

Journal of Law & Commerce

Vol. 40, No. 2 (2022) • ISSN: 2164-7984 (online)
DOI 10.5195/jlc.2022.241 • <http://jlc.law.pitt.edu>

ARTICLES

LAND LAWS AND FOREIGN DIRECT INVESTMENT IN MYANMAR:
WHY AMERICAN INVESTORS NEED TO RECONSIDER THE
CUSTOMARY RIGHTS OF SMALLHOLDER FARMERS

Alvin Hoi-Chun Hung



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LAND LAWS AND FOREIGN DIRECT INVESTMENT IN MYANMAR: WHY AMERICAN INVESTORS NEED TO RECONSIDER THE CUSTOMARY RIGHTS OF SMALLHOLDER FARMERS

*Alvin Hoi-Chun Hung**

ABSTRACT

This Article looks into the issue of the government's usage of land laws to release land from the smallholder farmers in Myanmar, which is considered not just a matter of striking a delicate balance between an individual's customary rights of land tenure versus the need for more efficient land redistribution to sustain the country's economic development, but also about how social stability of the rural villages in Myanmar are uprooted when the agricultural livelihood and homes of those smallholder farmers are taken away by the government's new land policies, and how cultivation flexibility and labor employment of small-scale agriculture have been sacrificed for the introduction of large-scale farming. Given the ample investment opportunities available at both ends of the supply chain in Myanmar, American investors have to be aware of the need to sustain their corporate social responsibilities by avoiding unnecessary suffering being done to smallholder farmers in Myanmar when their lands have been confiscated to accommodate the spatial needs of foreign direct investment (FDI). This Article provides recommendations to help American investors

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maintain their ethical stance and reputation when operating their cross-border businesses in Myanmar.

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*Land is not a mere commodity,
but an essential element for
the realization of many human rights¹*

INTRODUCTION

Underutilized land resources in developing countries appear to be attractive opportunities for American investors to expand their international markets and/or extend their global supply networks. Myanmar, a relatively less known country in southeast Asia, is an excellent example of these opportunities. Yet, without a clear overall picture of the socio-legal environment related to land resources in Myanmar, investing in this underexplored territory may pose a threat to American investors in terms of the possible violation of human rights, or more specifically, property rights, of local people.

Being one of the poorest countries in the world, Myanmar needs drastic changes to become a more open modern society with greater social and economic integration into the global economy. Effective government policies on the ownership and usage of land and appropriate allocation of human and natural resources are crucial to the country's economic development. Given a worldwide trend of enacting specific land laws for the expropriation of private land resources under customary tenure for more productive uses in developing countries,² the socio-political conflicts and possible injustice claimed by farmers affected by these laws have become a major concern for the possible violation of human rights. Based primarily upon this important concern, this Article looks into the need to strike a fair and equitable balance between the customary rights of smallholder farmers versus the significance of economic development for national interests as perceived by the government in Myanmar. How American investors have been affected by the land laws will be analyzed, and corresponding recommendations will be given. In addition, the Article also explores how cultivation flexibility and labor employment of small-scale agriculture have been sacrificed for the

¹ This quotation is extracted from the Office of the United Nations High Commissioner for Human Rights, *Land and Human Rights—Standards and Application*, OHCHR publication, 2015.

² Frédéric Mousseau et al., *Driving Dispossession: The Global Push to “Unlock the Economic Potential of Land,”* THE OAKLAND INST. 1, 3 (2020), <https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/driving-dispossession.pdf>.

introduction of large-scale farming. By doing so, this Article provides insights into the analysis of the ongoing transformations of land laws as an explicit form of the intended consequences of the conflict between emerging emphasis on economic interests versus the proclaimed public values regarding human rights that need to be attended to.³

This Article commences with a brief introduction to the concepts of property rights and government power as understood in the context of the socio-legal system in Myanmar. It then looks into the social and economic implications of the new land laws passed in 2012 and revised in 2018 and 2020 and analyzes how the customary tenure of smallholder farmers is affected by these land laws in Myanmar. It also investigates the role of foreign direct investment (FDI), particularly those of the American investors, in fostering the introduction of the government land policy to ensure more productive use of available land. Last, but not least, the Article provides recommendations to help American investors maintain their ethical stance and reputation when operating their cross-border businesses in Myanmar.

I. LAND POLICIES AND CULTIVATION IN MYANMAR

Myanmar has undergone significant changes in the past few decades. As an integral part of the macro trends of changes in the political and economic policies of the government after the 2010 election, the nation's new land policies to facilitate economic growth have been aggressively developed. In this connection, Myanmar farmers are in the process of being displaced as their land is expropriated and passed on to the hands of large-scale land developers to prepare for the attraction of FDI.⁴ This section will provide an overview of the socio-legal framework and environment of the ownership and cultivation of lands in Myanmar since its colonial era to pave the way for an analysis of the new land laws introduced in 2012 and 2019.

³ Sabrina Praduroux, *Objects of property rights: old and new*, in *COMPARATIVE PROPERTY LAW* (Edward Elgar Publishing 2017).

⁴ Raffaele Vignola et al., *Ecosystem-based Adaptation for Smallholder Farmers: Definitions, Opportunities and Constraints*, 211 *AGRIC., ECOSYSTEMS & ENV'T* 126, 127 (2015).

A. A Historical Perspective of Myanmar's Land Policy

An analysis of the modern political history of Myanmar can explain how the government's land policy has been evolving since its independence from British colonization (1886 to 1947). The country's land utilization is closely related to the government's policy on investment, especially those coming from foreign investors.

In 1948, the country was free from British colonial ruling and became an independent republic carrying the name "the Union of Burma." In the early independence years, the country's land policy was inherited primarily from British India's colonial laws and land policy, for instance, the Land Acquisition Act (1894).⁵ Later, more laws, such as Land Nationalization Act (1953), were passed by the parliament to oversee land ownership and utilization. The traditional land policy was in favor of the protection of the rights of smallholder farmers and peasants to use and cultivate their land while the state maintained ownership of all land in the country.⁶ The implementation of this policy includes the abolition of landlordism and the assignment of long-term leases to smallholder farmers.

On March 2, 1962, the military junta took control of Burma by overthrowing the elected civilian government. Between 1962 and 1988, Myanmar was ruled by a revolutionary council headed by the military junta generals, adopting "the Burmese Way to Socialism."⁷ New laws related to land cultivation and possession, such as Tenancy Law (1963) and Law Safeguarding Peasant Rights (1963), were enacted by the new socialist government with a view to implementing socialism. Since then, socialism has been practiced in the country, and almost all businesses and media have been nationalized. As the economy of Burma deteriorated significantly, the

⁵ MICHAEL W. CHARNEY, A HISTORY OF MODERN BURMA (Cambridge Univ. Press 1, 2 2009), https://www.researchgate.net/publication/290452251_A_History_of_Modern_Burma.

⁶ Nyein Nyein Kyaw et al., *Analysis of the Factors Influencing Market Participation among Smallholder Rice Farmers in Magway Region, Central Dry Zone of Myanmar*, 10 SUSTAINABILITY 4441 (2018).

⁷ MARTIN SMITH, BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY (1st ed.) (London and New Jersey: Zed Books 1991).

United Nations officially declared Burma to be included in the category of the Least Developed Countries (LDC) in September 1987.⁸

In 1988, after the outbreak of a series of protests and demonstrations, the military troops fired at the crowds, killing thousands of people.⁹ Martial law was immediately imposed by the newly formed “State Law and Order Restoration Council” (SLORC) but was later relaxed to allow more political freedom.¹⁰ In 1990, the junta leaders adopted a more open policy by organizing an election. A liberal political party, the National League for Democracy (NLD), led by Aung San Suu Kyi, won overwhelmingly in the election. Unfortunately, the military junta did not surrender its power, and leaders of NLD were arrested and imprisoned. While most of the policies and structure of the government remained almost the same as before the election, there was a change in land policy to improve land cultivation and utilization. The Central Committee for the Management of Culturable Land, Fallow Land, and Waste Land¹¹ was established in 1991 to systematically review all applications for the rights to cultivate and utilize land by both public and private organizations.¹² A vacant, fallow, and virgin (VfV) land notification was issued by the SLORC in 1991 for the purpose of land acquisition and attraction of foreign investment.

In 1997, SLORC was renamed the “State Peace and Development Council” (SPDC) by replacing “law and order restoration” with “peace and development,” indicating a modest change in the military government’s policy towards a relatively more open and democratic stance. Increased

⁸ Least Developed Country Category: Myanmar Profile (2021), <https://www.un.org/development/desa/dpad/least-developed-country-category-myanmar.html>.

⁹ The “8888 Nationwide Popular Pro-Democracy Protests” were a series of nationwide protests by university students in *Burma* that took place in August 1988. This is reported by Vincent Boudreau, in his book *RESISTING DICTATORSHIP: REPRESSION AND PROTEST IN SOUTHEAST ASIA* (Cambridge: Cambridge Univ. Press 2004).

¹⁰ Makhdoom Ali Khan, *The Burmese way: To Where?*, THE INT’L COMM’N OF JURISTS 1, 11 (1991), <https://www.icj.org/wp-content/uploads/2013/06/Myanmar-Burmese-way-fact-finding-report-1991-eng.pdf>.

¹¹ THE UNION OF MYANMAR STATE LAW AND ORDER RESTORATION COUNCIL, DUTIES AND RIGHTS OF THE CENTRAL COMMITTEE FOR THE MANAGEMENT OF CULTURABLE LAND, FALLOW LAND AND WASTE LAND (1991).

¹² Pauline Eloff & Michèle de Aquino, *Navigating Land in Myanmar: An Analysis of Land Reform, Related Laws, Instruments and their Implications*, PYIDAUNGSU INST. 1, 28 (2013), <https://www.pyidaungsinstitute.org/index.php/files/110/Navigating-Land/13/20180708landreformenglishversionfinaleediting-re.pdf>.

sanctions from the West drove the government to seek reform, and in 2003 the new “roadmap towards discipline-flourishing democracy” was announced but was not well accepted by people in Myanmar. A series of protests labeled the “Saffron Revolution”¹³ were triggered by the removal of fuel subsidies, and Buddhist monks were at the forefront of the protests and demonstrations in 2007.

To overcome social unrest, a new constitution was passed in 2008, representing a shift in the direction of political governance and economic development. Section 37 of the new Constitution of the Union of Myanmar (2008) stipulates that “The Union, (a) is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union”; (b) shall enact necessary law to supervise extraction and utilization of State-owned natural resources by economic forces; (c) shall permit citizens right of private property, right of inheritance, right of private initiative and patent in accord with the law.”¹⁴ This new constitution allows private ownership and utilization of government land, being the first time since the military junta took power in 1962.

A general election was held in 2010 and won by the military-backed Union Solidarity and Development Party (USDP). On October 21, 2010, as a symbol of a significant change in government policy, the junta changed the country’s official name to “Republic of the Union of Myanmar.” The country’s name was officially changed from “Burma” to “Myanmar.” Although the country’s new name has been commonly accepted by most nations in the world, the American government still calls its diplomatic office in Myanmar “U.S. Embassy in Burma.”¹⁵ In the same year, hundreds of political prisoners, including Aung San Suu Kyi, were released, and a wide range of relaxation of labor restrictions, press censorship, and new regulations on economic practices were put forward. In 2011, for the first time in half a century, Myanmar was visited by American President Obama,

¹³ “Saffron Revolution” is the protest by Buddhist monks who objected to the military government’s decision to raise oil and gas prices in 2007. The color saffron alludes to the traditional color of monks’ robes. This is reported by David Steinberg, *Globalization, Dissent, and Orthodoxy: Burma/Myanmar and the Saffron Revolution*, 9 GEO. J. INT’L AFF. no. 2 (2008): 127–35.

¹⁴ MYANMAR CONST. part 2 § 37.

¹⁵ U.S. EMBASSY IN BURMA, <https://mm.usembassy.gov> (last visited Apr. 13, 2022).

signifying the country's intention and trend of reintegrating into the global economy.

In 2012, a political reform took place. The military junta allowed the free election of the seats in the parliament but maintained the veto to disallow any changes in the constitution by keeping 25% of seats in state and regional 'hluttaws' (parliaments).¹⁶ In the year's by-election, the NLD won forty-one out of forty-four contested seats. Since the country opened to foreign investment in 2011, the Myanmar government has been developing its legal system and administrative practices regarding its land laws, in parallel with the new economic reform. One of the economic objectives is the promotion of agriculture as a base for the development of other sectors.¹⁷

In line with the political reform by relaxing the practice of socialism in the country, two principal land laws, the Vacant, Fallow and Virgin Lands Management Law (VFV Land Law) and the Farmland Law, were enacted by the Myanmar parliament on March 30, 2012. In the same year, the parliament enacted the Foreign Investment Law (2012) to attract more investment from international investors. The VFV Land Law and Farmland Law were later amended in 2018 and 2020, respectively. These laws aim at enhancing the productivity and efficiency of land utilization. A new law, the Land Acquisition, Resettlement, and Rehabilitation Law (LARR Law), was passed in 2019 to address the issues of resettlement and rehabilitation of people affected by land acquisition.

While Myanmar is moving towards a more open, democratic, and modern society, the military force overthrew the elected civilian government in February 2021 to take over all administrative powers of the civilian government.¹⁸ Since then, there have been numerous protests by the Myanmar people who requested the reinstatement of the civilian government. A large number of protesters and politicians, including Aung San Suu Kyi, were arrested. The future of Myanmar depends on how the military junta responds to these demands.

¹⁶ Myanmar has twenty-one "hluttaws," including seven states, seven regions, six self-administered zones and one self-administered division.

¹⁷ Peter M. Rosset, *Benefits of Small Farm Agriculture*, https://www.iatp.org/sites/default/files/Benefits_of_Small_Farm_Agriculture.htm (last visited Apr. 13, 2022).

¹⁸ Sebastian Strangio, *Protests, Anger Spreading Rapidly in the Wake of Myanmar Coup*, THE DIPLOMAT (Feb. 8, 2021), <https://thediplomat.com/2021/02/protests-anger-spreading-rapidly-in-the-wake-of-myanmar-coup/>.

B. Land Ownership and Utilization in Myanmar

The agriculture sector is the backbone of Myanmar's economy. It employs almost 70% of the labor force in Myanmar in 2019, contributing to about 38% of gross domestic product and around 25% of the country's total export income.¹⁹

Land ownership or tenure in Myanmar is complex and multifaceted, influenced by a number of traditional and colonial laws, as well as the proliferation of customary systems and practices. Myanmar has a socio-legal system of land ownership affected by three prominent factors—an autocratic government dominated by the military junta for many decades, together with an extensive prevalence of customary tenure of local smallholder farmers, with most of them engaged in traditional cultivation. A customary tenure is a form of land use rights based on the generally accepted norms and practices of a particular community.²⁰ According to the World Bank's report on land policies, communal forms of customary tenure are optimal arrangements for providing tenure security to farmers at minimum transaction costs.²¹ Myanmar needs an effective land registration system to properly record land owners' details under customary tenure. Since such a traditional practice of customary tenure has become widely acceptable to most farmers in Myanmar, it leaves little room for the government to introduce largescale farming backed by modern technology to improve farmland productivity and efficiency.

In Myanmar, more than 80% of farmers operate on the basis of smallholding, cultivating more than half the country's farmland in 2018–2019, according to the Myanmar Agricultural Statistics (2010–2011 to 2018–

¹⁹ *Myanmar at a Glance*, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, <https://www.fao.org/myanmar/fao-in-myanmar/myanmar/en/#:~:text=Myanmar%20Economy%20and%20the%20role%20of%20Agriculture&text=The%20agriculture%20sector%20contributes%20to,percent%20of%20the%20labour%20force>.

²⁰ Nwe Ni Soe & Sung Chin Par, *Most Farmers Do Not Know about the Vacant, Fallow and Virgin Land Management Law as the Grace Period to Register Closes*, NAMATI (Mar. 31, 2019), <https://namati.org/resources/most-farmers-do-not-know-about-the-vacant-fallow-and-virgin-land-management-law-as-the-grace-period-to-register-closes/>.

²¹ Klaus Deininger, *Land Policies for Growth and Poverty Reduction*, WORLD BANKGROUP (2003), <https://openknowledge.worldbank.org/handle/10986/15125>.

2019).²² Agriculture in Myanmar still adopts the traditional labor-intensive mode of production. As farming accounts for a majority of the total employment, it is closely related to not only the smallholder farmers but also the livelihood of the landless peasants in the country.²³ Based on World Bank's definition, smallholder or small-scale farmers are landowners with a low asset base and less than two hectares of cropland.²⁴ Despite being the most significant contributor to the total food production in the country, the majority of these farmers live in extreme poverty.²⁵

The focus on smallholder farmers deserves recognition not only because they are subject to marginalization and exploitation but also, they are relatively more flexible in terms of land utilization than large farms.²⁶ Land cultivation can be analyzed in terms of food production, impact on nature, land management, and employment.²⁷ Large-scale farming is characterized by monocultural plantation, mechanization, extensive use of chemical fertilizers, and less concern for land sustainability.²⁸ By contrast, the ownership system of customary tenure of smallholder farmers leaves no room for plantation agriculture, which is a single crop farming practiced on a large scale cultivated mainly for the market with the support of modern agricultural machinery.²⁹

²² *Myanmar Agricultural Statistics (2010–2011 to 2018–2019)*, THE GOV'T OF THE REPUBLIC OF THE UNION OF MYANMAR MINISTRY OF PLANNING, FIN. AND INDUS. (2020), [https://www.csostat.gov.mm/FileUpload/cso/FileDownload/Myanmar%20Agricultural%20Statistics\(2018-2019\).pdf](https://www.csostat.gov.mm/FileUpload/cso/FileDownload/Myanmar%20Agricultural%20Statistics(2018-2019).pdf).

²³ See Duncan Boughtonet et al., *Strengthening Smallholder Agriculture to Defend Myanmar's Food Security and Rural Livelihoods Against Covid-19*, MYANMAR STRATEGY SUPPORT PROGRAM POL'Y NOTE, Apr. 2020 at 2, <https://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/133687/filename/133898.pdf>.

²⁴ Csaba Csaki, *Reaching the Rural Poor: A Renewed Strategy for Rural Development*, WORLD BANK 6 (Aug. 2003), <https://openknowledge.worldbank.org/bitstream/handle/10986/14084/267630REACHING0THE0RURAL0POOR0.pdf?sequence=1&isAllowed=y>.

²⁵ See Danny Marks & Shihab Uddin Ahamad, *Why Smallholder Farmers Need Our Help*, THE MYANMAR TIMES (May 12, 2014), <https://www.mmtimes.com/opinion/10307-why-smallholder-farmers-need-our-help.html>.

²⁶ See generally Anneke Fermont & Todd Benson, *Estimating yield of food crops grown by smallholder Anneke farmers A Review in the Uganda Context*, INT'L FOOD POL'Y RSCH. INST. (June 2011), <https://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/124924/filename/124925.pdf>.

²⁷ See Eva-Marie Meemken & Marc F. Bellemare, *Smallholder farmers and contract farming in developing countries*, 117 PROC. NAT'L ACAD. SCI. 259 (2020).

²⁸ See Zhenling Cui et al., *Pursuing sustainable productivity with millions of smallholder farmers*, 555 NATURE 363 (2018).

²⁹ See generally Alfred E. Hartemink, *Plantation agriculture in the tropics: Environmental issues*, 34 OUTLOOK ON AGRIC. 11, 11–21 (2005).

Land cultivation in Myanmar is dominated by two characteristics: land classification and shifting cultivation.³⁰ In Myanmar, the government reclassifies underutilized land based on three conditions: vacant, fallow, and virgin (VFFV). Vacant land refers to the land that is not owned under proper registration. Fallow land denotes land that remains temporarily idle due to shift cultivation, and virgin land signifies land that has never been cultivated before. The land labeled as *vacant* or *virgin* in Myanmar plays a significant role in the livelihoods of tens of thousands of farmers and peasants.³¹ These allegedly vacant and virgin land covers over a third of the country's total farmland. Millions of people rely on these lands for their livelihood, involving sustainable farming and shared local-community-based forest resources for herbal medicine and other nutrient products.

The utilization of fallow land is important for land reclamation, promoting environmental improvements, and ensuring the sustainable use of land resources.³² This is implemented through a process of shifting cultivation, which is a traditional practice involving slashing and burning of forest, followed by crop cultivation for one or two years, then left fallow for an extended period, sometime more than ten years, for the recovery of the forest vegetation.³³ The Karen and Chin ethnic groups have practiced this method in Myanmar for centuries, based on the traditional knowledge passed down through generations. Shifting cultivation is a traditional practice characterized by a series of cultivation phases, involving slash and burn of primary or secondary forest initially, and crop cultivation for one year, followed by a fallow phase.³⁴ During this fallow phase, the land is left idle to recover by itself in a natural way, which is time-consuming but more environmentally friendly. Taungya is a unique form of shift cultivation of forest management in which land is cleared for forest plantation establishment, and farmers are allowed to plant initially for food crops before

³⁰ See generally Maxime Boutry et al., *Study on irrigated land tenure in Cambodia and Myanmar*, COSTEA-AFD (May 2021), <https://www.comite-costea.fr/wp-content/uploads/Rapport-final-Boutry.pdf>.

³¹ *Id.*

³² See generally Wu Qing & Xie Hualin, *A Review and Implication of Land Fallow System Research*, 8 J. RES. & ECOLOGY 223, 223–31 (2017).

³³ See Akari Phyu Phyu Thet & Naoko Tokuchi, *Traditional knowledge on shifting cultivation of local communities in Bago Mountains, Myanmar*, 25 J. FOREST RSCH. 347, 347, 351 (2020).

³⁴ *Id.* at 347, 351.

the trees are tall enough to overshadow the crops as an adaptive strategy of land use.³⁵ It is believed to have been developed during the colonial era in the nineteenth century.³⁶

C. Land Grabbing

Land grabbing, a particular form of land acquisition, has emerged to become a significant issue in the cultivation of farmland in developing countries. Land grabbing refers to large-scale land appropriation mainly by the government and related organizations to pave the way for large-scale land utilization and production modernization of private businesses, often related to foreign investment.³⁷

In Myanmar, land grabbing is achieved mainly by mandatorily transferring the use rights from designated vacant, fallow, and virgin (VFV) land to private investors for largescale export-oriented plantations, not necessarily recognizing the owners' customary law or user rights to these lands. The government intends to release the VFV land and mobilize it to more productive use to facilitate economic growth. Expropriation of land is often packaged and publicized as the only development route to prosperity in developing countries.³⁸

With the government's approval, vacant, fallow, or virgin land in Myanmar can be leased, sub-leased, or transferred to foreign investors. Other than the original purposes of the land in question, alternative use is allowed, subject to the government's permission. If land grabbing is done effectively and ethnically, land deals can improve the lives of poor rural farmers and peasants by enhancing land productivity, creating more job opportunities, and accessing overseas markets.³⁹ This is particularly important for foreign investment that can foster agricultural development in developing countries

³⁵ See Nicholas Menzies, *Three Hundred Years of Taungya: A Sustainable System of Forestry in South China*, 16 HUM. ECOLOGY 361, 361 (1988).

³⁶ *Id.* at 362.

³⁷ See generally Saturnino M. Borrás, Jr. et al., *Towards a better understanding of global land grabbing: an editorial introduction*, 38 J. PEASANT STUD. 209, 209–16 (2011).

³⁸ See generally STEFANO LIBERTI, *LAND GRABBING: JOURNEYS IN THE NEW COLONIALISM* (Enda Flannelly trans., Verso 2013).

³⁹ See generally J.R. Quintero, *Land Information System*, INT'L ENCYCLOPEDIA SOC. & BEHAV. SCI. (Neil J. Smelser & Paul B. Baltes eds., Elsevier Ltd. 2004).

such as Myanmar by providing capital, training, and modern farming technology needed in the country.

A study of land grabbing that affected more than 2,000 farmers in sixty-two towns in Myanmar conducted by the Transnational Institute in 2015 found that 57% of expropriated lands were customary land owned by smallholder farmers, confiscated mainly by the government and the military regime.⁴⁰ The study revealed that 42.5% of respondents possessed legal documents issued by the Myanmar government when their land was appropriated, evidencing that the possession of legal documents did not provide any significant protection against land grabbing for farmers. A vast majority of these farmers who lost their land did not receive any compensation.⁴¹

The global standards of land grabbing proposed by the Organization for Economic Co-operation and Development (OECD) suggest three basic principles to guide land investments.⁴² First, since the customary tenures of most smallholder farmers are hereditary, imprecise, and lack support documentation, the voices of these poor people should be well heard, and fair and transparent consent should be given by them before they are displaced. Second, governments in developing countries need to establish a clear legal and regulatory framework to regulate the land market, especially transactions involving foreign investors. Last, but not least, influential investors, especially those from developed countries, can work collaboratively with smallholder farmers by providing investments for building infrastructure, including roads and irrigation, energy supply, supplying agricultural inputs such as seeds, fertilizers, and farming skills. It appears that, from the perspective of developed countries in the OECD, appropriate compensation and resettlement of farmers who have been dispossessed of land is not considered a fundamental principle of land grabbing. This omitted principle should be taken into account to incorporate into the ethical standard of American investors considering doing business in Myanmar. By contrast, the

⁴⁰ See *Destroying People's Lives: The Impact of Land Grabbing on Communities in Myanmar*, LAND IN OUR HANDS NETWORK, at 2, 10 (Dec. 2015), https://www.tni.org/files/article-downloads/lioh_research_report_eng_0.pdf.

⁴¹ *Id.* at 27.

⁴² See Kanayo Nwanze, *Global Standards for "Land Grabs,"* OECD (July 9, 2009), <https://community.oecd.org/community/gcls/blog/2009/07/09/global-standards-for-land-grabs>.

United Nations' basic principles and guidelines on development-based evictions and displacement, in the event of forced dispossession of land, calls for the "provision of compensation, restitution, and adequate rehabilitation consistent with human rights standards" (paragraphs 42, 60–63, 69, 70) and suggests the need to provide "useful guidance on other phenomena that lead to displacement such as ethnic and armed conflict, and natural and human-induced disasters, including climate change-induced displacement" (paragraphs 52, 55).⁴³

Land grabbing in Myanmar is legitimized by the 2008 constitution, which stipulates that the Myanmar government is the decisive owner of all land and natural resources in the country, above and below the ground. Land rights are granted in the form of either leasehold rights, user rights, or the right to cultivate a specific plot of land, based on the permission of the local government bodies appointed and approved by the central government. The new land laws created an imprecise land registration and administration system based primarily on a top-down directive process in the absence of local participation. While the government claimed that these laws were intended to clarify ownership under the constitution and provide more customary ownership rights to smallholder farmers, big businesses, especially those who have profited most from the legislation. In fact, these land laws effectively facilitate the process of land grabbing rather than protecting farmers' land rights.

Under the ruling of the military regime in Myanmar, the process of land grabbing has been frequently used to seize farmland by both the government and the military rulers, often without any form of compensation to dispossessed farmers.⁴⁴ In most cases, the land grabbing is not just for official use or infrastructure projects but also for commercial uses by reselling to private commercial firms. There was little grassroots opposition to land grabbing given the military regime's power, although it raised enormous farmers' grievances.

Land policies are of fundamental importance to sustainable growth, good governance, people's well-being, particularly the smallholder farmers, and economic opportunities for local and foreign investment. Over the past

⁴³ *United Nations on Handbook on the United Nations Basic Principles and Guidelines on Development-based Evictions and Displacement*, HOUS. & LAND RTS. NETWORK, at 33 (2019), https://www.hlrn.org.in/documents/Handbook_UN_Guidelines.pdf.

⁴⁴ Boutry et al., *supra* note 30, at 29, 35.

years, land grabbing has significantly increased conflict across the country. The increasingly essential land issues need equitable solutions to land disputes.

II. INTRODUCING NEW LAND LAWS IN MYANMAR

March 30, 2012 is a milestone day in the legal history of land laws in Myanmar. On this day, the Myanmar parliament (*Pyidaungsu Hluttaw*) passed the Vacant, Fallow and Virgin Lands Management Law (VFV Land Law) (*Pyidaungsu Hluttaw Law No. 10 of 2012*) and the Farmland Law (*Pyidaungsu Hluttaw Law No. 11 of 2012*), causing a revolutionary change in the governance of agrarian lands in this country dominated by peasants and smallholder farmers.⁴⁵

These land laws introduced by the government of the Union of Myanmar were passed to encourage more productive private investment in the agricultural land, significantly impacting and replacing smallholder farmers who had been occupying their land relying upon customary tenure for decades.⁴⁶ These legislative measures attempt to formalize the process of land grabbing to encourage the marketization of private lands in Myanmar. The VFV Land Law and Farmland law were amended in 2018 and 2020, respectively, evidencing the challenges and objections faced by the government in balancing the interests between smallholder farmers and business investors. A new law, the Land Acquisition, Resettlement, and Rehabilitation Law (LARR law) (*Pyidaungsu Hluttaw Law No. 24 of 2019*), was enacted in 2019 to help settle the disputes arising from the displacement of smallholder farmers and peasants.

Implementation of these new land laws is facilitated by the establishment of the Central Committee for the Management of Vacant, Fallow and Virgin Lands (CCVFFV), created under the VFV Land Law in 2012.⁴⁷ In addition to the responsibility for granting and withdrawing use

⁴⁵ See Yuka Kaneko, *Land-Law Reforms in Vietnam and Myanmar: 'Legal Transplant' Viewed from Asian Recipients*, 8 ASIAN J.L. & SOC'Y 402, 416 (2021).

⁴⁶ See generally Stephen McCarthy, *Rule of Law Expedited: Land Title Reform and Justice in Burma (Myanmar)*, 42 ASIAN STUD. REV. 229, 229–46 (2018), <https://doi.org/10.1080/10357823.2018.1444731>.

⁴⁷ See Robert B. Oberndorf, *Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law: Improving the Legal & Policy Frameworks Relating to Land*

rights for VFV lands, it is also empowered to repossess the land from legitimate owners after commensurate compensation.⁴⁸

Under the 2008 constitution, land rights can be granted by the Myanmar government in the form of either leasehold rights, user rights, or the right to cultivate a specific plot of land, based on the permission of the local government bodies appointed and approved by the central government. The new land laws created an imprecise land registration and administration system based primarily on a top-down directive process in the absence of local participation. The government claimed that these laws were intended to clarify ownership under the constitution and provide more customary ownership rights to smallholder farmers. However, these land laws effectively facilitate the process of land grabbing rather than protecting farmers' land rights. In fact, it is the big businesses that have benefited most from the new land laws.

In the absence of proper legal protection, smallholder farmers and peasants in Myanmar, especially those belonging to the minority ethnic groups, are at risk of losing not just their lands but also their livelihood. When they are forced to surrender their lands to the government, which will, in turn, be leased to foreign investors, they will blame both the government and the foreigners. This section provides an analysis of the causes of the potential sufferings of these people and the risk of foreign investors who utilize the confiscated land for productive purposes.

A. The Vacant, Fallow, Virgin Lands Management Law (2012)

The Vacant, Fallow, Virgin Lands Management Law (VFV Land Law) of 2012 is essentially based on the official publication *Prescribing Duties and Rights of the Central Committee for the Management of Cultivable Land, Fallow Land, and Waste Land (CCCFW)*.⁴⁹ The Central Committee was

Management in Myanmar, FOOD SEC. WORKING GRP'S LAND CORE GRP., at 11 (Nov. 2012), https://www.forest-trends.org/wp-content/uploads/imported/fswg_lcg_legal-review-of-farmland-law-and-vacant-fallow-and-virgin-land-management-law-nov-2012-eng-2-pdf.pdf.

⁴⁸ See Vacant, Fallow and Virgin Lands Management Land Law, § 19, 2012 (Pyidaungsu Hluttaw Law No. 10/2012) (Myan.) [hereinafter *VFV Land Law*].

⁴⁹ *Duties and Rights of the Central Committee for the Management of Culturable Land, Fallow Land and Waste Land*, The State Law and Order Restoration Council, Notification No. 44/91 (Nov. 13, 1991), <http://faolex.fao.org/docs/pdf/mya139029.pdf>.

established by the State Law and Order Restoration Council (SLORC) of the military government in 1991 to commoditize land and attract investments from both local and international businesses. The 1991 publication itself is basically a replacement and, to a great extent, repackaging of the old colonial regulations set up by the Rules for the Grant of Waste Land (1861) and the Waste Land (Claims) Act (1863).⁵⁰ After the 2010 general election, the government legitimized the previous policy on land grabbing by transforming this 1991 publication into law in 2012.⁵¹ In a nutshell, the law is the old notification repackaged in the form of legislature to facilitate land grabbing. Specifically, it is meant to boost land grabbing further in the rural areas in the country under the name of economic development.

The VFV Land Law creates a mechanism where members of public and private sectors, especially foreign investors, can obtain land for productive purposes through three processes managed by the CCVFV, specifically the release, mobilization, and utilization of idle lands when they are identified and classified as vacant, fallow, and virgin (VFV) lands. The VFV Land Law assigns discretionary power in the CCVFV to grant permission to use VFV land to charge taxes and security fees for land use by monitoring the compliance of land expropriation and redistribution with the law.

The release of land is allowed under the VFV Land Law if there are no legitimate owners or users of the land in question. While recognizing the possibility that farmers or peasants are using the existing VFV land without formal recognition, Article 25 of the VFV Land Law requires the current users of these VFV land to register with the CCVFV, legitimizing their rights to carry out their farming or other related activities.⁵²

To mobilize the use of land, the law requires potential land users to apply to the CCVFV to lease available VFV lands for farming, mining, and other purposes allowed under the law.⁵³ Although Article 12 of the VFV Land Law gives a priority preference for the lease of available VFV lands to

⁵⁰ Eloff & de Aquino, *supra* note 12, at 26.

⁵¹ ZAW HTET AUNG, THERE IS NO VFV IN OUR AREA!: MOVEMENT COMPILATION OF LION & ALLIES 1 (2d ed. 2020).

⁵² See Jason Gelbort, *Implementation of Burma's Vacant, Fallow and Virgin Land Management Law: At Odds with the Nationwide Ceasefire Agreement and Peace Negotiations*, TRANSNAT'L INST. (2018), <https://www.tni.org/en/article/implementation-of-burmas-vacant-fallow-and-virgin-land-management-law>.

⁵³ VFV Land Law, *supra* note 48, at § 10.

citizens in Myanmar, the law, however, permits VFV land to be leased to foreign investors or any local organizations endowed with foreign investment in areas in which land investment operations are not able to be performed by local people.⁵⁴ This specifically implies that the large-scale operations of farming and factories, in which local companies do not have sufficient capital, technology, and expertise to perform, will likely be able to obtain land from the CCVFFV. For more productive utilization of VFV land, the VFV Land Law allows leases of land granted to applicants by the CCVFFV for a period of time up to thirty years and a cumulative maximum of 50,000 acres or 5,000 acres at any one time.⁵⁵

Article 25 of the VFV Land Law indicates that the CCVFFV should work with related government departments and organizations to protect the interests of farmers who are utilizing lands in areas where the VFV land user rights have not been granted. Any possible disputes arising from the implementation of the VFV Land Law are supposed to be resolved by the CCVFFV. While it is mandatory to register the use of law with the government through CCVFFV, there is no publicly accessible record-keeping mechanism for all VFV land lease agreements. There is no provision regarding the controversy in CCVFFV's land expropriation and allocation decision. In addition, there is no provision for environmental assessment.

The VFV Land Law recognizes shift cultivation as a legitimate form of land use, and a large number of farmers are using VFV lands without formal registration with the government. Yet, all decisions regarding the release, mobilization, and utilization are to be made solely by the CCVFFV. While the Environmental Conservation Law (2012) stipulates that the Environmental and Social Impact Assessments (ESIA) should be conducted for industrial crop developments or leases of VFV land for non-agricultural uses. Yet, how this is done is up to the discretion of the CCVFFV and is often ruled in favor of foreign investors.⁵⁶

Many people in Myanmar oppose the enactment and implementation of the VFV Land Law based on the fears that it will displace smallholder farmers from their lands of customary tenure because of a lack of proper registration.⁵⁷ Under the VFV Land Law, shift cultivation will no longer be

⁵⁴ *Id.* at § 12.

⁵⁵ *See id.* at § 10 (describing duration and size limitations on lease of VFV lands).

⁵⁶ *See* Soe & Par, *supra* note 20, at 10.

⁵⁷ *See supra* note 56.

considered an efficient way to use and cultivate farmland and is likely to be subject to the forced transfer of use rights to other investors. After six years, the VFV Land Law was amended in 2018 to enhance economic development by extending the availability of more VFV lands for agriculture, mining, and other productive purposes.

B. Farmland Law (2012)

The Farmland Law was approved and enacted by the Parliament on March 30, 2012, to supersede three old laws of land rights: Land Nationalization Act (1953), Tenancy Law (1963), and Law Safeguarding Peasant Rights (1963). According to section 3 of the Farmland Law, “farmland means paddy land, *ya* land, *kiang* land, shifting-cultivated land (*taungya*), perennial plant land, *dhani* (coastal) land, orchards, and alluvial land.”⁵⁸ The primary purpose of the Farmland Law is to ensure the efficient use of land and water resources and protect farmers from losing land to locally approved investment projects.⁵⁹ Under the Farmland Law 2012, the state remains the ultimate owner of all land in Myanmar. In combination with the VFV Land, the Farmland law requires farmers to follow the government’s prescriptions of the types of crop to be cultivated with predetermined production quotas.⁶⁰

Since the Farmland Law requires that the farmland is solely for agriculture, farmers are not allowed to use and utilize their land freely.⁶¹ The extraction of natural resources such as gems, minerals, petroleum, and gas is not allowed unless prior approval has been given. This literally turns the entire country into a feudal system in Medieval Europe, with the state as the landlord (or nobles), and all farmers become tenants of the nobles and have to pay a farming tax (or rent) to the latter.

The Farmland Law is implemented by establishing an administrative body called “Farmland Management Body.” Farmland tenure needs to be secured through a land registration system that issues land-use certificates

⁵⁸ The Farmland Law, § 3(b), 2012 (Pyidaungsu Hluttaw Law No. 11/2012) (Myan.).

⁵⁹ See *id.* at §§ 8, 34 (these articles appear to link to the *VFV Land Law*, permitting VFV lands to be reclassified as farmland when it is determined by an FAB that use of land is stable).

⁶⁰ *Id.* at § 3(b); see Examination and Critique of the 2012 Farmland Bill, HUM. RTS. FOUND. OF MONLAND, May 29, 2012, <http://rehmonnya.org/archives/2238>.

⁶¹ See The Farmland Law, *supra* note 58, § 12.

(LUC) to legitimate users, which is administered by the setting up of Farmland Administration Bodies (FABs) operating under the auspices of the Settlement and Land Records Department (SLRD).⁶² Farmers with the LUC will be able to sell, exchange, inherit, lease, and obtain credit through land mortgages. Disputes regarding the distribution and use of farmland are to be settled by FABs, and there is no mechanism to involve the judicial branch of Government. In other words, the decisions of the FABs are final, and farmers will not be able to appeal to a court of law in Myanmar.

Under the Farmland Law, the customary rights held by smallholder farmers and peasants are not recognized within the current legal framework without proper registration. These people are vulnerable to speculators and corporate agri-businesses. Farmers also need to obtain permission to change their crops to other plantations. In other words, farmers do not have the right to cultivate different crops at their will and cannot raise, process, and distribute their livestock products freely.⁶³ The Farmland Law allows labor organizations to be founded to achieve economic development.⁶⁴ National and regional labor unions, such as the Agriculture and Farmers Federation of Myanmar (AFFM), have been formed.⁶⁵

The Farmland Law serves the purpose of supplementing the VFV Land Law by providing the definition, scope, and purpose of land designated for farming. Lands classified as VFV can be resumed to become farmland if a permission order is obtained from the CCVFV.⁶⁶ The VFV Land Law permits local farmers to apply for and secure a “Permission Order” from a CCVFV to use VFV land not already being used, which could then be re-classified as farmland under the Farmland Law.⁶⁷

C. The Land Acquisition, Resettlement, and Rehabilitation Law (2019)

In addition to the enactment of the VFV Land Law and the Farmland Law in 2012, the Myanmar government passed the Land Acquisition,

⁶² *Id.* at § 12(f).

⁶³ *Id.* at § 12(h).

⁶⁴ *Id.* at § 38.

⁶⁵ Nicholas Henry, *Trade union internationalism and political change in Myanmar*, GLOBAL CHANGE, PEACE & SECURITY 27.1 (2015): 69–84 (2015).

⁶⁶ The Farmland Law, *supra* note 58, at § 34.

⁶⁷ *VFV Land Law*, *supra* note 48, at § 10.

Resettlement, and Rehabilitation Law (LARR law) in 2019 to govern and regulate compulsory land acquisition in Myanmar. This new law replaces the Land Acquisition Act of 1894, which was the principal legal provision for land expropriation during the colonial era. It sets out the land expropriation and acquisition framework regarding the need to express their public purposes, the entitlement and standard to receive compensation, and the processes and consultation as part of land acquisition.⁶⁸

The LARR Law requires the initial proposal to include an Environmental and Social Impact Assessment (ESIA), a resettlement action plan (RAP), and a rehabilitation plan. In comparison with the previous version in 1894, land developers will need more preparation work before the acquisition takes place. It provides a list of public purposes for which land expropriation can occur and the expropriation process. These purposes include national defense, infrastructure development, and any projects deemed to be in accordance with Myanmar's national economic policy. It requires studies and surveys of people affected by land expropriation and other stakeholders to consider the provision of resettlement and rehabilitation to them. The new law also attempts to enhance administrative transparency by involving experts in the environmental and social impact assessments (ESIA) of the environmental and social impacts of projects to be carried out on the expropriated land.

Regarding compensation, while the century-old Land Acquisition Act of 1894 stipulated the compensation to be the market value plus 15% to people whose lands are expropriated by the government, the LARR Law reduces it to only the market value. In addition, people affected by land expropriation are restricted to only legally registered owners, ignoring farmers who are using the land under traditional customary tenure. These people are mostly affected adversely by the new law. Worst of all, this expropriation process is not subject to judicial review and cannot be challenged in court.⁶⁹

⁶⁸ Margaret G. Wachenfeld, Senior Adviser, Myan. Ctr. for Resp. Bus. et al., Myanmar's Land Acquisition, Resettlement and Rehabilitation Law 2019—One Step Forward, Two Steps Back?, Presentation at the First International Conference on Environment and Sustainable Development (Jan. 8, 2020).

⁶⁹ *Id.*

Land grabbing has been taking place in Myanmar for decades. The VFV Land Law and the Farmland Law have legitimized the process, and the LARR Law serves to moderate the adverse effect of land grabbing. The primary victims of this dispossession are farmers in rural communities that inherited customary tenure systems, especially those belonging to ethnic minorities. While the LARR Law requires the payment of compensation for land acquisition, the actual amount is often underestimated.⁷⁰ Grievances prevail in the community of farmers, and American investors need to consider this issue carefully.

III. CORPORATE SOCIAL RESPONSIBILITY AND AMERICAN INVESTMENT IN MYANMAR

The transformation of farmland from traditional cultivation to modern agriculture requires the government's determination and public sympathy for the people who have lost their customary land and appropriate measures to attract FDI to bring in new capital, technology, and expertise. Land policies are often an integral part of the government's macro-strategies as the new ruling class attempts to establish new governance approaches. The political changes that started to occur in Myanmar in 2012, together with the introduction of new land laws, provide a good example.⁷¹ In Myanmar, as the socialist ruling class considers it legitimate to claim that all land in the country belongs to the government, the idea of grabbing land from all smallholder farmers has become a useful tool in releasing allegedly idle land for more productive purposes.⁷² It will also be an effective means to attract FDI by redistributing traditional farmland to them.

The FDI in Myanmar increased from \$0.9 billion in 2010 to \$4.8 billion in 2017 but declined to \$1.7 billion in 2019.⁷³ The new land laws passed in 2012 played a significant role in promoting new land investments. The

⁷⁰ Boutry et al., *supra* note 30, at 35–36.

⁷¹ SiuSue Mark & Ben Belton, *Breaking with the past? The politics of land restitution and the limits to restitutive justice in Myanmar*, LAND USE POL'Y 94, 3 (2020).

⁷² Brian McCartan, *Myanmar: Land Grabbing As Big Business*, ASIA TIMES ONLINE (Mar. 11, 2013), <https://www.cetri.be/Myanmar-Land-grabbing-as-big?lang=fr>.

⁷³ See *Foreign direct investment, net inflows (BoP, current US\$)—Myanmar*, THE WORLD BANK, <https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?locations=MM> (last visited Mar. 31, 2021, 7:55 PM).

decline in 2017 resulted from the government's military attack on the Rohingya people.⁷⁴ The military junta's takeover of Myanmar governmental power on February 1, 2021, will likely provide a further disincentive for FDI. According to Myanmar's Directorate of Investment and Company Administration, the attraction of FDI to come to Myanmar faces poor infrastructure, particularly transportation and energy supply, and socio-political stability in states such as Chin, Kachin, and Rakhine.⁷⁵ By providing cheap land and labor, two of the essential factors of production, Myanmar, to a great extent, is still attractive to foreign investors.

A. Foreign Direct Investment and Corporate Social Responsibility

According to the International Monetary Fund (IMF), foreign direct investment (FDI) plays a vital role in at least four aspects: economic growth promotion, technological transfer, employment opportunities, and import of capital in developing countries.⁷⁶ Research reveals that FDI plays a vital role in improving the productivity and efficiency of agriculture in developing countries.⁷⁷ To facilitate land productivity, it is expected that uncultivated land will need to be released, mobilized, and modernized to give place for the introduction of modern agriculture by FDI. Governments in developing countries are eager to release and mobilize land through the process of land grabbing and try their best to attract FDI to bring in new capital and technology to modernize land utilization in their countries.⁷⁸

It is important for foreign investors to have the appropriate exploration and exploitation activities in order to maintain and sustain their businesses in

⁷⁴ Megha Bahree, *For foreign investors in Myanmar, Coup adds new uncertainties*, AL JAZEERA (Feb. 18, 2021), <https://www.aljazeera.com/economy/2021/2/18/for-foreign-investors-in-myanmar-coup-adds-new-uncertainties>.

⁷⁵ See Directorate of Investment and Company Administration, <https://www.dica.gov.mm/> (last visited Apr. 6, 2022, 4:15 PM).

⁷⁶ P. Loungani & A. Razin, *How Beneficial Is FDI for Developing Countries?*, FINANCE & DEV.: A Q. MAG. OF IMF (June 2001), <http://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm>.

⁷⁷ Elibariki Msuya, *The Impact of Foreign Direct Investment on Agricultural Productivity and Poverty Reduction in Tanzania*, MUNICH PERSONAL REPEC ARCHIVE (Feb. 2007).

⁷⁸ See generally Matthias Görgen et al., *Foreign Direct Investment (FDI) in Land in developing countries*, DEUTSCHE GESELLSCHAFT FÜR TECHNISCHE ZUSAMMENARBEIT (GTZ) GMBH (2009).

host countries.⁷⁹ Foreign market exploration involves activities such as the search, discovery, experimentation, and innovation of foreign investors. By contrast, exploitation involves activities such as direct transfer, implementation, and maintenance of similar activities in home countries.⁸⁰ In the context of international business and management, research suggests that foreign market performance is more related to investors' exploration activities than to exploitation activities.⁸¹ Yet, both can contribute positively to the prosperity of local people if they are managed effectively.⁸²

While FDI appears to be beneficial to both foreign investors and host countries, research suggests that corporate social responsibility (CSR) is a concern of most international investors with respect to not just the host countries where they invest but also their home countries' ethical stance. CSR is a perspective that companies need to integrate their concerns with the political, economic, social, and technological environment within the scope of their business operations.⁸³ In other words, it is about how companies strike a balance between the pursuit of profitability and the need to fulfill their responsibilities to the stakeholders in their host and home countries.

Foreign investors in developing countries are aware of the implications that their investment can bring potential prosperity to the host economy. Yet, this cannot be an excuse to ignore the sufferings of local people whose land has been grabbed to give way to foreign investment.⁸⁴ CSR alone may not be sufficient to cope with the social costs of land acquisition for agricultural or industrial projects in developing countries like Myanmar. Although the local government needs to consider the external costs of land acquisition before the FDI is introduced to the local communities, it is the international investors

⁷⁹ Zhennan Wang, "Balancing exploitation and exploration in FDI location choices," *Academy of Management Proceedings*, 2016, <https://doi.org/10.5465/ambpp.2016.13984abstract>.

⁸⁰ See generally Yadong Luo, *Capability Exploitation and Building in a Foreign Market: Implications for Multinational Enterprises*, 13 *ORG. SCI.* 48, 48–63 (2002).

⁸¹ See Ana Lisboa et al., *Export Market Exploitation and Exploration and Performance: Linear, Moderated, Complementary and Non-Linear Effects*, 30 *INT'L MKTG. REV.* 211, 226 (2013).

⁸² Sabyasachi Sinha, *The Exploration–Exploitation Dilemma: A Review in the Context of Managing Growth of New Ventures*, 40 *VIKALPA: THE J. FOR DECISION MAKERS* 313, 318–19 (2015).

⁸³ See Dirk Matten & Jeremy Moon, *Corporate Social Responsibility Education in Europe*, 54 *J. OF BUS. ETHICS* 323, 323–37 (2004).

⁸⁴ See Roland Bardy et al., *Foreign Investment and Ethics: How to Contribute to Social Responsibility by Doing Business in Less-Developed Countries*, 106 *J. BUS. ETHICS* 267, 267–82 (2012).

who have to face the reality that such a land-grabbing process may cause hardship to stakeholders that violate their CSR provisions.⁸⁵

A study of fifty-five developing countries to examine the effects of foreign direct investment (FDI) on these nations' food production and security shows that FDI in the secondary and tertiary sectors decreases food production and security.⁸⁶ Still, the productivity of the agriculture sector improves because of the spillover effects of the FDI. The study also shows that introducing new factors of production, such as modern machinery, new seeds, and new skills, can help the overall food production of the host countries. Other studies show that, in addition to positive spillover effects,⁸⁷ developed countries' FDI in agricultural land in developing countries improves food security by upgrading the technology and efficiency in land utilization for crop production due to the concern for human rights and farmland sustainability in their home countries.⁸⁸ Spillover effects are economic events in one context because of the occurrence of other events in an unrelated context. In 2018, Grazia Santangelo reported that the FDI from developing countries would not improve the productivity and sustainability of farmland in the host countries at the same level of improvement as the developed nations' FDI did.⁸⁹

B. American Investment in Myanmar

Given the sensitive and fragile Sino-American relationship, American investors are hesitant to invest in China. Instead, countries in Southeast Asia have become lucrative places for international investors to expand their global supply chain by offering two inexpensive factors of production: labor and land. Yet, American companies investing in Myanmar at either or both ends of the supply chain are facing not only the challenge of the American

⁸⁵ Stefania Bracco et al., *Foreign Investment in Land and Corporate Social Responsibility: An Investigation for Africa*, AFRICAN CENTRE FOR TECHNOLOGY STUD. 6, 6–21 (2015).

⁸⁶ See Mehdi Ben Slimane et al., *The Role of Sectoral FDI in Promoting Agricultural Production and Improving Food Security*, INT'L ECON. 50–65 (2016) (unpublished manuscript) (on file with HAL Open Science).

⁸⁷ Spillover effects are economic events in one context because of the occurrence of other events in an unrelated context.

⁸⁸ See generally Slimane et al., *supra* note 86.

⁸⁹ Grazia D. Santangelo, *The Impact of FDI in Land in Agriculture in Developing Countries on Host Country Food Security*, 53 J. WORLD BUS. 75, 75–84 (2018).

government's sanctions on the country but primarily a reputational risk of unethical business practices for maltreating local people, especially the process of grabbing land from them. This Article will explore how this risk can be minimized when American investors acquire suitable land for business operations in Myanmar.

America's direct investment abroad amounted to \$6.15 trillion at the end of 2020, playing a significant role in the global economy.⁹⁰ Through its international networks, American investors are crucial players in privatizing uncultivated and underutilized land in developing countries like Myanmar, Papua New Guinea, Sri Lanka, and Zambia.⁹¹ In Myanmar, the expropriation of customary land is enhanced by the existence of an autocratic military government that operates two prominent organizations—Myanma Economic Holdings Limited (MEHL) and Myanmar Economic Corporation (MEC) that have diverse portfolios in almost all major sectors of the country, such as banking, construction, mining, and food industries.⁹² These organizations adopt the land-grabbing process to foster economic development in Myanmar.

As of September 2020, the United States was the tenth largest source of FDI in Myanmar, with nearly \$330 million invested in 2017, according to the Directorate of Investment and Company Administration (DICA) in Myanmar.⁹³ According to DICA, Myanmar received FDI of nearly US\$5.7 billion, around US\$110 million short of its target in 2019–20. Singapore, China, and Hong Kong are the largest investors in Myanmar. This figure represents a vast potential for foreign investors to increase their stake in Myanmar.

In a two-day visit to Myanmar, a delegation led by Adam Boehler, chief executive of America's International Development Finance Corporation

⁹⁰ See *Direct Investment by Country and Industry*, U.S. BUREAU OF ECON. ANALYSIS (July 22, 2021), <https://www.bea.gov/data/intl-trade-investment/direct-investment-country-and-industry#:~:text=The%20foreign%20direct%20investment%20in,position%20from%20Europe%2C%20primarily%20Germany>.

⁹¹ Mousseau et al., *supra* note 2, at 4, 4–32.

⁹² See *Governance Structure of MEHL and MEC*, UNITED NATIONS, OFFICE OF HIGH COMMISSIONER OF HUM. RTS. (Aug. 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/Infographic1_Governance_Structure_of_MEHL_and_MEC.pdf.

⁹³ Nan Lwin, *US Delegation Looks to Boost Investment in Myanmar*, THE IRRAWADDY (Oct. 28, 2020), <https://www.dica.gov.mm/>.

(DFC) in Naypyitaw on October 27, 2020, to enhance investment in the country given its strategic location in Southeast Asia.⁹⁴ The delegation comprised the senior staff of American organizations such as the Export-Import Bank and the Government Treasury, and international trade and commerce representatives. According to the Ministry for Investment and Foreign Economic Relations (MIFER), DFC plans to invest up to US\$60 billion in development projects in lower-income countries, including Myanmar.

There have been concerns that American multinational corporations are helping the military junta by providing financial resources in exchange for land and investment opportunities.⁹⁵ For instance, British American Tobacco entered Myanmar in 2013, and its joint venture partner was reported to have military ties and involvement in land grabbing. Chevron Corp., an American multinational energy corporation closely related to Standard Oil, has a large offshore gas project in partnership with Myanmar Oil and Gas Enterprise (MOGE). Coca-Cola Co., the soft drinks giant, was one of the first American companies to re-enter Myanmar after the United States started easing sanctions in 2012 and runs plants outside Yangon. Hilton Worldwide Holdings has three hotels in Myanmar on land leased from the military regime. These American multinational corporations, including British American Tobacco, Chevron, Coca-Cola, and Hilton Hotels, are facing challenges in operating their core businesses in Myanmar. The issue is further aggravated by the land grabbing process that attempts to release land to foreign investors in Myanmar, leading to local farmers' protests.

After the military regime took over the government in February 2021, the United States imposed some forms of limited sanctions on individuals doing business with military-controlled companies in Myanmar. Through Executive Order 14014 of February 10, 2021, the American government is sanctioning influential individuals in both the public and private sectors in Myanmar.⁹⁶ One of the key objectives of these sanctions is to avoid a direct impact on the people in Myanmar. For instance, on April 21, 2021, the Department of the Treasury's Office of Foreign Assets Control (OFAC)

⁹⁴ *Id.*

⁹⁵ Reuters Staff, *Factbox: The Foreign Firms Doing Business in Myanmar*, REUTERS (Mar. 9, 2021), <https://www.reuters.com/article/us-myanmar-politics-factbox-idUSKBN2B116H>.

⁹⁶ See Exec. Order No. 14014, 86 FR 9439 (Feb. 10, 2021).

sanctioned two Burmese state-owned enterprises, Myanmar Timber Enterprise (MTE) and Myanmar Pearl Enterprise (MPE), by blocking them from doing business with American companies.⁹⁷ Later, three Myanmar military holding companies, Myanmar Gems Enterprise, Myanmar Economic Corporation, and Myanmar Economic Holdings Limited, were also subject to the sanction of the Department of Treasury of the United States. Despite such sanctions, there were reportedly eighty-two timber shipments from Myanmar to the United States between February and November 2021, which is almost at par with the previous year.⁹⁸ To evade the American government's sanctions, some firms have been buying timber legally from third-party brokerage companies in Myanmar instead of directly from the MTE and MPE.⁹⁹ The very limited scope of the American government's sanctions provides opportunities for American companies to continue their investment in the country. The main concern is how to operate profitably and, most importantly, ethically.

IV. THE CONCERN OF AMERICAN INVESTORS REGARDING LAND LAWS IN MYANMAR

American investors need to be fully aware of the implications of the new land laws that have been passed and amended in Myanmar several times since 2012. After several decades of military rule,¹⁰⁰ the development of the rule of law in Myanmar is one of the most imminent issues and challenges to be tackled. The new land laws in Myanmar have been passed to legitimize and accelerate the transfer of farmland from the hands of farmers to allegedly more productive activities by foreign investors.¹⁰¹ According to the Department of Agricultural Lands Management and Statistics, 82% of the vacant, virgin or fallow land in Myanmar is located in the ethnic minority

⁹⁷ Press Release, *Treasury Sanctions Key Timber and Pearl Enterprises in Burma*, U.S. DEP'T OF THE TREASURY, Apr. 21, 2021, <https://home.treasury.gov/news/press-releases/jy0138>.

⁹⁸ Sheryl Lee Tian Tong, *Despite sanctions, U.S. companies still importing Myanmar teak, report says*, MONGABAY (Jan. 11, 2022), <https://news.mongabay.com/2022/01/despite-sanctions-u-s-companies-still-importing-myanmar-teak-report-says/>.

⁹⁹ *Id.*

¹⁰⁰ McCarthy, *supra* note 46, at 229.

¹⁰¹ Katherine O'Neill, *New Laws Threaten Family Farmers and Ethnic Communities in Myanmar*, OAKLAND INST. (Aug. 25, 2020), <https://www.oaklandinstitute.org/blog/new-laws-threaten-family-farmers-and-ethnic-communities-myanmar>.

states.¹⁰² For centuries, farmland in Myanmar has been primarily used for crop farms, flowers, and productive forests, in accordance with customary law and traditional practices, with minimal intervention by the state. Yet, they are described by government agencies as “informal, ill-disciplined and inefficient.”¹⁰³

The amendment of the VFV Land Law in 2019 requires all farmers in Myanmar to apply for a permit to continue working on their farms which they have owned for decades. Yet, it has been reported that over 90% of people affected by this law are not aware of its existence and are at risk of losing their land after the end of the mandatory registration period.¹⁰⁴ This has significant implications for ethnic minority people. For instance, a large number of Rohingya people, who settled mainly in the Rakhine state before moving to Bangladesh, will be deprived of their land rights permanently.¹⁰⁵ The combined effect of these land laws was to legitimize the process of land grabbing and land speculation by investors.¹⁰⁶

In a nutshell, the VFV Land Law provides an unprecedented opportunity for the government to make farmland legally available to foreign investors. While flexible farming allows farmers the discretion to grow all sorts of plantations, including banana, cashew, and mango trees, the Farmland Law governs farmers’ choices in their agricultural activities that restrict their competition with foreign investors in farming. These laws expedite the land-grabbing process, which ignites social conflicts and injustice. The passing of the Myanmar Investment Law in 2016, superseding the Foreign Investment Law 2012 and the Citizens Investment Law 2013, has reduced the regulatory barriers to FDI by relaxing foreign exchange controls and providing tax

¹⁰² Ben Dunant, *Why a land law change is sparking fears of mass evictions*, FRONTIER MYANMAR (Nov. 19, 2018), <https://www.frontiermyanmar.net/en/why-a-land-law-change-is-sparking-fears-of-mass-evictions/>.

¹⁰³ *See id.*

¹⁰⁴ Jacob Goldberg, *Nowhere to go: Myanmar farmers under siege from land law*, AL JAZEERA (Apr. 4, 2019), <https://www.aljazeera.com/news/2019/4/4/nowhere-to-go-myanmar-farmers-under-siege-from-land-law>.

¹⁰⁵ Peter Yeung, *Land Confiscation is Latest Barrier to Return for Myanmar’s Displaced*, THE NEW HUMANITARIAN (Mar. 15, 2019), <https://deeply.thenewhumanitarian.org/refugees/articles/2019/03/15/land-confiscation-is-latest-barrier-to-return-for-myanmars-displaced>.

¹⁰⁶ McCarthy, *supra* note 46.

relief.¹⁰⁷ There are concerns that the land laws have significant damage to the local agriculture-based communities in which traditional and customary land management has prevailed for centuries. FDI has been considered an incentive to dispossess the land ownership of tens of thousands of smallholder farmers and peasants, threatening their livelihoods in Myanmar.

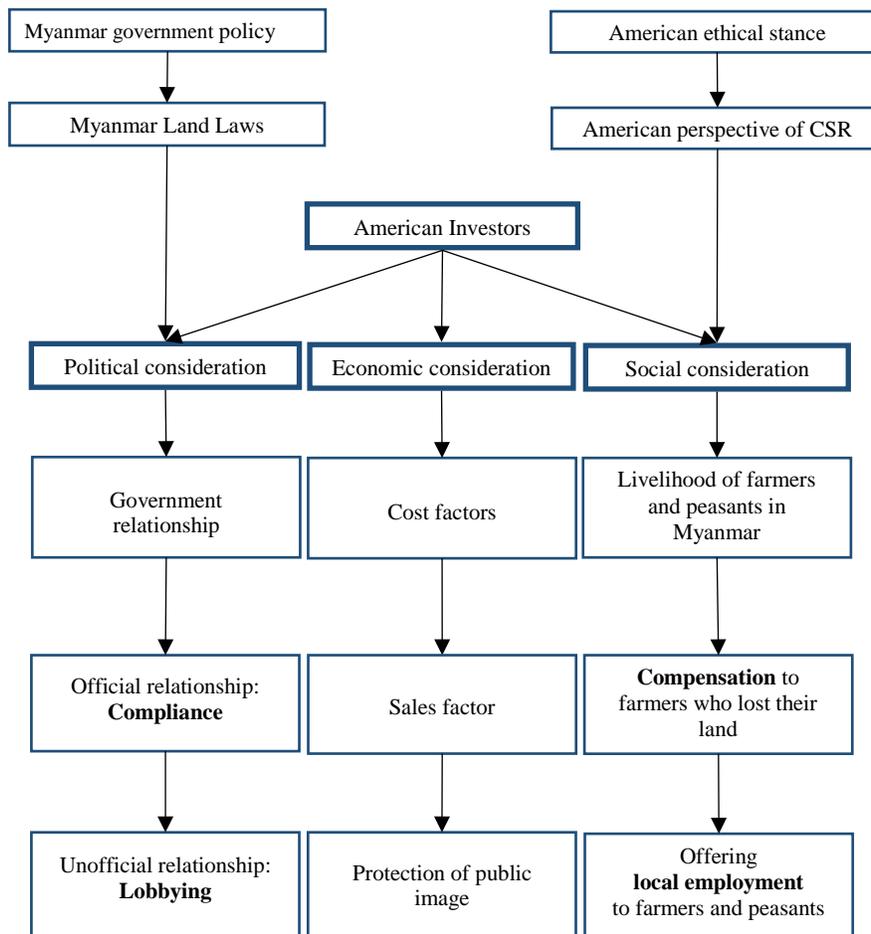
Overall speaking, these land laws passed and amended in the past decade are designed primarily to promote large-scale agricultural investment and have no intention to safeguard and protect smallholder farmers.¹⁰⁸ Addressing the numerous factors faced by American investors in Myanmar will be challenging because of the need to be aware of the corporate social responsibility (CSR) in their home country and the vested interests of stakeholders in the host country. There is an imminent need to balance three significant factors, which are economic, political, and social factors.

¹⁰⁷ United Nations Conference on Trade and Development, Myanmar Investment Law, Pyidaungsu Hluttaw Law No. 40/2016 (2016), <https://investmentpolicy.unctad.org/investment-laws/laws/172/myanmar-myanmar-investment-law>.

¹⁰⁸ *See id.*

Diagram 1 shows a graphical representation of the interaction among these three factors, placed in the context of the concern of the American investors regarding land laws in Myanmar.

Diagram 1:
The Concern of American Investors regarding Land Laws in Myanmar



A. Economic Consideration

Economic consideration of American investors regarding land laws in Myanmar refers to two ends of a supply chain: production cost and sales to customers. The logistics incurred in the supply, including infrastructure, transportation, and delivery, while being important in the total costs of sales, will have less concern regarding land laws in Myanmar.

The World Bank's study shows that agricultural productivity in Myanmar is very low. By contrast, other countries in Southeast Asia have a much higher level of productivity. For instance, to cultivate rice, it is estimated that one day of farming work in Myanmar generates only 23 kg of food. By comparison, the production is 62 kg in Cambodia, 547 kg in Thailand, and 429 kg in Vietnam.¹⁰⁹ The labor wage in Myanmar is very low compared to international standards, with a daily wage of about \$2.00.¹¹⁰ Farmers in Myanmar, together with the peasants they employed, are living in extreme poverty.

The LARR Law takes important steps forward in linking resettlement and rehabilitation to compulsory land acquisition. The law stipulates that the compensation to farmers whose land has been confiscated is the government's responsibility. However, American investors need to be aware of the hidden social costs of land acquisition, such as the costs to control farmers' grievances and their protests. In terms of productivity, since farmers are closely connected to the land they cultivate, they are best placed to decide which crops are most viable to grow on their land. If they can be supported by modern technology and knowledge in farming, their agricultural productivity can improve significantly.¹¹¹ It is worthwhile for investors to consider initiating joint development programs with the former owners of the land. Investors will have to consider co-opting the former occupants of the granted land to work as partners in land cultivation or as workers in the factories to be built on the land.

The other end of the supply chain is the sales to customers, another major concern factor for foreign investors in Myanmar. As Myanmar is a poor country, the demand for expensive imported consumer products is

¹⁰⁹ The World Bank, *Myanmar: Analysis of Farm Production Economics*, Economic and Sector Work Report No. 100066-mm (Feb. 26, 2016).

¹¹⁰ *Id.* at xvii.

¹¹¹ Dunant, *supra* note 102.

relatively low. Yet, for more popular consumer goods such as Coca-Cola and imported cigarettes, the consumers are willing to pay a premium price to purchase these items. If sales to customers are a primary concern, American investors will have to carefully consider their sales and product images. Any adverse publicity, such as farmers' grievances and protests, will impend these images, leading to a decline in sales.

B. Political Consideration

American investors' political consideration denotes their relationship with the institutional settings of Myanmar, especially the government and its governing bodies. In the context of land acquisition, foreign investors expect that the Myanmar government should ensure the alignment of the interests of farmers and investors in accordance with the international standards on land tenure, compensation, and resettlement. The purpose of the LARR Law is supposedly to guide the resettlement process associated with the FDI's involvement in land acquisition. The combined effect of the land laws enacted since 2012 has been to legitimize the compulsory land acquisition process that has been in existence for a long time.¹¹²

Like all other foreign investors in Myanmar, American investors need to maintain a good relationship with the host country's government. The most important rule, of course, is due compliance with local laws and regulations, which is a useful tool to minimize the risks incurred in corporate liability.¹¹³ There is a need for American investors to develop corporate conduct codes and internal compliance programs to comply with the local jurisdictions in Myanmar regarding laws governing employment, tax, production, and, in particular, land acquisition and utilization.¹¹⁴ It is necessary to strive for compliance with the law and avoidance of possible corporate misconduct by setting up effective compliance programs and, to some extent, encouraging whistleblowing by local employees.

¹¹² McCarthy, *supra* note 46.

¹¹³ Gonenc Gurkaynak & Derya Durlu Gürzumar, *Harmonizing the Shield to Corporate Liability: A Comparative Approach to the Legal Foundations of Corporate Compliance Programs from Criminal Law, Employment Law, and Competition Law Perspectives*, 47 *THE INT'L LAW.* 99, 103 (2013).

¹¹⁴ George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 *J. LEGAL STUD.* S97 (2002).

In addition to compliance with local laws, there is a need to communicate with the government for more favorable business operations conditions, commonly called lobbying. This lobbying effort is not restricted to local government and can be extended to the American government. For instance, Chevron sent lobbyists to America's State Department and key congressional offices to express its will against any sanctions that might disrupt its operations in Myanmar.¹¹⁵ The Myanmar government also employs international lobbyists to convince the international community that the country has a stable economy for the operations of internal investors.¹¹⁶

C. Social Consideration

The social consideration of American investors focuses on the impact on the stakeholders in Myanmar. In the case of land issues in Myanmar, the primary stakeholders are farmers who lost their land due to the imposition of the land laws and the peasants who lost their jobs on the farmland. Given the country's unique cultural, historical, and social realities, managing the stakeholders effectively is a difficult task.

Although the Myanmar government's compulsory land acquisition for more productive purposes, the land acquisition process is a concern for companies that care for their reputation in upholding human rights based on international standards. Myanmar has a poor reputation regarding human rights violations, including, among others, land grabbing. Many foreign investors are wary of investing with partners associated with such unethical practices. American investors need to be aware of the following three key questions when the land has been granted to them for operating their businesses in Myanmar:

1. Is the granted land legitimately obtained by the sellers or legal assignors? In most cases, the assignor is the Myanmar government

¹¹⁵ Kenneth P. Vogel & Lara Jakes, *Chevron Lobbies to Head Off New Sanctions on Myanmar*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/04/22/us/politics/chevron-myanmar-sanctions.html>.

¹¹⁶ *Myanmar Junta Hires Canadian Lobbying Firm For Global Campaign*, PROVOKE MEDIA (Mar. 8, 2021, 1:25 AM), <https://www.provokemedia.com/latest/article/myanmar-junta-hires-canadian-lobbying-firm-for-global-campaign>.

- because the Myanmar Constitution of 2008 stipulates that all land in Myanmar belongs to the government.¹¹⁷
2. Is the land really “vacant, fallow or virgin (VFV)”? There can be customary rights issues involved that the land has been taken away simply because farmers fail to register their land within the mandatory registration period.¹¹⁸
 3. Has any fair compensation been given to the land occupants who have claims on the land based on their customary rights?

A fair and equitable dispute resolution mechanism is fundamental to the successful implementation of any law. While there should have been an appeal mechanism, such as an appeal court or an independent arbitration body, that allows an equitable resolution of land disputes and conflicts between smallholder farmers, the State, and business investors regarding the land’s user rights, such mechanism barely exists.¹¹⁹ In this connection, the investors can consider employing independent assessors to investigate the issues related to these three questions. The cost and social responsibilities revealed by the assessment report should be taken into account to determine whether the planned investment will go ahead.

The land-grabbing exercise in Myanmar increases the level of displacement and landlessness among farmers, leading to farmers’ widespread protests.¹²⁰ For instance, the ruling party, the Union Solidarity and Development Party (USDP), leased about eighty acres in Kyaukse township to investors to generate funding for the party. Still, farmers claimed that the land that belonged to their ancestors had been stolen from them, and a series of protests followed.¹²¹ The process of land grabbing has been recurrently documented and reported by human-rights organizations in Myanmar, such as the Earth Rights International (ERI), the Human Rights Foundation of Monland (HURFOM), the Karen Human Rights Group (KHRG), and the Shan Human Rights Foundation (SHRF).¹²² It would be a public relations nightmare if any names of American investors are being

¹¹⁷ Constitution of the Republic of the Union of Myanmar 2008, art. 37.

¹¹⁸ Soe & Par, *supra* note 20.

¹¹⁹ McCartan, *supra* note 72.

¹²⁰ Mousseau et al., *supra* note 2.

¹²¹ Win Nandar, *USDP in Row With Farmers Who Say Party Stole Their Land*, MYANMAR NOW (Apr. 10, 2019), <https://www.myanmar-now.org/en/news/usdp-in-row-with-farmers-who-say-party-stole-their-land.T>.

¹²² McCartan, *supra* note 72.

identified by such reports. Although legally, it should be the Myanmar government's responsibility to ensure a fair market compensation livered to the customary landowners, American investors need to confirm that such payment is equitable and will take action if it is not by compensating the landless farmers indirectly through other channels, such as the offering of local employment.

CONCLUSION AND RECOMMENDATION

Land policy and management is a complex issue in Myanmar. The physical and economic displacement of farmers from their customary land can result in long-term hardship. Therefore, a viable solution is needed to avoid damaging impacts on the smallholder farmers, the economy, and the environment through more active engagement with stakeholders. Building upon the investigation of the new land laws in Myanmar, this Article draws insights from the analysis of the impact of these laws, along with the spillover effects of the inflow of FD to the country, with a particular focus on the CSR of American investors, on the livelihood of smallholder farmers and peasants.¹²³

Equitable and fair management of land and natural resources in Myanmar is crucial to balance the interests of farmers, the government, and foreign investors. Myanmar cannot hope to achieve sustainable social and economic development without a fair and transparent framework that protects the land rights of underprivileged farmers, especially those belonging to ethnic minorities.¹²⁴ A lack of open and equitable fairness in land management, together with socio-legal and economic weaknesses that favor institutional capital rather than poor farmers and ethnic minorities, poses a significant challenge to the nation's social and economic reform program. The government of Myanmar needs to acknowledge that issues relating to land ownership and conflict have to be addressed to avoid the disproportionate impact on FDI and the country's economic growth.

The VFV Land Law, the Farmland Law, and the LARR Law are designed to encourage the legal takeover of lands that millions of farmers and peasants rely on for their livelihoods for the purpose of economic

¹²³ Bracco et al., *supra* note 85.

¹²⁴ Soe Nandar Linn, *Myanmar: Conflicts Over Land in a Time of Transition*, 50 *ECON. & POL. WKLY.* 69, 73 (2015).

development. They form a potent combination that ensures the practice of land grabbing is packaged as a necessary means to achieve economic prosperity. In this regard, proper land management should be a high priority for the Myanmar government to minimize land conflict and social instability. In the absence of a more open consultative process, the current amended versions of the Farmland Law and VFV Land Law need to be addressed appropriately.

In conclusion, the existing legal framework relating to land resources and tenure security in Myanmar needs to be harmonized. It should incorporate international and regional best practices relating to land management. Current weaknesses in the Farmland and VFV Land Laws should be immediately addressed through revising bylaws and regulations. American investors considering investing in Myanmar need to be aware of the problems and hardships of those people affected by land grabbing and ensure that their corporate social responsibility will not be compromised by their investment in Myanmar.