Notes

Foreign Agricultural Investments in Myanmar: Toward Successful and Sustainable Contract Farming Relationships

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This Note examines how the Myanmar government can create an appropriate legal and regulatory framework to promote contract farming. While the viability of contract farming in Myanmar has attracted some academic interest, this Note contributes to existing literature in two ways. First, it utilizes the pre- and post-establishment framework in foreign investment literature in order to analyze the government's role at different stages of the contract farming relationship. Second, it draws from the experiences of Myanmar's closest analogue, Laos, which adopted contracting farming as a mode of agricultural foreign investment. This Note finds that while Myanmar's weak legal system poses challenges, its ongoing reform of the investment, land, and tax laws also presents opportunities for a successful adoption of contract farming.

INTRODUCTION

Since the late 2000s, the developing world has seen a significant increase in foreign direct investment ("FDI") inflow in agriculture, driven by cost and availability concerns arising from volatility in international food prices.[1] In practice, agricultural FDI has mainly taken two forms. The dominant form has been the government's granting of a sale or a long-term lease, whereby foreign investors take direct control of the land. The less common form has been a business venture, where foreign investors partner with local farmers to produce and purchase a certain crop at a future point in time.

Many developing countries have viewed the inflow of FDI as a means to economic development. As a result, they have been active in selling or leasing land to foreign investors, a phenomenon that has been called large-scale land concessions or "land grabbing."[2] However, while organizations like the International Finance Corporation ("IFC") and the World Bank have supported agricultural FDI as having the potential to be a "win-win,"[3] various studies have noted how the negative consequences of land concessions may, and often do, outweigh the positive ones.[4] The main criticism has been the displacement of individuals and communities, stemming from institutional shortcomings common in recipient countries.[5] Factors such as the lack of a clear legal framework governing land ownership,[6] widespread corruption, and poor governance typically

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1. *See generally* David Hallam, *Foreign Investment in Developing Country Agriculture—Issues, Policy Implications and International Response* (Dec. 7–8, 2009), http://www.oecd.org/investment/globalforum/44231828.pdf (paper for the Global Forum VIII on International Investment).

2. SHEPARD DANIEL & ANURADHA MITTAL, THE OAKLAND INST., THE GREAT LAND GRAB: RUSH FOR WORLD'S FARMLAND THREATENS FOOD SECURITY FOR THE POOR 1 (2009), https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/great-land-grab.pdf.

3. *Id.* at 6; *see also* KLAUS DEININGER ET AL., THE WORLD BANK, RISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS?, at xlii–xliv (2011), http://documents.worldbank.org/curated/en/998581468184149953/pdf/594630PUB0ID1810Box358282B01PUBLIC1.pdf.

4. *See, e.g.*, WARD ANSEEUW ET AL., INT'L LAND COAL., LAND RIGHTS AND THE RUSH FOR LAND: FINDINGS OF THE GLOBAL COMMERCIAL PRESSURES ON LAND RESEARCH PROJECT (2012), http://www.landcoalition.org/sites/default/files/documents/resources/ILC%20GSR%20report_ENG.pdf.

5. *See generally id.*; DEININGER ET AL., *supra* note 3; MATTHIAS GÖRGEN ET AL., GERMAN FED. MINISTRY FOR ECON. COOPERATION & DEV., FOREIGN DIRECT INVESTMENT (FDI) IN LAND IN DEVELOPING COUNTRIES (2009), https://www.giz.de/fachexpertise/downloads/Fachexpertise/giz2010-en-foreign-direct-investment-dc.pdf.

6. Individuals may lack legal titles because processes for obtaining them is difficult or unavailable. ISABEL CRABTREE-CONDOR & LEORA CASEY, ACTIONAID INT'L, LAY OF THE LAND: IMPROVING LAND GOVERNANCE TO STOP LAND GRABS 10–11 (Oct. 2012), http://www.actionaid.org/sites/files/actionaid/lay_of_the_land_-_improving_land_governance_to_stop_land_grabs_low_res.pdf. Moreover, the law often fails to recognize communal land use, the dominant form of land ownership in many developing countries. *See id.*

enable concessions of land currently being used by its own citizens, though these lands are officially characterized by the government as "available," "marginal," "idle," or "wasteland."[7]

By contrast, studies have been more positive on the possibility of channeling agricultural FDI into a form of joint business venture.[8] One such form has been contract farming, where foreign investors contract with local farmers to purchase certain crops at a future point in time.[9] In theory, contract farming resolves the problem that a developing country may face when engaging in land concessions: the dilemma between the desire to attract foreign investment and the need to protect its citizens' rights to their own land. It also offers other positive spillover effects, such as farmers' opportunity to benefit from investors' capital, technology, and expertise in agricultural management.[10] Though some studies have voiced concerns about how contract farming works in practice,[11] there is broad consensus that if implemented properly, it has the potential to allow developing countries to reap the benefits of foreign investment while protecting and empowering the local farmers.[12]

Taking this consensus as a starting point for my analysis, this Note examines Myanmar and its government's role in designing a

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7. ANSEEUW ET AL., *supra* note 4, at 7, 34. Foreign Investors generally target—and governments award—high-quality land with good accessibility and infrastructure, which further undermines the premise that surplus land is being conceded. *See, e.g.*, *id.* at 34; Pascal Liu, *Impacts of Foreign Agricultural Investment on Developing Countries: Evidence from Case Studies* 11 (Food & Agric. Org. of the U.N. [FAO] Commodity & Trade Policy Research, Working Paper No. 47, 2014), http://www.fao.org/3/a-i3900e.pdf.

8. *See generally* THE WORLD BANK, WORLD DEVELOPMENT REPORT 2008: AGRICULTURE FOR DEVELOPMENT (2007), https://siteresources.worldbank.org/INTWDR2008/Resources/WDR_00_book.pdf; U.N. Conference on Trade & Dev., *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development*, U.N. Doc. UNCTAD/WIR/2009 (Sept. 17, 2009).

9. U.N. Conference on Trade & Dev., *supra* note 8, at xxvi.

10. *See, e.g.*, FAO, *Trends and Impacts of Foreign Investment in Developing Country Agriculture: Evidence from Case Studies* (2013), http://www.fao.org/docrep/017/i3112e/i3112e.pdf.

11. Olivier De Schutter (Special Rapporteur on the Right to Food), *The Right to Food*, U.N. Doc. A/66/262, at 9 (Aug. 4, 2011) (noting that contract farming may transform small-scale farmers into "false wage-earning agricultural labourers on their own land"); *see also* KANOKWAN MANOROM ET AL., CROSS-BORDER CONTRACT FARMING ARRANGEMENT: VARIATIONS AND IMPLICATIONS IN THE LAO PEOPLE'S DEMOCRATIC REPUBLIC 6 (2011), https://www.adb.org/sites/default/files/publication/29172/cross-border-contract-farming.pdf (noting that some Thai non-governmental organizations have characterized contract farming schemes as a "slavery contract").

12. U.N. Conference on Trade & Dev., *supra* note 8, at 163; *see also* Hallam, *supra* note 1, at 6.

legal and regulatory framework conducive to contract farming arrangements. Myanmar presents an interesting case because its agriculture-centered economy is primed to attract significant investor interest as it continues to undertake economic and political reforms that began in 2011.[13] Myanmar's focus should therefore be on how to utilize this opportunity without undermining individuals' and communities' rights to their land, making a discussion of contract farming particularly applicable. Moreover, Myanmar's laws have historically suffered from uncertainty and inconsistency,[14] and its land and investment laws have been in flux since the 2011 reform.[15] Thus, an analysis of Myanmar's legal and regulatory framework, in the context of contract farming, has the potential to have real and practical consequences.

In order to analyze how Myanmar can successfully adopt contract farming, this Note also considers Lao People's Democratic Republic ("Laos") and its experiences with agricultural FDI. Laos presents a comparative example for Myanmar because it opened up to foreign investment earlier[16] and has experimented with both land concessions and contract farming.[17] More importantly, Laos and

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13. Richard W.A. Vokes & Francesco Goletti, *Agricultural and Rural Development in Myanmar: Policy Issues and Challenges* 1 (Jan. 2013) (unpublished manuscript) (on file with author) ("[R]ecent opening up and re-engagement with the global economy has also seen a growing interest in the development potential of the agriculture sector.").

14. Connie Carter, *Winners and Losers: Land Grabbing in the New Myanmar*, *in* LAND GRABS IN ASIA: WHAT ROLE FOR THE LAW? 100, 102–106 (Connie Carter & Andrew Harding eds., 2015).

15. The Myanmar government has been revising its investment and land laws since 2011. It adopted a new Myanmar Investment law in 2016, which replaced the Foreign Investment Law of 2012 and the Myanmar Citizens Investment Law of 2013. Myanmar Investment Law, Pyidaungsu Hluttaw Law No. 40/2016, Oct. 18, 2016, http://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/myanmar_investment_law_official_translation_3-1-2017.pdf. It adopted the National Land Use Policy in 2016, which is meant to guide drafting and implementation of a national land law. National Land Use Policy at Foreword, para. 5 (Jan. 2016) (Myan.), http://extwprlegs1.fao.org/docs/pdf/mya152783.pdf.

16. Laos began its reform through its New Economic Mechanism plan in 1986, which transformed its subsistence, planned into a market-oriented economy with little state interference. *See generally* Martin Stuart-Fox, *Laos in 1988: In Pursuit of New Directions*, 29 ASIAN SURV. 81 (1989). Foreign investment has expanded since restrictions on FDI were lifted in 2005, and between 2005 and 2012, nearly 250 agricultural projects with a combined value between $1.1 and $1.7 billion were approved. *See* RODERICK CAMPBELL ET AL., BUSINESS MODELS FOR FOREIGN INVESTMENT IN AGRICULTURE IN LAOS 13 (2012), http://www.iisd.org/sites/default/files/publications/business_models_ag_investment_laos.pdf.

17. The Lao government has experimented with moratoria to restrict large-scale land concessions, recognizing their potential adverse effects on its local citizens. *See generally* Cor. H. Hanssen, *Lao Land Concessions, Development for the People?* (Sept. 2007), http://

Myanmar share similar economic and geographic conditions, as well as characteristics material to the success of contract farming relationships. They are both designated as Least Developed Countries by the United Nations,[18] and both rely heavily on their agricultural sectors. In 2014, agriculture accounted for more than a quarter of the total GDP in both countries,[19] and employed or supported the livelihoods of more than sixty percent of their total populations.[20] Conditions pertinent to contract farming reveal further similarities. First, traditional farming methods characterize the agricultural sectors in both countries, making contract farming's potential for technology transfer and market expansion particularly significant.[21] Second, they occupy strategic geographic locations advantageous to contract farming.[22] Third, they suffer from weak

lib.icimod.org/record/12845/files/4948.pdf (paper for International Conference on Poverty Reduction and Forests, Bangkok). It also lists the promotion of contract farming as one of its long-term goals. *See generally* LAO PDR MINISTRY OF AGRIC. & FORESTRY, AGRICULTURAL MASTER PLAN 2011 TO 2015: PROGRAM APPROACH, ROADMAP: AGRICULTURE AND FORESTRY FOR SUSTAINABLE DEVELOPMENT, FOOD AND INCOME SECURITY (Sept. 15, 2010). Case studies on contract farming in Laos have generally found success. *See, e.g.*, DAVID FULLBROOK, LAOS EXTENSION FOR AGRIC. PROJECT (LEAP) FOR THE GOV'T-DONOR SUB SECTOR WORKING GRP. ON FARMERS & AGRIBUSINESS, SMALLHOLDER PRODUCTION AGREEMENTS IN THE LAO PDR: QUALIFYING SUCCESS (Oct. 2011); S. Setboonsarng et al., *Profitability of Organic Agriculture in a Transition Economy: The Case of Organic Contract Rice Farming in Lao PDR* (June 16–20, 2008), http://orgprints.org/11583/1/11583.pdf (paper for IFOAM Organic World Congress, Modena).

18. U.N. Comm. for Dev. Policy, Dev. Policy & Analysis Div., Dep't of Econ. & Soc. Affairs, *List of Least Developed Countries* (May 2016), http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf.

19. JOSE DE LUNA-MARTINEZ & RATCHADA ANANTAVRASILPA, WORLD BANK GROUP [WBG], MYANMAR AGRICULTURAL DEVELOPMENT BANK: INITIAL ASSESSMENT AND RESTRUCTURING OPTIONS 13 (2014), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/04/09/000333037_20140409113021/Rendered/PDF/866300Revised0000MADB0Final0April08.pdf; *Agriculture, Value Added (% of GDP)*, WORLD BANK, http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS (last visited June 7, 2017).

20. *See* DE LUNA-MARTINEZ & ANANTAVRASILPA, *supra* note 19, at 7; *Rural Population (% of Total Population)*, WORLD BANK, http://data.worldbank.org/indicator/SP.RUR.TOTL.ZS (last visited June 7, 2017).

21. *See supra* note 10 and accompanying text.

22. Laos and Myanmar each enjoy unique geographic advantages. Studies have identified Laos's long borders with multiple countries as a comparative advantage, given the intra-regional nature of agricultural FDI in Asia. *See* MANOROM ET AL., *supra* note 11, at 7. Likewise, studies have emphasized Myanmar's proximity to India and the Gulf countries, who would be eager to take advantage of its fertile, water-rich land. *See* MICH. STATE UNIV. & THE MYAN. DEV. RES. INST.'S CTR. FOR ECON. & SOC. DEV., STRATEGIC CHOICES FOR THE FUTURE OF AGRICULTURE IN MYANMAR: A SUMMARY PAPER 3 (July 2013), http://fsg.afre.

land rights and poor governance.[23] These factors counsel against the promotion of land concessions and for the adoption of contract farming since these weaknesses can be exploited more readily when the government engages in concessions.

In addition to drawing from Laos's experiences, this Note utilizes the distinction between pre- and post-establishment in international investment law in order to examine the Myanmar government's role in adopting and promoting contract farming. In foreign investment literature, this framework is used to analyze domestic treatments of foreign investors before and after a new investment is established and operational.[24] The government's role in adopting contract farming, of course, concerns its relationship with *both* investors and farmers, and its legal and regulatory tools in this context are also not confined to investment laws alone. Nonetheless, following this analytical framework is helpful because it recognizes that the government's objectives may differ depending on whether a relationship between the investor and the farmer has been established. Thus, this Note identifies, for each stage of investment, incentives and safeguards that Myanmar's government can create in a successful model for contract farming.

This Note proceeds in the following sections. Part I briefly outlines the Myanmar government's interest in controlling the social, environmental, and human rights impact that the adoption of contract farming may have in affected communities. While this is not the principal focus of this Note, it informs the subsequent discussions, because the government's decisions in designing the incentives to promote contract farming should be guided by its public policy goals. Part II examines the Myanmar government's role as *inducer* in the pre-establishment stage. Its main objective there is to incentivize both investors and farmers to engage in contract farming. Section II.A discusses how investment, land, and tax laws can set up an appropriate incentive structure to encourage investors to choose contract farming over land concessions, while Section II.B discusses how the government's mitigation of various risks can encourage participation from farmers. Finally, Part III examines the Myanmar government's role as *enforcer* in the post-establishment stage. Section III.A discusses how the government can prevent and mitigate

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msu.edu/Myanmar/myanmar_diagnostic_report_summary_july_2013.pdf.

23. *CPIA Property Rights and Rule-Based Governance Rating (1=Low to 6=High)*, WORLD BANK, http://data.worldbank.org/indicator/IQ.CPA.PROP.XQ (last visited June 7, 2017).

24. *See, e.g.*, *Dictionary of Trade Terms*, SICE: FOREIGN TRADE INFO. SYS., http://www.sice.oas.org/dictionary/IN_e.asp (last visited June 7, 2017).

the different kinds of breaches that may arise in contract farming relationships, while Section III.B discusses specific enforcement mechanisms that the government can adopt. Section III.C discusses how the government should plan for the investor's exit and the end to the contract farming relationship.

I. GOVERNMENT'S PUBLIC POLICY OBJECTIVES UNDERLYING AGRICULTURAL INVESTMENT

Adoption of any new form of investment necessarily implicates various public policy objectives. In the context of contract farming, one could identify three broad categories: social and economic development, environmental protection, and human rights. The purpose of this section is to engage in a brief overview of each of these objectives in order to examine how they should influence the Myanmar government's design of the legal and regulatory framework related to contract farming.

First, contract farming can advance the government's overarching social and economic goals by operating as a vehicle for rural development and poverty reduction. For example, because contract farming often involves growing cash crops to be sold in the global market, it can introduce local farmers to high-value crops that they can cultivate even after termination of the contract farming arrangement, as well as broaden their access to markets where they can sell their agricultural products. However, recent empirical studies demonstrate that contract farming can also disproportionately exclude smallholder farmers[25] and women[26] from participation. The principal reasons for the exclusion are the high transaction costs and various investment constraints associated with partnering with smallholder farmers,[27] as well as economic and social inequality that

25. Junning Cai et al., *Rice Contract Farming in Cambodia: Empowering Farmers to Move Beyond the Contract Toward Independence* 5 (ADB Inst. Discussion Paper No. 109, 2008), https://www.adb.org/sites/default/files/publication/156748/adbi-dp109.pdf; Sununtar Setboonsarng, *Global Partnership in Poverty Reducation: Contract Farming and Regional Cooperation* 8 (ADB Inst. Discussion Paper No. 89, 2008), https://www.adb.org/sites/default/files/publication/156728/adbi-dp89.pdf.

26. *See* De Schutter, *supra* note 11, at 10–11; Rebecca Smalley, *Plantations, Contract Farming and Commercial Farming Areas in Africa: A Comparative Review* 46 (Land & Agric. Commercialisation in Afr. (LACA) Project, Working Paper No. 055, 2013), http://www.fao.org/uploads/media/FAC_Working_Paper_055.pdf (stating that the problem is not limited to exclusion, but extends to the unequal distribution of income and decision-making power within a household).

27. CREM BV, CONTRACT FARMING IN ASEAN COUNTRIES: A FACT FINDING STUDY

women face in many developing countries.[28] Since this kind of exclusion can impede the government's efforts to reduce rural poverty and develop the agricultural sector, Myanmar should strive to include marginalized populations in contract farming relationships.[29]

Second, contract farming can harm the environment and thus requires the government to provide appropriate environmental protection measures. Three principal concerns for the Myanmar government should be deforestation, soil erosion, and depletion of water resources.[30] These concerns are particularly serious in a contract farming setting for at least two reasons. First, contract farming often involves introducing new crops and working with new technologies and farming techniques, which can have unpredictable environmental consequences. Second, both investors and farmers may lack an interest in environmental protection: the environment is unlikely to be foreign investors' concern when they participate in contract farming, and farmers may possess neither the expertise nor the incentive to anticipate or mitigate future damage to their land. Therefore, in designing the legal framework for contract farming, the Myanmar government should strive to ensure that it is practiced in a responsible and sustainable manner, both by imposing environmental risk-assessment requirements in the pre-establishment phase and by developing mechanisms to oversee the relationship post-establishment.

Third, promoting contract farming implicates several human rights issues, which the government must strive to balance. The United Nations has suggested, for instance, that the right to food under Article 25 of the Universal Declaration of Human Rights imposes a positive duty on governments to undertake certain

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33 (Aug. 2008), http://www.seacouncil.org/seacon/images/stories/pdf2013/contractfarminginaseancountries-crem-2008.pdf.

28. *See* Smalley, *supra* note 26, at 37.

29. Since Myanmar is only in the preliminary stage of adopting contract farming, however, concerns of marginalization may not be the government's primary focus. Trying to involve the marginalized population from the beginning may be difficult because the government would be aspiring to do too much with too little time and too few resources. Instead, it should focus on developing a balanced and equitable legal and regulatory framework for contract farming and on promoting its overall success by engaging farmers who are ideal business partners for foreign investors. The government may turn its attention more fully to the problem of marginalization when contract farming begins to entrench itself as a viable form of foreign investment for both investors and farmers, and this Note will consider marginalization only to the extent that the government's efforts may have an ancillary effect on it.

30. CHARLES EATON & ANDREW W. SHEPHERD, FAO, CONTRACT FARMING: PARTNERSHIPS FOR GROWTH 117 (FAO Agricultural Services Bulletin No. 145, 2001).

supportive actions in the context of contract farming.[31] These include ensuring smallholder farmer participation[32] as well as mitigating threats to food security, which may result from the participating farmers' inability to grow crops for subsistence.[33] Moreover, some studies have voiced concern that contract farming, by increasing the demand for labor, can lead to an increase in unpaid family and child labor.[34] Hence, such human rights concerns should also guide the Myanmar government's decision-making process.

Precisely how much influence each of these public policy goals should have on lawmakers will depend on the circumstances, including the Myanmar government's domestic socio-economic policy agendas. Nonetheless, these three policy objectives will be referenced consistently throughout the subsequent discussions on pre- and post-establishment in order to ensure that they are given due consideration when designing the legal framework to promote contract farming.

II. PRE-ESTABLISHMENT

Investors and farmers face different kinds of opportunity costs when they choose to engage in contract farming, which the government must leverage in order to secure their participation in the pre-establishment stage. Their respective opportunity costs are best analyzed by comparing the expected values of contract farming and their next best alternative.[35] For the investors, their alternative investment mode—large-scale land concessions—can have a higher expected value than contract farming because it can provide both a greater probability of success and better financial returns. Therefore, in order to channel investors into contract farming, the government needs to ensure that both its risks and returns are superior to those of land concessions. For the farmers, however, contract farming already has significant potential to offer higher financial returns compared to their next best alternative, subsistence agriculture. They are therefore

31. De Schutter, *supra* note 11, at 6.

32. *Id.* at 7.

33. *Id.* at 8–9.

34. *See, e.g.*, SUKHPAL SINGH, CONTRACT FARMING IN INDIA: IMPACTS ON WOMEN AND CHILD WORKERS (Int'l Inst. for Env't & Dev., Nat. Res. Grp. & Sustainable Agric. & Rural Livelihoods Programme, Gatekeeper Series No. 111, 2003), http://pubs.iied.org/pdfs/9281IIED.pdf.

35. Expected value is calculated by multiplying the probability of success with the magnitude of the future return.

likely to be more concerned with the potentially high risks associated with contract farming. Hence, the government's calculus in incentivizing farmers should revolve around reducing the risks of contract farming, rather than improving its financial returns.[36] The following discussion on the Myanmar government's role in pre-establishment takes this difference into account, discussing both variables of expected value in the context of investors, while focusing principally on the risk-related incentives in the context of farmers.

A. Incentivizing Investors to Choose Contract Farming

If Myanmar's objective regarding foreign investors is to incentivize them to choose contract farming over large-scale land concessions, it must make changes in its legal and regulatory framework in order to make the former more attractive than the latter. Since investors will weigh the benefits of both choices when making an investment decision, Myanmar should focus equally on making land concessions less attractive and on making contract farming more attractive. The following subsections consider the viability of different options in this regard, taking into account existing legal devices in Myanmar law, currently proposed laws, and additional legal tools that Myanmar could deploy.

1. Making Large-Scale Land Concessions Less Attractive

Myanmar may encourage contract farming by making concessions a less viable option for foreign investors. Concessions become less viable when direct management of land becomes less financially attractive, when the investors' power to take land is diminished, or when the landholders' power to protect their land is increased. Myanmar should, however, focus on the last option as the principal means to discourage concessions. Not only can improving land rights of citizens prevent abuse of the concession system by protecting land already in use, but it can also make a general, positive human rights impact by providing legal titles and remedies to local

36. Granted, even if contract farming already provides greater financial return than subsistence agriculture, increasing it further will still have a positive effect on farmer participation. However, the marginal benefit of this effort will be low. Because contract farming is an unfamiliar business venture for most farmers, the risk of failure, not the degree of improvement in their financial well-being, is likely to be their main concern during the decision-making process. This is especially so when those returns already promise to be superior to ones offered by subsistence agriculture.

landholders.

a. Designing Financial Incentives to Discourage Land Concessions

Myanmar can make direct control of land less profitable for foreign investors by increasing related capital costs and responsibilities. The government may consider three options in this regard: increasing land taxes, imposing tariffs on related imports and exports, and creating a benefit-sharing requirement between investors and the local community. While Myanmar should consider all of these options, it should focus on the benefit-sharing requirement because, in addition to discouraging concessions, it promotes the government's interests in administrative efficiency, rural development, and human rights.

First, Myanmar should introduce a tax system which subjects land awarded as concessions to a higher tax rate. In fact, the National Land Use Policy ("NLUP")[37] already discusses some tax measures which may be utilized to discourage land concessions. For instance, the NLUP contemplates a progressive tax system which would subject higher amounts of land holdings to higher tax rates,[38] as well as a system which would distinguish between land used for subsistence and commercial purposes.[39] Hence, if tailored to discourage concessions and implemented as part of the new national land law, these provisions will be effective financial disincentives for investors: land concessions in Myanmar have historically been large-scale[40] and their commercial nature would also automatically trigger higher tax rates under the proposed land law.

Second, Myanmar should consider imposing import- and export-related tariffs to products grown on land awarded as concessions.[41] Myanmar currently offers exemptions from customs

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37. The National Land Use Policy was adopted to outline the guiding principles behind a future national land law. National Land Use Policy (Jan. 2016) (Myan.), http://extwprlegs1.fao.org/docs/pdf/mya152783.pdf.

38. *Id.* para. 52.

39. *Id.* para. 56.

40. SHIVAKUMAR SRINIVAS & U SAW HLAING, FAO, MYANMAR: LAND TENURE ISSUES AND THE IMPACT ON RURAL DEVELOPMENT 26–27 (2015), http://www.burmalibrary.org/docs21/FAO-2015-05-Myanmar-land_tenure&rural_development-en-tpo-red.pdf.

41. For a discussion of import- and export-related taxes in facilitating contract farming relationships, see Phil Simmons, *Overview of Smallholder Contract Farming in Developing Countries* 22–23 (FAO, ESA Working Paper No. 02-04, 2002), http://www.fao.org/docrep/007/ae023e/ae023e00.HTM.

duties for inputs related to agricultural production,[42] and exported agricultural products are also exempt from income and commercial tax typically levied against other products.[43] Since these benefits apply equally to land concessions and contract farming, however, Myanmar may need to consider tailoring the exemptions more narrowly in order to channel the foreign investment away from concessions and into contract farming.[44]

Finally, Myanmar can impose a benefit-sharing requirement on investors engaged in concessions, whereby investors must share some of their profits with the local community. Such a requirement may be superior to taxes and tariffs for at least three reasons. First, a benefit-sharing requirement is less burdensome for the government because the parties involved can be required to establish and manage it by way of contract, whereas taxes and tariffs require active government involvement in implementation and enforcement. Second, a benefit-sharing requirement can further the Myanmar government's development objectives, as the resulting financial resources can propel rural development. Finally, a benefit-sharing requirement recognizes the reality that land awarded through concessions may not be unclaimed and unused.[45] Hence, until Myanmar can adequately protect the land rights of its citizens, imposing a benefit-sharing requirement on investors may alleviate problems of dispossession and displacement discussed in the Introduction.

b. Adjusting Legal Entitlements of Investors and Landholders

Myanmar can make land concessions less attractive to foreign

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42. MYAN. MINISTRY OF AGRIC. & IRRIGATION, COUNTRY STATEMENT OF MYANMAR 2–3 (Nov. 2014), http://www.fao.org/fileadmin/user_upload/faoweb/docs/MM3/Statements/Myanmar.pdf.

43. Trade Policy Review Body, *Trade Policy Review: Report by the Secretariat: Myanmar*, WTO Doc. WT/TPR/S/293, at 12 n.4 (Jan. 21, 2014) ("Previously all exports were subject to income tax (2%) and commercial tax (8%), now only five products are subject to these taxes, while they have been abolished for all others including agricultural products.").

44. Import and export duties and other trade policies should also comply with Myanmar's obligations under the World Trade Organization agreements, particularly the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

45. *See supra* note 7 and accompanying text; *see also* Peter Messerli et al., *The Geography of Large-Scale Land Acquisitions: Analysing Socio-Ecological Patterns of Target Contexts in the Global South*, 53 APPLIED GEOGRAPHY 449, 453 (2014) (finding that thirty-five percent of large-scale concessions in the global South target occupied farmland).

investors either by placing greater restrictions on investors' ability to lease land or by empowering local landholders to protect their land. For the following reasons, however, Myanmar should focus on the latter as its principal solution.

While it is possible for Myanmar to place greater restrictions on foreign investors' ability to lease land, this approach may not be ideal. Myanmar's foreign investment law and land law are two main sources of the investors' power to request land concessions.[46] Its foreign investment law, however, has consistently affirmed foreign investors' right to lease land for extended periods of time: both the past[47] and current laws[48] state that investors can lease land from the government for up to fifty years. Given this legislative history, as well as Myanmar's recent commitment to economic liberalization,[49] restricting investors' power to take land through investment laws will probably be seen as taking a step back, and is unlikely to be a realistic option for the Myanmar government.

Additionally, serious enforcement issues exist in imposing a restriction through the land law. Although the NLUP considers imposing a size limit to concessions and providing a system of dispute resolution,[50] it is unclear now how these provisions will be memorialized into binding law and how they will work in practice. Moreover, Laos's experience limiting land concessions suggests that such restrictions may be ineffective. Out of concern that they were harming its rural communities, Laos passed a moratorium in 2009

46. While Myanmar's foreign investment law defines the extent of foreign investors' access to land, its land laws determine which parcels of land are vacant and thus available for concessions. *See* Myanmar Investment Law ch. XII, Pyidaungsu Hluttaw Law No. 40/2016, Oct. 18. 2016, http://www.dica.gov.mm/sites/dica.gov.mm/files/document-files/myanmar_investment_law_official_translation_3-1-2017.pdf; Farmland Law, Pyidaungsu Hluttaw Law No.II of 2012, Mar. 30, 2012 (Myan.), http://extwprlegs1.fao.org/docs/pdf/mya139026.pdf; The Vacant, Fallow and Virgin Lands Management Law, Pyidaungsu Hluttaw Law No.10 of 2012, Mar. 30, 2012 (Myan.), http://www.burmalibrary.org/docs13/VFVLM_Law-en.pdf.

47. The Foreign Investment Law § 31, Pyidaungsu Hluttaw Law No 21/2012, Nov. 2, 2012 (Myan.), http://www.moj.go.jp/content/000112674.pdf.

48. Myanmar Investment Law § 50(b).

49. *See, e.g.*, Organisation for Economic Co-operation and Development [OECD], OECD Investment Policy Reviews: Myanmar (2014), http://www.oecd.org/daf/inv/investment-policy/Myanmar-IPR-2014.pdf; Michael Ramirez, *Myanmar Legal Update: Moving Toward Market Liberalization*, TILLEKE & GIBBINS: INFORMED COUNSEL (Nov. 2014), http://www.tilleke.com/sites/default/files/2014_Dec_Myanmar_Legal_Update.pdf.

50. National Land Use Policy para. 33 (Jan. 2016) (Myan.), http://extwprlegs1.fao.org/docs/pdf/mya152783.pdf.

which categorically prohibited concessions over 1000 hectares.[51] Enforcement, however, has proven difficult, with at least one study pointing out that a concession of 10,000 hectares was granted following the moratorium.[52] Likewise, although Lao laws limit provincial officials' power to approve concessions of 100 hectares for forest land, evidence suggests that these regulations are largely ignored because officials can benefit by granting concessions to foreign investors.[53] Hence, given Myanmar's poor governance and widespread corruption,[54] the restrictions contemplated in the NLUP may be ineffective.

Thus, rather than limiting the investors' powers, Myanmar should focus on protecting its own citizens' rights to their land. While empowering landholders will not diminish investors' power to request and receive concessions, doing so will be less attractive if current land ownership structures are better protected. Investors will be disincentivized because much of the rich, fertile land will now be legally held and out of their reach, and the government will be deterred because it must now compensate the local landholders for their land.[55] Moreover, protection of landholders' rights is unlikely to raise the same governance and corruption concerns. Because the government would be providing landholders with a vested legal right and the standing to seek legal recourse, instead of simply restricting the officials' powers to take the affected land, the officials' misconduct or abuse of power is much more likely to be policed and

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51. CAMPBELL ET AL., *supra* note 16, at 21; *see also* U.S. AGENCY FOR INT'L DEV., USAID COUNTRY PROFILE: PROPERTY RIGHTS AND RESOURCE GOVERNANCE: LAO PEOPLE'S DEMOCRATIC REPUBLIC 16 (June 2013), http://usaidlandtenure.net/wp-content/uploads/2016/09/USAID_Land_Tenure_Laos_Profile.pdf.

52. CAMPBELL ET AL., *supra* note 16, at 21.

53. Hanssen, *supra* note 17, at 6–7.

54. Transparency International's Corruption Perceptions Index (2016) ranks Myanmar 136th out of 176 surveyed countries, where a lower rank indicates a greater level of public sector corruption. *Myanmar*, TRANSPARENCY INT'L, http://www.transparency.org/country/MMR (last visited June 7, 2017).

55. Myanmar's existing land laws require the government to provide fair compensation if land is taken for a public purpose. ROBERT B. OBERNDORF, FOOD SEC. WORKING GRP., LEGAL REVIEW OF RECENTLY ENACTED FARMLAND LAW AND VACANT, FALLOW AND VIRGIN LANDS MANAGEMENT LAW: IMPROVING THE LEGAL & POLICY FRAMEWORKS RELATING TO LAND MANAGEMENT IN MYANMAR 18–20 (Nov. 2012), http://www.forest-trends.org/documents/files/doc_3274.pdf. *But see* NAMATI & LANDESA, RECOMMENDATIONS FOR IMPLEMENTATION OF PRO-POOR LAND POLICY AND LAND LAW IN MYANMAR: NATIONAL DATA AND REGIONAL PRACTICES 22 (Oct. 2015), https://www.landesa.org/wp-content/uploads/Recommendations-for-Land-Policy-and-Law-in-Myanmar-English-10.7.151.pdf (noting that the method of compensating landowners has been criticized for its poor calculation method and lack of due process).

sanctioned.

The ideal, long-term solution to protect landholders is to recognize and defend individual land rights.[56] This option, however, may not be a realistic immediate solution. Although Myanmar does recognize individual land rights through its Land Use Certificates ("LUCs"),[57] few rural households hold them due to complex and restrictive registration requirements.[58] Even if bureaucratic hurdles were eliminated, all rural land would have to be titled because many households lack *any* legal proof of land use.[59] As the World Bank has noted in its report on Laos's Second Land Titling Project, "[r]eform of land administration is a long-term endeavor that requires decades of investment of capital and human resources and sustained commitment."[60] Therefore, although the NLUP endeavors to "recognize and protect legitimate land tenure rights of people, . . . with particular attention to vulnerable groups such as smallholder farmers, the poor, ethnic nationalities and women,"[61] the country is unlikely to have the necessary resources or the time, as it undertakes reform, to protect land rights through official individual titles.

The more realistic option for Myanmar to protect landholders' rights is to recognize customary land rights,[62] to which the NLUP already dedicates significant attention. According to the NLUP, the new national land law will "[f]ormally recognize and protect the customary land tenure rights and related local customary land management practices of ethnic groups, whether or not existing land

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56. Although Myanmar's Constitution designates the state as the "ultimate owner of all lands and all natural resources," it has the power to grant rights of private property to its citizens. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR (2008) § 37.

57. Farmland Law § 8, Pyidaungsu Hluttaw Law No.II of 2012, Mar. 30, 2012 (Myan.), http://extwprlegs1.fao.org/docs/pdf/mya139026.pdf. LUCs provide the holder with the right to sell, exchange, inherit, and lease the land. *See id.*

58. Carter, *supra* note 14, at 111.

59. *Id.*

60. WORLD BANK, REPORT NO. ICR00001270, IMPLEMENTATION COMPLETION AND RESULTS REPORT ON A CREDIT IN THE AMOUNT OF SDR 10.8 MILLION (US$14.82 MILLION EQUIVALENT) TO THE LAO PEOPLE'S DEMOCRATIC REPUBLIC FOR THE SECOND LAND TITLING PROJECT 31 (May 20, 2010), http://documents.worldbank.org/curated/en/976591468278054046/pdf/ICR12700ICR0Bo110Disclosed0July0131.pdf.

61. National Land Use Policy para. 8(a) (Jan. 2016) (Myan.), http://extwprlegs1.fao.org/docs/pdf/mya152783.pdf.

62. Customary land refers to land governed in accordance with local customs, and is often found in indigenous communities. For a more detailed discussion of customary land rights, see FAO, LAND TENURE AND RURAL DEVELOPMENT 7–22 (FAO Land Tenure Studies No. 3, 2002), http://www.fao.org/3/a-y4307e.pdf.

use is registered, recorded or mapped,"[63] and such recognition will "protect[] against grants or leasing of land at the disposal of government allowed under any existing law."[64] However, in order to provide meaningful protection to landholders, Myanmar should go beyond a simple recognition and require a formal registration of communal land under its new national land law. The consequences of giving recognition without formal registration are evident from the experience of Laos. The Lao government recognizes, but does not provide, a system to register communal land and, as a result, the government can still lease this land to investors without just compensation.[65] Granted, such provisions, if enacted, would only protect land currently in communal use, and therefore would not extend protection to all landholders. Nonetheless, a significant portion of Myanmar's land is held by ethnic minorities practicing communal tenure systems,[66] and—relative to individual titling—recognition and registration of customary land rights would be a much less resource-intensive and more realistic short-term solution.

Finally, it should be noted that securing citizens' land rights not only shifts foreign investors away from land concessions, but also incentivizes them to participate in contract farming. In contract farming arrangements, investors must bear the risk of farmers' insecure land rights since land may be lost before completion of performance under the contract.[67] Thus, securing land rights for farmers mitigates at least one risk that may dissuade investors from engaging in contract farming while also alleviating the concern that disincentivizing concessions may discourage agricultural FDI altogether.

2. Making Contract Farming More Attractive

In addition to making land concessions less viable, Myanmar

63. National Land Use Policy para. 66(b).

64. *Id.* para. 69.

65. U.S. AGENCY FOR INT'L DEV., *supra* note 51, at 12.

66. Kirsten Ewers Andersen, Land Core Grp., Myan., *Analysis of Customary Communal Tenure of Upland Ethnic Groups, Myanmar* (2015), http://www.burmalibrary.org/docs21/Land/Andersen-2015-Analysis_of_Customary_Communal_Tenure_of_Upland_Ethnic_Groups_Myanmar-en.pdf.

67. Case studies from Laos consistently note this concern from investors. *See, e.g.*, DAVID FULLBROOK, LAOS EXTENSION FOR AGRIC. PROJECT (LEAP) FOR THE GOV'T-DONOR SUB WORKING GRP. ON FARMERS & AGRIBUSINESS, CONTRACT FARMING IN LAO PDR: CASES AND QUESTIONS 34 (Oct. 2007), http://www.fao.org/uploads/media/Library_Contract_Farming_in_Laos_Cases_Questions_2007_LEAP.pdf.

should also design positive incentives for foreign investors to engage in contract farming. This Section examines two methods to make contract farming more attractive to investors: reducing transaction costs and providing financial incentives. As discussed more fully below, the Myanmar government should not provide long-term financial incentives to investors, and should instead focus principally on reducing transaction costs that the investors must incur to engage in contract farming.

a. Reducing Transaction Costs

Transactions costs can generally be divided into three broad categories: 1) search and information costs, 2) bargaining and decision costs, and 3) policing and enforcement costs (addressed as part of the post-establishment analysis below).[68] In order to make contract farming more attractive than land concessions, the Myanmar government must not only ascertain what these costs are for contract farming, but also how they compare to those for land concessions. Because contract farming involves multiple stakeholders, whereas land concessions allow investors to take direct control of the land, investors engaged in contract farming are likely to face higher costs in each of these categories. Therefore, the government's objective should be to minimize the various risks and difficulties that arise from working with other stakeholders in order to ensure that they are not serving as barriers to entry for investors.

Search and information costs for contract farming include the cost of gathering agricultural, social, and economic information about the region, the cost of determining the suitability of individual farmers, and the cost of building relationships with the farming community.[69] These costs can be reduced by the introduction of facilitators and intermediaries—such as farmer organizations—that can provide relevant market information and perform a clearinghouse function of matching foreign investors with local farmers.[70] Moreover, while there is little the government can do directly to assist parties in forging constructive relationships, it can promote the creation of facilitators and intermediaries and adopt clear laws governing contract farming, thereby decreasing misunderstandings and reasons for parties to distrust one another.

68. Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141, 148 (1979).

69. Simmons, *supra* note 41, at 6.

70. Section II.B.3, *infra*, will discuss the practicalities of such a process from the farmers' perspective.

Likewise, bargaining and decision costs include both the costs of drafting and negotiating contracts with the farmers and the costs of registration and approval with the government. There is little that the Myanmar government must do to reduce contract-related costs, which are already expected to be low for investors due to their superior bargaining power, especially in the absence of facilitators and intermediaries.[71] Myanmar should, however, strive to reduce the set-up and operational costs associated with contract farming. Because there are currently only a handful of contract farming arrangements in Myanmar, and because many of the relevant laws are in flux, it is unclear what the requirements will be for investors to participate in contract farming. Therefore, when designing the governing laws and regulations, the Myanmar government should take special care not to burden investors with excessive bureaucratic hurdles and to provide an unambiguous and transparent framework to follow. Procedural simplification is particularly important because the involvement of multiple stakeholders is likely to make contract farming a more time-consuming endeavor than land concessions. Thus, one significant barrier to investor participation in contract farming could be eliminated if the Myanmar government worked to alleviate some of the delays involved in this process.

b. Providing Financial Incentives

The Myanmar government must be cautious when providing financial incentives to foreign investors. While a certain level of incentives is needed to channel foreign investment into contract farming, over-incentivizing can have negative economic and public policy consequences. If financial incentives are provided by way of reduction in taxes and tariffs, the opportunity cost of foregone revenue may become too significant for the government to bear. Additionally, "incentives can undermine the development of private sector service providers that could make [them] no longer necessary,"[72] such as private finance. Finally, financial incentives may give rise to at least two types of adverse selection problems:

71. Granted, these costs may increase with the empowerment of local farmers, discussed in Section II.B.3, *infra*. However, farmers' active participation in negotiations should actually have an overall positive effect on investors' transaction costs by reducing potential misunderstandings and establishing a more mutually beneficial, long-term relationship.

72. U.S. AGENCY FOR INT'L DEV., BUILDING AN ENABLING ENVIRONMENT FOR CONTRACT FARMING SUCCESS 10 (Enabling Agricultural Trade Policy Brief No. 6, 2015), http://eatproject.org/docs/EAT_PolicyBreif_ContractFarming_022715_web.pdf.

they can attract a suboptimal group of investors who are investing only to reap the benefits of government subsidies, or give rise to economically unviable contracts that result in failure.[73] Therefore, in either case, the incentives will not result in sustainable contract farming relationships.

With these concerns in mind, the Myanmar government can provide limited, short-term financial incentives to investors through tax law and subsidies. Inasmuch as land taxes are often a major cost in any agricultural investment, contract farming already has an intrinsic advantage over land concessions: because the investors are not the legal owners of the land in contract farming relationships, the contracting farmers, not the investors, will bear the burden of paying land taxes. However, even if investors agree to bear the tax burden as part of the arrangement, Myanmar can still make contract farming relatively more attractive by introducing a progressive tax system based on the size of the land.[74] Unlike land concessions, contract farming often engages multiple farmers and thus involves utilizing an aggregate of smaller land holdings.[75] Hence, under a progressive tax system, an investor will face a lower overall tax burden when choosing contract farming over concessions, since each individual land holding will be subject to a lower tax rate.

In addition to favorable tax treatments, the Myanmar government can utilize subsidies to encourage contract farming.[76] Several reasons, however, militate against relying on subsidies too heavily to attract investors. First, given the limited resources available, a good case can be made that subsidies, if any, should go to supporting the local farmers, and not the foreign investors. Second, subsidies can give rise to severe adverse selection problems if they

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73. Adverse selection is a concept in economics referring to a situation where parties have asymmetric information. LOUIS PHLIPS, THE ECONOMICS OF IMPERFECT INFORMATION 70 (1988). In the context of government subsidies, adverse selection can occur because the government may not have effective means to ascertain the quality or intention of the investors, which allows them to exploit the financial incentives intended to foster profitable and sustainable contract farming relationships.

74. As discussed in Section II.A.1.a, *supra*, the NLUP already contemplates such a system. *See* National Land Use Policy para. 52 (Jan. 2016) (Myan.), http://extwprlegs1.fao.org/docs/pdf/mya152783.pdf.

75. *See generally* EATON & SHEPHERD, *supra* note 30.

76. As a member of the World Trade Organization, Myanmar must abide by WTO's Agreement on Agriculture, which limits domestic support measures distorting production and trade. As a Least Developed Country, however, Myanmar is exempt from the requirement to undertake reduction commitments. *See* Agreement on Agriculture art. 15, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

are conditioned on the relationship's eventual success, whereas benefits such as tax breaks on exports will apply only if the relationship actually yields a harvest. Finally, for the same reasons, subsidies have the greatest potential for loss of resources. If subsidies are provided pre-establishment, the government will incur those expenses regardless of the outcome of the contract farming relationship. But if they are provided at some future point in time, post-establishment, they are unlikely to incentivize investors given Myanmar's uncertain political climate as well as investors' discounting of future earnings. Thus, the Myanmar government should explore ways to design subsidies to avoid these potential pitfalls. One option is to guarantee the cash or in-kind loans that investors extend to farmers for inputs and technology. The credit risk associated with these loans is one of the costs that investors must bear in a contract farming relationship, and the government can provide a financial incentive for investors by providing compensation if the farmer defaults.[77]

To summarize, the Myanmar government can incentivize investors to engage in contract farming in one of two ways. First, it can diminish the relative appeal of large-scale land concessions, the foreign investors' principal alternative mode of investment, by implementing financial disincentives and protecting the rights of local landholders. Second, it can make contract farming more attractive by reducing associated transaction costs and providing financial incentives. Because promotion of contract farming requires strong participation from *both* investors and farmers, the following section discusses how the government can improve farmer participation in order to match investors' interest.

B. Engaging Farmers to Participate in Contract Farming

In order to increase farmer participation, Myanmar should mitigate real or perceived risks faced by farmers considering contract farming.[78] Contract farming is often the only viable way for farmers practicing subsistence agriculture to improve their livelihoods[79] and

77. Potential benefits of this policy will be discussed again from the farmer's perspective in Section II.B.2, *infra*.

78. Such risk mitigation measures are particularly important in the context of contract farming because, by abandoning subsistence agriculture, farmers give up on food security for themselves and their families. Hence, from the farmers' perspective, contract farming may be seen as a high-risk, high-return venture that trades the relative stability and security of subsistence agriculture for the potential for greater income.

79. De Schutter, *supra* note 11, at 5.

the principal reason that they engage in it is to increase their income.[80] Thus, when trying to incentivize farmers, it is likely unnecessary to provide additional financial incentives outside of what is already being offered through the contract farming arrangement, and the government can instead focus exclusively on mitigating risks associated with partaking in contract farming.[81] This Note examines three such risks: 1) threats to food security from transitioning out of subsistence farming, 2) credit risk from investors' provision of inputs and technology, and 3) risk of the parties' unequal bargaining power resulting in an unfair negotiation. These concerns, and the appropriate government responses, are discussed in turn.

1. Allaying Concerns of Food Security

Threats to farmers' food security stem from their abandonment of subsistence agriculture in favor of contract farming, which involves production of crops exclusively for sale. Since they are no longer growing food for subsistence, farmers are left vulnerable to market forces and volatilities in domestic food prices. In order to minimize this risk, the Myanmar government should adopt the solutions proposed by the United Nations: 1) requiring the contracting farmer to reserve a portion of his or her land to grow subsistence crops, and 2) exploring ways to use by-products and residues from contract farming activities for subsistence purposes.[82]

2. Mitigating Credit-Related Risks

Investors' provision of inputs and technology to farmers is a common arrangement in contract farming relationships, and one which allows poorly endowed, low-productivity farmers to engage in the production of cash crops for investors.[83] However, farmers may come to bear severe risks by accepting these inputs from investors. The Lao government, for instance, promotes the "2+3 model" for contract farming, in which the farmer provides land and labor and the investor provides capital, production technology, and access to

80. MANOROM ET AL., *supra* note 11, at 32.

81. Financial incentives for farmers, if provided, would also run into the same kind of adverse selection and sustainability problem discussed in Section II.A.2.b, *supra*.

82. De Schutter, *supra* note 11, at 8–9.

83. EATON & SHEPHERD, *supra* note 30, at 11; INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW [UNIDROIT] ET AL., LEGAL GUIDE ON CONTRACT FARMING 10–11 (2015), http://www.fao.org/3/a-i4756e.pdf.

markets.[84] As a study by its Ministry of Planning and Investment has discovered, however, investor inputs are provided as loans or credits in-kind, often at prices higher than market, and deducted before payment for products.[85] Moreover, investors sometimes demand farmers' land as collateral for these loans,[86] leaving farmers vulnerable if loans cannot be repaid. At least two studies in Laos have voiced concern that farmers are at risk of losing their land if the relationship ends in failure,[87] with one positing that securing direct control of the land via foreclosure may be the investor's real intention.[88]

Such anecdotal evidence supports the United Nations' warning that contract farming can lead to a "cycle of debt"[89] and "devastating dependence . . . on the technology, credit, inputs and services provided by [the investors]"[90] for the participating farmers. The Myanmar government must mitigate these risks in order to encourage farmer participation in contract farming. Investors' provision of inputs will be a benefit only if they are delivered in a non-predatory manner. At least three options are available for the government: making the loans themselves, guaranteeing the loans, and encouraging the development of the agricultural insurance sector.

The Myanmar government provides loans to farmers for various inputs through the Myanmar Agricultural Development Bank ("MADB"), which has more than 200 branches and covered 1.87 million customers at the end of 2012.[91] Therefore, Myanmar already has an established means to allow farmers engaged in contract farming to obtain government loans. Though the benefit of receiving capital from foreign investors must be foregone if the government provides the loans directly, there are also significant positive effects. First, the government can achieve its public policy goal of mitigating the threat of foreclosure for farmers, instead offering them alternative

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84. MANOROM ET AL., *supra* note 11, at 11.

85. MINISTRY OF PLANNING & INV., EXECUTIVE SUMMARY: IMPACTS OF CONTRACT FARMING ON POVERTY AND ENVIRONMENT IN LAO PDR 6 (Aug. 18, 2014), http://rightslinklao.org/wp-content/uploads/downloads/2014/10/2014_9_3_CF_ExSum.pdf.

86. UNIDROIT ET AL., *supra* note 83, at 100.

87. FULLBROOK, *supra* note 17, at 25; MANOROM ET AL., *supra* note 11, at 19; *see also* UNIDROIT ET AL., *supra* note 83, at 6–10 (warning against potential high levels of indebtedness for farmers).

88. FULLBROOK, *supra* note 17, at 64.

89. De Schutter, *supra* note 11, at 11–12.

90. *Id.* at 11.

91. DE LUNA-MARTINEZ & ANANTAVRASILPA, *supra* note 19, at 7.

means of repayment in case of default. Second, investors will have more reasons to choose contract farming when the government bears a portion of their financial burden. Third, smallholder farmers may have more opportunities to participate in contract farming because their high credit risks are one of the reasons that investors view them as sub-optimal business partners.[92]

Guaranteeing the loans as part of a public development program, however, may be a superior option for the Myanmar government, for it resolves at least two problems that could arise if the government acts as a direct lender. First, to the extent that loans from MADB are provided in cash and not in-kind, they may be diverted to uses unrelated to the contract farming arrangement. Therefore, limiting its role as a guarantor can obviate the need for the government to monitor farmers' conduct. Second, even if the government were able to provide the loans in-kind, the investor may prefer to retain control of input provision for quality control reasons or to ensure that inputs are provided in a timely manner. Assuming the role of a full or partial guarantor also protects farmers from foreclosure while being less financially burdensome, and it still provides a degree of financial incentives for the investors.

Finally, in the long-run, Myanmar should support the development of the agricultural insurance sector as a way to encourage farmer participation in contract farming. Reasonably priced agricultural insurance can promote farmer participation because it can mitigate risks unique to contract farming, such as the possibility that the new crop is incompatible with the land. Moreover, if such development occurs alongside the government's efforts to broaden access to contract farming for women and marginalized communities, the problem of exclusion discussed in Part I could be mitigated. Though there have been repeated calls for the creation of agricultural insurance,[93] no such product exists in Myanmar as of March 2016.[94] Thus, one of the Myanmar government's long-term goals should be to develop this sector, not only as a means to promote contract farming, but also in order to

92. *See supra* note 27 and accompanying text.

93. Kyay Mohn Win, *New Take on Crop Insurance: Sompo*, MYAN. TIMES (Yangon) (Feb. 16, 2015), http://www.mmtimes.com/index.php/special-features/204-insurance-2015/13165-new-take-on-crop-insurance-sompo.html; Tin Mg Oo, *Rice Federation Looks Toward Swiss Crop Insurance*, MYAN. BUS. TODAY (Yangon) (Aug. 11, 2015), http://www.mmbiztoday.com/articles/rice-federation-looks-toward-swiss-crop-insurance.

94. *Workshop on Agricultural Insurance in Myanmar (22 March 2016), Nay Pi Taw*, CONSULATE GEN. INDIA, MANDALAY, MYAN. (Mar. 23, 2016), http://www.cgimandalay.com/index.php/workshop-on-agricultural-insurance-in-myanmar.

achieve its rural development objectives more generally.

3. Making Negotiations Fairer for Farmers

In addition to providing incentives, the government should further support the farmers throughout the negotiation process. Because they lack access to both relevant market information and legal knowledge,[95] farmers often suffer from a severe imbalance in bargaining power relative to investors. Case studies have revealed that, in many cases, farmers have no role in designing the contract, are offered contracts that must be accepted or rejected in whole,[96] and are left unprotected by bare-bone and boilerplate contract terms.[97] As a result, misunderstandings are also frequent. For instance, a farmer may believe that the contract guarantees a minimum price, when no such provision actually exists.[98]

This Note considers two options that the government can adopt in order to empower farmers in the negotiation process. First, it can support the creation of entities that can serve as facilitators and intermediaries. Such entities are frequently discussed in contract farming literature as a potential solution to the problem of unequal bargaining power,[99] and this Note examines the viability of two types of organizations in the context of Myanmar: farmer organizations and government agencies. Second, the government can enact laws to govern contract farming relationships between investors and farmers. In particular, it can draw from the recently published Legal Guide on Contract Farming,[100] as well as from the United Nations Convention on Contracts for the International Sale of Goods ("CISG")[101] and the International Institute for the Unification of Private Law's

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95. De Schutter, *supra* note 11, at 12 ("The bargaining position of farmers is often weak before they enter into contracts. They typically have less information and negotiating skills than their business partners and a lower degree of legal literacy.").

96. UNIDROIT ET AL., *supra* note 83, at 65; *see also* MANOROM ET AL., *supra* note 11, at 29.

97. CÉLINE SINITZKY BILLARD & PHOUTHSY BOUNMICHIT, SUCCESS CONDITIONS FOR CONTRACT FARMING BETWEEN PRODUCERS AND TRADERS IN XIENG NGEUN DISTRICT OF LUANG PRABANG PROVINCE, LAO PDR 29 (2010).

98. *Id.* at 31.

99. *See generally* De Schutter, *supra* note 11; FULLBROOK, *supra* note 17; Martin Prowse, *Contract Farming in Developing Countries—A Review* 85 (Agence Française de Développement, A Savior No. 12, 2012); Vokes & Goletti, *supra* note 13.

100. UNIDROIT ET AL., *supra* note 83.

101. U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3.

("UNIDROIT") Principles of International Commercial Contracts ("PICC").[102] These options protect farmers' rights in different ways: while facilitators and intermediaries create a reliable support network, laws governing contract farming provide a degree of procedural standardization and legal protection. Hence, the Myanmar government should focus on both of them in the pre-establishment phase.

a. Supporting the Creation of Facilitators and Intermediaries

Myanmar should encourage the creation of farmer organizations as a means to support farmers in negotiations, while limiting the role of government agencies in a similar capacity. Though various definitions of farmer organizations exist, they generally refer to any organizational form that manages or markets production of individual farmers.[103] The resulting cooperation and coordination can improve farmers' bargaining power in various ways, including obtaining higher prices by giving quality assurances and supplying bulk quantities,[104] providing market information that may not be readily available to individual farmers,[105] and generally assisting with the contract negotiation process.[106] So far, however, the Myanmar government has done little to foster the development of farmer organizations. Though the NLUP mentions farmer organizations in the context of dispute resolution—stating that they should participate at every level to protect farmers' interests[107]—it makes no mention of how the government will encourage their creation or what kind of government support will be available to them. Hence, if Myanmar were to utilize farmer organizations to protect farmers' interests in contract farming, the government must formulate a concrete plan to bring them into existence and support their operations.

102. UNIDROIT, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010), http://www.unidroit.org/english/principles/contracts/principles2010/integralversion principles2010-e.pdf.

103. UNIDROIT ET AL., *supra* note 83, at 45.

104. Jos Bijman et al., *Empowering Small Holder Farmers in Markets: National and International Policy Initiatives* 17–18 (ESFIM Working Paper No. 1, 2007), http://www.esfim.org/wp-content/uploads/ESFIM_Working_Paper_1.pdf.

105. *Id.*

106. *Id.*

107. National Land Use Policy para. 41(a) (Jan. 2016) (Myan.), http://extwprlegs1.fao.org/docs/pdf/mya152783.pdf.

One way for Myanmar to design this plan would be to draw from the experiences of Laos. The Lao government has consistently affirmed its commitment to developing farmer organizations since at least 2008,[108] and it identifies two roles for itself in doing so: a promotional role of pitching the concept to farmers and mobilizing support, and a regulatory role of adopting appropriate policy and legal frameworks.[109] In a promotional capacity, the Lao government has established the Sub-Working Group on Farmers and Agribusiness ("SWGAB") under the Ministry of Agriculture and Forestry, with the stated purpose of "empower[ing] smallholders [through] policy options and capacity-building priorities."[110] SWGAB regularly hosts discussions and workshops with farmers in order to encourage cooperation and development of a network of farmer organizations,[111] and Myanmar should strive to provide a similar forum for its farmers. Likewise, in a regulatory capacity, the Lao government has committed itself to providing capacity building as farmer organizations evolve from informal groups to legally recognized entities, as well as to protecting the rights of farmer organizations and enforcing their compliance with relevant policies and regulations.[112] Myanmar should make similar commitments in order to create an enabling policy environment for farmer organizations and to ensure that a proper balance is maintained between their rights and responsibilities.

By contrast, Myanmar should not encourage government agencies to act directly as facilitators and intermediaries. As an initial matter, a government agency may not have the capacity to represent the farmers' interests adequately, due to lack of resources,

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108. Some of the preliminary steps that it has taken include the creation of the Farmer Organization Working Group within the Ministry of Agriculture and Forestry ("MAF") and the emphasis on farmer organizations in MAF's Strategy for Agricultural Development. GOV'T OF LAO PEOPLE'S DEMOCRATIC REPUBLIC & U.N. DEV. PROGRAMME, ANALYSIS OF CONDITIONS FOR FARMER ORGANIZATIONS AND COOPERATIVES FROM A VIEWPOINT OF CLIMATE CHANGE ADAPTATION AND RESILIENCE, AND RECOMMENDATIONS FOR IMPROVEMENTS 2 (2012), http://adaptation-undp.org/sites/default/files/downloads/farmer_organizations_action_plan_iras_november_2012.pdf. More recently, it has also created a steering committee and a development fund aimed at supporting farmer organizations. *See id.* at 2.

109. *Id.* at 4.

110. RITA GEBERT, JOINT SUB-WORKING GRP. ON FARMERS & AGRIBUSINESS, FARMER BARGAINING POWER IN THE LAO PDR: POSSIBILITIES AND PITFALLS 1 (Feb. 2010), http://lad.nafri.org.la/fulltext/2237-0.pdf.

111. *See, e.g.*, *Lao Farmers to Lead Capacity Building Program*, ASIAN FARMERS' ASS'N FOR SUSTAINABLE RURAL DEV. (Feb. 6, 2014), http://asianfarmers.org/?p=2981.

112. LAO PDR MINISTRY OF AGRIC. & FORESTRY, *supra* note 17, at 14–15.

poor governance, or corruption. The example of Laos is instructive. In Laos, the government agencies considered best positioned to assist farmers in negotiations are the District and Provincial Agriculture and Forestry Offices ("DAFO" and "PAFO").[113] However, these agencies have been criticized for lacking the budget, knowledge, and enforcement power to represent farmers' interests adequately.[114] Moreover, even if they had the capacity, a government agency is likely to have agendas that may compromise its ability to represent the farmers in negotiations. A report on contract farming prepared for the Lao government has found, for instance, that officials' rent-seeking behavior was widespread at various points in the market chain, and that "far too much direct (and indirect) involvement of local leaders and officials . . . [was] resulting in distortions unfavourable for the farmers."[115] Some agendas may even be wholly unrelated to corruption or officials' self-interest: rather than protecting farmers' interest, the government agency may simply want to maximize the overall size of the deal or get as many contracts signed as possible, or it may want to get a particular foreign investor involved for political reasons. In both cases, the agency would be furthering the government's political and economic objectives instead of serving the farmers' interests. Hence, instead of being active facilitators or intermediaries, a government agency—if established—should be limited to a more conservative role. For example, it could take the lead in providing international market information on agricultural products, perform a clearinghouse function of matching investors and farmers, or bring in NGOs more qualified to assist farmers.[116]

b. Enacting Laws that Govern Contract Farming

Though the existence of facilitators and intermediaries can assist farmers in negotiations, Myanmar should still enact laws specific to contract farming in order to ensure that farmers' rights are legally protected. To do so, Myanmar can draw from the recently released Legal Guide to Contract Farming ("Legal Guide"), a joint effort from UNIDROIT, the U.N.'s Food and Agriculture Organization ("FAO"), and the International Fund for Agricultural

113. FULLBROOK, *supra* note 17, at 6, 68.

114. *Id.* at 68.

115. GEBERT, *supra* note 110, at 11.

116. U.S. AGENCY FOR INT'L DEV., *supra* note 72, at 12.

Development.[117] While the Legal Guide does not provide model laws, it does contain a detailed discussion of contract form and content that can guide lawmakers.[118] Since the NLUP already mentions contract farming,[119] Myanmar can utilize the new national land law to require essential contract terms for every contract farming arrangement, such as: price and quantity, production process, quality specifications, and risk allocation measures. These minimum requirements will also benefit farmer organizations as they draft model contracts for particular crops or regions, since provisions essential to protecting farmers' interest will be mandated by law.

In order for these laws to be effective in protecting farmers' interests, they must also provide default rules and gap fillers. The CISG and the PICC are two international legal texts which have received some attention in contract farming literature in this regard.[120] Though Myanmar is not a party to the CISG and PICC provides only non-binding guiding principles, both texts can still provide valuable guidance for the government. Since the CISG only applies to the sale of goods,[121] it will not cover other aspects of contract farming such as licensing and investor relations. However, inasmuch as the transaction concerns the sale of the agricultural product to the investor, the CISG can be a source of model law for lawmakers. Likewise, though the PICC, like the CISG, only applies to international commercial contexts,[122] it provides a comprehensive body of contract law that lawmakers can consult to create regulations that appeal to sophisticated foreign investors.

Hence, in order to engage the local farmers, the Myanmar government should focus on minimizing the risks that may prevent them from realizing the full financial benefits of contract farming. Then, once the government can secure strong participation from both investors and farmers in the pre-establishment phase, its role would shift to one of policing and enforcement in post-establishment. The specific challenges in this regard, and the appropriate government responses, are discussed in the following Part.

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117. UNIDROIT ET AL., *supra* note 83.

118. *See generally id.*

119. National Land Use Policy para. 34 (Jan. 2016) (Myan.), http://extwprlegs1.fao.org/docs/pdf/mya152783.pdf.

120. *See, e.g.*, UNIDROIT ET AL., *supra* note 83; Caterina Pultrone, *An Overview of Contract Farming: Legal Issues and Challenges*, 17 UNIFORM L. REV. 263, 265–67 (2012).

121. U.N. Convention on Contracts for the International Sale of Goods, *supra* note 101, art. 1, 1489 U.N.T.S. at 60.

122. UNIDROIT, *supra* note 102.

III. POST-ESTABLISHMENT

Once a relationship between foreign investors and local farmers is established, the government must be able to manage it by 1) ensuring compliance with the contract, 2) dealing with conflicts and breaches effectively, and 3) planning for the investor's eventual exit.

A. Preventing and Mitigating Breach of Contract

In a contract farming relationship, either party may have an incentive to breach under certain conditions. Parties are most likely to breach in one of three scenarios: 1) when an act of God, such as a natural disaster, makes performance impossible; 2) when a change in circumstances makes breach and payment of damages more economically efficient than performance under the contract; or 3) when a party's dominant position enables it to engage in abusive, opportunistic behavior and avoid paying damages. Because parties' motivations and liabilities are different in each scenario, the government's efforts to prevent and mitigate the breach must also be tailored accordingly.

1. Managing Breaches Resulting from an Act of God

Because an act of God is, by definition, unavoidable, the government's role here is not to prevent its occurrence, but rather to manage the consequences of such an event effectively. The most common acts of God affecting farmers will be those that disrupt production, such as a flood or a drought, which makes delivery of the agricultural products impossible.[123] Likewise, while not as common, an abrupt change in legislation or government policy,[124] as well as the occurrence of armed conflicts or embargos, can make it difficult for investors to perform under the contract. Some of the government's efforts to mitigate the consequences of these events will actually occur in the pre-establishment phase, such as mandating, in contract drafting, the inclusion of a *force majeure* clause or other risk-sharing arrangements. However, there are at least three objectives that the Myanmar government should achieve

123. UNIDROIT ET AL., *supra* note 83, at 133.

124. U.S. AGENCY FOR INT'L DEV., *supra* note 72, at 7 ("Government policies aimed at protecting food security, such as short-term trade bans and price controls, are often enacted on an *ad hoc* basis and may alter market dynamics and price signals without warning.").

in the post-establishment phase to mitigate the consequences of acts of God: maintaining stable investment policies, encouraging the development of the agricultural insurance sector, and providing monetary support.

First, the government should ensure that its policies—especially as they pertain to investment, land, and tax—remain stable and foreseeable for investors. Such consistency is critical as Myanmar undertakes broad-sweeping reform, as changes in the legal and regulatory framework may severely impact the economic viability of contract farming relationships. Second, the government can encourage the development of agricultural insurance to mitigate the possibility that farmers are forced to breach due to natural disasters or other uncertainties associated with contract farming, such as crop incompatibility. Finally, the government may choose to provide monetary support when the failure of the contract farming relationship results from acts of God. Government support may be the only way to shield farmers from bearing the entire liability in the absence of effective risk-sharing provisions or a private insurance sector, and Myanmar should consider it as a short-term solution until farmers have alternative means to protect themselves.

2. Enforcing Damages when Parties Engage in Efficient Breaches

An efficient breach occurs when it is economically beneficial for a party to breach and pay damages instead of performing under the contract.[125] For instance, it is efficient for investors to breach if the sum of the current market price and the amount of damages is lower than the contract price. Likewise, it may be efficient for farmers to breach if the price of subsistence crops increases dramatically such that transitioning a portion of contracted land to grow subsistence crops and paying damages make economic sense. In these cases, the government's role is not necessarily to prevent breaches, but rather to ensure that one party's breach does not leave the other worse off than if performance had occurred. This is particularly important in the context of Myanmar due to the country's poor legal enforcement mechanisms,[126] because a pure cost-benefit decision can turn into an abusive situation if there is no way to enforce damages. Thus, when parties are engaging in efficient breaches, the government's goal should be to provide mechanisms to calculate the appropriate amount of damages and enforce their

125. *Breach of Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014).

126. *See infra* Section III.B.

payment.

The Myanmar government should deal with these situations mainly in the pre-establishment phase by requiring liquidated damages clauses for all contracts. Such a requirement takes into account the reality of legal enforcement in Myanmar, where tribunals may not have the time, capacity, or willingness to ascertain the appropriate amount of damages themselves.[127] By designating the amount of damages at the outset, investors and farmers can make their intentions clear and provide the tribunal with a remedy that is relatively easy to enforce. Granted, whether parties will actually *choose* to enforce these contractual provisions is unclear, given that there may be other incentives at work. For instance, the FAO has found that the relatively small sum at stake and the fear of souring their relationship with the farming community often compel investors not to pursue any legal claims against the breaching farmers.[128] Similarly, not only is the legal system generally unavailable to rural farmers in Myanmar, but it is also viewed with skepticism and distrust.[129] Nonetheless, as Myanmar improves its enforcement and dispute resolution mechanisms, these damages provisions are likely to become valuable tools in allowing both parties to exit economically unviable situations without leaving the other worse off.[130]

3. Discouraging Parties' Abusive, Opportunistic Behavior

In a contract farming relationship, both investors and farmers may engage in abusive, opportunistic behavior by exploiting their strategic advantages. This kind of behavior should be distinguished

127. *Enforcing Contracts in Mynamar*, WORLD BANK, http://www.doingbusiness.org/data/exploreeconomies/myanmar/enforcing-contracts (last visited June 7, 2017).

128. EATON & SHEPHERD, *supra* note 30, at 62 ("In the majority of cases, it is highly unlikely that a sponsor will take legal action against a smallholder for a breach of contract. The costs involved are inclined to be far in excess of the amount claimed, and legal action threatens the relationship between the sponsor and all farmers, not just those against whom action is being taken.").

129. Carter, *supra* note 14, at 102–06.

130. In encouraging the use of liquidated damages in contract farming, however, the Myanmar government must strive to ensure that investors' use of liquidated damages clauses is not predatory. As discussed in Section II.B.2, *supra*, an apparent benefit to farmers, such as an extension of credit by investors, may actually harm farmers if there is room for abuse by investors. Similarly, liquidated damages clauses may not be enforced against investors and farmers equally, for only investors will be protected by instrumentalities such as limited liability and bankruptcy law. Therefore, the government should explore means to ensure that farmers are compensated adequately.

from an efficient breach: while the latter is an effort by one party to terminate the relationship by paying compensation, the former involves no such cost-benefit calculus between the cost of performance and damages. Rather, abusive behavior occurs when a party knows that a legal remedy is likely to be unavailable to the other party. For investors, such a situation arises due to their superior market power as monopsonists,[131] which may allow them to manipulate prices, quotas, or quality specifications. For farmers, it arises due to investors' monitoring problem, which may allow them to secretly sell their yield to other buyers or otherwise deviate from contract terms.

Hence, unlike acts of God or efficient breaches, these kinds of behaviors involve a degree of deceit and an intent to benefit at the other party's expense, and require the government to take on an active role in their prevention. To this end, the Myanmar government should provide appropriate legal and non-legal disincentives for parties to refrain from abusing their strategic advantage, as well as establish mechanisms to identify abusive situations. The government's options in policing investors and farmers in this manner are discussed in turn.

a. Investors' Opportunistic Breach

Investors' main strategic advantage is their monopsony position, which stems from the fact that farmers are often locked into a specific crop that lacks a reliable domestic market.[132] The government should prevent investors' abuse of this strategic advantage mainly through changes in the legal framework. One potential solution is the adoption of antitrust laws and regulations. If implemented properly, Myanmar's new Competition Law,[133] which

131. A monopsony exists when there are multiple sellers but only one buyer in a particular market. *Monopsony*, ENCYCLOPEDIA BRITANNICA (July 20, 1998), https://global.britannica.com/topic/monopsony. A monopsonist refers to that buyer.

132. *See, e.g.*, MAKING GLOBALIZATION WORK BETTER FOR THE POOR THROUGH CONTRACT FARMING 11 (Sununtar Setboonsarng & PingSun Leung eds., 2014); Sashi Sivramkrishna & Amalendu Jyotishi, *Monopsonistic Exploitation in Contract Farming: Articulating a Strategy for Grower Cooperation*, 20 J. INT'L DEV. 280 (2008).

133. The Competition Law, Pyidaungsu Hluttaw Law No9, Feb. 4, 2015 (Myan.), http://www.commerce.gov.mm/sites/default/files/documents/2015/11/E-Version%20For%20Competition%20Law.pdf. This law went active in February of 2017. *Myanmar's Competition Regime to Be Effective February 2017*, DFDL (Dec. 7, 2015), https://www.dfdl.com/resources/legal-and-tax-updates/myanmars-competition-regime-to-take-its-effect-in-february-2017.

governs the level of competition in markets, should be able to reduce investors' market power through its broad prohibitions on anti-competitive acts,[134] monopolization of markets,[135] and unfair competition,[136] as well as provide guidelines for the government to create contract-farming-specific regulations on investor behavior. While focusing principally on antitrust legislation, Myanmar should also consider two alternative legal options to discourage strategic behavior by investors: recognizing an action for fraud or punitive damages, or imposing a sunk cost on investors by requiring posting of a bond at the outset of the contract farming relationship.[137] Both measures increase the potential downside of engaging in abusive, opportunistic behavior, and a bond can also attract more farmers by providing a potential safety net in case the investor breaches.[138]

While establishing a proper legal framework, which can be a time-consuming and difficult endeavor, Myanmar may also rely on several non-legal solutions. Strong farmers' organizations can be a solution to the problem of investors' breach because they can improve farmers' strategic position during negotiations and find alternative markets for them when the investor does not purchase the harvest. Moreover, creating a greater risk of reputational loss for investors can be an effective deterrent against opportunistic behavior.[139] As a long-term solution, Myanmar should focus on establishing commercial structures which allow more investors to enter the market, which will naturally reduce their monopsony power.

b. Farmers' Opportunistic Breach

The principal problem that allows farmers to breach is the investors' difficulty in monitoring farmers' conduct. While the most common way in which farmers breach the contract farming

134. The Competition Law ch. VII.

135. *Id.* ch. VIII.

136. *Id.* ch. IX.

137. Some contract farming relationships in Laos have successfully used bonds to discourage investors' strategic behavior. *See* FULLBROOK, *supra* note 17, at 60–61.

138. In Laos, the arrangement was such that a sum equaling the value of a percentage of the expected crop yield was deposited with DAFO, which was to be given to the farmers in case the investor breached. *Id.*

139. *See, e.g.*, Prowse, *supra* note 99, at 75 (noting that third-party providers of credit can reduce the problem of investors' opportunistic behavior by creating greater potential for reputational loss for investors).

agreement is by secretly selling the yield to other buyers in breach of contract,[140] they may also breach by not honoring specific contract terms such as production quality or by diverting the investor's inputs and technology to other uses. Therefore, it is imperative that the government provide alternative monitoring measures or devise other means to discourage farmers' strategic behavior.

Taking advantage of investors' difficulties with monitoring may not actually be the only driving force behind farmers' so-called "opportunistic" conduct. For instance, the United States Agency for International Development ("USAID") identifies, in addition to purely strategic behavior, three other reasons why farmers may engage in this kind of conduct: the farmer 1) may need liquidity because he or she operates at a slim margin with few assets, 2) may lack the sophistication to abide by contract terms, or 3) may not trust the investor to honor his or her end of the contract.[141] The legal and non-legal devices discussed thus far in other contexts mitigate these factors significantly. For instance, government involvement in making or guaranteeing loans can improve the problem of liquidity.[142] Likewise, proper education and use of facilitators can resolve the problem of sophistication.[143] Finally, farmers' meaningful participation in negotiations[144] and government efforts to discourage investors' breach can improve problems of trust.[145] Thus, while recognizing that farmers may not be abusing their strategic advantage in every situation, this section will focus on those instances when such abuse *is* the driving force behind their actions.

Similar to the context of investors' breach, Myanmar can utilize the threat of punitive damages and liability for fraud in order to discourage farmers from engaging in abusive behavior. However, given that farmers' strategic advantage stems from the difficulty in monitoring their conduct, Myanmar should do more than simply

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140. While this kind of behavior can plausibly be categorized as a purely efficient breach, farmers' side-selling contains elements of deceit that are lacking when a purely economic choice is made between performance under contract and payment of damages. For instance, the investor may possess a right of first refusal, which would require the farmer to obtain permission before engaging in side-selling. Similarly, side-selling may prevent farmers from fulfilling their contractual obligations to the investor.

141. U.S. AGENCY FOR INT'L DEV., *supra* note 72, at 1–2. While these factors are discussed specifically in the context of farmers' side-selling, they are generally applicable to other situations as well.

142. *See supra* Section II.B.2.

143. *See supra* Section II.B.3.a.

144. *See supra* Section II.B.3.

145. *See supra* Section III.A.3.a.

provide means to seek legal remedy once an opportunistic breach is determined to have occurred; instead, it should establish mechanisms to identify the breach *when* it occurs. To this end, several non-legal solutions discussed in the context of investors' breach are applicable. For instance, farmer organizations can assist investors with the problems of monitoring because they are closer in proximity to farmers and have an incentive to maintain a positive working relationship with the investors. Thus, they may compel compliance from farmers by threatening internal penalties or revocation of organization membership. Moreover, while farmers may care little about forsaking their relationship with the foreign investment community, they are likely to care much more about their reputation in the local community. Therefore, enforcement of contract at the village or provincial level could lead to a greater rate of compliance than if the investors themselves, or a national government agency, were acting as enforcers. One way for Myanmar to encourage these kinds of monitoring mechanisms would be to draw from the successes of various farmer organizations in Laos, such as the *Association des Groupements de Producteurs de Café du Plateaux des Bolovens* (Bolaven Plateau Coffee Producers Cooperative or "CPC"), which have managed to enforce the obligations of both farmers and investors successfully.[146]

Finally, the Myanmar government should control farmers' side-selling by managing the degree of monopsony in different markets. USAID finds that improving competition among investors generally reduces farmers' side-selling by "incentivizing [investors] to offer better prices and benefits to inspire loyalty."[147] At the same time, however, it recognizes that some markets may not be "naturally conducive to . . . robust competition,"[148] and that "[i]n such situations, granting a territorial concession to [an investor] is the surest way to control farmer side-selling" by removing alternative buyers from the market.[149] Therefore, whether the government's effort to reduce investors' monopsony power will have a synergetic effect on controlling farmers' side-selling depends on the type of market that it is targeting, and it must have the flexibility to rely on the *presence* of monopsonies to control farmers' opportunistic behavior in some circumstances.

To summarize, the appropriate government responses to

146. LAO PDR MINISTRY OF AGRIC. & FORESTRY, *supra* note 17, annex 2, at A24–A25.

147. U.S. AGENCY FOR INT'L DEV., *supra* note 72, at 11.

148. *Id.* (recognizing two such markets: 1) the early stages of a new industry and 2) rural areas where parties have lopsided or imperfect access to market information).

149. *Id.*

parties' breaches differ depending on why they have breached the contract. Since breaches stemming from acts of God are unavoidable, the government's focus should be on minimizing their consequences. Similarly, since efficient breaches are parties' efforts to exit an economically unviable relationship, the government's focus should be on requiring and enforcing damages provisions. Finally, since parties' respective strategic advantages can give rise to abusive, opportunistic behavior, the government should strive to discourage such conduct as much as possible. If efforts to prevent and mitigate these breaches fail, however, Myanmar must also be able to provide an efficient and equitable forum for dispute resolution, which the following section discusses in detail.

B. Establishing a System of Dispute Resolution

Establishing an effective dispute resolution system is a particularly challenging task for Myanmar because the current legal enforcement mechanisms are poorly designed, inaccessible to the rural poor,[150] generally distrusted,[151] and rarely relied on by foreign investors due to the fear of compromising their relationship with the farming community.[152] Therefore, it is particularly important that the government consider alternative means of dispute resolution for contract farming relationships rather than focusing solely on improving its judicial system.

While not specific to contract farming, the NLUP already considers such means to be established by the new national land law, including special courts, independent monitoring bodies, processes for settlement, and arbitration tribunals.[153] However, it is not yet known when and how these systems will be established and given appropriate enforcement power. On the other hand, the NLUP's idea of utilizing "farmers organizations to resolve land disputes arising between their members"[154] appears more promising. A natural extension of this concept in the context of contract farming would be to allow farmer organizations to arbitrate disputes arising between their members and foreign investors. Granted, farmer organizations may not be perfectly impartial adjudicators, for they may have

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150. *See* De Schutter, *supra* note 11, at 14.

151. Carter, *supra* note 14, at 104.

152. EATON & SHEPHERD, *supra* note 30, at 62.

153. National Land Use Policy para. 42 (Jan. 2016) (Myan.), http://extwprlegs1.fao.org/docs/pdf/mya152783.pdf.

154. *Id.* para. 41(b).

reasons to favor one party over the other in each individual dispute. Nonetheless, they are still well-positioned to give due consideration to the interests of both parties since, as an intermediary, they have an incentive to maintain a positive working relationship with both parties. Moreover, given the degree of corruption in Myanmar and the discrepancy in bargaining power between investors and farmers, it is difficult to envision a government agency providing more equitable and transparent dispute resolution services.[155]

C. Planning for Investor's Exit

Finally, Myanmar should ensure that the transition at the end of the contract farming relationship is smooth for both investors and farmers. Investors' main concern would be repatriating capital invested in, and profit resulting from, the contract farming relationship. However, since contract farming requires relatively limited capital input from investors and involves export of physical products, neither capital nor profit repatriation will be a significant issue for investors.[156] Likewise, farmers' main concern would be the subsequent use of the land. As Myanmar strives to transition from subsistence to commercial agriculture, the ideal situation would be to match new investors with farmers whose current contract is expiring. To this end, matchmaking via farmer organizations or a government agency, provision of market information, and streamlining of application and registration processes, discussed above, will all be useful. On the other hand, if the farmer must return to subsistence agriculture, environmental impact assessment in the pre-establishment phase will become critical because switching to a different crop may leave a lasting negative impact on the land.

From a macro perspective, Myanmar should also consider the

155. It is also worth noting that insofar as the dispute concerns government action, foreign investors will be able to rely on the guarantees of Myanmar's bilateral investment treaties (BITs), such as fair and equitable treatment and protection from expropriation. As of May 2017, however, only six BITs to which Myanmar is a party are in force. *See International Investment Agreements Navigator: Myanmar*, U.N. CONF. ON TRADE & DEV.: INVESTMENT POL'Y HUB, http://investmentpolicyhub.unctad.org/IIA/CountryBits/144 (last visited June 7, 2017). For a more in-depth discussion of contract farming and BITs, see CARIN SMALLER & HOWARD MANN, INT'L INST. FOR SUSTAINABLE DEV., A THIRST FOR DISTANT LANDS: FOREIGN INVESTMENT IN AGRICULTURAL LAND AND WATER 11–13 (2009), http://www.iisd.org/pdf/2009/thirst_for_distant_lands.pdf.

156. Granted, this assumes that Myanmar's general investment law, banking, and currency control laws do not impose restrictions on these transactions. But given the trend of FDI liberalization in Myanmar, the government is unlikely to impose such restrictions and risk losing valuable foreign investment.

issue of investor retention. Retention may be a less significant problem in the context of contract farming relative to large-scale land concessions. Since parties contract for a seasonal yield, the contract can be readily amended—and the relationship adjusted—if problems arise which threaten the investor's stake in the project. Similarly, since contract farming is much more of a private transaction with less government involvement than land concessions, it is less likely that a government action will prompt investors' premature exit. Nonetheless, to the extent that government policy can negatively affect the viability of contract farming relationships, Myanmar should strive to ensure that expropriation or otherwise arbitrary government action does not prematurely end an otherwise productive relationship. Moreover, Myanmar would benefit from the creation of a government agency that assesses the effects of its policies on investor retention. By conducting surveys, identifying statistical trends, and providing periodic reporting, such an agency could ensure that the most productive relationships are being maintained and extended.

CONCLUSION

As Myanmar gradually opens up to the global economy, contract farming can be a valuable tool not only in attracting foreign investment generally, but also in driving the country's agricultural and rural development. Relative to large-scale land concessions, contract farming can provide a better opportunity for meaningful community involvement and the protection of local land rights. Its successful promotion in Myanmar, however, is contingent upon the Myanmar government's adoption of various legal and non-legal measures. The purpose of this Note has been to explore these measures through the pre- and post-establishment framework in the foreign investment literature, as well as by drawing from the experiences of Laos.

As explained above, the government's role differs meaningfully depending on whether it is in the pre- or post-establishment phase, and on whether it is targeting the foreign investors or the local farmers. The government's objective during the pre-establishment phase is to encourage participation in contract farming, but investors and farmers should be motivated to do so by different means. Whereas investors are likely to engage in contract farming only if it offers a greater expected benefit than other modes of investment such as land concessions, farmers are likely to participate as long as various risks of contract farming are minimized. This Note has suggested that this discrepancy stems from the parties' respective opportunity costs, since, while contract farming is one of many available modes of investment for investors, it is often the only way for farmers to improve their livelihoods.

Likewise, the government's objective during the post-establishment phase is mainly to prevent and mitigate breaches. Both investors and farmers may breach for a number of reasons when engaged in contract farming, and the appropriate government responses should also vary accordingly. While breaches resulting from acts of God or a party's pure cost-benefit calculus should be mitigated, it is parties' abusive, opportunistic behavior which calls for the greatest degree of government intervention. Such behaviors invariably contain elements of deceit which make identifying breach and enforcing damages difficult, and the government should take on an active role in preventing them. Finally, the government's role during the post-establishment phase also includes providing an equitable forum for dispute resolution, as well as ensuring a smooth transition out of the relationship for both parties.

This Note also proceeded with the premise that in the early stages of reform, the Myanmar government's foremost goal should be to ensure the economic success of contract farming relationships that it promotes. Its various public policy objectives must be reassessed, however, as contract farming begins to entrench itself in Myanmar as a viable mode of investment for foreign investors. Thus, a promising avenue for future research would be to examine, with more specificity, how the Myanmar government's role should differ at varying stages of such entrenchment. Incorporating such a temporal element into existing literature would give the government an even more precise roadmap to follow and contribute to realizing the full potential of contract farming in Myanmar.

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