substantial, so transparent and accountable investment into agriculture will be critically important for reducing poverty and inequality in the country.

Agriculture investments in Myanmar have attracted considerable attention in the media and have raised some serious concerns among local and international civil society groups. This has been in part due to the land conflicts and displacement that have emerged in connection with agribusiness and other land- and resource-intensive development projects.¹⁶ Beyond this, reports suggest that some small investments into agriculture are already having an impact on the rights of the most marginalized rural communities.¹⁷

If improvements are not made in how agricultural investment into Myanmar is implemented, the poorest people risk losing out through loss of assets, social and economic displacement and being cut out of local supply chains. While policy makers have acknowledged the need to support smallholders by improving access to credit and providing affordable fertilizers and seeds,¹⁸ they have also made it clear that attracting foreign investment is crucial to achieving goals around economic reform and reintegrating Myanmar into the global economy.¹⁹ Without improved regulation, this poses a growing risk to the people of Myanmar.

This paper explores the available information on foreign agribusiness investment into Myanmar, outlining the potential risks and opportunities for communities and farmers presented by these investments. It makes the case that investors and their governments need to do more to ensure that investments into Myanmar are more transparent and that they respect the rights of communities and farmers.

Box 1: What do we mean by ‘responsible investment’?

There is no single definition of ‘responsible investment’, but there are standards, guidelines and principles that can guide both businesses and governments on how to ensure that investment is conducted in a manner that is not focused solely on profit but also considers the needs and respects the human rights of local people, and avoids or minimizes environmental damage. Many of these come from a business and human rights framework.

Business-related activities must not infringe on the rights of local people or violate existing laws and regulations. In cases where local laws and regulatory frameworks are lacking, foreign investors can draw on global best practice standards. A key document related to responsible investment is the United Nations Guiding Principles on Business and Human Rights (the UNGPs). These principles are based on the UN’s ‘Protect, Respect and Remedy’ framework, i.e. the state duty to protect against human rights abuses by third parties, the corporate responsibility to respect human rights and the need for access to remedy for those affected by business-related activities.²⁰

Myanmar is one of the countries that have agreed to develop a national action plan for implementation of the UNGPs at the national level. This could be an important opportunity for the government to ensure that the country’s rules, regulations and legislation are meeting the requirements of international best practice, as well as helping to establish practical grievance mechanisms for companies to engage with local communities in developments.²¹

2 WHY IS AGRICULTURAL INVESTMENT IN MYANMAR IMPORTANT?

Agriculture is an important sector for Myanmar's economic development, and ensuring that the benefits of growth in the agriculture sector are spread could help deliver significant improvements in levels of poverty and inequality. This section provides an overview of what agriculture currently looks like in Myanmar and spotlights some of the key issues faced by communities experiencing foreign investment into agriculture.

A SNAPSHOT OF AGRICULTURE IN MYANMAR

According to a 2014 policy review by the Organisation for Economic Co-operation and Development (OECD), Myanmar, once referred to as the 'rice bowl' of Asia, is now one of the weakest agricultural producers in the ASEAN region, following decades of mismanagement of the sector.²² Despite this, agriculture remains a critical sector of the country's economy, accounting for 22.5 percent of GDP in 2013–14 (rising to over 30 percent when combined with livestock and fisheries).²³ More importantly, millions of rural households are engaged in agricultural production of one form or another across the country.²⁴ Agriculture remains high on the national political agenda and has been identified as a priority sector for development, in particular increasing the production of rice, oilseed and beans for domestic consumption and export.²⁵

Over the past two decades, production of Myanmar's main food crops has increased, with rice, beans and sesame planting and production all rising steadily.²⁶ The largest agricultural crops by area planted include rice (45 percent), which accounts for the largest crop in terms of area planted; pulses (23 percent); and oilseeds such as groundnut and sesame (19 percent). The largest industrial crops are sugar, rubber and cotton (see Table 1).

Myanmar is one of the world's major exporters of pulses, with an industry estimated to be worth \$1.2bn in 2012–13.²⁷ World Trade Organization data indicate that in 2011–12 pulses accounted for 12.3 percent of the country's merchandise exports, wood and wood products 6.7 percent, rubber 3.4 percent, rice 3.3 percent and maize 2.4 percent.²⁸ By 2013, agricultural products accounted for 26.6 percent of all Myanmar's exports.²⁹ However, data are extremely hard to collect in Myanmar, and anecdotal evidence suggests that an unknown amount of investment and agricultural production goes unrecorded, particularly in ethnic areas not under the direct control of central government – though it is thought that that such unrecorded investment is sizeable. This means that the official crop production figures as set out in Table 1 may in reality be significantly higher.

Table 1: Crop production in Myanmar, 2013–14³⁰

Crop	Sown area (hectares)	Production (tonnes)
Rice	7,280,000	28,320,000
Pulses	4,530,000	5,900,000
Sesame	1,622,000	—
Groundnut	931,000	—
Rubber	610,000	177,000
Sunflower	481,000	—
Maize	441,000	1,626,000
Cotton	299,000	509,000
Sugarcane	169,000	10,473,000
Niger seeds	155,000	—
Oil palm	148,000	138,000
Tea	94,000	98,000

Source: MOAI (2014); some figures not available

Foreign investors currently active in Myanmar's agriculture sector are engaged in every aspect of the supply chain, from production to processing, purchasing and trading. How companies engage in their part of the value chain differs depending on the project, the area in which the investment is happening and, critically, the investment itself. In some cases, companies build plantations or processing plants on land they have purchased from individuals, while in others they have received land concessions from the government. Elsewhere, investors lease land directly from smallholders or contract local farmers to produce crops for sale to the company – this is also known as contract farming. Although smallholder farmers make up the largest share of agricultural production, these foreign investors have greater resources at their disposal, including access to finance, land, high-quality inputs, technology and labour.

A SECTOR DOMINATED BY SMALL-SCALE FARMING

Agriculture accounts for almost one-quarter of Myanmar's national GDP, and most of this production and employment comes from small-scale farming.³¹ This is not unique to Myanmar: globally small-scale farmers, cooperatives and rural enterprises make up the majority of investment in agricultural production, and evidence suggests that, worldwide, around 500 million small-scale farmers support almost two billion people.³²

The development of small farms provides a commercially viable option with better outcomes in terms of poverty reduction and positive impacts on other sectors than many large-scale land investment models. Small farms provide jobs, allow communities to build assets and help local markets flourish.³³ In a developing country context like Myanmar, a focus on agriculture led by small-scale farmers could be a significant contributor to the reduction of poverty and inequality.

In Myanmar, authorities have recently placed a strong emphasis on modernizing the agriculture sector through mechanization and promotion of large-scale farming. Large-scale farms may be more competitive where complex and expensive processing procedures are necessary to add value. They may promote private investment and facilitate technology transfer between countries, and by developing outgrower schemes may also increase small-scale farmers' access to markets.³⁴

However, the government, development partners and investors should exercise caution. Large farms tend to generate more unequal distribution of income and do not have a strong record of contributing to poverty reduction.³⁵ A focus on expansion, mechanization and exports could lead

to further land acquisitions displacing farmers and communities, and large-scale agriculture with minimal linkages to the local economy risks harming rather than helping small-scale farmers.³⁶ In addition, the granting of land for large-scale agriculture in Myanmar, and elsewhere in Southeast Asia, is frequently connected with land conflict and the displacement of local communities.³⁷

As stated in Oxfam's report³⁸ on the challenges around large-scale agricultural partnerships between governments, donors and multinationals in Africa:

A weight of evidence points to the central role of small-scale farming in reducing poverty, generating employment and contributing to local food security. A World Bank Group review shows that there is little evidence to demonstrate the existence of economies of scale in agricultural production. At the same time, evidence shows that large-scale agriculture is more likely to increase land speculation, worsen inequality of land ownership, and lead to environmental damage.³⁹

It is vital that when investment does come to Myanmar, it delivers on outcomes for local economies as well as for investors. Moreover, there should be a clear path for commercial investment to support small-scale producers.

GROWING LAND CONCESSIONS

Since the 1990s, the Government of Myanmar (GoM) has granted a large number of land concessions to private companies in order to encourage the development of large-scale agriculture projects.⁴⁰ This approach gained further support after the passage of the MOAI's 30-year Master Plan for the Agriculture Sector (2000–01 to 2030–31), which set the target of converting 10 million acres of 'wasteland' for use in agribusiness.⁴¹ This was made easier by the passage of the 2012 Farm Land Law and the Vacant, Fallow and Virgin Land Management Law (VFV Law), which gave the MOAI responsibility for granting concessions over 'vacant, fallow and virgin' lands. Initially these concessions can be up to 5,000 acres (around 2,000 hectares), but they may subsequently be increased to 50,000 acres (around 20,000 hectares) if the original area is fully developed. In order to encourage investors in these large-scale projects, various investment incentives apply to concessions, including low rental fees and land tax exemptions.⁴²

As of April 2014, according to figures from the MOAI, approximately 2.3m acres (over 930,000 hectares) of land concessions – an area nearly 10 times the land size of Hong Kong – had been granted to private companies.⁴³ Kachin State has both the largest number and the largest area under concessions, followed by Sagaing, Tanintharyi and Ayeyarwady Regions and Shan State. As these are official government figures, they exclude any concessions granted by provincial or military authorities, or any in areas under the control of ethnic armed groups. In addition to this, a further 822 concessions have been granted by the Ministry of Environmental Conservation and Forestry (MOECAF).⁴⁴ These concessions represent a substantial scale-up of land sales. Between 2010 and 2012 there was an almost 100 percent increase in the amount of land granted for large-scale agribusiness.⁴⁵ The majority of concession areas are reportedly for the development of rubber, oil palm and rice, but concessions have also been granted for jatropha, sugar and cassava.⁴⁶

Table 2: Concessions granted to domestic companies by the MOAI (to 31 March 2014)⁴⁷

State/region	Number of companies	Granted area (ha)
Kachin	113	371,715
Sagaing	30	162,626
Tanintharyi	41	126,464
Ayeyarwady	59	89,187
Shan	65	85,427
Rakhine	10	45,487
Magwe	19	35,835
Mandalay	10	7,190
Bago	14	5,758
Yangon	9	5,460
Nayphitaw	6	4,126
Kayin	1	409
Total	377	939,683

Source: MOAI (2014)

The GoM has been promoting foreign investment in land since 1988. Previously foreign companies could obtain rights to land only if they worked in joint venture with a local company, but since 2011 foreign companies have been able to receive long-term leases over land provided they are approved by the Myanmar Investment Commission (MIC).⁴⁸ At present, few concessions have been granted to foreign companies;⁴⁹ however, anecdotal evidence suggests that many domestic companies operate in partnership with a foreign partner.⁵⁰ Crucially, the process of applying for and granting concessions is opaque and there is evidence that contracts have been awarded without consultation with key stakeholders.⁵¹ Concerns have been reported regarding the overlap of concessions with sensitive forested areas, lands of smallholders and shifting cultivation and grazing lands,⁵² and concession holders have often failed to implement development plans. Of critical importance is the estimation that less than a quarter of concessions have actually been developed or planted, a clear violation of the regulations governing concessions.⁵³ According to one academic study, some businesses that have been granted concessions do not appear to have sufficient interest in farming and instead ‘gain land rights in order to enable mineral extraction, lumbering or land rental to smallholder sharecroppers’.⁵⁴

CONTRACT FARMING

Contract farming is a form of investment used in many parts of the world. It involves an investor signing an agreement with a farmer or a farmers’ group, to cultivate an agreed amount of a specific crop at an agreed price. Farmers may provide land and labour, while investors may provide inputs such as seeds, machinery, fertilizers and training.

While contract farming has the potential to increase the income of smallholders as well as provide a direct connection to markets, it often fails small-scale farmers because there is inadequate legislative and policy architecture in place to ensure that they get a good deal out of their agreement with the private investor. As stated in the OECD policy review mentioned earlier: ‘No regulatory framework is in place to support inclusive business partnerships between smallholders and large investors that would help ensure that investments benefit both local communities and agri-business companies.’⁵⁵

Farmers are generally in a weaker position when negotiating contract terms, and may have limited knowledge of market conditions that will govern the outcomes of the partnership. In a context

where the rule of law is weak, it may be difficult for poor farmers to compel buyers to honour their side of the contract, and in some cases landholders with low literacy levels and limited experience of using formal contracts may not understand the terms they are agreeing to.⁵⁶ Those interviewed for this report stated that there is sometimes a lack of transparency regarding exactly who the contracting parties are, and landholders often do not even know the name of the company that they have signed the contract with. This is further complicated by the fact that various actors play a role in the contract farming chain, including brokers, buyers and traders, with the result that the actual farmers may never find out who exactly they are selling to.⁵⁷

Although data are limited, contract farming is thought to be on the rise in Myanmar. In 2014 it was reported that PepsiCo planned to begin sourcing potatoes from producers in Shan State. PepsiCo's local partner, Capital Diamond Star, provides fertilizers, seeds and insecticides to farmers who pay for these inputs after harvesting, and farmers are paid a premium in order to ensure supply.⁵⁸ The Thai company CP Corn – a subsidiary of Charoen Pokphand Group – also utilizes contract farming for the production of corn for animal feed.⁵⁹ During interviews with NGOs in Yangon, various interviewees stated that contract farming was extensive both in areas bordering Thailand and China, with smallholders selling to Thai buyers (often through middlemen), and in Shan and Kachin, where farmers sell their produce to Chinese buyers.

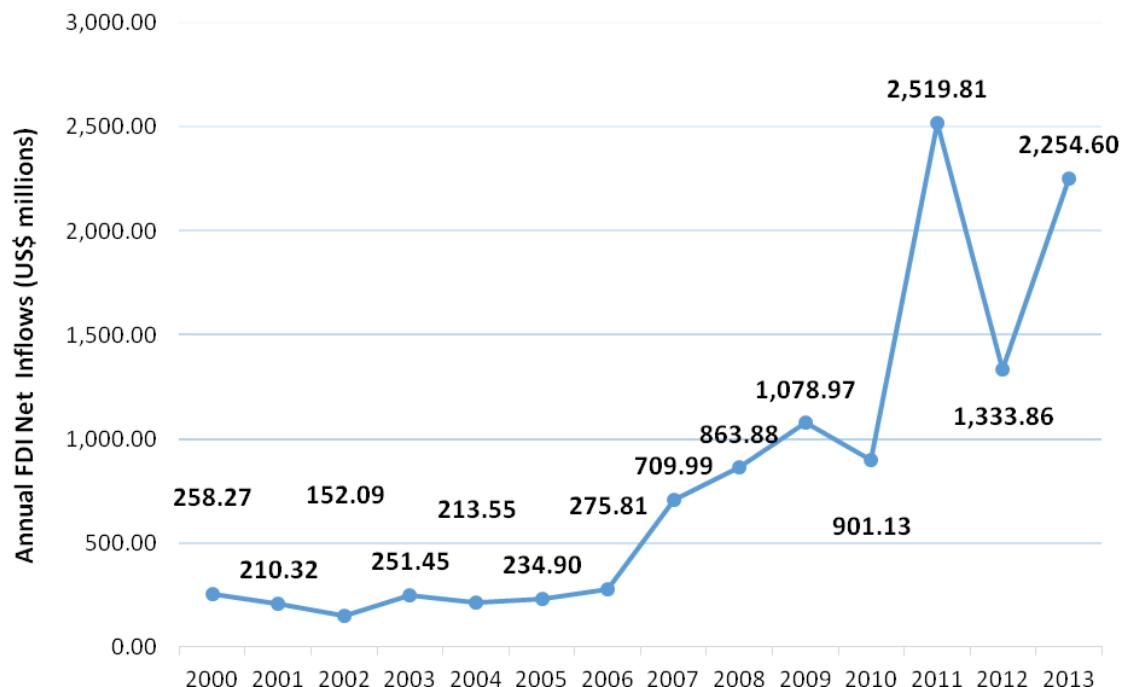
Oxfam's experience shows that companies working with farmers through contract farming arrangements often provide a large loan for farmers to purchase inputs such as seeds, fertilizers or pesticides from that company. This arrangement places farmers at risk of debt-based reliance on the company in question, as well as a lack of freedom to move from the contract if they so wish at a later date. In practice, many forms of contract farming can often lock farmers into debt-based servitude to much larger and more powerful actors in the supply chain. There is also often a risk of a complete lack of transparency in the way that prices are set, or how deductions are decided in contract farming. This illustrates some of the risks to farmers of relying on a single buyer⁶⁰ and signals the importance – for all parties – of clear contracts before contract farming arrangements are entered into.⁶¹

3 FOREIGN INVESTMENT INTO MYANMAR

Although Myanmar has not yet experienced the major influx of foreign capital that many observers predicted, investment is on the rise, and it is clear that international companies are eager to establish or expand operations. For many potential investors, Myanmar is a promising new frontier, and while it is challenging to accurately assess the exact amount of foreign direct investment (FDI) flowing into the country, data from the World Bank show a significant and clear increase in recent years, with FDI in 2013 reaching over \$2.25bn – almost 10 times the amount recorded in 2000.⁶² The GoM's Directorate of Investment and Company Administration (DICA) records an even greater rise in investment in recent years.⁶³ It is important to note that DICA statistics indicate how much investment is approved but do not indicate how much foreign investment actually enters the country.⁶⁴ The World Bank statistics record *realized* investment, which explains the large discrepancy between the two sets of figures (see Figures 1 and 2).

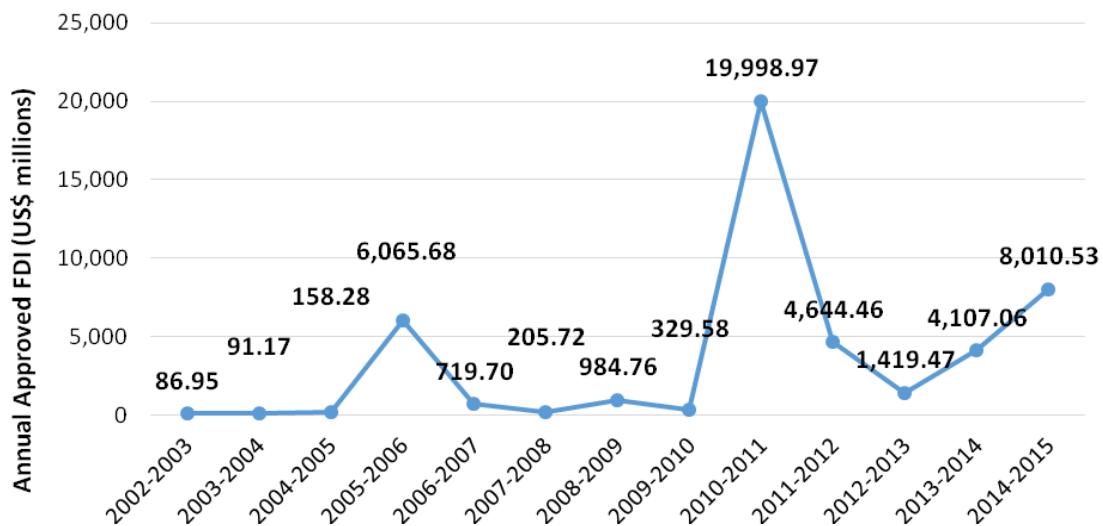
At the same time, a significant amount of foreign investment is entering Myanmar through informal channels, with foreign investors using local partners as proxies.⁶⁵ This means that while some investment may be over-reported, a significant amount of smaller investments and investments into ethnic areas may also be under-reported.⁶⁶

Figure 1: World Bank – annual FDI inflows to Myanmar, 2000–2013



Source: World Bank (2015)

Figure 2: DICA – annual approved FDI in Myanmar, 2002–2015



Source: Myanmar Directorate of Investment and Company Registration (2015)

Table 3: Approved FDI in Myanmar by ‘existing enterprises’ as of 31 March 2016 (by sector)

Sector	Number of enterprises	Approved FDI (\$ millions)	% of total FDI
Oil and gas	96	21,486.951	40.22
Power	9	13,654.642	25.56
Manufacturing	543	5,352.799	10.02
Transport and communications	24	4,909.107	9.19
Mining	11	2,367.958	4.43
Hotels and tourism	47	2,186.029	4.09
Real estate	24	2,224.998	4.16
Agriculture	16	221.185	0.41
Livestock and fisheries	18	201.673	0.38
Industrial estate	3	189.113	0.35
Other services	43	633.644	1.19
Total	834	53,428.099	100.00

Source: Myanmar Directorate of Investment and Company Registration (2016)

While the official figures for approved agricultural investment are low, there has been a clear increase in recent years and the amount of investment in the sector has doubled year-on-year since 2012.⁶⁷ The currently low levels of foreign investment in agriculture (up until May 2015, less than 1 percent of recorded foreign investment went to agriculture, livestock and fisheries⁶⁸) present an opportunity to governments and businesses to make sure that as official investments scale up, they are implemented following best practice around free, prior and informed consent (FPIC), environmental and social due diligence and public transparency.

Box 2: 'Off the books' investment

An unknown amount of both foreign and domestic investment is thought to go unrecorded in Myanmar. The statistics included above only cover those investments that require approval from the Myanmar Investment Commission (MIC). Smaller investments are likely to be missed by these statistics, as are foreign investments by businesses working in joint venture with military-controlled enterprises.⁶⁹ Some investors may simply choose to bypass the formal investment approval channels for the sake of convenience.⁷⁰ Some foreign investment is not recorded as such as it is implemented by local counterparts – and according to at least one report, investing through a local partner allows foreign investors to avoid FDI regulations and government oversight, and reduces the taxes, fees and informal payments required to navigate bureaucratic processes.⁷¹

Another potentially significant omission is that of investment in ethnic areas that are not under the control of government. Much of the foreign investment in hydropower, oil and gas projects in these areas goes through formal channels, but other foreign investment is often informal. It is impossible to accurately measure the extent of this informal investment, but it is assumed to be large, especially in forestry and agriculture projects in areas such as Kachin and Shan states.⁷²

REGIONAL INVESTMENT IN AGRICULTURE

Myanmar's most significant investors are other countries in the region. In terms of value, as of December 2015, China, Singapore and Hong Kong rank as the top three foreign investors, according to DICA statistics. Although the UK ranks fourth, this includes investments flowing from UK overseas territories, e.g. tax havens, and these investments are likely to include companies from various countries. The Netherlands is therefore the only non-Asian nation included in the top 10 foreign investors in Myanmar, and it accounts for less than 2 percent of approved FDI. China is the biggest investor by a significant margin.⁷³

In terms of trade, according to the Ministry of National Planning and Economic Development, in 2014–15 China was Myanmar's biggest trade partner, with exports to China worth \$3.536bn and the top category being agricultural products.⁷⁴

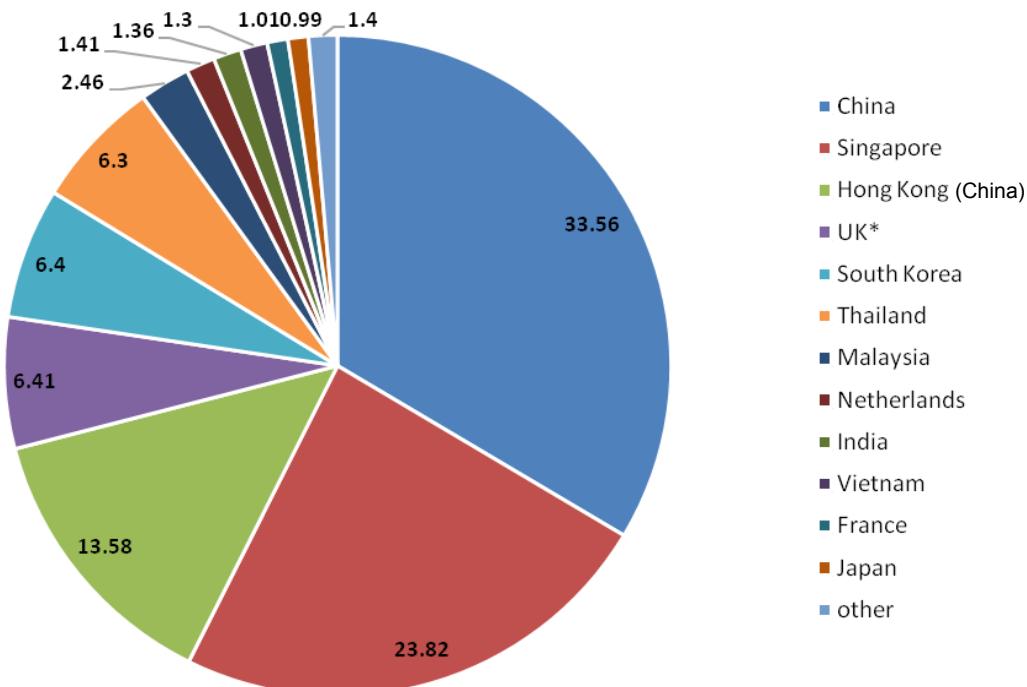
Table 4: FDI of 'existing enterprises' in Myanmar as of 31 March 2016 (by country)⁷⁵

Country	Number of enterprises	Approved FDI (\$ millions)	% of total FDI
1. China	107	17,927.927	33.56
2. Singapore	173	12,729.231	23.82
3. Hong Kong (China)	107	7,254.902	13.58
4. United Kingdom*	49	3,423.484	6.41
5. Republic of Korea	113	3,417.019	6.40
6. Thailand	57	3,364.558	6.30
7. Malaysia	28	1,313.669	2.46
8. The Netherlands	11	755.066	1.41
9. India	22	728.149	1.36
10. Vietnam	11	693.262	1.30
11. France	3	537.610	1.01
12. Japan	75	528.832	0.99

* Including overseas territories

Source: Myanmar Directorate of Investment and Company Registration (2016)

Figure 3: FDI by ‘existing enterprises’ in Myanmar as of 31 March 2016 (by country)



Source: Myanmar Directorate of Investment and Company Registration (2016)

While there is no sectoral breakdown of each country’s investment, anecdotal evidence suggests that China and Thailand are the two biggest foreign actors involved in agricultural investment, and that other Asian investors are also active, including Singapore, Malaysia, Indonesia, Vietnam, India and South Korea. These regional investors are for the most part focused on rubber and palm oil production and processing. Thai companies are concentrated mainly in the south of Myanmar and Chinese in the northern states, although there are examples of companies from these countries investing elsewhere in the country. Although some Western investors are active in sourcing agricultural products in Myanmar, such as PepsiCo and Heineken, their share of investment in agriculture is minimal. The following section summarizes investment in key agricultural production.

Box 3: Bilateral and multilateral agreements related to agriculture investment

Myanmar has bilateral agreements with a number of partners which seek to promote investment, including investment in agriculture. It has ratified bilateral investment treaties (BITs) with the Philippines, China, India, Thailand and Japan; others are signed but not yet in force. Myanmar is also negotiating additional treaties with various other nations.⁷⁶ Myanmar and China have signed several agreements and memoranda of understanding related to agricultural cooperation, and in November 2014 the two countries issued a joint statement on ‘deepening bilateral comprehensive strategic cooperation’. This statement included an agreement to establish a China–Myanmar committee on agricultural cooperation. China committed to support development of rural areas and agriculture, provide agricultural concessional loans and encourage Chinese companies to participate in agricultural development. It was also agreed to expedite the construction of an agricultural demonstration centre.⁷⁷

Myanmar is a member of the Ayeyawady-Chao Phraya-Mekong Economic Cooperation Strategy (ACMECS), which was initiated by Thailand in 2003 and includes Cambodia, Laos and Vietnam. Under this framework, members cooperate on issues including trade and facilitation of investment. The ACMECS Plan of Action 2016–18 contains a specific section on agricultural cooperation which, among other things, commits to encourage and promote further development of bilateral and multilateral contract farming.⁷⁸

Free trade agreements have also been signed with various countries, and through membership of ASEAN Myanmar is party to various agreements including the ASEAN Comprehensive Investment Agreement, as well as the ASEAN-Australia-New Zealand Free Trade Agreement, the ASEAN-Korea Free Trade Agreement and the China-ASEAN Free Trade Agreement.⁷⁹ While these agreements relate to investment and trade in general, they have clear implications for the facilitation of investment and trade in agriculture products.

The remainder of this section looks at key agricultural commodities into which foreign companies are currently investing in Myanmar.

Rubber

Rubber is a major focus of agriculture investment in Myanmar and has received significant interest from Chinese and Thai companies. The GoM has established a 30-year rubber development plan with the goal of creating a rubber production area of 607,000 hectares (1.5m acres) and annual production of 300,000 tonnes by 2030.⁸⁰ China, Singapore and Malaysia are the largest importers of Myanmar's rubber; other importers include Indonesia, Korea, Vietnam, India and Thailand.⁸¹ Chinese and Thai companies have received grants for large-scale rubber plantations in Kachin, Shan and Thanintharyi. Although there has been considerable coverage of these large-scale investments, smallholders still account for the majority of rubber production. According to one study, smallholders with less than 20 acres of planting constitute 90 percent of the total number of growers, and those with over 100 acres represent only 1 percent of all growers.⁸² In the north of Myanmar, companies from China's Yunnan province, or with connections to Yunnan, are the main players in Chinese rubber cultivation, and most of the Chinese rubber investment in Myanmar is connected to China's opium substitution programme (see Box 4).⁸³ Official statistics indicate that Shan State, which neighbours China, has the fourth largest area of rubber plantations, covering 172,287 acres.⁸⁴

For example:

- In 2006 a Yunnan State Farms subsidiary signed a development agreement granting 100,000 mu (16,473 acres) to plant rubber with support from the opium substitution programme.⁸⁵
- In 2007 another subsidiary, Dongfeng Tianyu Co. Ltd., reportedly signed a 30-year agreement to develop rubber over an area of 20,000 mu (3,295 acres).⁸⁶ A 2008 article from Dongfeng's website reports that the company planted 230,000 rubber seedlings in Pangkham, Shan State, close to the border with China.⁸⁷
- In 2012 Yunnan State Farms opened a rubber processing plant, also in Pangkham. The plant reportedly cost RMB 23.65m (\$3.89m) to build and is operated by the subsidiary Menglian Rubber Co. Ltd.⁸⁸

Private Chinese companies have also been connected with rubber production in Myanmar, including Kunming Gaoshen Rubber Planting Co. Ltd. (a subsidiary of Gaoshen Group, which as of 2013 had reportedly invested in rubber production over 19,900 acres in Shan State).⁸⁹ Yunnan Jin Chen Investment Company is reported to have planted 23,063 acres of rubber in Mongmao in Shan State as well as corn, coffee, nuts, sesame seeds, rice and longan (a tropical fruit).⁹⁰ In the Wa-controlled areas of Shan State, Yunnan Hongyu Group, a company acting through the subsidiary Yunnan Emerald Industrial Development Co. Ltd., has invested in longan, tea, orange, rubber, rice, banana and lemon plantations, all through the opium substitution programme; its investments are implemented through a joint venture with a division of the United Wa State Army.⁹¹ The activities of Yunnan Hongyu Group have been connected to forced eviction, pollution and forced labour, and in one case the military reportedly ordered villagers to burn forest lands previously used by 17 villages to make way for rubber planting in Tachilek township.⁹²

Media reports, company websites and Chinese government documents indicate that a large number of Chinese firms have received approval for rubber concessions and to develop various

other crops. At the same time, various reports – albeit hard to verify – have emerged regarding conflicts between companies (and their military partners) and local communities. It is, however, widely recognized that Chinese companies are highly influential in the rubber trade in the north, and according to one study on the political ecology of rubber in Myanmar, local producers and smallholders are increasingly dependent on a handful of ‘dealers’ who specialize in trade with China.⁹³ All of this will have implications for future agricultural investment into Myanmar.

China is the main rubber player in the north of Myanmar, but the southern areas of Mon State, Tanintharyi Region and Kayin State are the country’s three biggest rubber-growing areas. According to official statistics from 2012–13, the three areas had 470,066 acres, 298,356 acres and 213,027 acres of planted rubber respectively.⁹⁴ Thailand is a major player in Myanmar’s rubber industry in the south and Thai businesses are investing in agribusiness concessions and purchasing rubber from smallholders, often through middlemen. Thailand’s interest in rubber in Myanmar is unsurprising, given the geographical proximity and the fact that Thailand is the world’s largest rubber producer and exporter.⁹⁵ Thai Hua Rubber has been exploring opportunities for rubber development in Thanintharyi, and Thai media reported in 2012 that the company was awaiting approval of a 125,000-rai (49,400-acre) concession.⁹⁶ The Thai firm Sri Trang Agro-Industry has also established a joint venture with local company Ayeyar Hintha Holdings and plans to develop plantations in Mon State.⁹⁷

The Malaysian government has sought to promote agricultural cooperation through high-level meetings with counterparts in Myanmar. In 2012, Malaysia’s Minister of Plantation Industries and Commodities stated that its companies were eager to explore opportunities for the development of rubber and palm oil plantations in joint venture with local partners.⁹⁸ Malaysian company Felda Global Ventures Holdings has since entered a joint venture with a local partner in order to construct a rubber processing plant and explore plantation opportunities. The company’s CEO told the press that the company aimed to plant over 30,000 hectares (74,100 acres), and is also exploring investment in sugar and palm oil.⁹⁹

Vietnam also has an interest in developing rubber plantations in Myanmar, and in 2010 signed the Vietnamese government signed a memorandum of understanding for a 48,000-hectare rubber concession in Rakhine State. However, this project stalled due to conflict in the area.¹⁰⁰ In May 2015 Vietnam’s Deputy Prime Minister made a request to the GoM to simplify administrative procedures for granting investment licences to Vietnamese companies. State-owned Vietnam Rubber Group (VRNG) has a rubber project in Bago Region and the Bank for Development and Investment of Vietnam (BIDV) has launched a branch in Myanmar, which aims, among other things, to invest in agriculture projects.¹⁰¹

Palm oil

At present, production of edible oils in Myanmar is still dominated by local firms, but there is some foreign interest in palm oil, including a small number of foreign-invested projects involving Korean and Malaysian companies.¹⁰² This signals future export potential. For now, current production only meets a fraction of domestic demand and policy makers have identified edible oils as a strategic industry. Official statistics show that up to 2012–13 just under 360,000 acres of land had been planted with oil palm,¹⁰³ and each year Myanmar imports more than 75 percent of the palm oil that it consumes. Large-scale oil palm production is located exclusively in Tanintharyi Region,¹⁰⁴ where a 42,000-acre (17,000 ha) palm oil plantation being developed by Myanmar Stark Prestige Plantation Co Ltd. has become involved in a land conflict with local people. The company is a joint venture between Malaysian company Stark Prestige Plantation and a local company. According to the Karen National Union, which controls these areas, the company cleared the farmland of local people.¹⁰⁵ Earlier in the year 14 villagers were arrested for pulling up a fence in protest against the company.¹⁰⁶

In addition to the risk of land conflicts, there are also concerns that the expansion of oil palm production has had, and will continue to have, a drastic impact on Tanintharyi's environment.

Oil palm now covers a massive 18 percent of the entire region, and oil palm concessions have been approved in forested areas that have high conservation value. Less than 20 percent of these concessions had been planted by the end of 2013, and their prime locations have led to suggestions that they are motivated primarily by revenue connected to logging, rather than to oil palm production.¹⁰⁷ These trends are especially concerning as the area is an environmental hotspot. According to Fauna and Flora International:

*Myanmar's Tanintharyi region is one of the country's most important biodiversity areas with 2.5 million hectares of intact lowland rainforest home to globally threatened animals including tigers, leopards, elephants, tapirs, Malayan sun bears and Gurney's Pitta, a colourful ground-dwelling bird found nowhere else in the world.*¹⁰⁸

Adding another layer of complexity to this situation, many concessions have been granted in former conflict areas where ethnic Karen people have been displaced. As stated in a recent Forest Trends report: 'Historical land use claims by Karen populations who wish to return to their original settlements since the tentative ceasefire with KNU present new challenges to the legality and ethics of oil palm production, rezoning for conservation, and resettlement of IDPs and refugees.'¹⁰⁹

Sugarcane

Until fairly recently, Myanmar's sugar industry was mostly state-owned.¹¹⁰ After liberalization, industry production has expanded to over 380,400 acres. Sagaing is the top sugarcane-producing area, followed by Shan and Bago.¹¹¹ There are more than 20 sugar mills currently operational, with three larger mills under construction by private companies – two in joint venture with foreign investors.¹¹² Almost 70 percent of sugar plantations are smaller than 2 hectares, and most sugar mills source sugarcane from local farmers under contract agreements.¹¹³ According to the OECD investment policy review, although sugarcane cultivation has increased, Myanmar's sugar mills operate below capacity and 19 of a total of 21 existing sugar mills currently cater only to domestic demand.¹¹⁴

In 2014, the Singapore-listed, Malaysian-owned company Wilmar International announced a major investment in Myanmar's sugar industry. Based in Sagaing State, Wilmar operates in joint venture with the local company Great Wall Food Industry Co. Ltd. Through this arrangement, Wilmar acquired Great Wall businesses, including its sugar plantation, two processing plants, a bio-ethanol plant and a fertilizer factory.¹¹⁵ Wilmar has been involved in high-profile land conflicts connected to its oil palm plantations in Indonesia. At the time, the company had received financing from the World Bank's International Finance Corporation (IFC), and complaints from affected communities led to the activation of the IFC's mediation process. According to the NGO Forest Peoples Programme:

*Wilmar's operations have been widely criticised for failing to adhere to the law, for the takeover of communities' lands without their consent, for the clearance of forests without prior environmental impact assessments and for illegal burning. There are numerous land disputes between Wilmar subsidiaries and local communities, as well as conflicts over the way it treats smallholders.*¹¹⁶

In recent years Wilmar has taken steps to improve its image, committing to a 'No Deforestation, No Peat, No Exploitation Policy' pledge, which includes commitments to respect human rights, tenure rights and the right of communities to give or withhold FPIC, and to resolve grievances through an open, transparent and consultative process.¹¹⁷ When contacted by the Business and Human Rights Resource Centre (BHRRC) as part of its survey of companies active in Myanmar (see section 4), Wilmar replied detailing some of the policies that it plans to put in place in its Myanmar operations. These include conducting environmental and social assessments and establishing a grievance mechanism.¹¹⁸ The company has also set up a 'dashboard', which it describes as a

website dedicated to reporting on its sustainability performance indicators.¹¹⁹ However, to date, it is not possible to see its environmental and social impact assessment (ESIA) for the Great Wall joint venture. Great Wall has also been the subject of complaints by local communities.¹²⁰

Chinese companies operating in the north of Myanmar are investing in sugarcane production, although this is hard to quantify due to the lack of investment data for these areas. There are some reports of large Chinese sugarcane investments in other areas of the country, but concrete data are not available. When Malaysian firm Felda (mentioned above) announced that it was entering Myanmar, it said that in addition to its rubber and oil palm activities, it was conducting a study to develop 30,000 hectares of sugarcane near Mandalay.¹²¹ Thai investors have shown an interest in investing in sugarcane in Myanmar, but Thailand's two top sugar companies have stated that they are in no rush to invest in the country at present.¹²²

Rice

Most of the rice currently produced in Myanmar is for domestic consumption, but the country was once one of the world's largest rice exporters. It currently exports mostly low-quality rice, with the majority of exports going to China. Regulations on foreign investment in rice are restrictive, with the current Foreign Investment Law forbidding joint ventures with foreign partners without government approval.¹²³ The World Bank has stated that further liberalization is needed with regards to regulations on rice investment and export control in order to increase the value of the sector and promote investment.¹²⁴

For years, rice exports to China were illegal as quality standards were not in place. A system has now been established through which the Myanmar Rice Federation (MRF) has the responsibility to facilitate trade with state-owned China National Cereals, Oils and Foodstuffs Corporation (COFCO). Chosen companies must meet China's quality and health standards and must be registered with the MRF. In 2015 the MRF announced which companies would be permitted to export rice to China; the selection was criticized by some farmers, who suggested that larger companies were favoured. This creates risks for smallholders who have no choice but to sell to a small group of potentially powerful exporters.¹²⁵

The current restrictions may be relaxed when the new investment law is passed, and media reports suggest that there is interest from foreign regional companies in investing in the rice sector. Thai firms are looking to invest in rice mills and farms, and have plans to produce large quantities of rice for export. Areas of interest include Yangon and rice-growing areas along major rivers such as the Ayeyarwaddy River and Bago, the Thanlwin or Salween River and the Sittaung River.¹²⁶

Other crops

Corn: A number of other crops have attracted the attention of foreign investors. One of the biggest foreign companies engaging in agriculture projects in Myanmar is the Thai conglomerate Charoen Pokphand Group (CP). CP is one of the largest private companies in Thailand and has diverse business interests, including agribusiness, seeds and fertilizers and animal feed. The company operates in Myanmar through Myanmar CP Livestock Co., Ltd., which was registered in 1997. In 2012 CP committed to invest \$550m in Myanmar over the following three years, with this investment directed towards developing corn, rice farms and rice mills, and livestock processing plants.¹²⁷

Corn is produced mostly for export, and according to the MOAI 80 percent of total production is exported.¹²⁸ The main producing areas are Shan State, Chin State, Ayeyarwady Region and central areas of the country. Most corn produced in Myanmar is grown from hybrid seeds introduced by private companies; CP is the leader in hybrid maize and claims over 80 percent of the market. CP Corn is active in Shan State, where it produces corn mainly for export to China for use as chicken feed, and has moved from initially working with smallholders directly through

contract farming agreements to working with local brokers and traders instead. This is important because, according to one recent study on CP in Shan State, it has created a complex system of wealth accumulation and has led to a situation where cultivators have lost negotiating power and CP has reduced its own liability by shifting risks onto smallholders. Crucially, the incentives and promotions utilized by CP in Shan State have led to a transformation of local farming approaches, from traditional subsistence upland agriculture to high-input cash cropping for export. While bringing wealth to the areas where CP is active, this transformation has also contributed to an increase in loans, debt and loss of assets.¹²⁹ CP Corn replied to a request for information from the BHRRC in 2014 and explained that it planned ‘in the foreseeable future’ to adopt the same human rights policy that one of its sister companies uses for agricultural operations elsewhere in the region.¹³⁰ It is not clear if this policy is yet in place in Myanmar.

Coffee: Nestlé has announced plans to build a factory in Myanmar and will source ingredients such as coffee domestically.¹³¹ Singapore-listed Yoma Strategic Holdings is also expanding in Myanmar and, in joint venture with a global agriculture commodities company, plans to invest \$20m in coffee production. Yoma has already received loans from the IFC.¹³²

Fruit and vegetables: Various types of crops are being developed through the opium substitution programme in northern Myanmar, including several kinds of fruit, although details are scant (see Box 4). The OECD reports that fruit harvests have multiplied by 3.8 times in the past decade and vegetables by 2.4.¹³³ However, the extent to which foreign investors are involved in this increase is unclear.

Box 4: China’s opium substitution programme

Much of China’s rubber investment in Myanmar is connected to the opium substitution programme. Various statements and agreements have been issued concerning this programme – for example, in 2007 the two countries signed the ‘Action Plan for Alternative Planting between China and Myanmar’. This plan affirms that China’s State Council will provide special funds, credit and tax breaks to participating companies, and that both countries will facilitate the entry and exit of people and goods across their borders and will develop supporting policies to encourage enterprises to invest in alternative crop planting in areas agreed by China and Myanmar.¹³⁴

According to an official from China’s Ministry of Public Security, quoted in a 2014 *China Daily* article, China allocated RMB 500m (\$80.2m) to Myanmar and Laos, along with technical assistance, during 2013 in order to support the development of plantations. The ministry stated that to date Myanmar and Laos had implemented more than 200 alternative planting projects under the programme.¹³⁵ The most popular crop being developed is rubber, but companies have invested in various other crops including corn, rice, bananas and watermelons. Comprehensive data on projects implemented under the programme are difficult to come by, but Chinese government data for Yunnan province indicate that over 90,000 acres of land have been granted to companies for opium substitution projects.¹³⁶ Several reports, including one by the Transnational Institute, have documented displacement caused by this initiative.¹³⁷

4 IMPACTS AND RISKS ASSOCIATED WITH AGRICULTURAL INVESTMENT IN MYANMAR

Impacts and risks associated with the inflows of agriculture investments are many and varied. This section highlights just a few the most central issues related to possible impacts and risks.

CONSEQUENCES OF WEAK TRANSPARENCY

A lack of transparency around agricultural investments creates risks for communities as well as for investors. These risks include impunity and opaque avenues for redress, unrealized revenue, corruption and project delays. In Myanmar, where many companies do not disclose the locations of their operations or other details publicly, there is significant scope for risks of this nature.

Between 2014 and 2015, the Business and Human Rights Resource Centre (BHRRC) wrote to more than 120 foreign companies investing in Myanmar, requesting that they publicly disclose information about their operations.¹³⁸ As of April 2015, 56 percent of those companies had replied or indicated that they were preparing a response. While more than half of all companies replied with some basic information, the 44 percent who did not reply create a blind spot which prevents communities and civil society organizations (CSOs) from being able to access information.

It is often difficult to identify the various partners involved in investments into Myanmar, including through joint venture operations. Foreign companies often operate with local Myanmar companies as silent partners rather than in a formally registered joint venture, which can make it difficult to identify local actors.¹³⁹ In armed ethnic areas, incoming investors are making deals directly with armed groups and regional administrations that do not report directly to Myanmar's national institutions, making investment in these areas extremely hard to monitor and trace.¹⁴⁰

Transparency in land-related deals in Myanmar is a major challenge. While this is not a problem unique to Myanmar and has been a notable feature of the global 'land rush',¹⁴¹ it is a serious problem with potential to cause risks for communities, governments and investors alike.

Firstly, it is an issue with significant implications for communities where agriculture investments are happening (see below for conflict, displacement and resettlement risks). Potentially affected people need to know the details of an investment in order to assess the likely impacts on their livelihoods and access to resources, and they must know which actors are involved in order to know who they can approach to discuss their concerns and lodge grievances or discuss employment opportunities and other benefits. Secondly, a lack of transparency in land deals increases the chances that the state will lose out on revenues such as taxes on land, production and exports, further limiting the potential benefits for local people and the host country.¹⁴² Thirdly, where there is limited public oversight of projects and investments, corruption can flourish. Fourthly, a lack of communication channels and public disclosure can also slow down or stop company investments in cases where limited information sharing results in local people and authorities becoming distrustful of a proposed project.

Given the institutional challenges still faced in Myanmar, it is not enough for foreign investors simply to rely on local systems and regulations. They must ensure that their investments meet best practice by proactively disclosing information about their operations and ensuring that Myanmar communities and CSOs have access to grievance mechanisms and avenues to engage with businesses.

LAND CONFLICT, DISPLACEMENT AND RESETTLEMENT

A key risk from agriculture investments into Myanmar is the creation of land disputes and/or loss of land for smallholders. Land disputes are a major and long-running concern in Myanmar and have resulted in smallholders losing land and access to resources. In late 2014 the Myanmar National Human Rights Commission (MNHRC) reported that 45 percent of all complaints it received that year were connected to land disputes.¹⁴³ Earlier, in mid-2012 a bill was passed that established a Land Acquisition Investigation Commission, which has the power to review land conflict cases and report to the President's office. Within months of being established, the commission had received over 2,000 cases,¹⁴⁴ a clear indication of the scale of the problem. It was also reported in regional media that Myanmar's Central Land Use Management Committee received 14,499 complaints of land conflicts between November 2013 and May 2015.¹⁴⁵ Many disputes involve the military or well-connected companies, which limits the recourse available for less powerful parties involved.¹⁴⁶

A new National Land Use Policy (NLUP) has recently been approved,¹⁴⁷ but for the time being Myanmar does not have in place strong land administration systems, and the majority of smallholders do not hold land ownership documents. Despite the land reforms that have taken place in recent years, large gaps remain and, as stated by the World Bank: 'The rules and procedures for obtaining, keeping and transferring land use rights are complicated, non-transparent, and uncertain.'¹⁴⁸ These problems are compounded by weaknesses in dispute resolution institutions and mechanisms.¹⁴⁹ Many land disputes are longstanding, and are not necessarily connected to incoming investment. Nonetheless, they are a symptom of weak legal and regulatory systems, and incoming investors must proceed with caution in order to avoid becoming involved in land disputes with local people.

Even in cases where investment does generate employment, when those investments require large-scale land acquisition the disadvantages may outweigh the benefits for local people in a context where land rights are unclear and insecure.¹⁵⁰ This highlights the need for strong due diligence on the part of foreign investors, both when selecting local business partners and when investigating the history of land ownership and use in areas that are impacted by their investments. Secure access to land is crucial for both economic growth and for the protection of the rights of Myanmar citizens.

Not only do shortcomings in the current regulatory systems expose small-scale farmers to significant risks, but both historical grievances and new disputes connected to investments in land pose business and reputational risks for investors. This issue cannot be underestimated, and as the Myanmar Centre for Responsible Business (MCRB) stated in a 2014 publication: 'Land is possibly the most complex challenge any business investing in Myanmar with a land footprint will face.'¹⁵¹ Risks for investors are explored in greater detail below.

Box 5: Ethnic minority groups and customary land use

The challenges faced by smallholders in ethnic upland areas are especially acute, in large part because of the longstanding lack of legal recognition of customary land use and tenure systems. At present, no existing laws recognize customary rules and practices regarding land management, despite the fact that some ethnic groups have relied on these laws for generations. The state does not legally recognize upland swidden (shifting) cultivation (known locally as *taungya*), which therefore has no legal protection, despite the fact that 30–40 percent of the population are considered *taungya* cultivators.¹⁵² Furthermore, historically, the Ministry leading on Agriculture (formally MOAI) had a stated aim of replacing traditional shifting cultivation methods with terrace farming, which it describes as ‘modern upland farm reclamation’.¹⁵³ The lack of legal recognition of traditional land use leaves smallholders extremely exposed to land conflicts and to being pushed from their land to make way for investment in what is regarded by the state as ‘vacant’ land. An additional concern regarding investment in ethnic areas is the risk of exacerbating or reigniting pre-existing conflicts and tensions. Dispossession and land conflict can contribute to the marginalization of ethnic communities, and investors in agriculture and other land-intensive projects must therefore conduct thorough assessments before moving forward with investments in conflict and ceasefire areas.¹⁵⁴

There is also a clear link between landlessness, poverty and food insecurity.¹⁵⁵ High levels of landlessness are the result of multiple factors. Some people may struggle to acquire land at all; others may lose their land due to indebtedness, land confiscation or conflict. But after land is lost, it is often very difficult or impossible for families to get it back. Stripped of a central asset, these landless households are often left with no option but to work as labourers in agriculture or construction, and such income can be precarious – especially in agriculture, where the pay is low and wage labour is seasonal.¹⁵⁶

IMPACT OF AGRICULTURE INVESTMENTS ON WOMEN

Although women in rural areas contribute to agricultural work and are usually responsible for the majority of unpaid work connected to the home and family, they do not enjoy equality in terms of assets, access to education, financial services or participation in decision making. Poor rural women are often disadvantaged with regards to land rights, and therefore investment that impacts on the land use of local people impacts disproportionately on women.

The role of women and girls in agriculture, while significant, is often not given equal recognition with the role of men.¹⁵⁷ But ignoring the role of women in agriculture can result in their being overlooked in policy, legislation and investment, with wide and deep implications for many aspects of life. In Myanmar, where men are typically regarded as the ‘head of household’, land documents are often in the man’s name. This means that in cases where investment leads to land conflict or acquisition, investors and authorities may be more likely to speak directly with the male head of household. When companies enter contract farming arrangements with local people, they will often deal with men rather than women – again, due to their status as head of household. Wage labour in agribusiness often favours men, as it can be physical and therefore regarded as ‘man’s work’. Women can find work on plantations, but may be assigned work that is less physical and less well paid.¹⁵⁸ This has potential long-term implications for poverty reduction as it perpetuates the perception that women’s work is not as valuable as that of men.

One other major risk for women through agricultural investments comes with the type of investment being made: large commercial investments are often ‘gender-blind’ and target cash crops that are more often grown by men. Oxfam research in Africa found that while women often grow fruit and vegetables and food security crops to serve local and informal markets, the crops targeted by large-scale investment, such as rice and sugar (in Tanzania and Malawi, for example) target international or regional markets, and are traditionally controlled and farmed by men. These investment choices can lead to increases rather than reductions in gender inequality in rural areas.¹⁵⁹

Equal rights for women need to be made explicit in laws related to land and agriculture policy. Those legal provisions that seek to protect the rights of women in relation to land and agriculture must be enforced, and local authorities incentivized to make this happen. Encouragingly, gender is mentioned in the NLUP,¹⁶⁰ this now needs to be made into reality. Investors must ensure that their environmental and social impact assessments analyse the implications of potential investments for women. If not, they run the risk of exacerbating pre-existing gender equalities and creating new ones.

RISKS TO INVESTORS

Myanmar’s current environment also exposes investors to risks. Myanmar is a complex place to do business¹⁶¹ and, as outlined above, a lack of transparency and accountability not only impacts on people and the environment, but also on investors. The absence of adequate investment and land use data, for example, means that companies which acquire rights to develop an agribusiness project may do so in ignorance of the fact that there are pre-existing claims to the land that has been sold or granted to them. Poorly planned investment decisions can lead to conflicts that not only harm local people but also company profits and reputations.

The advisory services firm TMP Systems defines this risk for investors:

Tenure risk is the likelihood of a phenomenon in which local populations opposed to a land-based project – such as a dam, mine, mill or farm – impede or interrupt the project due to conflicting rights claims. The financial impacts of such disputes can be significant, leading in some cases to project cancellation or abandonment.

This risk is endemic to rural areas of emerging markets, where satellite imagery shows 93% of concessions to be inhabited and competition for resources is a literal matter of life and death. Human presence, together with often inefficient tenure systems and land rights recognition, increase the chances of disputes with project developers.¹⁶²

Costs to investors because of conflict over land use claims can be up to 29 times the operating costs of the project or can include abandonment of the project, according to TMP’s research.¹⁶³

Experiences from Cambodia clearly illustrate the multiplicity and the depth of risks faced by investors when engaging in agriculture projects in an environment of weak governance and limited transparency. Conflicts around agriculture concessions in Cambodia have become notorious, and in many cases overlapping land claims have slowed or halted project development. In some of the highest-profile cases in recent years, thousands of households have become involved in conflicts with companies that have been granted concessions for sugar plantations.¹⁶⁴

It is important that investors conduct appropriate due diligence and understand not only the existing legal and regulatory framework, but also its shortcomings and the limitations of the implementing institutions.

Box 6: Resources for the private sector on responsible land-based investments

There is an emerging body of guidance and good practice to help companies pursue responsible land-based investments. This includes:

- Oxfam's guidance to companies on what comprises a comprehensive land rights commitment, on FPIC and beyond.
https://www.oxfam.org/sites/www.oxfam.org/files/bn-sugar-rush-land-supply-chains-food-beverage-companies-021013-en_1.pdf
- Various guidance documents for implementing internationally recognized standards on land, including the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT):
 - The Interlaken Group's *Respecting Land & Forest Rights: A Guide for Companies*
<http://www.interlakengroup.org/resources>
 - USAID's *Operational Guidelines for Responsible Land-Based Investment*
<http://www.usaidlandtenure.net/documents/operational-guidelines-responsible-land-based-investment>
 - The *OECD-FAO Guidance for Responsible Agricultural Supply Chains*
<http://mneguidelines.oecd.org/rbc-agriculture-supply-chains.htm>
- TMP Systems is an advisory firm, focusing on asset management and other issues. It recently developed the 'IAN Risk Management Platform for Land Tenure Risk'. This tool uses geospatial data to highlight where land may be a salient risk in companies' supply chains, and outlines company-led processes to counter these risks throughout the project cycle.
<http://www.tmpsystesms.net/ian>
- *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* provides additional detail on the UN Guiding Principles for Business and Human Rights
http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_Eng.pdf

Implementing respect for land rights is, as one company has expressed, a 'journey'. These tools, employed in combination with bringing in local experts to offer context-specific advice, can help companies take the steps they need to effectively manage for and address social and environmental land-related risks and impacts.

5 INTERNATIONAL STANDARDS AND GUIDELINES FOR RESPONSIBLE INVESTMENT

If international investors and governments follow international standards on business and human rights, displacement and land, they will be able to better ensure that human rights in this sector are not violated.

Many of the principles and guidelines listed below are voluntary, but they can be important to both investors and communities because they highlight the fundamental rights of local people and provide guidance to investors on what they can do to ensure that their operations are socially and environmentally sustainable. At the same time, it is critical that the GoM draws on standards such as the UN Guiding Principles and the VGGT to bring its own legislation and policy up to international best practice. Currently, there are still gaps in Myanmar's legislative requirements for companies to protect people's rights. Businesses should consult these international standards and best practice guidelines to govern their conduct and ensure that local people and the environment are not negatively impacted by their operations.

UN Guiding Principles on Business and Human Rights: The UN Guiding Principles (UNGPs) are a set of 31 standards that support the implementation of the UN's 'Protect, Respect and Remedy' policy framework.¹⁶⁵ Although not legally binding, the UNGPs were unanimously endorsed by the UN Human Rights Council in 2011 and have since become an authoritative and powerful reference point for business and human rights globally.¹⁶⁶ Myanmar has committed to develop a national action plan to implement the UNGPs.¹⁶⁷

UN Basic Principles on Development-Based Evictions and Displacement: The impact of forced evictions can be so severe that they represent potential violations of internationally recognized human rights, including the rights to adequate housing, food, water, health, education and work. In 2007, the UN's Special Rapporteur on adequate housing presented the Basic Principles to the Human Rights Council. These guidelines aim to assist states in developing policies and legislation to prevent forced evictions and to mitigate impacts when resettlement is unavoidable.¹⁶⁸

UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security: The VGGT were officially endorsed by the Committee on World Food Security (CFS) in 2012 and aim to promote food security and sustainable development by improving secure access to land, fisheries and forests. The guidelines cover all types of tenure, including public, private, communal, indigenous, customary and informal. The document sets out principles for responsible governance of tenure and provides a framework that states can use when developing strategies, policies, legislation, programmes and activities.¹⁶⁹

OECD Guidelines for Multinational Enterprises: The OECD Guidelines are a comprehensive set of recommendations on responsible business conduct. They state that obeying domestic law is the first obligation of enterprises, but they also provide additional voluntary principles and standards in areas including employment, the environment, information disclosure, conducting risk-based due diligence, stakeholder engagement and corporate governance. When the Guidelines were last revised in 2011 a new section on human rights was added, which is consistent with the UNGPs.¹⁷⁰ Very few of Myanmar's top investors are OECD members; however, the Guidelines can still be drawn upon by non-members.

The International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability: the IFC Performance Standards form part of the IFC's Sustainability Framework along with the IFC's policy on environmental and social sustainability and are mandatory for the IFC's clients. These standards, which are used as a point of reference by many other investors, provide guidance on how to identify risks and impacts and help avoid, mitigate and manage these. Compliance with these standards requires investors to address risks and impacts across a range of areas including for example environmental and social risk impacts, labour and working conditions and indigenous peoples, among others.¹⁷¹

At the time this paper was written, the final version of Myanmar's National Land Use Policy (NLUP) had been approved. This policy makes a number of references to international standards. For example, Article 7 includes in a list of basic principles: 'To adopt international best practices such as voluntary guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security'. In addition, Article 36 states: 'When managing the relocation, compensation, rehabilitation and restitution related activities that result from land acquisition and allocation, unfair land grabbing or displacement due to the civil war, clear international best practices and procedures shall be applied...' These references are encouraging, and the above standards should be drawn upon as the GoM moves forward with the development of the Land Law and associated regulations.

Box 7: Coca-Cola's due diligence in Myanmar

Coca-Cola re-entered Myanmar in 2012 following the lifting of sanctions by the US State Department. The company has said that before re-entering the country it went through the most in-depth due-diligence in its recent history.¹⁷² The due diligence process took into account commercial and legal issues, and also included 'a thorough review of human and workplace rights, and environmental issues to assess the nature of actual and potential adverse human rights impacts related to future business operations'.¹⁷³

Due diligence was also conducted on the financial and environmental performance of Coca-Cola's local business partners. In its Responsible Investment in Myanmar report, the company identifies the importance of having a local partner to navigate the unfamiliar business environment, but also stresses that it is important that local partners are 'credible, ethical and not associated with any person or organization on the Specially Designated Nationals (SDN) list'.¹⁷⁴ In addition to its own assessments, Coca-Cola hired a social compliance audit firm to conduct research on potential human and workplace rights risks. This included an assessment of risks associated with land rights, environmental degradation and limitations on freedom of association.¹⁷⁵ Coca-Cola's Supplier Guiding Principles delineate its expectations of suppliers, including that they develop and implement internal business processes to ensure compliance. The company conducts trainings, assessments and audits of suppliers,¹⁷⁶ and has published four 'responsible investment' reports since re-entering Myanmar.¹⁷⁷

The due diligence processes that Coca-Cola employed for its investments in Myanmar can serve as an example to other investors establishing investments in the agriculture sector. However, despite this, Coca-Cola and other investors could go further in their due diligence. In 2015 Global Witness identified that one of Coca-Cola's business partners in Myanmar also had interests in a jade company – a sector well known for corruption and rights abuses. The business partner was associated with a company subject to US sanctions.¹⁷⁸ After engaging with Global Witness on this, Coca-Cola conducted additional due diligence, looking into the connection. The company's 2015 report 'Responsible Investment in Myanmar' notes that information on this business relationship was not available during Coca-Cola's acquisition in 2012.

Identifying these types of business relationship through robust, ongoing, company-led due diligence is vital to enable any company to make an informed decision on their partners. Global Witness also recommended that Coca-Cola and all other companies should conduct more robust due diligence and disclose 'who owns and controls in-country ventures and partnerships'.

Box 8: Food and beverage companies and land rights

Oxfam's Behind the Brands campaign highlighted land-related human rights risks and impacts linked to the supply chains of the world's 10 largest food and beverage companies. The campaign shed light on conflicts in Cambodia – involving Thai sugar supplier Khon Kaen Sugar (KSL) (a second conflict in Cambodia involves Mitr Phol) – and Brazil, and encouraged the companies to commit to 'zero tolerance' for land grabs and respect communities' right to FPIC, and to ensure that their suppliers do the same. Coca-Cola was the first company to make a comprehensive commitment on this;¹⁷⁹ PepsiCo, Nestlé and Unilever soon followed suit.¹⁸⁰ Implementing these commitments in Myanmar can help companies and their suppliers to ensure responsible land-based investments.

6 STATE REGULATION OF OUTBOUND INVESTMENTS

Under the pillar of the state's duty to protect, the UN Guiding Principles on Business and Human Rights include the foundational principle that states should clearly set out the expectation that all businesses domiciled in their territory respect human rights throughout their operations.

It can be challenging for home states to monitor the activities of companies operating abroad, especially companies that have a broad global reach. But it is in the interests of states to do everything in their power to ensure that both state-owned and private companies operate in a responsible manner when operating overseas. This is first and foremost an ethical and human rights obligation, but also an issue of diplomacy and reputation. Outbound investment that is not implemented in a responsible manner risks harming people and the environment, and can also result in disputes and conflict that can sour diplomatic relations and negatively impact on business operations elsewhere.

Home states can play a vital role in promoting responsible investment by encouraging companies to follow international standards and guidelines when investing overseas – for example, the UNGPs, the OECD Guidelines to Multinational Enterprises and the VGGT.

This section considers examples of states in the Southeast Asia region taking measures to address conduct in outbound investment. If states can effectively regulate outbound investments, this would help to ensure that companies are required rather than merely encouraged to uphold human rights throughout their operations in Myanmar.

GUIDELINES RELATED TO CHINESE OVERSEAS INVESTMENT AND FINANCE

China is one of the few countries to have developed specific environmental and social guidelines relating to its outbound investment and finance. For a number of years, the Chinese government has been calling on its companies to implement overseas projects in a responsible manner. In 2006, China's State Council, the country's highest administrative body, issued the Nine Principles on Encouraging and Standardizing Foreign Investment, followed in 2014 by the Measures for Overseas Investment Management.¹⁸¹ These principles called on Chinese enterprises to abide by local laws and regulations, to commit to social responsibility, to pay attention to environmental protection and to support local communities and people's livelihoods.¹⁸² In the following years, more detailed guidelines have been issued by various government ministries and institutions, several of which have relevance to overseas agricultural investment.

In 2013 China's Ministry of Commerce (MOFCOM) and Ministry of Environmental Protection jointly issued the Guidelines for Environmental Protection in Foreign Investment and Cooperation. These guidelines re-emphasize that Chinese enterprises should follow local laws and regulations, respect local customs and beliefs and promote harmonious development of the economy, environment and local communities. They also call on companies to conduct environmental impact assessments and create management plans to mitigate any negative impacts associated with their investments. After operations begin, companies are instructed to monitor pollution. The guidelines state that companies should improve communication with local people and gather public opinions concerning development projects.¹⁸³ China's State Forestry Administration (SFA) also issued the *Guide to Overseas Silviculture by Chinese Enterprises* in 2007, and the *Guide to Sustainable Overseas Forests Management and Utilization by Chinese Enterprises* was

developed and issued by the SFA and MOFCOM in 2008. New guidelines are now being developed for overseas forestry projects, and there are plans to develop guidelines for overseas rubber investment.¹⁸⁴

China has also issued guidelines that apply to Chinese financial institutions that are providing finance for overseas projects. The Green Credit Guidelines, issued by the China Banking Regulatory Commission (CBRC) in 2012, cover issues including due diligence, client compliance review and project performance assessment, and explicitly state:

*Banking institutions shall strengthen the environmental and social risk management for overseas projects to which credit will be granted and make sure project sponsors abide by applicable laws and regulations on environmental protection, land, health, safety, etc. of the country or jurisdiction where the project is located.*¹⁸⁵

In November 2015 the *2015 Report on Sustainable Development of Chinese Enterprises Overseas* was released. The report outlines the progress of Chinese companies in sustainable overseas development through the lenses of corporate governance and economic, environmental and social performance.¹⁸⁶ The research was a collaboration between the UN Development Programme (UNDP), the Research Centre of the State-owned Assets Supervision and Administration Commission (SASAC) of the State Council and the Chinese Academy of International Trade and Economic Cooperation (CAITEC) of the Ministry of Commerce. It includes a survey of Chinese enterprises' perceptions of their own sustainable development performance. This report demonstrates an increasing interest by the Chinese government in communicating efforts to promote sustainable Chinese FDI and to shine a light on the enterprises' performance as corporate citizens.

The guidelines discussed here represent a progressive step on the part of China; however, at present they remain non-binding as no oversight mechanism or grievance mechanism has been created.¹⁸⁷ There is also a lack of available information on whether or not companies are implementing these guidelines, largely because they include no reporting requirements or public disclosure.

THE THAI NATIONAL HUMAN RIGHTS COMMISSION

Thailand's National Human Rights Commission (NHRC) was established in 2001.¹⁸⁸ Its mandate is to promote respect for human rights domestically and internationally and to examine alleged human rights violations and acts that do not comply with Thailand's international human rights obligations. The NHRC may propose remedial measures to individuals or organizations concerned in a case, and it submits annual reports to the Thai Parliament and the government.

Most of the complaints received by the NHRC are domestic, but a small percentage of complaints are received from outside of Thailand. The commission has investigated Thai sugar investments in Cambodia and in 2015 issued a report that found that Khon Kaen Sugar had committed 'serious human rights violations' in its investment in Koh Kong Province.¹⁸⁹ The commission has also received complaints from Myanmar regarding projects involving Thai companies. This includes a complaint submitted in 2013 regarding the development of the Dawei Special Economic Zone in Thanintharyi Region,¹⁹⁰ and a complaint regarding proposed hydropower dams in the Salween basin.¹⁹¹

ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS

In 1993 the original members of the Association of Southeast Asian Nations (ASEAN) issued a joint communiqué which stated that members should ‘coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human rights’. Members also agreed to ‘consider the establishment of an appropriate regional mechanism on human rights’. In 2009 the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established.¹⁹²

The terms of reference for the AICHR describe it as a ‘consultative inter-governmental body’; its mandate does not expressly include receiving and investigating complaints of human rights abuses.¹⁹³ There is no procedure in place to receive complaints, but communities impacted by Thai sugar investment attempted to submit a complaint to the AICHR. They received no response. At present this body is not playing a role in directly investigating alleged human rights violations, but it has a mission to develop strategies for the promotion and protection of human rights. It is therefore possible that the commission could at some point in the future become more active in looking at specific cases and suggesting remedies. This would, however, require significantly more political will and buy-in from all ASEAN members.

Box 9: US reporting requirements for responsible investment in Myanmar

During Myanmar’s period of military rule, US sanctions on trade and investment became increasingly strict and no new investment by US companies was permitted after 2003. These sanctions were suspended in 2012, and the Reporting Requirements on Responsible Investment were introduced for any aggregate investments worth over \$500,000.¹⁹⁴ Under the requirements, investors must provide information on due diligence and policies and procedures concerning human and workers’ rights, the environment, anti-corruption, community and stakeholder engagement, hearing grievances from employees and local communities, and corporate social responsibility policies. Reports must include impacts and risks, and must specify what measures have been or will be taken to minimize and prevent these impacts. Investors must also report on what policies companies have in place to deal with resettlement connected to their investments. Investors are bound to report total payments to governments of over \$10,000.¹⁹⁵ The website of the US Embassy in Myanmar states:

The Department of State will use the information collected as a basis to conduct informed consultations with U.S. businesses to encourage and assist them to develop robust policies and procedures to address a range of impacts resulting from their investments and operations in Burma. We also intend the public report to empower civil society to take an active role in monitoring investment in Burma and to work with companies to promote investments that will enhance broad-based development and reinforce political and economic reform.¹⁹⁶

The US reporting requirements are a positive step, but there have been criticisms that the requirements are too open to interpretation, resulting in extremely varied levels of detail in company reporting, insufficient information on company activities and a reduction in the value of the requirements as a standardized tool across US companies abroad for the purposes of monitoring by civil society. Many CSOs are urging the US government to strengthen the requirements to ensure that they are sufficiently robust and meaningful.

7 CONCLUSION AND RECOMMENDATIONS

Agricultural investment in Myanmar has the potential to support development of the agriculture sector and bring both economic and social benefits to local people. However, opening up to investment without first having in place strong systems to manage an influx of investors could be potentially catastrophic for both smallholders and the environment. The risk of human rights violations remains high, despite some positive steps having been made towards legal reform of the land sector.

Many ongoing land disputes are longstanding, and are not necessarily connected to incoming foreign investment. Nonetheless, they are a symptom of the weak legal and regulatory systems and limited tenure security facing many Myanmar citizens. This means that incoming investors must proceed with caution in order to avoid becoming involved in land disputes. Even in cases where incoming investments do generate employment, when those investments require large-scale land acquisition the disadvantages may outweigh the benefits for local people if the investment takes place in a context where land rights are unclear and insecure.¹⁹⁷

The governments of Myanmar, investing companies and countries where foreign investors are based have unique roles to play to ensure that investment is conducted in a responsible manner and in ways that respect human rights. The UN Guiding Principles on Business and Human Rights provide a strong framework through which these roles can be implemented.

The remainder of this section sets out key recommendations which the Government of Myanmar, foreign governments, businesses investing in Myanmar and development partners active in the country could follow to help deliver on more responsible agricultural investment.

Recommendations to the Government of Myanmar

Land concessions

- **Cease granting large-scale concessions until the new National Land Use Policy is being effectively implemented and a Land Law is passed.** The laws currently being used to grant concessions are widely seen as failing to protect smallholders and ethnic groups. Until the new Land Law is passed, the GoM should suspend the granting of new concessions.
- **Review the implementation of existing concessions.** Existing concessions should be monitored against their development plan and agreement with the government, and if the company has not met its obligations, concessions should be frozen, or revoked if serious violations have occurred.
- **Ensure that decisions to grant additional land concessions in the future are based on a thorough and responsible assessment of proposals.** This must take into account existing land use, and no concession should be granted without a detailed assessment and mapping of existing land use rights.
- **Ensure that all relevant stakeholders are consulted on concessions, including, crucially, potentially affected communities;** no land use rights should be transferred from pre-existing land users without their free, prior and informed consent.
- **Increase transparency and access to information regarding existing and future investments related to land.** The GoM should increase transparency in investment by making available reliable statistics, maps and other documents related to land-based investments. This includes releasing details of the locations and boundaries of existing land

concessions. These data should be stored in an open database which includes project maps, names of investors, purpose of the project and status of implementation.

- **Ensure that land acquisition is implemented in line with international best practice and in compliance with international human rights law.** Involuntary resettlement should only occur when in the public interest and as a last resort. In cases of private investment, the state must ensure that no one with legitimate pre-existing land rights is forced to move against their will. In such cases, the principle of FPIC should be upheld.
- **Draw on international standards and principles when developing new land laws and regulations.** The VGGT can serve as a guide as the process of drafting the new Land Law takes place.
- **Increase the accessibility of the land registration process for small-scale farmers.** The process of land registration should be made simpler and more transparent, giving villagers and farmers, including women, a greater voice. Ensure that farmers understand their rights, and that these rights are protected.
- **Explicitly acknowledge customary land use of ethnic minority groups and put in place interim protections to prevent further loss of traditional lands.** In line with the new National Land Use Policy, the traditional land occupation and use of ethnic groups must be acknowledged and protected.
- **Ensure that women's rights are considered in developing new policies and laws.** Ensure recognition of the value of women's work, including in agriculture. Women's equal rights to land, credit, infrastructure and services should be guaranteed, and discrimination based on head-of-household criteria should be eliminated. Gender issues must be considered and addressed in the drafting of future policies, laws and programmes related to land and agriculture.

Support for small-scale farmers

- **Respond to the needs of small-scale farmers, not just large investors.** A comprehensive vision of agriculture is needed which responds to the needs of small-scale farmers, with explicit measures to invest in farm production and local markets.
- **Reallocate the national budget to increase agricultural spending, particularly to improve the quality and reach of extension services and inputs;** this also means resourcing local government to focus on farmer-identified challenges.
- **Support the development of agricultural cooperatives and producer organizations based on an appropriate regulatory framework,** and empower them to link to and work with the local private sector.
- **Provide scrutiny of investment proposals and monitoring of approved investments** to ensure that they protect smallholder interests.
- **Use government bodies to provide support to farmers in the negotiation of contract farming arrangements,** and regulate and monitor ongoing contract farming agreements.

Ensuring that rights are upheld

- **Ensure that environmental and social impact assessments (ESIAs) are conducted for new land- and resource-based investments.** ESIAs include genuine consultation with local people, including women. Measures must be developed to mitigate negative impacts, but if these impacts are too great, projects should not proceed.
- **Continue to improve the process of public consultation when drafting new law and policy.** Learning from the process of consultation that took place around the National Land Use Policy, continue to improve processes and ensure that genuine consultation is conducted and is accessible to all stakeholders.
- **Ensure that appropriate and effective remedies are put in place to deal with alleged human rights abuses connected to business activities.** The third pillar of the UN Guiding Principles is access to remedy. In addition to taking measures to protect against

business-related human rights abuses, states must ensure that there are judicial, administrative and legislative remedies in place which ensure that if abuses do occur, affected people have access to effective remedies.

Recommendations to foreign governments

- **Recognize that the duty to protect extends beyond national boundaries.** The duty to protect against business-related abuses is not confined only to a state's own territory. In cases where a company's overseas operations are causing harm, both host and home states have a duty to act.
- **Promote the adoption of international standards, principles and guidelines to companies investing overseas.** Home governments should promote and encourage companies to implement international standards such as the UN Guiding Principles, the OECD Guidelines to Multinational Enterprises and the VGGT.
- **Governments across the region should follow the practices of China and develop guidelines related to social and environmental safeguards in overseas investment.** China has developed a number of guidelines for Chinese companies and financial institutions operating overseas. Although basic, they can serve as a foundation from which to promote improved conduct in overseas investment.
- **Chinese state institutions should strengthen existing overseas investment guidelines.** China's guidelines on overseas investment are promising, yet they lack enforceability. China should do more to disseminate these guidelines, train enterprises active overseas in how they should be implemented, and subsequently monitor their implementation. Steps should also be taken to integrate grievance mechanisms into such guidelines in the future.
- **Taking a lead from Thailand, governments throughout the region should empower human rights commissions to investigate alleged business-related human rights abuses.** National human rights commissions should accept and investigate complaints of business-related human rights abuses beyond national boundaries.
- **Require companies investing abroad to disclose their activities.** Home countries should require companies investing overseas to disclose the details of their investments, including type, size and location. This is especially important in cases such as Myanmar, where access to information in the host country is severely limited.

Recommendations to businesses investing in or sourcing from Myanmar

- **Ensure compliance with local laws and regulations and follow international standards,** including the responsibility to respect human rights as set out in the UNGPs, and the VGGT. Businesses have the obligation to follow local laws and regulations, but should go further by implementing higher standards that go beyond what is required under state law, using the International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability as a minimum. End-user companies should ensure that the companies with which they have business relationships adhere to these standards.
- **Consider alternatives to large-scale land investments.** Prioritize models of investment that do not require the transfer of land away from small-scale farmers and communities, and that are based on fair contracts.
- **Conduct thorough due diligence.** Before buying or leasing new land, expanding existing operations or developing existing holdings, and periodically during the project life-cycle, investors must conduct robust due diligence. Due diligence enables the company to gain a clear understanding of the local context and of social, environmental and human rights risks and/or impacts. End-user companies should likewise conduct due diligence, looking into the policies and practices of the companies with which they have business relationships.

According to the UNGPs (Guiding Principles #17–21),¹⁹⁸ due diligence includes:

- assessing the actual and potential impacts of human rights (including investigating impacts on existing land users);
 - integrating assessment findings into decision-making processes and addressing risks and adverse impacts identified;
 - tracking the effectiveness of the company's efforts to address adverse impacts;
 - communicating these efforts to stakeholders (such as local communities).
- **Assessments should also examine other environmental and social impacts, and must include the participation of potentially affected communities.** Assessments must be based on timely, transparent and meaningful consultation with affected communities, including women. Businesses should engage with and seek the input of those who could be affected by investment decisions. These assessments should be made public in an accessible format so that communities and civil society groups can engage with the findings.
- **Ensure respect for indigenous peoples and local communities' free, prior and informed consent (FPIC).** Before making major investment decisions, businesses must consult with local people, including women and marginalized groups. Any land acquisition or land use change must follow the principles of FPIC. After a project becomes operational, consultation should continue.
- **Make available operational-level grievance mechanisms, per UNGP 29 and following the principles of UNGP 31.** Effective grievance mechanisms will enable the investor to catch adverse impacts before they escalate, and provide potentially affected communities and workers with a means for redress.
- **Provide access to remedy** in cases where the company has caused or contributed to adverse human rights impacts, per responsibilities under the UNGPs.
- **Improve transparency by disclosing project details.** Companies should disclose locations of their investments, including maps showing the boundaries of plantations and processing plants, the purpose of the investment, period of contracts and concession agreements. Businesses should also publish information on what processes they have in place to ensure respect for human rights, including access to grievance mechanisms. Publications should be made in a form that is accessible to affected people. This should be done in a manner which guarantees accessibility to affected communities (e.g. appropriate language, channels of communication for disclosing project details, and so on).
- **Adopt a comprehensive commitment to respect the land rights, including customary and usage rights, of women, communities and indigenous people.** The policy commitment should cover the company and its suppliers, and should be based on existing guidance for such commitments.¹⁹⁹
- **Champion responsible land-based investments among government officials, peer companies, multi-stakeholder initiatives and other stakeholders.** Take an active role to foster a race to the top and strengthen sector-wide initiatives and regulations.
- **Recognize the critical role that women play in agriculture.** Support efforts to ensure that women have equal access to work, extension, credit and inputs. Commit to equal pay for equal work as well as ensuring that the legal minimum wage and other Myanmar labour laws are followed.
- **Adhere to a fair sharing of risk and benefits in contract farming and related arrangements with smallholders.** Develop fair and transparent terms of trade, quality standards and pricing structures, as well as transparent and equitable dispute resolution mechanisms. Identify needs around access to inputs, extension, risk management, local infrastructure, post-harvest processing and help to find solutions, working with government wherever possible.

Recommendations to development partners

- **Ensure that aid is used to help the government support equitable growth and improve food security through small-scale agriculture.** This can be achieved by supporting small-scale farmers to access infrastructure, extension, finance and other inputs, as well as

strengthening their power in markets (e.g. by supporting the development of producer organizations).

- **Ensure that technical advice and funding also help the government to develop and implement policies targeted at supporting equitable growth through small-scale agriculture**, and improve social and environmental safeguards linked to investments.
- **Encourage the creation of multi-stakeholder spaces** where farmers, civil society, the private sector and government can raise and jointly resolve issues, and promote and develop inclusive value chains.
- **Work with and support the government, businesses and civil society to participate in developing and implementing governance reforms that enable Myanmar to meet international standards.** This should include the VGGT and UN Guiding Principles on Business and Human Rights.
- **Support the development of inclusive policy processes.** Support capacity building for government agencies, particularly at regional and local levels, as well as supporting civil society and farmers to be able to influence policy design and implementation and budget processes.

NOTES

- 1 Ministry of National Planning and Economic Development (2013). Framework for Economic and Social Reforms: Policy Priorities for 2012–15 towards the Long-Term Goals of the National Comprehensive Development Plan, p.25.
- 2 Ibid., p.24.
- 3 The 2014 Agriculture in Brief publication by the Ministry of Agriculture and Irrigation (MOAI) states that, as of April 2014, 377 concessions had been granted, with a combined area of 939,683 hectares (around 2.32m acres). See also: <http://data.worldbank.org/indicator/AG.LND.TOTL.K2>
- 4 K. Woods (2015). Commercial Agriculture Expansion in Myanmar: Links to Deforestation, Conversion Timber, and Land Conflicts. Washington DC: Forest Trends, p.14.
- 5 Although Singapore is a top investor in Myanmar, this masks the reality that much of this is actually investment by other countries routed through Singapore. For example, see: <http://www.scmp.com/news/asia/article/1642453/singapore-beats-china-become-top-investor-myanmar>
- 6 S. Chao (ed.) (2013). Agribusiness, Large-Scale Land Acquisitions and Human Rights in Southeast Asia: Updates from Indonesia, Thailand, Philippines, Malaysia, Cambodia, Timor-Leste and Burma. United Kingdom: Forest Peoples Programme, p.144.
- 7 Phyo Zin (2015, 16 March). Controversial Palm Oil Project Sparks Arguments. Myanmar Eleven. <http://www.nationmultimedia.com/aec/Controversial-palm-oil-project-sparks-arguments-30256025.html> (accessed July 2015); San Maw Aung (2015, 26 February). Myanmar Authorities Arrest 14 Villagers, Charge Them With 'Illegal' Land Protest, Radio Free Asia. <http://www.rfa.org/english/news/myanmar/villagers-02262015165655.html> (accessed July 2015).
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This paper was written by Jasmine Burnley, Daisy Gardener and Mark Grimsditch. Oxfam acknowledges the assistance of Duncan Pruet, Cho Zin Thet and Chloe Christman. Oxfam Discussion Papers are written to contribute to public debate and to invite feedback on development and humanitarian policy issues. They are 'work in progress' documents, and do not necessarily constitute final publications or reflect Oxfam policy positions. The views and recommendations expressed are those of the author and not necessarily those of Oxfam.

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The information in this publication is correct at the time of going to press.

Published by Oxfam GB for Oxfam International under ISBN 978-0-85598-759-6 in February 2017. Oxfam GB, Oxfam House, John Smith Drive, Cowley, Oxford, OX4 2JY, UK.

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