



# A FEASIBILITY ASSESSMENT ON THE INTRODUCTION OF ALTERNATIVE DISPUTE RESOLUTION (ADR)/ COLLABORATIVE DISPUTE RESOLUTION (CDR) TO RESOLVE LAND DISPUTES IN MYANMAR

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# Content

	<b>Page</b>
Contents	1
Tables and Boxes	2
Author and NRC Research Team	3
Acknowledgements	4
Acronyms	5
Glossary	7
Executive Summary	15
1. Introduction	35
2. Methodology	39
3. Land Disputes, Grievances and Conflicts in Myanmar	43
4. Government of the Union of the Republic of Myanmar (GORUM) and Karen National Union (KNU) Responses to Land Disputes and Grievances	48
5. Dispute, Grievance and Conflict Resolution in Myanmar	50
6. The Rationale and Benefits for Introducing, Implementing and Institutionalizing CDR Approaches and Procedures in Myanmar	56
7. Village Dispute Resolution in Myanmar	59
8. Village Tract and Ward Dispute Resolution	67
9. Central to Ward and Village Tract Administrative Institutions, Mechanisms Established by the GORUM to Resolve Land Disputes and Grievances	84
10. The Central Administrative Body of the Farmland (CAB) Dispute and Grievance Resolution Mechanism	85
11. The Central Committee for Management of Vacant, Fallow and Virgin Lands (CCMVFVL) Dispute and Grievance Resolution Mechanism	109
12. The Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands (CCRCFOL) Dispute and Grievance Resolution Mechanism	133
13. Karen National Union Governance Structure and Land Dispute and Grievance Resolution Mechanism	161

# Content

	<b>Page</b>
14. Theories of Change and Strategies for Introduction, Implementation and Institutionalization of CDR in GORUM and KNU Institutions and Dispute Resolution Mechanisms	184
<b>Tables</b>	
Table 1: The Rational and Benefits for Introducing, Implementing and Institutionalizing CDR Approaches and Procedures for Resolving Land Disputes, Grievances and Conflicts	56
Table 2: Grievance Mechanism and Dispute Resolution Procedures of the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands (CCRCFOL)	138
Table 3: KNU Dispute and Grievance Resolution Mechanism: Forums and Procedures for Resolving General Land Disputes and Grievances	166
Table 4: KNU Mechanisms and Procedures for Resolving Special Kinds of Disputes and Grievances	170
<b>Boxes</b>	
Box 1: Myanmar's Land Institutions and Dispute and Grievance Resolution Mechanisms	18
Box 2: Strategies for Introducing, Implementing and Institutionalizing CDR Approaches and Procedures	34
Box 3: Alternative Dispute Resolution (ADR)/ Collaborative Dispute Resolution (CDR)	36
Box 4: UN Guiding Principles (UNGPs) and Effectiveness Criteria	40
Box 5: Examples of Private Disputes over Land	44
Box 6: Examples of Grievances or Public Disputes over Land	45
Box 7: Broad Theories of Change and Strategies	185

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## Acronyms

ADR	Alternative Dispute Resolution, also referred to as Collaborative Dispute Resolution (CDR)
ABF	Administrative Body of the Farmlands including the Central ABF, Region/State ABF, District ABF, Township ABF, Ward/Village Tract ABF.
ABsF	Plural for more than one ABF. (ABsF in some government documents are also called Farmland Management Committees.)
CABF	Central Administrative Body of the Farmland (Also called the Central Farmland Management Committee)
CCMVFL	Central Committee for Management of Vacant, Fallow and Virgin Lands including its subsidiary bodies
CCRCFOL	Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands
CDR	Collaborative Dispute Resolution, also referred to as Alternative Dispute Resolution (ADR)
CLC	Central Land Committee of the Karen National Union
DALMS	Department of Agricultural Land Management and Statistics (Formerly the Settlements and Land Records Department – SLRD)
DA	District Administrator
DABF	District Administrative Body of the Farmland
EAO	Ethnic Armed Organisation
FL	Farmland Law of 2012
GAD	General Administration Department
GORUM	Government of the Republic of the Union of Myanmar
ICLA	Information, Counselling and Legal Assistance Project of the Norwegian Refugee Council
VFVLMML	Vacant, Fallow and Virgin Lands Management Law
LGBTQ	Lesbian, gay, bisexual, transgender and queer
KNU	Karen National Union the political wing of an Ethnic Armed Organisation in South East Myanmar
MOALI	Ministry of Agriculture, Livestock and Irrigation (Formerly the Ministry of Agriculture)
MOHA	Ministry of Home Affairs
MONREC	Ministry of Natural Resources and Environmental Conservation (A consolidation of the former Ministry of Mines and Ministry of Environmental Conservation and Forestry)
NLD	National League for Democracy
NRC	Norwegian Refugee Council
RCs	Rescrutinizing Committees, subsidiary bodies of the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands
R/SA	Region/ State Authority
R/SABF	Region/State Administrative Body of the Farmland (Also called Region/State Farmland Management Committee)
SIG	Special Investigation Group
SLRD	Settlements and Land Records Department (Currently the Department of Agricultural Lands Management and Statistics (DALMS))
TA	Township Administrator
TABF	Township Administrative Body of the Farmland (Also Called Township Farmland Management Committee)
UNDP	United Nations Development Programme



UNHCR	United Nations High Commission for Refugees
VFVL	Vacant, Fallow and Virgin Lands
VFVLMML	Vacant, Fallow and Virgin Lands Management Law
VLC	Village Land Committee
VT	Village Tract
VTA	Village Tract Administrator
WA	Ward Administrator
WVTAL	Ward and Village Tract Administration Law
VTABF	Village Tract Administrative Body of the Farmland (Also called VT Farmland Management Committee)

For the purpose of this study, the following definitions will be used.

### **Alternative Dispute Resolution (ADR)**

A catch-all term for a range of voluntary procedures used by parties engaged in a dispute, grievance or conflict to cooperate, find or develop mutually acceptable agreements to settle their differences. ADR procedures were originally developed and used as alternatives to going to court to obtain a judicial ruling by a judge. ADR procedures are similar or identical to those used in Collaborative Dispute Resolution (CDR)

### **Amyotha Hluttaw**

The House of Nationalities, the upper house of the Pyidaungsu Hluttaw, the Assembly of the Union of Myanmar.

### **Arbitration**

A third party dispute, grievance or conflict resolution process in which disputants or grievants voluntarily submit issues in dispute to an acceptable individual or group for either a non-binding recommendation for a settlement or a binding decision.

**Arbitration** is considered to be an Alternative Dispute Resolution (ADR) or Collaborative Dispute Resolution (CDR) procedure because parties voluntarily submit their dispute to a mutually acceptable third party and are not compelled to participate as in a judicial proceeding. Additionally, parties commonly have input into the procedures/rules that will be used and can decide whether the arbitrator's decision will be non-binding or binding. If it is binding, the parties voluntarily commit to comply with the outcome of the proceedings and are not compelled to do so as occurs in a court of law.

### **Arbitrator/Arbiter**

A person who provides arbitration assistance.

### **Collaborative Dispute Resolution (CDR)**

A number of procedures that facilitate voluntary engagement of parties in a dispute, with a grievance or in conflict to cooperate and discover or develop mutually acceptable agreements that settle their differences. CDR procedures generally result in consensus agreements. Consensus may be reached through unassisted discussions or negotiations; with the help of a third party who helps involved parties address relationship issues and engage in effective problem-solving or negotiations; or by voluntary acceptance by parties of a third-party recommendation or decision for a settlement. CDR procedures are not tied to any context or institution – customary, statutory judicial or administrative – where they may be used

### **Communications procedures and skills**

Methods used by parties to a dispute, grievance or conflict or by third parties to enhance listening and speaking skills; asking a range of types of questions; identifying and framing diverse types of interests; framing issues to be addressed in a mutually acceptable manner; providing feedback, etc.

### **Complaint**

A statement that something is wrong, unsatisfactory or unfair. (Same as grievant.)

### **Complaint-handling mechanism and procedures**

Institutionalized systems and processes to address and resolve complaints. (See also grievance resolution system.)

### **Complainant**

A person who lodges a complaint against a person, organization or institution. (Also, a grievant)

### **Conciliation**

A third party dispute, grievance or conflict resolution process in which an independent intermediary gathers relevant information through interviews with involved or other knowledgeable parties, mediates and, if necessary, makes a recommendation for how parties' differences might be satisfactorily resolved.

**Conciliation** –A third party dispute, grievance or conflict resolution process in which an independent intermediary gathers relevant information through interviews with involved or other knowledgeable parties, mediates and, if necessary, makes a recommendation for how parties' differences might be satisfactorily resolved.

**Third-party assistance** through interviews, discussions and mediation by an independent and unbiased individual or group to identify possible solution(s) to a dispute, grievance or conflict, and, if needed, provision of advice or a specific recommendation for how a dispute, grievance or conflict might be satisfactorily be resolved.

### **Conciliator**

A person who provides conciliation assistance.

### **Conducting interviews and data collection**

Procedures for talking with Individuals and groups, conducting field-visits, collecting and analyzing primary and secondary resources, etc.

### **Conflict**

A highly polarized dispute between two or more people, groups or institutions – often over several serious and deep-rooted issues – which commonly involves actions that result in serious psychological, physical or financial harm to persons and/or property.

### **Conflict coaching**

Procedure used by third parties to improve the capacity of one or more parties involved in a dispute, grievance or conflict to promote and enhance their effective engagement in resolution activities. Coaching may involve helping disputants or grievants listen more effectively, ask questions, share ideas, give and make recommendations for procedures or substantive proposals to address or resolve a dispute, grievance or conflict and prepare for direct dispute resolution activities with other parties. (See Justice Facilitators for the customary version of this process.)

### **Conflict/dispute resolution procedures**

A range of unassisted and assisted processes used by parties on their own or by third parties to address or resolve a disagreement, dispute, grievance or conflict. Common procedures include conflict/dispute analysis, problem-solving, negotiation, facilitation, mediation, conciliation, fact-finding, arbitration and litigation.

## **Consensus**

A decision or agreement made without voting, which all participants can support, “live with”, or at a minimum, not oppose. At its strongest, a consensus meets all parties’ needs and interests to the greatest extent possible. At its weakest, it is a compromise in which things parties’ value differently are traded and gains and losses are shared in a manner that is acceptable to those involved.

**Consensus** – A decision or agreement made without voting, which all participants can support, “live with”, or at a minimum, not oppose.

## **Consensus decision-making process**

A process for a group to identify or construct an acceptable agreement that all participants support, can “live with”, or, at a minimum, will not oppose that does not involve voting. Participants identify and discuss issues of individual or mutual concern, educate each other about their needs and interests, generate multiple options that may potentially satisfy them and identify or build agreements that address their needs and interests to the greatest extent possible.

## **Convening**

The process of conducting a situation assessment/conflict analysis and bringing parties together to talk and address a problem or resolve a dispute, grievance or conflict. Convening may be conducted by a third party one or more of involved parties.

## **Customary Dispute Resolution**

In the Myanmar context, third-party assistance – by a village leader, customary leader (commonly an elder, group of elders), a village land committee and, on occasion, multiple respected community members or a whole village – to help villagers resolve disputes between and among them and to develop voluntary recommendations by the third party that all disputants can accept, “live with” or, at a minimum, will not oppose.

## **Customary law**

There are two definitions of customary law: 1) Laws originally codified during British colonial rule by the 1898 Burma Laws Act. The Act recognizes Buddhist, Muslim and Hindu laws concerning succession, inheritance and marriage for followers of these religions. Other acts which codify aspects of customary law include the Buddhist Women’s Special Marriage and Succession Act of 1954, the Christian Marriage Act and the Divorce Act, and the Succession act of 1925. 2) Written and unwritten rules which have developed from the customs and traditions of communities. In this study, to distinguish between these two kinds of customary law, the latter will be referred to a “customary practices”.

## **Customary land**

Land historically occupied, used, managed and administered by an ethnic community.

## **Customary practices**

Local historic and current procedures used by a community, in contrast to state statutory procedures, to allocate land, recognize use rights, define appropriate land use and recognize boundaries between members’ land.

## **Disagreement**

A difference in view or opinion.

## **Disputant**

An individual or group involved in a dispute.

## **Dispute**

A significant disagreement or argument, frequently between private parties, over a narrow range of issues.

**Dispute** – A significant disagreement or argument, frequently between private parties, often over a narrow range of issues.

## **Dispute/Grievance/Complaint Resolution Mechanism**

A combination of institutionalized procedures embedded in an institution for the resolution of disputes, grievances or complaints. The institution and procedures may also be called an “accountability” mechanism.

**Dispute, Grievance or Complaint Resolution Mechanism** – A combination of institutionalized procedures embedded in an institution for the resolution of disputes, grievances or complaints. The institution and procedures may also be called an “accountability” mechanism.

## **Dispute resolution system**

An institutionalized and systematic approach for preventing, managing and resolving disagreements, disputes, grievances, complaints or conflicts. Dispute resolution systems include procedures to prevent the development of various types of differences by analyzing their causes and implementing structural or systemic changes to address them, and procedures to address and resolve individual and multiparty issues.

## **Facilitator**

A person who provides facilitation assistance.

## **Facilitation**

A third party process in which an acceptable individual or group provides process assistance to design and conduct a meeting to establish or build relationships, promote understanding, share information or determine a way forward to solve a problem or dispute.

## **Fact-finding**

A third party process in which an independent, impartial and neutral individual or group investigates a dispute, grievance or conflict that makes recommendations for how it might or should be resolved.

## **Grievance**

A complaint initiated by an individual or group against a government, government institution a private entity and/or its personnel over something or an action that is believed to be wrong or unfair.

**Grievance** – A complaint initiated by an individual or group against a government, government institution a private entity and/or its personnel over something or an action that is believed to be wrong or unfair.

## **Grievance Mechanism**

See Dispute/Complaint Resolution Mechanism above.

## **Grievant**

A person who lodges a grievance against a person, organization or institution. (Same as complainant.)

**Hluttaws**

Parliaments at the Union, State and Region levels in Myanmar.

**Interest**

A substantive, procedural or relationship desire or need.

**Interest**

Based or Focused Negotiation or Mediation – Procedures for negotiation or mediation in which participants focus on identification of their desires or needs and search for or develop solutions that meet or satisfy them.

**Interview and data collection procedures**

Methods used by parties to a dispute, grievance or conflict or by third parties for Interviewing, data gathering and conducting site visits.

**Joint Fact-finding**

Investigation of issues in a dispute or conflict – such as physical/geographic, technical or, on occasion, legal – by a single committee or team composed of stakeholders and/or decision-makers and experts from different “sides” in an effort to reach a common understanding of facts related to the case and a potential agreement. The committee identifies key issues or questions to be answered, scopes parties’ interests and needs, identifies how questions might be answered, secures (if needed) the advice of experts and evaluates the results. While the process does not guarantee agreement, it generally results in a greater common understanding of the situation, issues to be addressed and potential options to do so.

**Joint Fact-finding** – Investigation of issues in a dispute or conflict by a single committee or team composed of stakeholders and/or decision-makers and experts from different “sides” in an effort to reach a common understanding of facts related to the case and a potential agreement.

**Joint Meetings**

Meetings conducted to address and resolve a dispute, grievance or conflict with key parties present and participating.

**Justice Facilitators**

One or more individuals, commonly members of a village or ward, who informally help a person or people in a dispute or with a grievance to identify appropriate procedures and people to assist in resolving them. This role and procedures are similar to those of a conflict coach.

**Justice Facilitators** – One or more individuals, commonly members of a village or ward, who informally help a person or people in a dispute or with a grievance to identify appropriate procedures and people to assist in resolving them.

**Kawthoolei**

Customary name for the territory of the Karen people.

**Mechanisms and procedures for implementing, monitoring and enforcing agreements and decisions**

Participatory and independent third-party methods for carrying out, observing and assuring compliance with agreements or decisions.

### **Med-Arb**

A third-party process in which parties reach an agreement on the process to be used for dispute resolution and that the outcome of the process will be binding. The process begins with the third party serving as a mediator. If the parties do not reach an agreement, the third party switches roles and becomes an arbitrator who makes a binding decision.

### **Mediation**

Third-party assistance by a mutually acceptable individual or group to help parties involved in a dispute, grievance or conflict to conduct productive negotiations and reach mutually acceptable voluntary agreements. Assistance may involve convening meetings; improving procedures parties use to communicate and negotiate; providing ways to obtain substantive information needed to resolve issues in dispute; establishing, building or improving relationships between disputing or other concerned parties; identifying or building consensus agreements; and implementing activities to recognize the end of a dispute, implement agreements and promote compliance.

**Mediation** – Third-party assistance by a mutually acceptable individual or group to help parties involved in a dispute, grievance or conflict to conduct productive negotiations and reach mutually acceptable voluntary agreements.

### **Mediator**

A person who provides mediation assistance to resolve a dispute, grievance or conflict.

### **Negotiation**

Procedures for conducting unassisted talks to make a transaction or resolve a dispute, grievance or conflict.

**Negotiation** – Procedures for conducting unassisted talks to make a transaction or resolve a dispute, grievance or conflict.

### **Position**

A specific solution advocated by a party that satisfactorily meets his, her or their needs or interests.

### **Positional**

Based or Focused Negotiation – A process for negotiation in which participants sequentially take and relinquish positions that provide either more or fewer benefits until a compromise is reached in which gains and losses are shared in a mutually acceptable manner.

### **Problem-Solving**

Talks about an issue or to solve a problem. Participants may or may not be involved in a dispute, grievance or conflict. Problem-solving may be conducted by parties alone or with the assistance of a facilitator.

### **Procedures for giving advice and/or making recommendations**

A range of methods for providing feedback and/or suggestions.

### **Private meetings and “pendulum” talks**

Procedures and strategies used by third parties to talk with disputants or grievants separately, shuttle between them and help move parties toward greater understanding of their situation or interests and reach agreements.

**Pyithu Hluttaw**

House of Representatives, the lower house of the Pyidaungsu Hluttaw, the Assembly of the Union of Myanmar.

**Pyidaungsu Hluttaw**

Assembly of the Union of Myanmar, the national-level bicameral legislature of the Republic of the Union of Myanmar.

**Reconciliation**

Procedures to help disputants understand each other's views; make different views, ideas or beliefs more compatible with each other; facilitate apologies; establish, mend or restore amicable relations between disputing parties; and/or facilitate acceptance of a situation or outcome.

**Situation assessments/conflict analysis and strategy design procedures**

Processes that can be used by parties to a dispute, grievance or conflict or by third parties to enhance greater understanding of issues and interests, conflict dynamics, procedures that are or could be used to manage and resolve differences, potential options for resolution and strategies to move parties toward agreements.

**Separate Boards**

A board formed by the Central Committee for Management of Vacant, Fallow and Virgin Lands to inspect cases and matters relating to rights to work on and utilize vacant, fallow and Virgin Lands granted by the Naypyidaw Council or respective Region or State.

**Special Board**

A board formed by the Central Committee for the management of Vacant, Fallow and Virgin Lands to inspect the situation regarding implementation of projects on vacant, fallow and Virgin Lands and to determine compliance with terms and conditions of a permit.

**Tatmadaw**

Armed forces of The Union of the Republic of Myanmar.

**Third party**

An individual or group of people not directly involved as primary parties in a disagreement, dispute, grievance or conflict that assists participants to resolve their differences. Third parties are commonly unbiased concerning the people, issues, interests or potential outcomes at stake. Third parties may provide relationship, procedural or substantive assistance to promote voluntary agreement-making by disputing parties or make advisory non-binding recommendations or binding decisions.

**Village**

Geographic area and political jurisdiction designated by Myanmar's Ward and Village Tract Administration Law of 2012 (WVTAL), which is not included within a town boundary.

**Village Tract**

Geographic and political jurisdiction composed of 3-6 villages and their households.

**Village Tract Administrator**

Lowest level rural GORUM official who oversees administration of a Village Tract

**Ward**

Geographic area and political jurisdiction designated by the Ward and Village Tract Administration Law of 2012 (WVTAL), which is composed of a number of households within a town boundary.

**Ward Administrator**

Lowest level urban GORUM official who oversees administration of a Ward within a township.



CDR Training at Pain Nel Taw village, Thaton township, Mon State (Saw Tin Moe Win, NRC)

### Background to the Study

This study analyzes the functioning and performance of institutions, mechanisms and procedures established by the Government of the Republic of the Union of Myanmar (GORUM) and the administration of the Karen National Union (KNU) to resolve a range of types of land disputes and grievances. Institutions analyzed include the Central Administrative Body of the Farmland (CABF), the Central Committee for Management of Vacant, Fallow and Virgin Lands (CCMVFL), the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands (CCRCFOL) and those of the KNU.

The study examines and compares the performance of the above institutions and mechanisms with the United Nations Guiding Principles (UNGP) on Business and Human Rights and associated “Effectiveness Criteria”, internationally recognized standards for state and non-state dispute resolution mechanisms.

Additionally, the study explores the feasibility of introducing, implementing and institutionalizing Alternative Dispute Resolution (ADR) procedures – also commonly referred to as Collaborative Dispute Resolution (CDR) – in the institutions and land dispute and grievance resolution mechanisms of the GORUM and KNU to expand access to justice for people living in the country. These procedures are methods that enable parties to a dispute or grievance to cooperate and find or develop mutually acceptable solutions that settle their differences. Examples of procedures include: negotiation, fact-finding or joint fact-finding, conflict coaching, facilitative mediation, conciliation and arbitration.

Because ADR procedures have traditionally been defined as alternatives to taking a dispute, grievance or conflict to a court for a judicial decision, and CDR refers more generally to processes used by parties to cooperate to resolve their differences and is not tied to a specific institution, CDR will be used as the preferred term for these procedures in the remainder of this study.

The study concludes with recommendations and potential strategies for the GORUM, KNU, non-governmental and community-based organizations (NGO and CBOs) and donors for how they can facilitate the introduction, implementation and institutionalization of CDR.

Data collection for this study consists of a desk study of primary and secondary documents on the four land dispute and grievance resolution institutions and mechanisms, and interviews and Focus Group Discussions (FGDs) conducted by the author, staff of the Norwegian Refugee Council's Information and Counselling and Legal Assistance Project (ICLA), and five NRC consultants studying GORUM and KNU customary and government institutions and procedures for resolving land disputes (The NRC Team). Interviews were conducted in Karen, Mon, Shan, and Rakhine States and Eastern Bago District. Interviewees included villagers, potential or actual users of the land dispute and grievance resolution mechanisms, Village Tract Authorities, Township-level authorities in Karen State and state-level officials in Shan State.<sup>1</sup> Additional interviews were conducted with staff members of UNDP, Mercy Corps, IDLO and NAMATI.

<sup>1</sup>Participants in interviews or Focus Group Discussions (FGDs) include: Ward or Village Tract Administrators (WVTAs) – 25; Township Administrators (TAs) – 5; officials from other GORUM institutions – 35; end-users – 300; and international government organizations, INGOs, NGOs and CBOs – 4.

## Disputes and Grievances over Land in Myanmar

Having access to land and the ability to effectively resolve issues and disputes related to it are of critical importance to the people of Myanmar. 66% of the population live in rural areas,<sup>2</sup> and 70% are engaged in agriculture and depend on predictable access to land to secure livelihoods.<sup>3</sup> Access to land is also important to the government for development and construction of projects in the public interest or to lease to private enterprises for income.

As in all countries, disputes and grievances arise over access and use of land, both between private parties and the state. For the purpose of this study, Disputes are significant disagreements, frequently between private parties, generally over a narrow range of issues. Grievances are complaints initiated by an individual or group against a government, government institution a private entity and/or its personnel over something or an action that is believed to be wrong or unfair.

Private disputes often occur over the location of or changes in boundaries, land encroachment, inheritance, land use or damage to crops caused by animals. Other private disputes arise over perceived arbitrary or biased decisions by third parties, allegations of illegal or corrupt acts by parties or intermediaries and discrimination by individuals, communities and their members or intermediaries against individuals, families, women or members of minority ethnic or religious groups.

Grievances concerning land are commonly over government institutions' inaction or actions. Examples include delays in processing requests for land and issuance of Land Use Certificates (LUCs), perceived to be unfair land allocation decisions, failure to grant use-right permits, disagreements about compliance with the terms and conditions of use-rights permits, government corruption, and illegal confiscation of land by the government and its failure to return it, provide adequate in-kind restitution or fair compensation.

Land confiscations by the government, ethnic armed organizations (EAO) and other powerful parties have been an especially serious problem in Myanmar since its independence, and especially after 1962 when the military seized power from the civilian government. While some incidents have involved only private parties, others, which are the most serious and have had the greatest impact on Myanmar's population, involve the GORUM's military (the Tatmadaw), its ministries and departments, sub-department governmental bodies and domestic and international companies that have secured rights to use land from the government.

To date, there is no comprehensive data on how much land has been seized in Myanmar, either legally or illegally, and by whom. In many Myanmar communities, however, illegal confiscations have caused serious hardships on those who have lost land and their ability to secure livelihoods.<sup>4</sup>

## Myanmar's Land Dispute and Grievance Resolution Institutions and Mechanisms

Until relatively recently, there were limited formal government procedures to resolve land disputes above the village level. Generally, government administrators were responsible for handling disputes or grievances as part of their normal administrative duties. Additionally, there were almost no institutionalized ways to contest illegal confiscations of land, appeal for its return or receive adequate compensation for losses.

<sup>2</sup>Burma, Country Profile, LANDLINKS. <https://www.land-links.org/country-profile/burma/>

<sup>3</sup>FAO. Myanmar at a Glance <http://www.fao.org/myanmar/fao-in-myanmar/myanmar/en/>

<sup>4</sup>See *When the Farmer becomes the Criminal: Land Confiscation in Burma's Karen State*. New York: Human Rights Watch, 2016.

In the last decade, to address the number and impacts of land disputes and grievances, the GORUM created three new institutions with land resolution mandates and mechanisms. The KNU also created a number of institutions and mechanisms. (See Box 1: Myanmar's Land Dispute and Grievance Resolution Institutions and Mechanisms)

**Box 1: Myanmar's Land Institutions and Dispute and Grievance Resolution Mechanisms**

- The Central Administrative Body of the Farmland (CABF)
- The Central Committee for Management of Vacant, Fallow and Virgin Lands (CCMVFVL)
- The Central Committee for Rescrutinizing Confiscated Farmlands and other Lands (CCRCFOL)
- The Karen National Union (KNU) dispute resolution institutions and mechanisms

The Central Administrative Body of the Farmland (CABF) was established in 2012 by the Farmland Law (FL). The CABF and its subsidiary Administrative Bodies of the Farmland (ABsF) are multi-purpose institutions with two of their primary functions being allocation of farmland and addressing and resolving land disputes. Most disputes addressed by the CABF and ABsF involve private parties, although they also handle some involving government agencies and their personnel.

The Central Committee for Management of Vacant, Fallow and Virgin Lands (CCMVFVL) was also established in 2012 by the Vacant, Fallow and Virgin Lands Management Law (VFVLM). The principal functions of the CCMVFVL and its subsidiary bodies are to identify and designate state land as VFVL, determine its eligibility for distribution, make allocations to applicants for use-rights to work and utilize VFVL and assure compliance with the terms and conditions of use-right permits. In the course of carrying out its duties the CCMVFVL encounters, or in some cases creates, a range of disputes between land users, commonly farmers occupying and working land under customary tenure, and land applicants, which are often either government agencies or private national or international companies. To handle and resolve disputes and grievances that arise, the CCMVFVL has established a dispute resolution mechanism and related procedures.

The Central Committee for Rescrutinizing Confiscated Farmlands and other Lands (CCRCFOL) was established in 2016 by Presidential Order. The CCRCFOL and its subsidiary bodies (Rescrutinizing Committees or RCs) are the only GORUM institutions with an exclusive mandate to resolve land disputes and grievances over claims of land confiscations, both legal and illegal. As noted above, most confiscations involve the Tatmadaw, ministries, departments, other government entities and companies.

The Karen National Union (KNU) dispute resolution institutions and mechanisms are the fourth way of resolving land disputes in locations covered in this study. The Karen National Union (KNU) is the political organization and administration of the Karen people and others who live in areas of Myanmar that are fully or partially controlled by the KNU. The KNU has created its own mechanisms, multiple bodies and procedures to resolve land and other disputes from village to central levels. Some of the procedures utilize customary practices; others, methods more commonly found in governmental agencies – third-party recommendations for settlements or decisions. Many KNU procedures, at multiple levels, strive to develop consensus agreements by involved parties.

In analyzing the four institutions and their dispute resolution mechanisms, procedures are evaluated using the United Nations Guiding Principles on Business and Human Rights (UNGPR) "Effectiveness Criteria. These criteria were developed over a three-year period by John Ruggie, a Special Representative of the UN Secretary General, Kofi Annan, and approved in 2008 by the UN Human Rights Council.

Originally developed to define corporate-community relationships and responsibilities, the criteria are now widely used international benchmarks for responsibilities and to measure the performance, effectiveness and alignment of state and non-state dispute resolution institutions and mechanisms to promote access to justice and protect human rights. The Guiding Principles are based on “States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms; ...and the need for rights and obligations to be matched to appropriate and effective remedies when breached.”<sup>5</sup>

Criteria used to assess the four mechanisms include their perceived: 1) legitimacy, 2) accessibility, 3) predictability, 4) equitability, and 5) transparency in the views of stakeholders for whose use they are intended; and whether procedures used by the institutions and mechanisms and their outcomes are 6) congruent with international human rights law and practices, 7) promote continuous learning and 8) are based on dialogue and deliberation as means of settling disputes and grievances.

### General Findings related to Land Dispute Resolution and GORUM Dispute and Grievance Resolution Institutions and Mechanisms

In analyzing land dispute resolution practices in Myanmar and the three GORUM entities described above, the author and NRC Team made the following findings about their structures and performance and have drawn conclusions about how they are or are not congruent with the UNGP’s “Effectiveness Criteria”. (Specific details and information on the functioning and performance of each of the institutions and mechanisms, and how they compare to the “Effectiveness Criteria”, is provided in the body of the study.)

- A significant number of people in Myanmar prefer to resolve disputes or grievances on their own using informal talks or negotiation and to reach voluntary consensus-based agreements. The preference for direct settlement of differences is confirmed by multiple interviews and focus groups conducted for this study and a number of others.<sup>6</sup> This orientation bodes well for the introduction, implementation and institutionalization of CDR approaches and procedures that utilize collaboration between disputing parties to reach voluntary agreements.

A significant number of people in Myanmar prefer to resolve disputes or grievances on their own using informal talks or negotiation and to reach voluntary consensus-based agreements.

- If settlements cannot be reached by direct negotiation, parties frequently turn to either informal or formal third parties at the village level for assistance in reaching voluntary agreements. Who serves as third parties in villages varies by ethnic community, locale, custom, the subject of the dispute, its level of intensity and the authority of intermediaries who provide help. Third parties commonly include: family members, neighbors, elders, 10 and 100 Household-heads, wives of Household-heads, political party representatives, members of community-based organizations (CBOs) (such as women’s organizations), religious leaders and, less frequently, astrologers or fortunetellers.<sup>7</sup> Village-level third parties may also include community committees without specific mandates or that focus exclusively on land issues.

<sup>5</sup>Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework. New York and Geneva, United Nations, 2011, 1.

<sup>6</sup>Confirmation in Interviews and Focus Group Discussions (FGDs) conducted the NRC Team for this report in villages and communities in Karen, Mon, Shan and Rakhine States and East Bago Division; and in the following studies: Lisa Denney, William Bennett and Khin Thet San. Making Big Cases Small and Small Cases Disappear. Yangon, Myanmar: My Justice, November 2016; Access to Justice and Informal Justice Research, Shan State. Yangon, Myanmar, UNDP, 2017; Access to Justice and Informal Justice Research, Rakhine State, Yangon Region. Yangon, Myanmar, UNDP, 2017, and; Access to Justice and Informal Justice Research, Yangon Region, Yangon Region. Yangon, Myanmar, UNDP, 2017. The UNDP studies indicate that between 50% and 82% percent of respondents prefer direct negotiations as their process of first choice to resolve disputes.

Dispute and grievance resolution procedures used by village level third parties include: listening; helping to improve communications between and among parties, imparting advice, making suggestions, providing “soothing words”, encouraging direct negotiations, conducting facilitative mediation or conciliation (the latter being mediation with a suggestion of a potential solution if parties cannot agree), and making a specific recommendation or decision.<sup>8</sup>

Voluntary agreements are achieved when involved parties, either on their own or with third party assistance, reach a consensus decision that all can support, “live with” or, at a minimum, will not oppose; or accept a recommendation or decision made by a third party.

Failure to resolve disputes at the village level occurs when involved parties cannot agree on a mutually satisfactory solution, they do not accept a recommendation or decision by a village third party or neither they nor the village-level third party have authority to settle or make decisions on the issues in question. Third parties at the village generally do not have authority to engage in or help settle disputes if one of the parties is a government entity.

- A Ward or Village Tract Administrator (WVTA) and Village Tract Land Committee are commonly the first third parties from whom assistance is sought to resolve significant land disputes. WVTA's are the lowest level officials in the GORUM administrative structure. WVTA's are members of either their wards or one of the villages in the Village Tract (VT). They are elected by residents of their Ward or members of multiple villages in a VT.

A nation-wide study conducted in 2017, found that over 60% of participants saw WVTA's as having the most responsibility for six justice-related tasks, including settling issues between people.<sup>9</sup> Another study of 7 States and Regions found that over 63% of respondents, including both men and women, indicated that WVTA's were the first person they would approach for assistance to resolve a land disputes.<sup>10</sup> 49% of participants in the second study saw WVTA's major role as mediating when there are conflicts between villagers, with the second most important role, at 42%, being ensuring peace and security in the village.<sup>11</sup>

A Ward or Village Tract Administrator (WVTA) and Village Tract Land Committees are commonly the first third parties from whom assistance is sought to resolve significant land disputes.

VT Land Committees are chaired by VTAs and include a clerk from the General Administration Department (GAD), a representative of the Township Department of Agricultural Land Management and Statistics (DALMS) and two members of villages in the VT. The two village representatives are either a farmer or someone from a civil society organization (CSO) and an elder. Members of VT Land Committees serve as members of the VTABF and provide dispute resolution assistance to investigatory bodies of the CCMVFVL and RCs of the CCRCFOL.

<sup>7</sup>Denney, et al, Making Big Cases Small and Small Cases Disappear.

<sup>8</sup>NRC Team investigations and focus group discussions in Karen, Mon, Shan and Rakhine States and East Bago District; Shaun Butta and Justine Chambers A Survey of Customary Land Dispute Mechanisms in Kayin State, Eastern Bago Division and Shan State, Yangon, Myanmar, Norwegian Refugee Council ICLA, forthcoming report, 2018; Denney, et al, Making Big Cases Small and Small Cases Disappear.

<sup>9</sup>Searching for justice in the law: Understanding access to justice in Myanmar - Findings from the Myanmar Justice Survey. Yangon, Myanmar: British Council, 2018, 40. [https://myjusticemyanmar.org/sites/default/files/MJS%20Report\\_FINAL\\_online.pdf](https://myjusticemyanmar.org/sites/default/files/MJS%20Report_FINAL_online.pdf)

<sup>10</sup>The State of Local Governance: Trends in Myanmar. 65.

<sup>11</sup>Ibid. 63.

- All three GORUM institutions and their land dispute or grievance resolution mechanisms – the CABF, CCMVFVL and CCRCFOL – are administrative bodies under the GORUM executive branch of government. Each is mandated to address and resolve specific types of land disputes and grievances.

All three GORUM institutions and their land dispute or grievance resolution mechanisms – the CABF, CCMVFVL and CCRCFOL – are administrative bodies under the GORUM executive branch of government.

- Overall governance of each of the three institutions and their dispute resolution mechanisms is overseen and coordinated by a central body or committee at the Union, Nay Pyi Daw-level of government. Committees at the Union level are led by Ministers and other senior officials from various ministries, departments and the Tatmadaw concerned about land issues.

The CABF has a finality clause in its enabling legislation that grants it final decision-making authority on land issues within its mandate. While there is not a similar clause for the CMVFVL or the CCRCFOL, it appears that given these institutions are the highest-level administrative bodies authorized to address and resolve land issues in their mandates, they have final authority.

- The central body or committee of each of the three institutions is responsible for establishing appropriate subsidiary standing or ad hoc bodies at Region, State, District, Township, and in some circumstances, ward and village tract levels. Many, but not all, of the institutions’ mechanisms have established standing committees.
  - Administrative Bodies of the Farmland (ABsF) are present at all levels from Central to VT level.
  - The CCMVFVL operates primarily at Central, Region and State levels with some Management Committees and investigation boards below them down to the Township level. Many of the latter bodies are formed on an ad hoc basis when investigations of applications for use of VFVL are conducted or when compliance with terms and conditions for use of VFVL are being evaluated.
  - The CCRCFOL is mandated to have committees from the central to VT level. VTAs and VT Land Committees are expected to assist Rescrutinizing Committees in investigations. Vice President Henry Van Thio in a speech on August 7th, 2018, however, noted that some Rescrutinizing Committees (RCs) of the CCRCFOL, especially at lower levels, are not fully functional, are not following central committee guidance or have yet to be established.<sup>12</sup>
- Oversight of lower-level subsidiary bodies or committees of the three institutions is administered by Chief Ministers at the Region and State levels of government and officers of the General Administration Department (GAD). The GAD is Myanmar’s civil service. The Department is under the Ministry of Home Affairs whose leaders are required to be senior military officers. Many GAD officials at all levels of the GORUM’s land dispute and grievance resolution mechanisms are former military officers.

The administrative structure of the dispute or grievance resolution mechanisms and their personnel enable the military to have influence on the outcomes of land disputes and grievances.

<sup>12</sup>“VP U Henry Van Thio praises Mandalay Region for topping the list among states and regions in returning confiscated lands”, New Light of Myanmar, August 7th, 2018, Issue 113, Volume 5. <http://www.globalnewlightofmyanmar.com/vice-president-u-henry-van-thio-praises-mandalay-region-for-topping-the-list-among-states-and-regions-in-returning-confiscated-lands/>

- Government agencies and staff that are members of all three institutions' dispute and grievance mechanisms are from relevant ministries and departments with mandates to address, or that are concerned about, land issues. In many cases, the same government agencies, and frequently the same personnel at appropriate levels, serve on all three bodies or committees. Representatives of the Tatmadaw are on a number of committees down to the District level.
- Government officials at all levels of the three GORUM dispute and grievance resolution mechanisms are predominantly men. Customary land governance is also predominately handled by men from the majority ethnic community in the area. The new National Land Use Policy approved in January of 2016 recognizes the importance of inclusion of women in land governance.<sup>13</sup> Few women, minorities or members of other potentially vulnerable groups, however, serve as senior officials at any level of the GAD, ministries or the military. This study did not identify any women who are Ward or Village Tract Authorities (WVTAs).

Government officials at all levels of the three GORUM dispute and grievance resolution mechanisms and in customary mechanisms are predominantly male.

Religious minorities are rarely WVTAs, TAs or in any position of authority. The result of the factors above is that dispute or grievance resolution bodies or committees may not be composed of members similar to the gender or backgrounds of parties that may seek their assistance. In some situations, this may be problematic, such as when land issues involve women's or minority issues and rights.

- There is limited specific guidance on roles, responsibilities and authorities of government officials serving at different levels of GORUM land dispute and grievance resolution mechanisms and the resolution procedures they are authorized or allowed to use. Lack of clarification of the authority of officials often results in disputes or grievances being elevated to higher levels for action when they might be settled at lower ones.

There is limited guidance on roles, responsibilities and authorities of government officials serving at different levels of GORUM land dispute and grievance resolution mechanisms and procedures they are authorized or allowed to use.

There is limited guidance on procedures for investigations and site visits to land in question, who can or must participate, the types of procedures that can be used and kinds of outcomes that are acceptable. This lack of guidance inhibits the potential use of collaborative problem-solving and early resolution of contested issues.

Additionally, details on how disputes can be settled are not provided. Guidelines are not available on when and how officials can negotiate or mediate settlements or make recommendations or decisions.

Lack of standards and criteria for making recommendations or decisions and who must be involved have resulted in outcomes of subsidiary bodies or committees being rejected by upper-level decision-makers and their being returned to lower level officials to be re-done, to provide additional information or to have appropriate sign-off and signatures by all committee members.

- Civil society members and other non-governmental experts are mandated by the enabling legislation or Presidential Order to be members at various levels of each mechanism's bodies or committees. Civil society participation varies by mechanism and the level at which they are designated to be members.
  - ABsF have civil society members only at village tract levels.
  - The CCMVFV has civil society members on the Central Committee and was mandated by an amendment to the LMVFV in 2018, to have representatives of local ethnic groups, farmer representatives, CSO representatives and appropriate experts on its Region and State committees.<sup>14</sup>
  - The CCRCFOL has civil society members – farmers and civil society organizations (CSOs) – on subsidiary RC's from the ward and village tract level, where they exist, to the Region and State level. Members of parliament (either national, Region or State) may also be on committees from Township to Region and State levels. There are no civil society members on the Central Committee.
  - The ABsF have civil society members only at village tract levels.
- Guidance is not available for either government or civil society members of dispute and grievance resolution mechanism bodies or committees on the latter's role, responsibilities and authorities. Specifically, there is not guidance on criteria for civil society members to serve as members of bodies or committees, procedures for their selection and appointment, or their responsibilities and authorities as committee members. In a number of case, this has led to their marginalization on committees and their work.<sup>15</sup>

Guidance is not available for either government or civil society members of dispute and grievance resolution mechanism bodies or committees on the latter's roles, responsibilities and authorities.

- Comprehensive national statistics on the number of disputes or grievances submitted to the three mechanisms, or how they are handled and resolved, are not publicly available.<sup>16</sup> Most reporting is on individual cases in newspapers or on the Internet. Some States, such as Shan, have compiled some data and shared it with the NRC Team. It is not clear, however, if and how this information is made available to the public and how frequently it is updated.

Resolution may involve parties reaching a mutually acceptable agreement through negotiation, mediation or conciliation; voluntary acceptance of a recommendation or non-binding decision by an administrator and/or a committee; or a conclusive binding and non-appealable administrative decision by the Region, State or CABF, the CCFVFL or the CCRCFOL.

ABsF and Rescrutinizing Committees (RCs) are generally physically accessible to people with a dispute or grievance. Investigations for applications for use of vacant, fallow or Virgin Lands are conducted by the CCMVFVL investigation committees at the Township level by the Ministry of Agriculture, Livestock and Irrigation's Department of Agricultural Land Management and Statistics (DALMS). Applications for help to resolve a farmland dispute or grievance can be made at the WVT and Township level bodies of the ABsF. Disputes and grievances concerning VFVL can be addressed to any appropriate level Management Committee of the CCMVFVL or its lower-level investigation bodies. Requests for assistance to address claims over illegally confiscated land can

<sup>14</sup>At the time of writing this report, it was not clear if civil society members have been appointed at Region and State levels. There are no civil society members mandated to participate in lower-level committees or on investigation bodies.

<sup>15</sup>Ye Yint Htun and Caitlin Pierce, Myanmar's Foray into Deliberative Democracy. June 2017.

<sup>16</sup>Information is not available on the Office of the President's web page or on any other government website.

be made to RCs the WVT, where they exist, to the Central level. Land Committees at the VT-level are expected to assist and support the work of all three of the mechanisms and their committees or investigatory bodies.

The physical presence of these bodies and committees at Township and WVT levels will be important for the introduction and implementation of CDR procedures as they provide potential forums for face-to-face interactions, problem-solving, negotiation and mediation between disputants, grievants and other involved parties.

- Although some GORUM dispute and grievance mechanisms may be physically accessible at VT and Township levels, there may be potential barriers to access for women, minorities or other potentially vulnerable populations. Variables appear to be who is involved in the dispute or grievance, the kinds of issues to be resolved, who is approached to provide assistance, and the views of mechanism body or committee members toward members of vulnerable populations

In one study, women participants across 11 research sites in two States and one Division indicated that they were much more confident approaching local customary authorities with whom they had existing relationships than formal government authorities.<sup>17</sup>

If, however, a party to a dispute or a grievance is from outside of a local community, issues are more complex or contentious and a WVT needs to be involved, women reported being “less able to approach government officials or other community authorities for assistance [such as seeking help] regarding land grabs. Women in remote areas were disproportionately affected, due to concerns for their safety and attitudes that they should not be involved in politics. In addition, male respondents often had more knowledge of GORUM land laws.”<sup>18</sup>

Ethnic and religious minorities, youth, differently abled and members of LGBTQ communities may also be reluctant or have difficulty approaching either customary or GORUM mechanisms for help to resolve land disputes. Some barriers for these groups include not speaking the language used by mechanism bodies or committees, marginalization or discrimination by the majority ethnic community, risks of raising contentious issues or targeted persecution.<sup>19</sup>

- Once disputes or grievances are submitted to any of the mechanisms, disputants and grievants have reported that they often have difficulty obtaining information about the status and progress of their cases. Effective, transparent, public and easy to use case tracking and monitoring systems are not fully in place. Disputants and grievants often must make frequent trips to Township Department offices to determine what is happening with their cases, and even then, do not always get prompt or detailed answers.
- Meetings of the three institutions’ dispute and grievance mechanisms, especially above the WVT level are generally not open to disputants, grievants or concerned members of the public except at the WVT level for the ABF. This is likely one factor that contributes to lack of trust by stakeholders that the procedures used, and decisions made, are fair.

<sup>17</sup>Shaun Butta and Justine Chambers, A Survey of Customary Land Dispute Mechanisms in Kayin State, Eastern Bago Division and Shan State. Yangon, Myanmar, Norwegian Refugee Council ICLA, forthcoming report, 2018, 101.

<sup>18</sup>Ibid.54.

<sup>19</sup>Ibid. 53.

- Procedures of the dispute and grievance resolution mechanisms and standards and criteria used to determine outcomes, especially for less informed and weaker parties, are often not transparent or well known. Farmers, who comprise the majority of disputants or grievants, are not knowledgeable about their housing, land and property (HLP) rights or the functioning and procedures of the three mechanisms.<sup>20</sup> The procedures and how to use them are much better known and more transparent for stronger parties, such as the Tatmadaw, ministries and departments or other powerful individuals or entities, such as companies.
- Though rules or guidance for the GORUM land dispute resolution mechanisms explicitly recognize personal testimony by knowledgeable village heads or elders as valid evidence for farmers' (disputants or grievants) historic occupation and use of land, in practice documents (Land Use Certificates (LUCs), tax forms, etc.) are given much more weight in administrative decision-making. This approach to evidence is highly disadvantageous to farmers who may have worked and utilized land in question for many years under customary tenure but may not have applied for and registered formal documentation for their use-right. Additionally, some farmers with documentation, for circumstances beyond their control, may have lost it due to decomposition of paper, floods, leaving them when fleeing armed conflict, etc.

Documents (Land Use Certificates (LUCs), tax forms, etc.) are given much more weight as evidence in administrative decision-making than personal testimony by knowledgeable village heads or elders about farmers' historic occupation or use of land.

- There are significant, and often insurmountable differences, in the forms and amounts of power and influence between or among parties involved in land disputes or grievances. This is especially the case when farmers and the government are parties. These differences can and often do significantly lace farmers at a disadvantage. The Tatmadaw, ministries and departments or other powerful parties, such as national or international companies, have significant influence over the procedures and outcomes of dispute and grievance resolution initiatives. Often, for example, land determined by the CCRCFOL to be illegally taken cannot be returned without permission of the concerned ministry.<sup>21</sup> Powerful institutions also have significant influence over whether land is designated as VFVL and its allocation for large public or private projects. This is often the case, even if the land in question has been used and cultivated for years by local farmers.
- There is a significant possibility of structural conflict and conflicts of interest for government institutions and their personnel that are members of the CABF and ABsF; the CCMVFVL, its Management Committees and staff involved in VFVL investigations; and the CCRCFOL and RCs. Government agencies and personnel that are members of GORUM administrative institutions mandated to address land issues are often called upon to make decisions about both land allocation and the resolution of land disputes or grievances. If the agencies or their personnel, because of their involvement on the same or different committees, are called upon to resolve land disputes or grievances concerning allocation decisions they made in the past, there is a significant potential for either perceived or actual conflicts of interest. Having institutions and their personnel with these dual roles does not guarantee the impartiality and neutrality required of members of a trusted dispute and grievance resolution mechanism. This potential and/or actual structural conflict – and how it may or will impact the neutrality, impartiality and potential bias of involved institutions and personnel – will be important for all of the dispute and grievance mechanisms

<sup>20</sup>This was confirmed in multiple interviews and FGD conducted by the NRC Team in all study sites.

<sup>21</sup>Guidelines for the CCRCFOL (Letter No. ..../1- Committee/ Land (Central)/2016, 4. (J), June 10th, 2016) state that, "For the land dispute cases of concerning ministries, measures must be taken only with approval of the relevant ministry"

to address, whether or not the dispute resolution providers are decision-makers or facilitators of CDR processes.

There is a significant possibility of structural conflict and conflicts of interest for government institutions and their personnel that are members of the CABF and ABsF; the CCMVFVL, its Management Committees or government personnel involved in VFVL investigations; and the CCRCFOL and RCs.

Ideally, the two functions – land allocation and dispute and grievance resolution – should be separated with different institutions and individuals serving as land allocators and dispute or grievance resolvers. If, however, this is not possible, guidance should be developed by each of the mechanisms that describe conditions and procedures for institutions and/or their members to recuse themselves and not participate in dispute resolution activities if they have previously been involved in land allocation decisions on properties in question or have perceived or actual conflicts of interest.

- The majority of procedures used by the three GORUM land dispute and grievance resolution mechanisms are not based on engagement and dialogue. Current administrative dispute or grievance resolution procedures, with the possible exception of activities at the VT and on occasion the Township levels, involve little if any face-to-face interaction, dialogue or collaborative problem-solving between or among involved parties, the third-party administrator and/or his or her committee.

The majority of procedures used by the three GORUM land dispute and grievance resolution mechanisms are not based on engagement and dialogue.

Procedures used by the mechanisms are primarily investigatory and adjudicatory in nature. They involve a hierarchy of administrators and committees sequentially investigating cases, commonly by a review of documents and on occasion site visits to the land in question and writing reports with their conclusions. If the issues involved are not complex, of lower financial value, do not involve multiple parties, are not politically sensitive, and the involved administrators and committee members believe they have the authority to settle the case, they may make either a non-binding recommendation or a decision on a settlement. If, however, the case has characteristics that are the opposite of those listed above, and the administrator or committee does not believe it has the authority to make a decision, they forward their findings and a recommendation to higher bodies or committees for appropriate action or a binding decision.

- There are very limited mandates for the use of CDR procedures in the laws or Presidential Order that established the three land institutions and dispute and grievance resolution mechanisms, their rules or guidance or the National Land Policy. An exception is a requirement that the CCMVFVL negotiate with “peasants” that have been cultivating land for a significant period of time that has been misallocated to another party so that the involved peasants are not unfairly or unjustly dealt with.<sup>22</sup>

<sup>22</sup>Vacant, Fallow and Virgin Lands Management Law, Chapter VIII, Supporting the Persons who have the Right to Cultivate or Utilize Vacant, Fallow and Virgin Lands, 25, (b) and (c); and Notification No. 1/2012, Vacant, Fallow and Virgin Lands Management Rules, 52, UN Habitat unofficial translation.

- Current use of collaborative dispute resolution procedures by any of the three institutions' dispute and grievance resolution mechanisms is limited and conducted on an ad hoc basis. At the VT, ward and township levels, some Village Tract, Ward or Township Administrators may meet with parties separately and engage in negotiations or shuttle between them to try and develop a mutually acceptable settlement of their differences.

In other cases, VW, Ward or Township Authorities and their committees may convene parties for them to engage in face-to-face talks, conduct fact-finding and provide either mediation or conciliation assistance. They may provide facilitative mediation without making any substantive input, give general advice on ways to reach agreements, or, if conciliating, may conduct more extensive investigations of cases, draw conclusions and provide specific non-binding recommendations for settlements.

- Appeals by disputants or grievants of unacceptable administrative decisions by personnel in all three dispute and grievance resolution mechanisms are allowed. Appeals, however, are "administrative appeals" made to one or more senior officials or administrators in the same institution that made the initial decision in question. Some appeals, such as those commonly made to ABsF, may be filed with and heard by a sequence of increasingly higher-level ABF administrators, officials and their committees. Other appeals, such as those over decisions by RCs, may be made directly to authorities above the RC that made them or to the Region, State or Central levels.
- Myanmar does not currently have a body of administrative law with regulations that establish standards for procedural fairness and transparency or that require a reason to be provided for decisions or outcome of appeals.<sup>23</sup> Additionally, national legislation codifies keeping final decision-making authority within the administrative dispute and grievance resolution mechanisms through finality clauses. These clauses, established by legislation, give administrative bodies the authority to make final decisions that cannot be appealed to or reviewed by a court. An example is Law No 11/2012 which gives ABsF at Region and State level authority to make final decisions on cases brought before them. Similar provisions are in the Vacant, Fallow and Virgin Lands Management Law (VFVLM), which grants Region or State bodies authority to make final decisions on allocation requests or resolve disputes over smaller parcels of land. Cases involving larger tracts must be forwarded to the Central Committee for a final decision.

RCs at various levels, depending on the amount of confiscated land requested to be returned, may or may not be able to make either a non-binding recommendations for a settlement or a binding decision. Often, however, lower level administrators do not believe they have the authority to make binding decisions. When presented with this situation, lower-level administrators generally elevate cases either to the next higher or other appropriate level of RC for it to take appropriate action.

<sup>23</sup>Access to Justice and Administrative Law in Myanmar. Yangon, Myanmar, USAID and Tetra Tech, October 2014.

- There are significant limitations on the rights of parties involved in dispute or grievance over land to take their case to a government court or independent body for a binding decision on issues in question or appeal a decision by an administrative dispute resolution mechanism and its personnel. Currently land disputes over inheritance or minor criminal activity – such as encroachment, trespassing, failure to vacate property, property damage, etc. – are some of the few types of cases allowed to be taken to a government court for a judicial decision. Additionally, Guidance for the CCRCFOL allows disputing parties to go to court to resolve contested allocation and ownership issues related to land the Committee determined will be released and returned.<sup>24</sup>

There are significant limitations on the rights of parties involved in a dispute or grievance over land to take their case to a government court or independent body for a binding decision on issues in question or to appeal a decision by an administrative dispute resolution mechanism and its personnel.

There is neither a general statutory right nor legal right in Myanmar’s common law for parties dissatisfied with an administrative decision to have it reviewed by the judiciary or an impartial independent entity.<sup>25</sup> The Constitution of 2008, however, allows parties to a dispute or grievance with the government to appeal to the Union Supreme Court for several kinds of writs, orders by the judiciary that address a contested administrative process or decision.<sup>26</sup> In theory the process for requesting writs should provide an avenue for disputants or grievants who do not accept an administrative process or decision to challenge it in court. In reality the process is not well known, complicated, time consuming and expensive. Supreme Court hearings are not always open to the public and many of its decisions on writs are not published and publicly available.<sup>27</sup> Finally, the number of writs issued is low relative to the number of applications.<sup>28</sup>

A final barrier to disputants or grievants engaging in judicial procedures or seeking writs to settle contested issues is the general aversion by many members of the population to taking cases to court. Many view the transaction costs – time, legal and court costs, distance to court, delays in decision-making, not being able to work during judicial proceedings, etc. – to be prohibitive.<sup>29</sup> Others fear unpredictable outcomes, believe that fair results are not likely or there is a probability of corruption.<sup>30</sup> One study on the provision of justice in South East Myanmar noted that village respondents noted “The higher-level GoM justice system, which exists at township, district, state/region and union levels, is seen as corrupt, expensive, slow and unfair, including by W/VTs and 100 household heads.”<sup>31</sup>

<sup>24</sup>Letter No. ..../1- Committee/ Land (Central)/2016, 2. (C) (3), June 10th, 2016.

<sup>25</sup>Access to Justice and Administrative Law in Myanmar.

<sup>26</sup>The right to use writs was conferred on the Union Supreme Court by the Constitution of 2008, Section 296. Writs may be “used to challenge the legality of decisions of the lower courts and of government agencies. There is currently no opportunity for individuals to bring writ cases to the State and Region High Courts; this right is only available in the Supreme Court. The jurisdiction of the Supreme Court to issue writs (sachundaw) is contained in section 296.” Access to Justice and Administrative Law in Myanmar. 5.

<sup>27</sup>Ibid. 7-8.

<sup>28</sup>Ibid. 8.

<sup>29</sup>Searching for justice in the law: Understanding Access to justice in Myanmar – Findings from the Myanmar Justice Survey 2017. Yangon, Myanmar, My Justice, 2017. 47.

<sup>30</sup>Ibid.; Justice provision in south east Myanmar. Yangon, Myanmar, 2018. ii; Access to Justice and Informal Justice Research, Shan State. 82; Ms. Aye Gets Hurt Twice, Access to Justice and Informal Justice Systems Research, Rakhine State.60; and Access to Justice and Informal Justice Research. 41.

<sup>31</sup>Justice provision in south east Myanmar. ii.

Disputants and grievants need rights to be able to easily access impartial and trusted courts or independent bodies mandated to review and make binding and enforceable judgements concerning decisions or verdicts on appeals made by administrative bodies. When considering procedures available to them to resolve disputes and grievances, parties need to be able to compare their Best Alternatives to a Negotiated Agreement – which might be achieved by a decision of a customary leader, government administrator, judge, or an independent third party – to what that might or can be attained by engaging in a CDR process and reaching a voluntary agreement.<sup>32</sup> Only then will they be able to make informed decisions on the best procedures to use to try and achieve their goals.

- In spite of the CCRCFOL making decisions and arranging for the return of some illegally confiscated land and/or paying compensation, there has been significant dissatisfaction among a substantial number of grievants due to the perceived low number of satisfactory decisions, quantities of land actually returned, amounts paid in compensation (when it has been paid) and perceived to be unreasonable time between when a decision is made to release land and its return to original users.<sup>33</sup> In addition, non-use-right holders often apply for Land Use Certificates (LUCs) for land that is to be returned and receive them before land has been received by its original use-right holders and they have an opportunity to apply for and receive LUCs themselves. Dissatisfaction, on the part of a many farmers has led to some disillusionment with the National League for Democracy (NLD) and its repeated promises that illegally confiscated land will be returned in an efficient and timely manner. There has been an increase in demonstrations, arrests and criminal prosecutions of farmers protesting the lack of return of illegally confiscated land.

...there has been significant dissatisfaction among a substantial number of grievants due to the perceived low number of satisfactory decisions, quantities of land actually returned, amounts paid in compensation (when it has been paid) and perceived to be unreasonable time between when a decision is made to release land and its return to original users.

### Recommendations concerning the feasibility of Introducing, Implementing and Institutionalizing CDR Approaches and Procedures in GORUM Land Dispute and Grievance Resolution Mechanisms

- Government leaders, NGOs and CBOs striving to introduce and implement CDR should build on the support of the State Counsellor, Daw Aung San Suu Kyi. In her opening speech at the conference on Justice Sector Coordination for Rule of Law on 7th March 2018:

“It is my observation that at the community level, the majority of people continue to use long-standing local methods for solving disputes and are reluctant to take cases to the formal or official justice system of the State.... Therefore, in formulating our national justice strategy, we should take into consideration the use of mediation in resolving disputes systematically and the development of various modes of alternative dispute resolution to settle disputes.”

<sup>32</sup>The concept of Best Alternatives to Negotiated Agreements (BATNAs) was first described by Roger Fisher and William Ury in *Getting to Yes: Negotiating Agreement without Giving In*, New York, Penguin, 1981. BATNAs refer to the best alternatives to a negotiated (or mediated agreement) in terms of substantive outcomes, efficiencies and costs of procedures, impacts on future relationships between or among disputing parties and the likelihood of a satisfactory positive outcome.

<sup>33</sup>As noted earlier, national data on the amount of land illegally confiscated, subsequently returned or for which compensation has been paid is not publicly available.

- Government leaders, bodies and concerned NGOs/CBOs should build support for introduction, implementation and institutionalization of CDR, beyond that of the State Counsellor by identifying other GORUM officials, members of the National Land Use Council and leaders in the three land-focused institutions and dispute and grievance resolution mechanisms who may be future champions for the use of CDR procedures. While champions are needed at all levels of the land institutions and dispute and grievance resolution mechanisms, ideally, they should be high enough in the government to act as advocates and catalysts for using the new procedures and support and protect government officials and parties who provide them.

Government leaders, bodies and concerned NGOs/CBOs should build support for introduction, implementation and institutionalization of CDR by identifying GORUM officials, members of the National Land Use Council and leaders in the three land-focused institutions and dispute and grievance resolution mechanisms who may be future champions for the use of CDR procedures.

- Institutionalize the use of CDR to resolve land disputes and grievances by amending the Farmland Law and Vacant, Fallow and Virgin Lands Management Law, revising the Presidential Order that established the CCRCFOL, and/or administratively issuing new rules or guidance to allow or mandate its use. Formal approval for the utilization of CDR will validate and encourage its use by government officials and end-users. Multiple approaches, rather than a single one, should be pursued to promote institutionalization.
- Enhance existing dispute and grievance resolution procedures similar to CDR that are currently being used by Ward, Village Tract and Township Administrators and their land committees and introduce new CDR procedures, as appropriate, to improve their performance. At these levels, officials and committees are more likely to be receptive to the concepts and procedures presented in training and the potential benefits of using CDR to help resolve land disputes. Additionally, introduction at this level will likely require fewer formal government approvals and permissions.

Enhance existing procedures similar to CDR that are currently being used by Ward, Village Tract and Township Authorities and their land committees and introduce new CDR approaches and procedures, as appropriate, to improve their performance.

- Propose and conduct training for ABSF, as these bodies handle the largest number of local disputes, most of which are private, and do involve as many parties with asymmetrical levels of power and influence, which is commonly the case when a government entity is a party. Try to the greatest extent, to involve Township Administrators and members of their ABSF in training to promote coordination between VT and township initiatives and garner township-level support for use of the procedures.
- Training ABSF at VT and township levels in CDR procedures will likely have a “halo-effect” and increase their use in the work of the CCMVFVL and the CCRCFOL at these levels and potentially in some villages. Since government agency and personnel on all three dispute and grievance resolution mechanisms are often similar, if not identical, successful application of CDR procedures to address and successful resolve farmland disputes handled by the ABSF, will likely encourage experimentation and its use by other mechanisms – the CCMVFVL and the CCRCFOL – as well as by VT committee members in their villages.

- Explore integrating CDR procedures into several CCMVFVL and CCRCFOL activities. While It may be difficult to implement CDR to resolve disputes or grievances that involve very powerful parties – the Tatmadaw, ministries and departments or other influential parties – it may not be impossible. Two potential CDR procedures that should be introduced are joint fact- finding during early investigations of applications for VFF land or claims regarding the return of illegally confiscated land, and potentially mediation provided by a range of potential third parties. Mediation can help fact-finders, and ideally joint fact-finders, explore potential options for settlement of land disputes and grievances, and, if parties are amenable and have the authority to reach agreements, facilitate negotiations to resolve them.<sup>34</sup>

Explore the use of joint fact-finding and potentially mediation in early investigations by the CCMVFVL and the CCRCFOL.

### General Findings related to the KNU and Dispute and Grievance Institutions and Mechanisms

The KNU administration has made significant progress in developing policies and implementing institutions and mechanisms to resolve land disputes and incorporating methods that are similar or identical to CDR procedures. Below are general findings on KNU initiatives.

- The KNU has approved and significantly implemented elements of its Land Policy that address many UNGPs and “Effectiveness Criteria” concerning human rights, rights of women and indigenous people and procedures grounded in deliberation and dialogue. For example, the KNU has promulgated and implemented a rule that “requires a representative from the Karen Women’s Organisation (KWO) on each village ‘council’ in areas under its administration. These representatives also sit on the KNU- managed Village Land Committee that helps mediate disputes.”<sup>35</sup>

The KNU has approved and significantly implemented elements of its Land Policy that address many UNGPs and “Effectiveness Criteria”.

Since 2003, central-level KWO has been conducting training programs for women on women’s rights and dispute resolution.<sup>36</sup> The NRC research, however, found that while representatives of the KWO are members of councils and land committees, in practice the former have little authority and there were no instances of women mediating land disputes.<sup>37</sup>

- The KNU has recognized or established new institutions that utilize dispute and grievance resolution procedures similar or identical to CDR methods. For example, the Central Committee has established a Central Land Committee authorized to convene and conduct discussions between disputing parties and grievants and seek to build and reach consensus decisions. This committee is also authorized to engage with parties from different villages who disagree over their boundaries, or parties that may potentially be adversely affected by development projects initiated by the government. In the latter case the Committee is authorized to help potentially affected parties to determine whether to give their Free Prior Informed Consent (FPIC) for the proposed project and collaborate to find ways to minimize possible negative impacts.

<sup>34</sup>The involvement of these parties, however, does not guarantee that weaker parties will obtain either acceptable negotiated agreements or administrative decisions. See, Evidence is Not Sufficient to Secure Land Rights in Myanmar. Yangon, Myanmar, NAMATI, January 2017, for information on satisfactory settlement of land claims where legal advocates were involved.

<sup>35</sup>Shaun Butta and Justine Chambers, A Survey of Customary Land Dispute Mechanisms in Kayin State, Eastern Bago Division and Shan State. 63.

<sup>36</sup>Justice provision in south east Myanmar. 16.

<sup>37</sup>Ibid.

The KNU has recognized or established new institutions that utilize dispute and grievance resolution procedures similar or identical to CDR methods.

- KNU customary dispute resolution practices at the village and VT tract levels, and in many of its administrative bodies, emphasize helping disputing parties reach consensus decisions – either by direct talks or negotiations, with the assistance of village and/or customary leaders and committees or voluntary acceptance of recommendations from village leaders or groups. Consensus outcomes are also the goal of Temporary Dispute Resolution Committees established to resolve disputes that cannot be settled at the village level.

KNU customary dispute resolution practices at the village and VT tract levels, and in many of its administrative bodies, emphasize helping disputing parties reach consensus decisions.

- The KNU does not have a specific institution or mechanism to address and resolve disputes or grievances over confiscated land by the Karen National Liberation Army (KNLA) or other Ethnic Armed Organizations (EAOs). It may be important in the future for the KNU to consider establishing such an entity if existing KNU mechanisms cannot effectively resolve these kinds of cases.<sup>38</sup>
- KNU policies allow land disputes and grievances to be taken to KNU courts at township, district and central levels for authoritative judicial rulings. Recommendations and decisions of lower level committees, and presumably those by authorities of the KNU administration, are subject to independent judicial review.
- There are tensions between KNU institutions with mandates to manage and administer land and resolve disputes and grievances and GORUM institutions with similar mandates in areas under dual control. Issues that may or have caused problems include: which laws, rules and regulations take precedence, the authorities of KNU and GRUM administrative bodies, which entities are authorized to survey land and issue use-right permits, and where this can occur; whether land allocation decisions or resolutions of disputes reached by each entity are recognized by the other; and what entity has responsibility for resolving land disputes and grievances and where this may happen.

### Conclusions and recommendations concerning the feasibility of Introducing, Implementing and Institutionalizing CDR Approaches and Procedures in KNU Institutions and Land Dispute and Grievance Resolution Mechanisms

- The KNU and potential providers of CDR skills training should focus and build on existing dispute resolution institutions, mechanisms and procedures recognized or established by the KNU – Enhance the capacities and skills of existing dispute resolution providers and effectiveness of procedures they are already using. Augment them, as appropriate, with new CDR approaches to help practitioners and parties more effectively reach consensus agreements.
- The KNU and potential providers of CDR skills training should Identify potential or existing champions at all levels of the KNU administration who will support additional training for dispute resolution practitioners. Work with champions – in Karen Agricultural Department (KAD), Central Land Committee and ward and village tract levels – to build broad support for increased dispute and grievance resolution capacity building.

<sup>38</sup>One participant in an FGD in Mon State, whose land was illegally confiscated by an EAO, indicated the importance of developing procedures to address this problem. As of the date of the FGD, GORUM had not been able to settle the dispute and he had not had his land returned.

- The KNU should consider requesting NGOs and CBOs, with requisite expertise to provide CDR training for appropriate staff of the Central Land Committee, the KAD, Township and Village Tract Administrators involved in the resolution of land disputes and grievances. Participants in training from different components and levels of the KNU mechanism will benefit from increased development of skills, coordination resulting from the use of common approaches and procedures and the establishment of or deepening of existing relationships that will help them work together when resolving difficult cases.

If training resources are available, training can also be conducted for targeted villages where there seem to be more land disputes that have been difficult for village and other customary leaders to resolve.

Additionally, Training-for-Trainers' programs on CDR should be conducted for staff of the Central Land Committee so they can provide ongoing training for their personnel and parties and other KNU government and community entities – such as Township Administrators and VTAs and their committees and members of special committees convened by the Land Committee, such as those handling development issues.

- Appropriate leaders and staff of GORUM and the KNU administration mandated to address land issues in areas under joint administration should consider participating in training programs on collaborative dispute resolution. The National Ceasefire Agreement (NCA) states that “The Government and individual Ethnic Armed Organizations shall coordinate the implementation of tasks that are specific to the areas of the respective Ethnic Armed Organization.”<sup>39</sup> This includes the administration of land and the resolution of land disputes. Training can help clarify how GORUM and KNU administrative entities can coordinate their activities, develop common procedures for resolving disputes and grievances, improve their working relationships and enable participants to address and resolve problems of mutual concern. Identical training can be conducted for the GORUM and KNU separately, or in joint sessions.

Appropriate leaders and staff of GORUM and the KNU administration mandated to address land issues in areas under joint administration should consider participating in parallel or joint training programs on collaborative dispute resolution.

### Strategies for Introducing, Implementing and Institutionalizing CDR Approaches and Procedures in the GORUM and KNU Administration

The study concludes with an examination of potential strategies for introduction, implementation and institutionalization of CDR using Top-Down, Bottom-Up and “Both/And” approaches. (See Box 2: Strategies for Introducing, Implementing and Institutionalizing CDR Approaches and Procedures)

The Bottom-Up strategy builds support for the use of CDR informally by introducing and demonstrating its effectiveness at the village tract and township levels.

The Top-Down strategy strives to build support of high-level governmental decision-makers in the GORUM and KNU who can authorize or mandate the use of CDR by the institutions and bodies responsible for resolving land disputes and grievances. Changes using the Top-Down strategy can be promoted and institutionalized by revisions to the GORUM National Land Use Policy, amendments to

<sup>39</sup>National Ceasefire Agreement, Chapter 6 Future Tasks, Tasks to be implemented during the interim period, Article 25. c

Presidential Orders or legislation, or issuance of revised rules or guidance by leaders and/or committees of the three administrative land dispute and grievance resolution mechanisms.

**Box 2: Strategies for Introducing, Implementing and Institutionalizing  
CDR Approaches and Procedures**

- The Bottom-Up strategy builds support for the use of CDR informally, often at lower levels of government or in communities, by introducing and demonstrating its effectiveness at the village tract and township levels.
- The Top-Down strategy strives to build support of high-level governmental decision-makers in the GORUM and KNU who can authorize or mandate the use of CDR
- The “both/and” strategy incorporates elements of both the Top-Down and Bottom-Up strategies by building credibility and acceptance for the use of CDR at the village level and working to obtain approval or a mandate for their use from senior government officials.

The “both/and” strategy, which is the recommended approach, incorporates elements of both the Top-Down and Bottom-Up strategies. This strategy strives to build credibility and acceptance for the use of CDR by demonstrating its effectiveness in resolving disputes at the village tract and township levels; and, at the same time, working to obtain either approval or a mandate for use of the procedures from senior government officials.

## Introduction



Planting season underway in Hpa-an Township, Kayin State (1)

This study analyzes the functioning and performance of institutions, mechanisms and procedures established by the Government of the Republic of the Union of Myanmar (GORUM) and the administration of the Karen National Union (KNU) to resolve a range of types of land disputes and grievances. Disputes are significant disagreements, frequently between private parties, often over a narrow range of issues. Grievances are complaints initiated by an individual or group against a government, government institution a private entity and/or its personnel over something or an action that is believed to be wrong or unfair.

Institutions analyzed include the Central Administrative Body of the Farmland (CABF), the Central Committee for Management of Vacant, Fallow and Virgin Lands (CCMVFL), the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands (CCRCFOL) and those of the KNU.

The study examines and compares the performance of the above institutions and their mechanisms for handling land issues with the United Nations Guiding Principles (UNGP) on Business and Human Rights' "Effectiveness Criteria", internationally recognized standards and best practices for state and non-state dispute resolution mechanisms.

Additionally, the study explores the feasibility of introducing, implementing and institutionalizing Alternative Dispute Resolution (ADR) – commonly also called Collaborative Dispute Resolution (CDR) – approaches and procedures in the land dispute and grievance resolution institutions and mechanisms established by the GORUM and KNU to expand access to justice for people living in the country. (See Box 3: Alternative Dispute Resolution also commonly called Collaborative Dispute Resolution.)

### Box 3: Alternative Dispute Resolution (ADR)/ Collaborative Dispute Resolution (CDR)

Voluntary procedures used by parties engaged in a dispute, grievance or conflict to cooperate, find or develop mutually acceptable agreements to settle their differences.

ADR CDR are procedures that parties to a dispute, grievance or conflict use to cooperate and find or develop mutually acceptable solutions to settle their differences. Several examples of these procedures include: conflict coaching, fact-finding or joint fact-finding, facilitative mediation, conciliation and arbitration.

Because ADR procedures have traditionally been defined as alternatives to taking a dispute, grievance or conflict to a court for a judicial decision, and CDR refers more generally to processes used by parties to cooperate to resolve their differences and is not tied to a specific institution, CDR will be used as the preferred term for these procedures in the remainder of this study.<sup>40</sup>

CDR procedures have been used successfully in many countries around the world to resolve difficult and contentious land disputes and grievances and are often significant components of dispute and/or grievance resolution mechanisms. Mechanisms are institutions with structured procedures and personnel established to prevent, address and resolve disputes or grievances.

Today around the world, governments, companies, INGOs, NGOs and civil society organizations are establishing institutions, mechanisms and procedures to more effectively prevent and resolve disputes, grievances and serious conflicts over land. Some of these are designed to address and resolve common land issues in communities between and among members – such as differences between family members over inheritance, neighbors or villages over boundaries, or people who possess different privileges or rights related to land use such as the right to a house plot or land for different purposes (agriculture, pasture, orchards, wood collection, etc.)

Other disputes, grievances and conflicts involve multiple parties and clashes over larger and often more contentious issues – confiscation of land by a government or government agency for its own use or allocation to secondary parties; land grabbing by private individuals, groups or companies; returns of refugees or Internally Displaced Persons (IDPs) to reclaim homes or land in their communities of origin<sup>41</sup>; or resettlement of refugees and IDPs in new host communities.

<sup>40</sup>In most cultures and countries, there are a number mechanisms, procedures and people parties can turn to for assistance in resolving their differences. They commonly include: courts, litigation, lawyers, judges and judicial rulings; administrative or managerial bodies, bureaucratic procedures and officials who reach decisions; customary forums, processes and leaders follow community norms to develop conclusions; religious settings, clerics and deliberations that produce outcomes congruent with religious principles; and public and private forums that provide settings for a range voluntary dispute resolution processes that are often facilitated by a range of types of third parties. All of the above are alternatives for resolving disputes.

The term “Alternative Dispute Resolution” or “ADR” originated in the United States in the early 1970s, and originally referred to voluntary dispute resolution procedures that were alternatives to going to court and obtaining a ruling by a judge or decision by a jury. Since then, procedures encompassed by the term ADR have been extensively applied beyond the context of courts. Continuing to call them alternatives in the original sense, however, is an inaccurate. These procedures, as well as judicial procedures are all alternatives for dispute resolution.

Because of ADR’s historic link as alternatives to courts and adjudication, this author prefers the term Collaborative Dispute Resolution (CDR) as it emphasizes voluntary use collaborative processes – such as negotiation, mediation, conciliation, fact-finding, arbitration and a number of other procedures – that parties can use to resolve their differences rather than linking procedures to a particular forum or institution, such as courts.

Internationally, a range of institutions and mechanisms have been developed to address some of the types of land disputes described above. Examples are the housing, land and property (HLP) dispute resolution assistance provided in Bosnia and Kosovo by international, and subsequently national, administrative tribunals;<sup>42</sup> Timor-Leste's Ministry of Justice's Land and Property Directorate's mediation services;<sup>43</sup> the Sri Lankan Ministry of Justice's Special Mediation Boards (Land) Programme;<sup>44</sup> the Liberia Land Commission's decentralized Land Coordination Centers and Mediation Committees<sup>45</sup>; and the Norwegian Refugee Council's (NRC) land dispute resolution initiatives in multiple countries.<sup>46</sup>

This study of land dispute and grievance resolution institutions and mechanisms will explore:

- The kinds of land disputes and grievances occurring in Myanmar;
- GORUM and KNU institutions, mechanisms, procedures, personnel and current practices used to address and resolve diverse kinds of disputes and grievances;
- The performance of GORUM and KNU dispute and grievance resolution institutions and mechanisms in relation to the United Nations Guiding Principles (UNGP) on Business and Human Rights' "Effectiveness Criteria";
- Opportunities and challenges for existing institutions, mechanisms, procedures and personnel in resolving land disputes and grievances; and
- The feasibility of introducing, implementing and institutionalizing Collaborative Dispute Resolution (CDR) in GORUM and KNU institutions and mechanisms to enhance existing procedures and apply new ones to improve access to justice for people living in the country.

The goals of this study are to:

- Provide information to GORUM executive, legislative and administrative decision-makers, and KNU leadership and committees about the current functioning of the country's land dispute resolution institutions and mechanisms and their strengths and constraints;

<sup>41</sup>Resolving Land Disputes Through Restitution Mechanisms: A Comparative Analysis of Country Case Studies. Chicago: University of Chicago, The Law School, 2017.

<sup>42</sup>Scott Leckie, ed., *Returning Home: Housing and Property Rights of Refugees and Displaced Persons*, Ardsley, N.J., Transnational Publishers, 2003; Walpurga, Engelbrecht, "Property Rights in Bosnia Herzegovina: The Contributions of the Human Rights Ombudsperson and the Human Rights Chamber Towards their Protection". In *Returning Home: Housing and Property Rights of Refugees and Displaced Persons*, 83-142; and Alan Dodson and. Veijo Heiskanen, "Housing and Property Restitution in Kosovo". In *Returning Home: Housing and Property Rights of Refugees and Displaced Persons*, 225-242.

<sup>43</sup>Report on Research Finding and Policy Recommendations for a Legal Framework for Land Dispute Mediation. Timor-Leste Land Law Program, February 2004; and Moore C. and Brown, G. "Designing Dispute Resolution Systems and Building Local Capacities for Settling Land and Property Disputes in Post-Conflict and Post-Crisis Societies", in *Building Peace: Practical Reflections from the Field*. Ed. Craig Zelizer and Richard A. Rubinstein, Sterling, Virginia, Kumarian Press, 2009; Christopher Moore and Jonathan Bartsch, *Land Disputes: Effective Procedures & Strategies*, Colombo, Sri Lanka, Ministry of Justice & Ministry of Land and Land Development, 2014;

<sup>44</sup>Christopher Moore and Jonathan Bartsch, *Land Disputes: Effective Procedures & Strategies*, Colombo, Sri Lanka, Ministry of Justice & Ministry of Land and Land Development, 2014.

<sup>45</sup>Technical Recommendations and Justifications for Local Land Dispute Resolution Entities, Monrovia, Liberia, US-AID and Tetra Tech Land Dispute Resolution Project, June 2014; and Christopher Moore, *Public Policy Framework for Collaborative Land Dispute Resolution in Liberia*, Monrovia, Liberia, USAID and Tetra Tech Land Dispute Resolution Project, June 2014.

<sup>46</sup>The Norwegian Refugee Council's (NRC) Information and Legal Counselling Project has established dispute resolution mechanisms and provided services in a number of countries including Afghanistan, Democratic Republic of Congo, Jordan, Lebanon, Liberia, Somalia, South Sudan and Uganda.

- Provide advice to GORUM executive, legislative and administrative decision-makers, and KNU leadership and committees on how to develop and implement new policies, legislation, guidance and procedures that will help make their land dispute and grievance resolution institutions and mechanisms more congruent with the United Nations Guiding Principles (UNGPs) on Business and Human Rights’ “Effectiveness Criteria”;
- Inform members of civil society – farmers and other potential users, and NGOs, CBOs supporting them – about procedural options available to address and resolve land disputes and/or grievances and considerations for accessing and utilizing them;
- Make recommendations for how CDR can be introduced, implemented and institutionalized to improve the resolution of land disputes in Myanmar; and
- Assist MyJustice and the Norwegian Refugee Council’s Information, Counselling and Legal Assistance (ICLA) Project to develop future CDR programming that will promote greater access to justice and resolve land conflicts in Myanmar.

## Methodology

### Standards and Methodology for Analysing the Performance of Land Dispute and Grievance Resolution Institutions and Mechanisms

#### Standards and Criteria

Until relatively recently, there have not been clear internationally recognized standards that define the responsibilities of state and non-state actors, institutions and mechanisms engaged in dispute and grievance resolution to ensure access to justice and protect the human rights of potentially or actually affected parties. While various actors and researchers have developed a number of frameworks,<sup>47</sup> one, and associated standards, has become the most widely accepted – the UN Guiding Principles on Business and Human Rights (UNGP).<sup>48</sup>

UNGP are now widely used as benchmarks to measure the performance, effectiveness and alignment of state and non-state dispute resolution institutions and mechanisms to promote access to justice and protect human rights. The Guiding Principles are based on “a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.”<sup>49</sup> Further, the Guiding Principles prescribe that they “should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.”<sup>50</sup>

The UNGPs note that even where state or non-governmental institutions are operating optimally, problematic issues, disputes or grievances that require access to justice or to secure human rights may still arise. The UNGPs require that parties that have experienced in the past or are presently encountering actions that result in disputes, grievances or potential violations of human rights must have effective methods to seek redress. Having effective dispute resolution systems, grievance mechanisms and complaints-handling procedures in place can play an important role in satisfactorily addressing issues of concern.

Additionally, the study explores the feasibility of introducing, implementing and institutionalizing Alternative Dispute Resolution (ADR) – commonly also called Collaborative Dispute Resolution (CDR) – approaches and procedures in the land dispute and grievance resolution institutions and mechanisms established by the GORUM and KNU to expand access to justice for people living in the country. (See Box 3: Alternative Dispute Resolution also commonly called Collaborative Dispute Resolution.)

<sup>47</sup>One example of a framework presented in *Resolving Land Disputes Through Restitution Mechanisms: A Comparative Analysis of Country Case Studies*. 2017, uses the United Nations Principles on Housing and Restitution for Refugees and Displace Persons (the “Pinheiro Principles”). These global standards approved by the UN Human Rights Subcommittee in 2005, articulate restitution rights for refugees and IDPs.

<sup>48</sup>Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework. New York and Geneva, United Nations, 2011. The UNGP were proposed by UN Special Representative on business & human rights, John Ruggie, and endorsed by the UN Human Rights Council in June of 2011. 1.

<sup>49</sup>Ibid.

<sup>50</sup>Ibid.

The “Guiding Principles” and “Effectiveness Criteria” detailed in Box 4: UN Guiding Principles UNGPs

**Box 4: UN Guiding Principles (UNGPs) and Effectiveness Criteria**

State and non-state actors, institutions and mechanisms engaged in dispute and grievance resolution should be seen by the stakeholder groups for whose use they are intended as:

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance [or dispute/conflict resolution] processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance [or dispute/conflict] informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights; and
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harm;

On an operational-level, mechanisms should also be:

- (h) Based on engagement and dialogue: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harm.

and

Effectiveness Criteria will be used to assess the performance of the GORUM and KNU’s land dispute and grievance resolution institutions, mechanisms, procedures and personnel.<sup>51</sup>

The Principles and Effectiveness Criteria will be used as the structure for analyzing the effectiveness and performance of existing GORUM and KNU dispute resolution institutions, mechanisms, procedures and personnel established to resolve land disputes, grievances or conflicts.

### Standards and Criteria

Data collection for this study consists of a desk review of primary and secondary documents on the four land dispute and grievance resolution institutions and mechanisms, and interviews and Focus Group Discussions (FGDs) conducted in 2018 by the author, staff of the Norwegian Refugee Council’s Information and Counselling and Legal Assistance Project (ICLA), and five NRC consultants studying GORUM and KNU customary and government institutions and procedures for resolving land disputes (The NRC Team).

<sup>51</sup>ibid. 33-34.

The NRC Team conducted interviews in villages, wards, village tracts and townships in Karen/Kayin, Mon, Shan and Rakhine States and Eastern Bago Division and at the state-level in Shan State.<sup>52</sup> Interviewees included villagers, potential or actual users of the land dispute and grievance resolution mechanisms, Village Tract Authorities, Township-level authorities and state-level officials in Shan State. Additionally, the NRC Team conducted interviews with staff of UNDP, Mercy Corps, IDLO and NAMATI.

Interviews focused on interviewees' awareness and knowledge of housing, land and property (HLP) rights, land disputes and grievances experienced by villagers, customary tenure and dispute resolution practices and governmental and non-governmental institutions and mechanisms available to help resolve land issues and the services and procedures they provide used.

Additionally, the author and NRC Team reviewed a wide range of written primary and secondary sources. Primary resources included legislation and laws, decrees and guidance documents. Secondary resources included a range of articles, monographs and book chapters prepared by INGOs, NGOs, CBOs and academics.<sup>53</sup>

### Standards and Criteria

First, the initial research assumed that the institutions and mechanisms identified for analysis were fully established and functioning as mandated by their enabling documents. This, however, was not always the case. While some institutions have been established, others have not. This is especially the case at the ward and village tract level. Additionally, many are not functioning as mandated, and lack detailed guidance on how to perform their duties.

Next, as Furnivall noted in his historical study of governance of Myanmar, Burma, "One must take into account the inevitable divergence between law and practice. The machinery of government is not mechanical; it is vital, consisting of human beings with human limitations and with a human prejudice against new-fangled notions. Administrative officials are comfortable in their habitual routine; they tend to resent changes and to go on as before even when they are supposed to be doing something different. Reforms often pass over their heads."<sup>54</sup> In this study, it was not always possible to determine whether what is on paper, i.e. laws or Presidential Orders, is actually happening on the ground.

Field data is also limited geographically to Karen/Kayin, Mon, Shan and Rakhine States and Eastern Bago Division, and may not be generalizable to other states and regions in Myanmar.

The research is limited to institutions created by the GORUM and the KNU. It does not examine and analyze institutions created in Myanmar by other EAOs.

The research has been limited by the small number of interviews, especially with higher government or administrative officials, much fewer than expected, that NRC was able to conduct.<sup>54</sup> On occasion, it took extensive periods of time to get approval from the GORUM and schedule visits to various locales and institutions to conduct interviews. Additionally, in some situations, the government was unresponsive or seemed reluctant to have interviews conducted with State, District, Township, Ward/

<sup>52</sup>Participants in interviews or Focus Group Discussions (FGDs) included: Ward or Village Tract Administrators (WV-TAs) – 25; Township Administrators (TAs) – 5; officials from other GORUM institutions 35; end-users – 300; and international government organizations, INGOs, NGOs and CBOs – 4.

<sup>53</sup>See Appendix C for Bibliography and References.

<sup>54</sup>J.S. Furnivall, *The Governance of Modern Burma*. New York: Institute of Pacific Relations, 1958, 2.

<sup>55</sup>See Appendix B List of Interviewees.

Village Tract Administrators (VV/TAs) implementing the dispute or grievance resolution institutions and mechanisms being studied or with villagers involved in disputes or grievances.

GORUM and KNU land dispute and grievance resolution mechanisms and the procedures they use to resolve differences differ across Myanmar. For this reason, it is hard to generalize how various disputes and grievances are actually being settled in various locales. A number of studies indicate that mediation in addition to administrative decision-making is used, but there is not agreement on how mediation is defined and what third-parties actually do in practice. Additional local studies are needed in the future to analyze what administrative service providers are actually doing.

There are limited studies and available statistical data on topics that are the focus of this study – kinds and numbers of land disputes, the performance of GORUM and KNU dispute and grievance resolution mechanisms, time to reach agreements or decisions, outcomes when different dispute resolution procedures are used, the performance of GORUM and KNU dispute and grievance resolution mechanisms, actual returns of illegally confiscated land, etc. If they do exist, there are relatively few available in English or on the Internet.

Primary and secondary research for this study relies primarily on English translations of official GORUM documents written in Myanmar language. Often, translations were not clear as to their meaning and frequently used different terms for the same institutions and mechanisms. This required constant checking, and in some cases, re-translation. Secondary documents prepared by international organizations, INGOs, NGOs and CSOs were generally either written in understandable English and were well translated.

Finally, the timeline for conducting on-the-ground research and writing this study was roughly seven months, which limited the number of interviews and focus groups that could be conducted and the scope and depth of research.

## Land Disputes, Grievances and Conflicts in Myanmar

The Myanmar Constitution of 2008 establishes that the state is the ultimate owner of all land in Myanmar and maintains a right of eminent domain.<sup>56</sup> A bit more than half of the country's territory is directly managed and administered under statutory law. Other areas, in particular in the "ethnic" States, land is managed and administered using customary norms, rules and practices.<sup>57</sup> In many areas, both customary practices and statutory law are used.

It is possible for parties desiring a statutory use-right to obtain a Land Use Certificate (LUC) from the government based on the 2012 Farmland Law. LUCs provide the holder with a legal right to work and utilize state property, guarantee some degree of security of tenure and allow transfer of title through sale. They do not, however, confer legal ownership.

Disputes, grievances or conflicts can occur both over land where the user has obtained a statutory use-right or that is occupied and used customarily. In general, there are two broad categories of clashes over land in Myanmar: 1) Disputes – significant disagreements or arguments, frequently between private parties, often over a narrow range of issues, and 2) Grievances or public disputes – complaints initiated by individuals or groups against a government, government institution or private parties, such as companies, over something or an action that is believed to be wrong or unfair.<sup>58</sup> Grievances or public disputes frequently involve one or more government agencies; cannot be resolved privately between parties on their own or with the assistance of a third party such as an elder, village leader, village committee or a Village Tract Administrator; and generally require the involvement of either a government administrator at the Township level or above or a court to secure a resolution.

<sup>56</sup>Constitution of the Republic of the Union of Myanmar, Chapter I, Basic Principles of the Union, section 372008

<sup>57</sup>Documenting Customary Tenure in Myanmar. Mekong Region Land Governance. March 2012. <https://data.opendevlopmentmekong.net/dataset/4a3fe7a8-9e62-4c52-92a9-bb2a419157f7/resource/c73649ea-720c-4969-9a3d-bd6ce383492e/download/Customary-Tenure-Guidebook-MMRfirsteditionfinal.pdf>

<sup>58</sup>There is no national information or statistics on how many of each type of these disputes are occurring in Myanmar. There are some statistics for some states on the number of grievances against the government involving claims of illegal land confiscations.

<sup>59</sup>Some of these examples were identified in Denney, et al, Making Big Cases Small and Small Cases Disappear.; others were identified by NRC in multiple interviews in villages and townships.

Some examples of private disputes are provided in Box 5: Examples of Private Disputes over Land<sup>59</sup>

#### Box 5: Examples of Private Disputes over Land

- Inheritance (how use rights to customary or statutory land are divided between or among successors, who gets how much, its location, women's and children's rights of inheritance, etc.)
- Customary boundaries (where they were historically, are currently and disagreements over changes that have or should be made)
- Disputes over house plots (size, location, etc.)
- Contested ownership of crops, trees and plants
- Customary use of the same parcel of land by different parties of for different purposes;
- Disputes between individuals, groups or villages over access to natural resources (water, pasture, forests, etc.)
- Damage to land and property by persons or animals
- Nuisance issues (operating a business on land or failure to maintain sanitary standards, which have adverse impacts on neighbors)
- Squatting (occupation by a party of a parcel of land for which they do not have a valid customary or statutory use right, often by poor families or unregistered migrants that have fled violence or been evicted from their land)
- Informal land transfers or sales (made without appropriate government documentation or registration)
- Illegal land sales (single or multiple sales)
- Seizure of land used as collateral for a loan by a lender (occurs when a debt has not been repaid according to the terms of the agreement)
- Encroachment (by neighbors or a private company on land claimed by another party)
- Occupation and use of land presumed to be abandoned or vacant (often due to disuse, absence of a customary user or statutory use-right holder or land that is fallowed)
- Confiscation of land historically occupied or used by an ethnic minority by a member of an ethnic majority
- Relations between communities and their members with private companies over land-related issues
- Land grabbing (by a private party or company)
- Rights of return of refugees and IDPs (to housing, land and property and their communities of origin).

<sup>60</sup>The GORUM is establishing a number of Special Economic Zones (SECZ), which have, and will likely in the future, receive a number of grievances from members of project-affected communities over land, such as resettlement policies and practices and/or compensation for lost land. Current zones and those in the process of implementation include: Thilawa SEZ in the Yangon Region, Dawei SEZ in the Taninthayi Region and Kyauk Phyu SEZ in Rakhine State.

Examples of grievances and public disputes are presented in Box 6: Examples of Grievances or Public Disputes over Land.<sup>60</sup>

As can be seen from the lists of disputes and grievances, both private disputes between individuals and groups or grievances against the government are common problems in Myanmar. One of the most serious, however, is land confiscation by the government, companies and the military. Many of these have occurred between 1988 and the present.

#### Box 6: Examples of Grievances or Public Disputes over Land

- Delays in processing or denial by a government entity of an application for a LUC (long processing time, time to conduct of a survey and issue a LUC, requests by government agencies for bribes to speed up the process, etc.)
- Complaints about the performance of the Department of Agricultural Lands Management and Statistics (DALMS) (concerning delays, perceived or actual different unfair or excessive charges to conduct a land survey, register land or issue a LUC; requests for bribes; and decisions on when and what party should be issued land)
- Encroachment by the Tatmadaw or a government Ministry, Department or other entity on farmland that has been used customarily for years by a farmer or farmers, and for which the latter may or may not have a LUC
- Confiscation of farmland by the Tatmadaw, government Ministry or Department without due process
- Designation of farmers' customarily used land as vacant, fallow or Virgin Lands by the Committee for Management of Vacant, Fallow and Virgin Lands, and its allocation to another party
- Government confiscation of farmers' land for a specific public purpose, and failure by the government to develop it for the designated use
- Government confiscation of land historically occupied and used by an ethnic minority
- Confiscation of land claimed by a farmer or farmers by the Tatmadaw, a government Ministry or Department and subsequent leasing or selling it to a private party (either domestic or foreign)
- Occupation or squatting by people on government land or land allocated to another party (such as land around a government building or private industrial facility)
- Complaints over the time required for government to release land it has determined should be returned to its original owner
- Complaints over unpublicized illegal land sales and issuance of LUCs to secondary parties by the government after it has determined that said land should be returned to its original owner
- Complaints over inadequate compensation for land confiscated legally or illegally by the government or a private entity
- Complaints over inadequate compensation with alternative land for land confiscated legally or illegally by the government
- Complaints over implementation of resettlement policies and claims of inadequate compensation in land or money
- Legal charges against villagers of criminal trespass or mischief (such as may occur during "plow protests" where farmers occupy land they believe is theirs but has been allocated to another party)
- Legal suits between farmers who have been allocated land use rights by the government but are taken to court by current users
- Disagreements between community members over allocation of land confiscated and subsequently released and returned by the government (which are to be sent to a court for a judicial decision)

- Different treatment of ethnic communities by the government regarding their land use rights, such as lack of recognition of the legitimacy of different agricultural practices (e.g. swidden) and resulting government land seizures and allocations
- Rights of refugees and IDPs to land restitution and to return home after displacement
- Disputes over boundaries between villages
- Failure to change names on Land Use Certificates when land is transferred from one party to another (through inheritance, granting of a use right or sale)

While some confiscations have been legal and initiated for a legitimate public purpose and the good of the state and people of Myanmar, a significant number have been illegal ‘land grabs’. Illegal seizures include: “(a) land confiscated without due process (and probably using force or political authority) (b) land acquired through a largely faulty process; and c) limited time-period permits granted for use of land for development and production/extraction.”<sup>61</sup>

Most illegal land seizures, whether conducted by military or other government agencies have similar characteristics. They frequently are “arbitrary in nature... and involve little or no effort to find alternatives to displacement”; lack any significant consultation with potentially affected parties to obtain free and informed prior consent; result in “disputed, inadequate or non-existent... compensation”; do not have any policy or actions for adequate resettlement following the acquisition of the land; have “insufficient opportunities for judicial or other forms of redress to prevent or resolve displacement due to land acquisition, and effectively completely disavow the housing land and property rights of those affected.”<sup>62</sup>

There are currently no comprehensive or publicly available figures land illegally confiscated over past decades. “Official figures from MOALI indicate that 3.8 million acres of allegedly vacant or fallow land were confiscated and granted to Ministries, companies, the Tatmadaw, or individuals, for agricultural development purposes between 1992 and 2016. This does not include, however, land confiscated for other purposes, such as military encampments or infrastructure projects.”<sup>63</sup> Other research estimates that the amount of confiscated land may be as high as 5.2 million acres.<sup>64</sup>

<sup>61</sup>Srinivas and U Saw Hlang, Myanmar: Land Tenure Issues and the Impact on Rural Development, Rome: FAO, May 2015. See also: Myanmar Centre for Responsible Business, Land – Briefing Paper, Yangon, Myanmar: Institute for Human Rights and Business, Myanmar Centre for Responsible Business and the Danish Institute for Human Rights, March 2015 as cited in Restitution in Myanmar: Building Lasting Peace, National Reconciliation and Economic Prosperity Through a Comprehensive Housing, Land and Property Restitution Programme. Yangon, Myanmar, Displacement Solutions and Norwegian Refugee Council, March 2017, Footnote, 7.

<sup>62</sup>Restitution in Myanmar: Building Lasting Peace, National Reconciliation and Economic Prosperity Through a Comprehensive Housing, Land and Property Restitution Programme. 7.

<sup>63</sup>A Promise Unfulfilled: A Critique of the Committees for Rescrutinization of Confiscated Land and other Lands, 2017. <https://www.slideshare.net/EthnicConcern/a-promised-unfulfilled-a-critique-of-land-reinvestigation-committeeenglish-version>, 33.

<sup>64</sup>Kevin Woods. “Commercial Agriculture Expansion in Myanmar: Links to Deforestation, Conversion Timber, and Land Conflicts”. Forest Trends Report Series. March 2015.

Additionally, reports published by the Ministry of Agriculture and Irrigation, the Settlements Land Records Department (the forerunner agencies to Ministry of Agriculture, Livestock and Irrigation and the Department of Agricultural Land Statistics (DALMS), and the Ministry of Environmental Conservation and Forestry (one of the ministries that was the forerunner to the current Ministry of Natural Resources and Environmental Conservation) on state-owned leases and land use, indicate that approximately 20 % all of Myanmar's land has been allocated to foreign or joint-venture investors for terms of 30-70 years.<sup>65</sup> "Senior government officials conceded that State land leases/concessions have been negotiated and awarded in haphazard and inconsistent ways with negligible quantification and qualification of their impacts"<sup>66</sup>

<sup>65</sup>Srinivas and U Saw Hlang. Myanmar: Land Tenure Issues and the Impact on Rural Development, Rome: FAO, May 2015. See also: Myanmar Centre for Responsible Business, Land – Briefing Paper, Yangon, Myanmar: Institute for Human Rights and Business, Myanmar Centre for Responsible Business and the Danish Institute for Human Rights, March 2015 as cited in Restitution in Myanmar: Building Lasting Peace, National Reconciliation and Economic Prosperity Through a Comprehensive Housing, Land and Property Restitution Programme.

<sup>66</sup>Ibid. 7.

## Government of the Union of the Republic of Myanmar (GORUM) and the Karen National Union (KNU) Responses to Land Disputes and Grievances

### Laws, Presidential Orders, Policies and Institutions established to address and resolve Land Disputes and Grievances

In response to disputes and grievances listed above, the GORUM has passed two land-related laws, issued one Presidential Order, and established three new institutions to manage and administer government/state land and resolve land disputes. It has also approved a National Land Policy.

The KNU has approved a comprehensive Land Policy that recognizes customary dispute resolution institutions and mechanisms. It also provides for the establishment of new statutory bodies, many if not most of which have been created, to assist in the resolution of land disputes and grievances.

The GORUM's Farmland Law (FL) of 2012, created the Committee for Administrative Bodies of the Farmland, which is responsible for the management and administration of farmland. It also establishes a dispute resolution mechanism that primarily focuses on the resolution of private disputes over land.

The GORUM's Vacant, Fallow and Virgin Lands Management Law (VFVLMML) was also passed in 2012. It created the Central Committee for Management of Vacant, Fallow and Virgin Lands, which regulates allocation of vacant, fallow and Virgin Lands and compliance by use-right holders with the terms of their permits. The Committee has a dispute resolution mechanism and procedures for addressing disputes or grievances concerning allocation of state land, compliance with use-right permits and criminal activity.

On May 5, 2016, the GORUM's President's Office established the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands (CCRCFOL or CRC) on.<sup>67</sup> The mandate of the CRC is "to urgently address the land-grabbing issues for the people so that they do not face losses of farmland and other lands in the Republic of the Union of Myanmar."<sup>68</sup> The CCRCFOL is the only institution and mechanism in Myanmar with an exclusive mandate to address land disputes, all others have multiple responsibilities.

In January of 2016, the GORUM President's cabinet of the former military-led civilian government formally endorsed the National Land Use Policy (NLUP). The Policy identifies a number of goals, one of which is to "develop transparent, fair, affordable and independent dispute resolution mechanisms in accordance with rule of law".<sup>69</sup>

The NLUP mandated the Union Government to establish a National Land Use Council (NLUC), which was created on the 17<sup>th</sup> of January 2018. It convened its first meeting on the 7<sup>th</sup> of April of that year.<sup>70</sup>

<sup>67</sup>Union of Myanmar President Office order letter No. 14/2016 issued on 5th May 2016. It should be noted that documents, publications and translations referring to this committee often use different names for it. Some of them include: the "Central Committee for Rescrutinization of Confiscated Farmlands and Other Lands", the "Central Committee for Reviewing Confiscated Farmlands and Other Lands", the "Central Committee on Confiscated Farmlands and Other Lands", and the "Central Land grab RescrutinizationCommittee ", the "Land Rescrutinization-Committee" and the "Land Grab Committee".

<sup>68</sup>Union of Myanmar President Office order letter No. 14/2016.

The KNU's first Land Policy was approved at its 9<sup>th</sup> Congress in 1974. The most recent version was endorsed by its Executive Committee after the 15<sup>th</sup> Congress on December 2015. The Land Policy describes institutions, mechanisms and personnel, from the village to the central level of the KNU, that are to be involved in the resolution of land disputes and grievances. It also details their mandates and the procedures to be used.

Before examining the above institutions, mechanisms and policies of the GORUM and KNU in more detail, it is important to examine how parties in Myanmar approach settling differences and some of the dispute resolution procedures currently used or potentially available to them.

<sup>69</sup>National Land Use Policy, Part (I), Objectives and Principles, Chapter (I) Objectives – (b), (c) and (d), January 2016.

<sup>70</sup>Notification No. 15/2018 – Formation of National Land Use Council, 17th of January 2018. (Unofficial Translation); and “Land Management: Meeting for Land Use Policy”. MITV, April 7, 2018. <http://www.myanmarinternationaltv.com/news/land-management-meeting-land-use-policy>

## Dispute, Grievance and Conflict Resolution in Myanmar

People in a dispute or conflict, or with a grievance against an official or institution, generally have a number of possible ways to respond. Some may attempt either direct talks or negotiations between the people or groups involved or turn to third parties to help them try and reach voluntary agreements. Others may turn to a person or institution with the authority to make a decision for them. In yet other cases, involved parties may choose not to respond at all.

### Dispute Avoidance

Numerous studies have found that a significant number of people in Myanmar when faced with a dispute, conflict or grievance decide not to raise it or pursue resolution, or, if they do, drop their complaint shortly after unsuccessfully trying one, or occasionally two resolution procedures.<sup>71</sup> A 2017 study of 3556 randomly selected people living in states and regions across Myanmar and over the age of 18 found that one in six of them (17%), or someone in their household, had experienced a dispute in the last two years.<sup>72</sup> Of this number, almost half of the respondents (44%) took no action to try and settle them.<sup>73</sup>

Reasons for not initially raising issues and trying to resolve them are diverse. First, there is a “high level of perseverance many people display in enduring disputes or injustices and not reporting [raising] them. This is most evident among groups such as the poor, religious and ethnic minorities, women and migrants, who face widespread (and usually unrecognised) discrimination and feel unable to obtain better outcomes for themselves.”<sup>74</sup>

Additionally, many people in Myanmar, especially those living in villages where there are ongoing or potential future relationships between or among members, place a high value on avoiding tensions and disputes and maintaining smooth interpersonal relationships and social harmony. Individual values and family and community pressures are often quite strong to avoid discord, embarrassment or shaming other community members by bringing issues out into the public, and to preserve personal or family images and to save and give face to other parties by not engaging them in a dispute.<sup>75</sup>

Socio-religious beliefs may also play a role in not pursuing resolution of disputes. People in Myanmar, especially those who are Buddhists or Hindus, often believe that they should accept things as they are. Doing so can result in accumulation of good karma. Additionally, religious beliefs may stress that there will be consequences and punishment for people who do wrong in this life in their next one, so there is not an immediate need to resolve an issue.<sup>76</sup>

<sup>71</sup>Searching for justice in the law: Understanding Access to justice in Myanmar – Findings from the Myanmar Justice Survey 2017. Yangon, Myanmar, My Justice, 2017; Lisa Denney et al, 2016; Access to Justice and Informal Justice Research, Shan State. Yangon, Myanmar, UNDP, 2017; Ms. Aye Gets Hurt Twice, Access to Justice and Informal Justice Systems Research, Rakhine State, Yangon, Myanmar, UNDP, 2017; and Access to Justice and Informal Justice Research, Yangon Region. Yangon, Myanmar, UNDP, 2017.

<sup>72</sup>Searching for justice in the law: Understanding Access to justice in Myanmar. 7.

<sup>73</sup>Ibid. 69.

<sup>74</sup>Denney, et al, 31.

<sup>75</sup>Denney, et al, 33; and Searching for justice in the law: Understanding Access to justice in Myanmar. 69’ and Kyed, Helene Maria, Community-Based Dispute Resolution: Exploring everyday justice provision in Southeast Myanmar, Yangon, Myanmar, USAID, International Rescue, Danish Institute for International Studies and Project for Local Empowerment, 2018. 57.

<sup>76</sup>Kyed, Helene Maria, Community-Based Dispute Resolution: Exploring everyday justice provision in Southeast Myanmar. 103.

Other significant reasons why people may choose not to raise or try and resolve disputes, grievances or conflicts is that they do not feel empowered or capable of doing so. This is especially the case when a powerful party or government officials or institutions are involved. For example, in the past, issues concerning land confiscation by the government, private companies or other powerful parties had a very low chance of being settled favorably for a grievant, so it was often seen as either risky or not worth the effort to even raise or try to settle them.

The kind of dispute, grievance or conflict, however, does seem to make a difference regarding whether or not parties are willing pursue dispute resolution and use specific procedures to settle a dispute, grievance or conflict, or no procedures at all. Issues that parties are most likely to pursue are those that significantly impact their day-to-day lives. For example, a 2017 survey of 3,563 randomly selected participants over the age of 18 and from all states and regions in the country found that three-quarters of them pursued resolution efforts when a dispute was over land.<sup>77</sup>

A significant number of parties also drop disputes or grievances shortly after raising them and engaging in unsuccessful negotiations. A study in Shan State found that in 21 of 53 cases complainants identified as a high priority to resolve, including those over land and in which involved parties did not reach a negotiated agreement, the initiating party did not further pursue any other dispute resolution procedures to help settle contested issues.<sup>78</sup> Some of the reasons that complainants in this study and others have given for not pursuing other methods of resolution, such as mediation or third-party decision-making, included: concerns about the risk of further damaging relationships between parties or wanting to avoid shaming them; costs related to taking further action - travel costs to go to government offices to try and achieve a settlement or decision; a decision that the issue in dispute was not as important as originally thought; a belief that further effort would be a waste of time, lost opportunity costs for earnings from doing farm work or serving as hired labor; parties not knowing who to turn to for help or not believing that anyone could be of assistance; the other party having more money to pursue the case; or there was no formal contract or agreement to guide agreement-making.<sup>79</sup>

Finally, people fail to initiate action to resolve disputes or conflicts because they do not trust, lack knowledge about or do not believe that the formal justice system composed of judicial and administrative mechanisms can or will produce fair outcomes. Perceived or actual corruption by government institutions and their personnel also appears to be a significant barrier to pursuing resolution initiatives.<sup>80</sup>

<sup>77</sup>The study, however, did not differentiate whether participants in land disputes were private parties with potentially similar levels of power and influence, or one of them was the Tatmadaw, a government ministry or department or a powerful economic entity such as a company. It is more likely that respondent in the survey that decided to pursue resolution efforts were of the first category of actors, private parties, although there have been significant applications by people in Myanmar to the three GORUM land-focused institutions and dispute resolution mechanisms to resolve disputes or seek redress of grievances.

<sup>78</sup>Access to Justice and Informal Justice Research, Shan State. 65.

<sup>79</sup>Ibid. 65 – 66; and Searching for justice in the law: Understanding Access to justice in Myanmar. 69.

<sup>80</sup>Ibid. 31. Corruption by government officials was also mentioned in many interviews conducted by the NRC Team as a barrier to trusting GORUM dispute resolution mechanisms and believing that they would result in fair and just decisions or any outcome at all.

## Dispute Resolution Engagement

When disputants or grievants do decide to engage and pursue resolution of important issues, especially those over land, what path or paths do they take? Myanmar has a pluralistic legal system with multiple statutory laws, regulations and rules and customary practices that pertain to land<sup>81</sup> It also has both statutory and customary dispute and grievance resolution institutions, mechanisms, procedures and personnel that address land issues.

The two most common methods for engagement in dispute resolution in Myanmar are authoritative administrative or judicial adjudication and customary procedures. A third option, Collaborative Dispute Resolution (CDR) is used informally, although the procedures have similarities and in many cases are identical to some customary procedures.

### Authoritative Administrative and Judicial Dispute Resolution

Dispute resolution in Myanmar is influenced by two trends in the country's history and political culture. The first is a tradition of Top-Down rule and authoritative decision making. The second, involves disputing parties collaborating to reach consensus agreements on contested issues, or voluntarily submitting their differences to a trusted third party for a recommendation or decision for a settlement and accepting the outcome.

Myanmar has a long history of indigenous rulers, colonial officials, military authorities, or government administrators or courts making authoritative decisions. Within the contexts of absolute monarchies and colonialism, followed by military government, 'general administration' was premised on the need for bureaucratic units to support powerful executives—monarchs, colonial officers, and eventually regional military commanders—to fulfill general tasks and manage the state's engagement with the general public.<sup>82</sup> As J.S. Furnivall argued that historically, general administration in Burma (sic Myanmar) entailed the presence of 'omni-competent' administrators who 'performed all the essential functions of government: they tried civil cases as judges, and criminal cases as magistrates; they collected the revenue and were generally responsible for the promotion of welfare throughout their local charges'.<sup>83</sup>

At the local village level, Top-Down decision-making was also common. Furnivall noted that in villages prior to the British colonial period, and in many cases during this time, "the usual practice for people, to settle their disputes, civil or criminal, [was] through informal arbitration by local elders; in difficult cases they could invite the assistance of the Circle Headman though he had no legal status in such matters; but ordinarily "they would hardly ever dream of disputing the decision of the local elders; for them it was as binding as any Civil Court would make it."<sup>84</sup>

<sup>81</sup>Current Myanmar statutory law does not recognize customary land management and dispute resolution practices. They are, however, recognized in the National Land Use Policy, which advocates for their formal recognition.

<sup>82</sup>Kyi Pyit Chit Saw and Matthew Arnold, *Administering the State in Myanmar: An overview of the General Administration Department*, Discussion Paper 6, Yangon, Myanmar, Myanmar Development Resource Institute's Centre for Economic and Social Development and The Asia Foundation, October 2014, 4.

<sup>83</sup>IBID, 4, citing J.S. Furnivall, *The Governance of Modern Burma*. New York: Institute of Pacific Relations, 1958.

<sup>84</sup>J.S. Furnivall, *The Governance of Modern Burma*, 87, cited from his *Report on the Administration of Burma, 1868-69*, 60. Circle Headmen were individuals involved in overseeing the process of selecting village headmen and who also administered "Circles", collections of villages that were forerunners of Village Tracts.

During the British colonial period, Top-Down governmental authoritative decision-making at the local level was formalized, and continued to influence many of the norms, disputant or grievant expectations and third-party practices.<sup>85</sup> In post-colonial times, especially during the time of military rule, the state continued the pattern of administrative decision-making at all levels of government from central to Ward and Village Tract.<sup>86</sup>

Since 2012, the government has established the Administrative Bodies of the Farmland; the Central Committee for Management of Vacant, Fallow and Virgin Lands; and the Central Committee for Rescrutinizing Confiscated Lands and Other Lands to administratively resolve land disputes.

### Customary Dispute Resolution

Top-Down authoritative decision-making are not the only ways disputes, grievances or conflicts are resolved in Myanmar. Although some ethnic communities and villages do utilize more authoritative dispute resolution procedures, others use more collaborative customary methods.<sup>87</sup> The latter processes involve disputing parties working together, either on their own or with the help of a mutually acceptable third party, to identify or build mutually acceptable agreements, or voluntarily submit their issues to a respected customary authority or group for a recommendation or decision for a settlement, and accept the outcome. The result of most customary procedures where a settlement is reached, is a consensus agreement, one that all parties can accept or support, “live with”, or, at a minimum, will not oppose.

Customary dispute resolution procedures are generally used by members of ethnic communities and villages and not by statutory governmental administrative or judicial bodies.<sup>88</sup> The latter generally use standards and criteria and adversarial adjudicatory procedures that result in win/lose outcomes, which are often different from those found in most ethnic communities. Many villagers in the past, and currently today, see governmental procedures and outcomes as “based on principles wholly foreign to Burmese [ and other ethnic communities’] ideas of justice, which favoured compromise rather than the letter of the law.<sup>89</sup> This view, however, is changing as villagers are now beginning to view an authoritative decision by a government administrative body, or on rarer occasions a court, as potentially the best way to obtain a binding decision on contested issues.<sup>90</sup>

The practice of customary dispute resolution is not uniform across Myanmar and its ethnic communities. Customary dispute resolution commonly involves implementation of a range of procedures to help parties collaborate to reach satisfactory agreements or voluntarily accept third-party recommendations or

<sup>85</sup>J.S. Furnivall, *The Governance of Modern Burma*.

<sup>86</sup>The Farmland Law of 2012 states: “Land disputes in respect of the right for farming shall be decided by the Ward or Village Tract Administrative Body of the Farmland after opening the case file and making actions such as enquiry and hearing about the land disputes.”

<sup>87</sup>“Customary” is used in this report, as opposed to “traditional” to describe current common practices that have evolved over time and are regularly practiced by a specific community of people. In most countries and cultures “traditional” dispute resolution, the way disputes were resolved in the distant past, often no longer exists. “Traditional practices” have commonly been significantly influenced by and adopted many assumptions, values, norms and procedures from external sources.

<sup>88</sup>The exceptions are some Village Tract Authorities and their committee members who are members of villages and may also be customary leaders.

<sup>89</sup>Furnivall, 14.

<sup>90</sup>This view, however, is mitigated by and ongoing lack of trust in many government institutions and courts, problems with their performance and timely delivery of favorable outcomes and perceptions and direct experiences by many villagers that they are corrupt.

decisions. Some of these include: direct negotiations between involved parties; provision of advice from respected community members; process-focused mediation; conciliation in which a third party mediates and provides advice concerning parties' relationships and/or a potential substantive settlement; efforts on the part of intermediaries or members of a broader community to persuade disputants to accept a recommendation by a respected community authority; and non-binding third-party decision-making. More will be said about customary procedures later in this study when examining dispute resolution at ward, village and Ward and Village Tract levels.

### CDR Approaches and Procedures

Collaborative Dispute Resolution (CDR) encompasses a number of procedures that facilitate voluntary engagement of parties in a dispute, with a grievance or in conflict to cooperate and discover or develop mutually acceptable agreements that settle their differences. CDR is similar to many customary dispute resolution processes that seek to develop consensus agreements. Consensus may be reached through unassisted discussions or negotiations between disputing parties; with the help of a third party to help parties address relationship issues and engage in effective problem-solving or negotiations; or voluntary acceptance by involved parties of a third-party recommendation or decision for a settlement.

Listed below are common CDR approaches and procedures.

### Collaborative Dispute, Grievance and Conflict Resolution Procedures and Skills

- Conflict coaching – Procedure used by third parties to improve the capacity of one or more parties involved in a dispute, grievance or conflict to promote and enhance their effective engagement in resolution activities.
- Communications procedures and skills – Methods used by parties to a dispute, grievance or conflict or by third parties to enhance listening and speaking skills; asking a range of types of questions; identifying and framing diverse types of interests; and framing issues to be addressed in a mutually acceptable manner.
- Interview and data collection procedures – Methods used by parties to a dispute, grievance or conflict or by third parties for interviewing, data gathering and conducting site visits.
- Situation assessments/conflict analysis and strategy design procedures – Processes that can be used by parties to a dispute, grievance or conflict or by third parties to enhance greater understanding of issues and interests, conflict dynamics, procedures that are or could be used to manage and resolve differences, potential options for resolution and strategies to move parties toward agreements.
- Convening – The process of conducting a situation assessment/conflict analysis and bringing parties together to talk and address a problem or resolve a dispute, grievance or conflict. Convening may be conducted by a third party or one or more of involved parties.
- Facilitation – A third party process in which an acceptable individual or group provides process assistance to design and conduct a meeting to establish or build relationships, promote understanding, share information or determine a way forward to solve a problem or dispute.

- Fact-finding – A third party process in which an independent, impartial and neutral individual or group investigates a dispute, grievance or conflict that makes recommendations for how it might or should be resolved.
- Joint Fact-finding – Investigation of issues in a dispute or conflict – such as physical/geographic, technical or, on occasion, legal – by a single committee or team composed of stakeholders and/or decision-makers and experts from different “sides” in an effort to reach a common understanding of facts related to the case and a potential agreement.
- Negotiation – Unassisted talks to make a transaction or resolve a dispute, grievance or conflict.
- Mediation – A third-party dispute, grievance or conflict resolution procedure in which a mutually acceptable individual or group helps involved parties to conduct productive negotiations and reach mutually acceptable voluntary agreements.<sup>91</sup>
- Private meetings and “pendulum” talks – Third party strategies and procedures that involve private meetings with disputing parties and shuttling between them to further agreement-making.
- Conciliation – A third party dispute, grievance or conflict resolution process in which an independent intermediary gathers relevant information through interviews with involved or other knowledgeable parties, mediates and, if necessary, makes a recommendation for how parties’ differences might be satisfactorily resolved.<sup>92</sup>
- Arbitration – A third party dispute, grievance or conflict resolution process in which disputants or grievants voluntarily submit issues in dispute to an acceptable individual or group for either a non-binding recommendation for a settlement or a binding decision.
- Reconciliation – A range of procedures and activities to help parties understand different points of view, reconcile them, accept a changed situation or outcome and positively redefine their relationships

<sup>91</sup>Mediation is practiced in a variety of ways around the world. (See Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, San Francisco, Josey-Bass, 4<sup>th</sup> ed., 2014.) Two major variables in mediation practice are who provides mediation assistance and the procedures used.

Mediation is commonly provided either by “insider partials” or “insider mediators, who commonly have some kind of direct relationships with involved parties or “external independent mediators” who are more distant, neutral and impartial. (For more information on “insider partials”/ “internal mediators” and independent mediators, see, Wehr and John Paul Lederach, “Mediating Conflict in Central America”, in *Resolving International Conflicts: The Theory and Practice of Mediation*, ed. Jacob Berkovitch, Boulder, Colorado, Lynne Rienner Publishers, 1996, 56; Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*; Michelle Maiese. “Insider Partial Mediation” at: [http://beyondintractability.org/m/insider\\_partial.jsp](http://beyondintractability.org/m/insider_partial.jsp).); and Faye Leone and Tyler Giannuni, *Traditions of Conflict Resolution in Burma, Chang Mai, Thailand*: EarthRights International, 2005.)

<sup>92</sup>There is often confusion between the roles and functions of mediators and mediation and conciliators and conciliation. In conciliation, conciliators play a much more engaged and directive role than do mediators. Conciliators are commonly individuals, and occasionally groups of people, with significant authority and knowledge about the issues in dispute and see themselves, rather than the parties, as responsible for finding or developing solutions, if the parties cannot do so on their own. Conciliators actively engage throughout the conciliation process – gathering information about contested issues, uncovering the views and interests of involved parties, identifying or providing potential parameters for what might be an acceptable settlement, giving advice, trying out multiple options for potential agreements and, if needed, making a specific recommendation for a settlement. Often parties go to conciliators because they want their ideas on how to settle a dispute and, if necessary, to break a deadlock.

## The Rationale and Benefits of Introducing, Implementing and Institutionalizing CDR Approaches and Procedures in Myanmar

Before analyzing how land disputes are handled by GORUM government, KNU administrative and community institutions, it is important to consider the rationale and potential benefits of introducing, implementing and institutionalizing CDR approaches and procedures as components of existing mechanisms. There are three kinds of possible benefits: 1) substantive, 2) procedural and 3) relationship/psychological benefits. Some of these are outlined in Table 1: Rationale and Benefits for Introducing, Implementing and Institutionalizing CDR Approaches and Procedures for Resolving Land Disputes, Grievances and Conflicts. Each of these benefits may potentially be gained by stakeholders who are end-users of CDR procedures and the institutions and personnel that provide and implement them.

Table 1: The Rationale and Benefits for Introducing, Implementing and Institutionalizing CDR Approaches and Procedures for Resolving Land Disputes, Grievances and Conflicts

Potential Benefits	For Government, Administrative Agencies and/or Community Providers of Dispute, Grievance or Conflict Resolution Assistance	For Stakeholders – Farmers, Government Agencies, Companies and other parties to Disputes, Grievances or Conflicts
Potential Substantive Benefits	<ul style="list-style-type: none"> <li>▪ Greater opportunities for third parties to gather additional and potentially more accurate information about all parties' issues and interests</li> <li>Increased understanding by third parties of the issues and interests to be addressed and ideally met in a satisfactory outcome</li> <li>▪ Expanded opportunities to assist in the development and exploration of potential solutions to address contested issues and interests</li> <li>▪ Potential avoidance, unless necessary, of exclusively win/lose outcomes that may perpetuate or escalate a dispute, grievance or conflict</li> <li>▪ Increased opportunities to identify and/or build customized solutions that meet the interests of involved parties to the greatest extent possible</li> <li>▪ More informed decision-making, if necessary, by third parties</li> <li>Greater voluntary acceptance of</li> <li>▪ agreements or decisions by involved parties</li> </ul>	<ul style="list-style-type: none"> <li>▪ More opportunities for all parties to gather relevant information about issues in question and increase their knowledge and understanding of the diversity of interests that need to be addressed and met in a satisfactory outcome</li> <li>▪ Expanded opportunities for parties to develop, present and explore a range of possible solutions to address contested issues and associated interests</li> <li>▪ Potential avoidance of exclusively win/lose decisions by a third-party decision-maker that may not be accepted or result in the escalation of the dispute, grievance or conflict</li> <li>▪ Greater opportunities for parties to directly engage and develop customized agreements/outcomes that address specific situations or meet distinctive needs and interests of different parties</li> <li>▪ Higher number of integrative solutions that meet, to the greatest extent possible, all parties' interests</li> <li>▪ Greater clarity regarding requirements for parties to implement agreements or third-party recommendations or decisions</li> </ul>

Table 1: The Rationale and Benefits for Introducing, Implementing and Institutionalizing CDR Approaches and Procedures for Resolving Land Disputes and Grievances (Continued)

<p><b>Potential Substantive Benefits (Continued)</b></p>	<ul style="list-style-type: none"> <li>▪ Early warning about repetitive, structural or systemic causes of disputes, grievances or conflicts so they can be addressed and prevented in the future</li> </ul>	<ul style="list-style-type: none"> <li>▪ Greater transparency of outcomes</li> </ul>
<p><b>Potential Procedural Benefits</b></p>	<ul style="list-style-type: none"> <li>▪ Greater opportunities to lower institutional transaction costs (involvement of multiple personnel for investigations, meetings, report writing, development of recommendations or decisions, appeals, coordination with other institutions, etc.; time required to process cases; financial expenditures for personnel, to make site visits, etc.)</li> <li>▪ Higher likelihood of early resolution of disputes, grievances or conflicts</li> <li>▪ Increased legitimacy of institutional mechanisms and resolution procedures due to higher levels of participation by involved parties</li> <li>▪ Greater opportunities for third parties and those involved in a dispute, grievance or conflict to collaborate, engage in dialogue and deliberations and identify or develop customized integrative solutions that better meet parties' interests</li> <li>▪ Higher number of voluntary agreements and lower number of third-party decisions</li> <li>▪ Fewer appeals</li> <li>▪ Higher potential for all parties to voluntarily comply with terms of agreements and/or recommendations of decisions by a third party</li> <li>▪ Greater potential for more rapid implementation of agreements, recommendations or decisions because they have been accepted by all parties</li> <li>▪ Lowered activities required to enforce compliance</li> </ul>	<ul style="list-style-type: none"> <li>▪ Greater transparency for parties of resolution procedures and activities</li> <li>▪ Greater "buy-in" and ownership of the dispute, grievance and conflict resolution procedures by involved parties</li> <li>▪ Increased opportunities for early resolution of disputes and grievances and subsequent lowering of transaction costs for farmers (e.g. more time available for farming, lowered financial costs to pay for dispute resolution assistance, avoidance of delays in reaching a resolution, etc.); and for governmental and non-governmental stakeholders, such as Ministries or companies (personnel time, financial costs, unpredictable outcomes, etc.)</li> <li>▪ More involvement of all parties in dispute, grievance or conflict resolution procedures beyond presenting their case orally or in written form to a third party</li> <li>▪ Greater opportunities for parties to directly present, clarify discuss and understand the interests of all stakeholders (non-governmental parties, government entities and companies)</li> <li>▪ More opportunities for disputants, grievants and other concerned parties to engage in collaborative identification or development of integrative solutions that better meet all parties' interests</li> <li>▪ Provision of procedures for parties to conduct joint cost/benefit analyses of potential settlements and compare options developed through collaboration with potential decisions by a third-party decision-maker</li> </ul>

- Clear demonstration of the effectiveness of collaborative procedures that can be used to address any future implementation or compliance issues or other disputes that may arise
- More opportunities for institutions and their members to increase learning and improve dispute, grievance or conflict resolution procedures and outcomes
- Increased potential for more rapid implementation of agreements, recommendations or decisions
- Greater legitimacy of outcomes due to procedures used to reach them

Table 1: The Rationale and Benefits for Introducing, Implementing and Institutionalizing CDR Approaches and Procedures for Resolving Land Disputes and Grievances (Continued)

<p><b>Potential Relationship and Psychological Benefits</b></p>	<ul style="list-style-type: none"> <li>▪ Increased trust by parties in government, administrative or community-based resolution institutions, mechanisms, procedures and personnel</li> <li>▪ Greater acceptance by parties of the outcome of a dispute, grievance or conflict, regardless of whether it was achieved through voluntary agreements between or among parties or their acceptance of a recommendation or decision by a third-party decision maker</li> <li>▪ Establishment of a foundation for ongoing positive working relationships between the government or administrative agency providing dispute resolution assistance and involved stakeholders, which helps facilitate implementation and compliance with agreements or outcomes</li> <li>▪ Preservation of the dignity of all parties by saving and giving “face”<sup>93</sup></li> </ul>	<ul style="list-style-type: none"> <li>▪ Greater psychological buy-in, ownership and satisfaction by all parties of procedures used and outcomes achieved</li> <li>▪ Potential lowering of individual, group or organizational reputational risks– such as damage to reputation, loss of trust, impacts on revenue or finances, etc. – because of parties’ positive engagement collaborative processes as opposed to adversarial proceedings</li> <li>▪ Less damage to relationships between or among disputants, grievants, other parties or government entities</li> <li>▪ Establishment of a foundation for ongoing positive working relationships that help facilitate implementation and compliance with agreements or outcomes</li> <li>▪ Preservation of the dignity of all parties by saving giving “face”</li> </ul>
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<sup>93</sup>“Face” is a combination of an individual’s social standing, reputation, influence, dignity, and honor. Causing someone to “lose face” lowers how the affected person sees themselves or are viewed by others. Saving or “giving face” raises the estimation and worth of the affected person, both in their own eyes and in those of others. Greg Rodgers, “Saving Face and Losing Face: How to Save Face and Not Cause Someone to Lose Face”. <https://www.tripsavvy.com/saving-face-and-losing-face-1458303>

## Village Dispute Resolution in Myanmar

Before examining the three GORUM land dispute and grievance resolution institutions and those of the KNU, it will be useful to analyze how land and other disputes are handled and resolved at local levels in Myanmar, principally in villages. An analysis and understanding of acceptable intermediaries and procedures for resolving land disputes at the local level is important when considering how more collaborative dispute resolution approaches might be introduced and implemented in statutory government dispute resolution mechanisms.

### Villages in Myanmar

Villages are geographic areas and political jurisdictions designated by Myanmar's Ward and Village Tract Administration Law of 2012 (WVTAL), which are not included within a town boundary.<sup>94</sup> According to Government statistics, as of August 2015, there were 70,838 villages in the country.<sup>95</sup>

### Village Organization and Personnel

Villages in the GOROM are composed of 10 and 100-household units. Heads of 10-household units secure their position by recognition of their members as being the head of a household or group of households, their position as a customary leader and often their economic status or level of education.

10-household heads stand for election as potential heads of a 100-household unit. Household heads in 100-household clusters elect a 100-household head by majority vote who is recognized as the Village Head.<sup>96</sup>

Beyond leaders of 10 and 100-households, most villages have elders or other respected persons who may play a role in governance, land allocation and use and dispute resolution. They may serve in either informal or formal roles when performing each function.

### Village Disputes, Resolution Mechanisms, Personnel and Procedures

The kinds and frequency of land disputes that develop in villages varies significantly across the country. Many villages in which NRC interviews or focus groups were conducted reported that they have very few intra-village land disputes. As one interviewee said in Kayin State:

We trust and understand each other. People from the village never create disagreements or arguments over land boundaries because we know which space is our own. The land is marked by big trees, rocks or bamboo bushes. Everyone accepts it, because we have thout kyar. Even if someone moves away and works in Thailand, we know which area of land is theirs. It is their grandparents' land, so we always respect that. Because Karen people have thout kyar.<sup>97</sup>

<sup>94</sup>The Ward and Village Tract Administration Law, Chapter I, Title and Definition, (b), 2 & 3, 2012.

<sup>95</sup>"Myanmar Administrative Structure" (PDF). Myanmar Information Management Unit. August 2015.

<sup>96</sup>Third Amendment to the 2012 Ward and Village Tract Administrative Law, 2018.

<sup>97</sup>Shaun Butta and Justine Chambers, A Survey of Customary Land Dispute Mechanisms in Kayin State, Eastern Bago Division and Shan State, 2018, 29.

When disputes do arise, they are often settled by direct talks that are commonly strongly influenced by village norms and ethics that support getting along with family and neighbors and maintaining village harmony. For example, in Kayin, Plong Karen villagers often talk about having thout kyar relations with family and neighbors. This ethic requires villagers to “live simply and honestly, without pride and greed and ... value harmonious relations, over and above individual gain.”<sup>98</sup>

When disputes do occur in villages, they are commonly over inheritance, division of property as a result of divorce, shared ownership and use of land by family members, transfers or sales of land, conflicting or lack of documents related to land, refusal by current occupants to vacate and return property to original users who for various reasons vacated, encroachment and boundaries between villagers’ land or damage to fields and crops by cattle.<sup>99</sup> Local disputes may also arise due to population pressures, occupation of land by displaced persons, or issues related to returnees.<sup>100</sup>

Across multiple interviews and focus groups participants identified a significant number of grievances over legal or illegal land confiscations between villagers and villages and the Tatmadaw, ministries or departments, other government entities and private companies. Interviewees reported that these kind of disputes or grievances were virtually impossible to resolve at the village level.

If settlements were to happen, it would require talks or negotiations between villagers who had lost land and the party that seized it. Claimants, for a satisfactory resolution, would need to have some or all of their confiscated land returned, be given alternative land or be compensated for their loss by a fair monetary payment. Interviewees indicated that these options rarely, if ever happened.

Villagers frequently noted that they do not have the knowledge, negotiation or advocacy skills, language capacity in Myanmar or means of influence to engage as equals with more powerful parties. Village leaders are often in similar positions as villagers. Additionally, they do not have the authority to compel participation of governmental or powerful parties to participate in dispute or grievance resolution activities or make recommendations or decisions to settle these kinds of disputes.

In the past, especially during the period of military rule, when village leaders tried to handle these cases many were arrested or punished in some other manner. Today, they either do not take these cases or are mostly ignored by powerful parties.

Numerous studies and interviews with villagers and users of both village and statutory administrative dispute resolution mechanisms indicate a strong preference to try and resolve local disputes within villages.<sup>101</sup> A focus group in Mon State that involved farmers, Village Tract Authorities, a Township Administrator and NRC ICLA staff concluded that:

<sup>98</sup>Justine Chambers, “In Pursuit of Morality: Moral Agency and Everyday Ethics Amongst Plong Karen Buddhists of Southeastern Myanmar” PhD diss, Australian National University, 2018, 91.

<sup>99</sup>Helene Maria Kyed, *Community-Based Dispute Resolution: Exploring everyday justice provision in Southeast Myanmar*. 65. and Denney, et al. 2016. 10-11.

<sup>100</sup>Shaun Butta and Justine Chambers, *A Survey of Customary Land Dispute Mechanisms in Kayin State, Eastern Bago Division and Shan State*, 2018. 86.

<sup>101</sup>Searching for justice in the law: Understanding Access to Justice in Myanmar, 2018; Denney et al, 2016; Access to Justice and Informal Justice Research, Shan State. Yangon, Myanmar, UNDP, 2017; Ms. Aye Gets Hurt Twice, Access to Justice and Informal Justice Systems Research, Rakhine State, Yangon, Myanmar, UNDP, 2017; and Access to Justice and Informal Justice Research, Yangon Region. Yangon, Myanmar, UNDP, 2017.

Aggrieved farmers do not normally trust the [government] institutions in charge of resolving land disputes or administering land. The issue of unofficial fees in land registration creates a sense of grievance and helplessness on the farmers. Whenever possible, the preference is to have land issues resolved at the village level, without involving outside actors. However, this is clearly not possible in land grabbing cases.<sup>102</sup>

Numerous studies and interviews with villagers and users of both village and statutory administrative dispute resolution mechanisms indicate a strong preference to try and resolve local disputes within villages.

Interviews and focus group discussions (FGDs) for this study also found that participants in disputes between or among villagers, generally tried direct negotiations with other parties as their preferred way to resolve their differences, which validates the findings of a number of other studies.<sup>103</sup>

If direct negotiations are not successful, many disputants turn to one or more third parties for assistance. Who provides this help at the village level varies considerably across Myanmar. It commonly depends on the parties involved, the seriousness of the case, who is available to help settle differences and village norms and customs regarding who are acceptable dispute resolution assistance providers.

For less serious cases, dispute resolution in villages is commonly practiced informally by a range of third parties commonly termed “justice facilitators”.<sup>104</sup> People serving in this capacity may be family members, neighbors, elders, 10 and 100 Household Heads, wives of Household Heads, political party representatives, members of community-based organizations (CBOs) (such as women’s organizations), religious leaders (especially monks), paramilitary personnel, educated and well-connected persons, and, less frequently, astrologers or fortunetellers.<sup>105</sup>

For less serious cases, dispute resolution in villages is commonly practiced informally by a range of third parties commonly termed “justice facilitators”.

People in dispute or with a grievance approach justice facilitators for help for a variety of reasons. They may be ashamed of or embarrassed by being in a conflict, want to keep their problems private and not raise their issues more formally or publicly. A local village leader may not be trusted or weak and unable enforce outcomes of disputes resolution procedures. One or more parties may fear a local authority or have never been involved in a customary dispute resolution process.<sup>106</sup>

Justice facilitators may talk with parties separately and shuttle between them or bring several or all parties together. Often the focus of this facilitation is to promote some aspect of reconciliation – helping parties to understand each other’s views; making different views, ideas or beliefs more compatible

<sup>102</sup>Myat Thiri Aung and Jose Arraiza, “Lessons Learnt Paper on My Justice Project”, based on focus group conducted by the NRC Team in Bilin, Mon State and other areas of the project in September 18, 2018.

<sup>103</sup>Denney, et al. 2016; Access to Justice and Informal Justice Research, Shan State; Access to Justice and Informal Justice Systems Research, Rakhine State; and Access to Justice and Informal Justice Research, Yangon Region.

<sup>104</sup>Denney et al, 2016. The term “facilitators” is used for people in this role rather than “justice providers” because the former may not directly help to resolve disputes. See also, Helene Maria Kyed, Community-Based Dispute Resolution: Exploring everyday justice provision in Southeast Myanmar. 10.

<sup>105</sup>Ibid. 29 and 33.

<sup>106</sup>Helene Maria Kyed, Community-based Dispute Resolution: Exploring everyday justice provision in Southeast Myanmar. 74. d

with each other; establishing, mending or restoring amicable relations between disputing parties; and/or facilitating voluntary acceptance of a situation.

Procedures commonly used by justice facilitators to help disputing parties include: listening; helping to improve communications between and among parties, imparting advice, making suggestions and providing “soothing words. If reconciliation, acceptance of a situation or an agreement among parties cannot be reached informally as a result of by a justice facilitator, disputants or grievants may decide to pursue more direct problem-solving or dispute resolution efforts.

In some circumstances and communities, facilitators who are 10 or 100-Household Heads, may shift from being facilitators and become mediators.<sup>107</sup> In others justice facilitators may make referrals, serve as liaisons or accompany disputants or grievants to appropriate authoritative leaders in the village or to Village Tract Administrators and/or their committees for additional dispute resolution assistance.<sup>108</sup> In yet others, disputants may go on their own directly to village leaders for assistance.<sup>109</sup>

There are neither universal criteria for choice of third parties in Myanmar nor sequences for contacts to obtain more formal help from village leaders. In some communities, the Village Headman is often the first choice. If he cannot persuade disputing parties to settle a case, he may elevate it to a village elder. In other locales, disputants may go directly to an elder or elders’ committee for help. In yet other communities, elders and the village leader may work together to resolve disputes.

For example, in Shan State, villagers in Pa’O communities, as do many in Shan villages, commonly first go to an elder for help.<sup>110</sup> Elders are seen as having the requisite historical knowledge of land and land boundaries that can help people negotiate mutually acceptable agreements. In Shan communities, if an elder cannot help the parties to reach an agreement, a council of elders may be convened to provide further resolution assistance.<sup>111</sup>

Other entities in villages, other than individual Village Heads, elders or other respected persons to help resolve land disputes are either ad hoc or standing committees. Ad hoc committees are commonly formed by a Village Head and composed of respected members of the community, and on occasion elders. They are formed to address a specific dispute and upon concluding their work are disbanded.

<sup>107</sup>Ibid. Conclusions about provision of mediation at ward and village levels and wards and wards and village tracts was reached from research in Mon State and the Yangon region and may not be the case across the country. The variable in these two areas seemed to be whether a Village or Ward Tract Administrator was nearby and accessible and how many people lived in the ward or village. When the Administrator was not easily accessible, or the ward or village had a large population, facilitators were more likely to provide some mediation assistance.

<sup>108</sup>Helene Maria Kyed, *Community-Based Dispute Resolution: Exploring everyday justice provision in Southeast Myanmar*. 74.

<sup>109</sup>NRC focus group interview, Mon State, Thaton Township, Ahnan Pin VT, Ahnan Pin village, December 13, 2017.

<sup>110</sup>Interview conducted by a member of the NRC Team in a Pa’O village in the Pa’O Autonomous Region of Shan State, June 11, 2108

<sup>111</sup>Butta S. and Chambers, J., *A Survey of Customary Land Dispute Mechanisms in Kayin State, Eastern Bago Division and Shan State*. 81.

Examples of standing committees are village land committees and elders' councils.<sup>112</sup> The roles, authorities and duration of members' serving on these committees are generally determined by village norms and customs.

There is not one way across the country that members of either ad hoc or standing committees are identified, selected or appointed, nor is there one way that these bodies are convened, structured or operate.

Procedures used by committees to provide dispute resolution differ based on committee leaders and members involved, their orientations toward either more collaborative or third-party decision-making and community norms concerning methods for settling differences among members. In some communities, committees like individual facilitators or mediators, may convene meetings for parties in dispute to share their views, structure a problem-solving or negotiation process, facilitate communications between disputants (either directly or by shuttling between them), ask clarifying questions, call witnesses, help parties generate potential options for agreement, provide advice, help identify or build consensus agreements or make a recommendation for a settlement that members believe all parties will accept. Committees and their members may also try and persuade disputants to voluntarily accept their recommendation for a settlement or a decision. Persuasion often involves raising parties' awareness about the risks and costs of elevation or referral of the case to a higher authority.<sup>113</sup>

Procedures used by committees to provide dispute resolution differ based on committee leaders and members involved, their orientations toward either more collaborative or third-party decision-making and community norms concerning methods for settling differences among members.

Additionally, like individual dispute resolvers when making recommendations, committees often try to promote reconciliation between parties to encourage future positive working relationships between them and other concerned community members.

Other committees, however, do not engage in extensive facilitation or mediation activities before hearing parties' views and making a non-binding recommendation for a settlement or a decision.<sup>114</sup> Recommendations in these village dispute resolution proceedings are commonly called "decisions".

An important issue in community dispute resolution in which participation is voluntary, but also strongly encouraged by village norms and members, is how encourage and ensure parties' compliance with agreements or third-party recommendations or "decisions". Participants in interviews conducted by NRC reported that, especially in times past, disputants generally respected the views of committees or elders, almost always accepted their recommendations or decisions and complied with dispute resolution outcomes. Peer pressure from disputants' family or other community members also encouraged compliance.

<sup>112</sup>Ibid. NRC interview conducted in Shan State, June 11, 2018; Focus group discussion facilitated by NRC in Mon State, Thaton Township, Ahnan Pin VT, Ahnan Pin village, December 13, 2017.

<sup>113</sup>Helene Maria Kyed, *Community-Based Dispute Resolution: Exploring everyday justice provision in Southeast Myanmar*. 9.

<sup>114</sup>NRC interviews in Shan State and Kachin State by Shaun Butta, and interviews conducted by the NRC Team in Rakhine State.

There are, however, additional measures that village dispute resolvers may use to encourage or compel compliance. In some areas of Myanmar, when disputants reach agreements or voluntarily accept a recommendation or decision by a village leader or committee, parties are asked to sign or make a mark on a piece of paper that describes the settlement and indicates their agreement. This document serves as a record for the outcome of the case and encourages compliance with the terms of settlement.

In other cases, especially in disputes that involve criminal activities, a party guilty of an offence may be asked to sign a *khan wan*, a promissory letter that states that the offender will not commit the act again. The party signing the document is often told by the third party that if they do not comply with the terms of the *khan wan*, the case may be transferred to another entity – a Village Tract or Township Administrator, GORUM administrative land body or a court – for further action.

Occasionally, justice facilitators or facilitators from armed groups may play a role in encouraging, and in the case of the latter, compelling compliance.<sup>115</sup>

While acceptable agreements are frequently reached between or among villagers involved in land disputes with other community members, or they voluntarily accept recommendations or decisions by respected village third parties, this is not always the case. If one or more disputants is not satisfied with the outcome of dispute resolution procedures at the village level, they may request their Village Head, an elder or elders' council to refer their case to their VTA or take it to him directly on their own.<sup>116</sup> This commonly occurs when disputants and issues are highly contentious, one or more parties has a Land Use Certificate (LUC), or a powerful party who is not a member of the village is involved. Parties may also take their cases directly to VTAs if they do not trust their local leaders, see them as weak and ineffectual, believe they are corrupt, or think they do not have the will, authority or capacity to satisfactorily settle their issues and assure compliance with the outcome.

VTAs, as opposed to local village leaders, are increasingly viewed and accessed by disputants as the appropriate third parties to handle land disputes. They are seen to have more authority than any village leaders and to be more likely to secure agreements or make decisions that disputing parties will accept and comply with. Additionally, since the GORUM's introduction of LUCs, and the increasing importance for farmers to possess statutory land-use documents, the authority of local leaders as dispute resolvers who use customary standards and criteria for land allocation and use-rights has declined.<sup>117</sup>

<sup>115</sup>Helene Maria Kyed in her study, *Community-Based Dispute Resolution: Exploring everyday justice provision in Southeast Myanmar*, found that to be the case in Southeast Myanmar. 74 and 79.

<sup>116</sup>If, however, one or more disputing parties have a Form 7 Land Use Certificate, they can take their case directly to the Village Tract Administrator without going through any village or ward level dispute resolution process.

<sup>117</sup>Shaun Butta and Justine Chambers *A Survey of Customary Land Dispute Mechanisms in Kayin State, Eastern Bago Division and Shan State*. 93-94.

## Performance of Village Dispute Resolution Institutions and Mechanisms relative to the UNGPs “Effectiveness Criteria” and an Analysis of Customary Procedures and their compatibility with CDR

The focus of this study is principally on formal GORUM institutions, mechanisms, personnel and procedures for the resolution of land disputes and grievances. A detailed comparison of local community and customary dispute and grievance resolution mechanisms and procedures and the UNGPs’ “Effectiveness Criteria” is beyond the scope of this research.<sup>118</sup> It should be noted, however, that many village dispute resolution institutions, mechanisms, procedures and personnel do conform with a number of the UNGPs ad Effectiveness Criteria.

Dispute resolution providers and procedures are generally seen by users in villages to be legitimate and have significant credibility as means to resolve differences. The exception is where a village leader, elder or others involved in a local dispute resolution initiative are seen by disputants as being biased due to personal connections with involved parties or their families, have conflicts of interest or are corrupt or do not have the authority to make decisions on specific kinds of cases, most notably those that involve land grabbing.<sup>119</sup>

Village mechanisms, personnel and procedures are also easily accessible for most disputants and procedures are known and reasonably predictable. Many processes at this level of dispute resolution are also fairly transparent and based on some dialogue and deliberation between involved parties. There is often some joint fact-finding by involved disputants and third parties, and opportunities for disputants and others knowledgeable about the issues in question to present their views.

Settlements are generally consensus agreements reached by parties directly negotiating with each other or with the assistance of third parties – respected village leaders, elders or committees.

Settlements are generally consensus agreements reached by parties directly negotiating with each other or with the assistance of third parties – respected village leaders, elders or committees - observing, providing process mediation, or mediation with advice or a recommendation (conciliation).

Areas where performance of village resolution mechanisms and procedures may not always be consistent with the “Effectiveness Criteria” are related to the ease of access to customary dispute resolution procedures for women, youth, minorities or other vulnerable populations.<sup>120</sup> Groups identified above in some circumstances and communities may not have the status, information or support persons needed to fully participate and effectively advocate for their interests.

Recommendations or decisions by village third parties also may not always comply with national laws and international human rights standards. Interviews and FGDs conducted in Rakhine and Shan States

<sup>118</sup>Application of the UNPPs’ “Effectiveness Criteria” to assess the performance of local customary dispute resolution institutions, mechanisms, personnel and procedures can be found in Shaun Butta and Justine Chambers, A Survey of Customary Land Dispute Mechanisms in Kayin State, Eastern Bago Division and Shan State.

<sup>119</sup>Multiple individuals interviewed and focus groups conducted by NRC reported that there is often corruption over land issues on the part of village heads. Concrete data, however, on how pervasive this issue is across the country is not available. Given the number of reports about it, however, it seems to be fairly common.

<sup>120</sup>Shaun Butta and Justine Chambers, A Survey of Customary Land Dispute Mechanisms in Kayin State, Eastern Bago Division and Shan State, Yangon, Myanmar, Norwegian Refugee Council ICLA, forthcoming report, 2018

<sup>121</sup>Feedback from NRC’s Sittwe Team, September 4, 2018, and NRC’s Taunggyi Team, September 2018.

found that village leaders or villagers often did not know about statutory HLP laws, land registration procedures or ways to apply for compensation for land grabbing.<sup>121</sup>

Although there has been some movement by village mechanisms and personnel toward compliance with national laws and international human rights standards, customary norms and practices that are not congruent with them still prevail in some communities.

Because of similarities between many customary dispute resolution practices and CDR approaches and procedures it is likely that there will be less resistance to augmenting current practices with the latter procedures. There are, however, several areas where resistance may be encountered.

In some villages, leaders, other authorities or committees may prefer their role as third party decision-makers and using procedures that give more authority and responsibility to disputants to make their own decisions.

A second potential source of resistance may be perceptions on the part of village heads elders and committees that collaborative procedures may take more time to conduct. In some cases, this may be true. Often, however, the ease and shorter time required to implement voluntary agreements mitigates additional time that may be needed to reach a negotiated or mediated settlement. Additionally, these voluntary agreements can contribute significantly to reconciliation between or among disputants and promote community harmony.

Finally, resistance may be encountered if third parties do not recognize and support international human rights standards. This may be the case regarding those related to the treatment of minorities, women and lesbian, gay, bisexual or transgender (LGBT) people. This source of resistance, however, is not necessarily the exclusive purview of customary dispute-resolvers. Statutory administrators and decision-makers may have similar biases that affect the outcome of administrative dispute resolution procedures.

## Village Tract and Ward Dispute Resolution

Village Tracts (VTs) are the lowest level of formal administrative structures of the GORUM in rural areas.

Wards are geographic areas and political jurisdictions designated by the WVTAL within a town boundary.<sup>122</sup>

Established by the GORUM, VT and Ward dispute resolution institutions and dispute and grievance resolution mechanisms are available to people living in villages and urban areas to help them resolve a range of contested issues, including those over land. Like village dispute resolution mechanisms and procedures, VT and Ward mechanisms are fairly well known to local people, are generally easily accessible and provide a range of types of dispute resolution assistance.

Because there are significant similarities between a number of village, Village Tract, Ward and CDR approaches and procedures for resolving grievances and disputes, there is an opportunity to introduce, implement and institutionalize the latter methods at this level of government.

### Mandate

The Ward or Village Tract Administration Law of 2012 (WVTAL), establishes the structure for GORUM governance and administration at the VT and Ward level. It details guiding principles, functions and duties of Village Tract Administrators (VTAs) and Ward Administrators and the responsibilities of members and residents residing in VTs and wards.

### Organization and Personnel

There are currently 16,785 Village Tracts and Wards in Myanmar.<sup>123</sup> VTs are commonly composed of 3-6 villages and their households.

Wards are individual administrative units composed of households in townships. Wards are not grouped together to form larger units.<sup>124</sup>

The Ward or Village Tract Administration Law of 2012 (WVTAL), establishes the administrative structure of Village Tracts and Wards, which are identical. Their heads are Village Tract Administrators (VTAs) or Ward Administrators (WAs).

<sup>122</sup>Ibid.

<sup>123</sup>Helene Maria Kyed, Annika Pohl Harrison and Gerard McCarthy, G., "Local democracy in Myanmar: Reflections on ward and village tract elections in 2016. Copenhagen, DIIS, 2016, 2.

<sup>124</sup>The Ward or Village Tract Administration Law, Chapter 1, Title and Definition, 2, 3 and 4, 2012; and The State of Local Governance: Trends in Myanmar – A synthesis of people's perspectives across all States and Regions, Yangon, Myanmar, UNDP (UN Development Programme), 2015b. [http://www.mm.undp.org/content/dam/Myanmar/docs/Publications/PovRedu/Local%20Governance%20Mapping/UNDP\\_MM%20State%20of%20Local%20Governance%20-%20Synthesis%20Report.pdf](http://www.mm.undp.org/content/dam/Myanmar/docs/Publications/PovRedu/Local%20Governance%20Mapping/UNDP_MM%20State%20of%20Local%20Governance%20-%20Synthesis%20Report.pdf)

Ward and Village Tract Administrators in most areas are elected community leaders who are mandated by the WVTAL to carry out a range of administrative duties for multiple villages or single wards. They serve as the major link between citizens and other levels of government. Their role is especially important in rural areas where 80% of the population live, 70% of which are engaged in agriculture.<sup>125</sup>

The Ward or Village Tract Administration Law of 2012 (WVTAL), establishes the administrative structure of Village Tracts and Wards, which are identical. Their heads are Village Tract Administrators (VTAs) or Ward Administrators (WAs).

VTAs and WAs are not staff of the GAD, the civil service of the GORUM, that is under the military-controlled Ministry of Home Affairs. VTAs and WAs, however, do report to and are supervised by GORUM Township Administrators (TAs) in 330 townships across the country.

The GAD also provides Village Tract Administrators with a non-gazetted clerk, who is a staff member of the GAD.<sup>126</sup> The main functions of the Clerk are to provide office support for VTAs. Some of their functions, with the direction or approval of the VTA, include calling and serving as master of ceremonies at meetings, compiling and distributing meeting minutes and implementing meeting decisions.

VTAs and WAs are also assisted by VT or Ward Committees, which they chair. Some committees are ad hoc and convened to address a specific issue. Others are standing committees.

One of the most important committees at the VT level is the Land Committee. This committee makes decisions on land administration issues and helps resolve disputes or grievances that have not been settled at the village level. This committee also serves as the lowest level representative of the three national institutions mandated to address land issues, disputes and grievances.

Each VT Land Committee is mandated according to the Farmland Law to have an Administrative Body of the Farmland (ABF). Often VT Land Committees are designated as ABsF. Members of ABsF include, at a minimum, the VTA, the GAD clerk, an official from the Department of Agricultural Land Management Statistics (DALMS), a farmer representative and a representative of the broader community (multiple villages within the VT). The method of selection of farmer and community committee members varies across the country. Members of some committees are selected by the VTA or WA, or, as in the past, recognized and appointed by the GAD. Members of other committees may be nominees by local villages. All farmer and community members are volunteers and are not paid.

VT Land Committees are also mandated by the Vacant, Fallow and Virgin Lands Management Law (VFVLMML) and a Presidential order to provide specific services and relevant assistance to the Central Committee for Management of Vacant, Fallow and Virgin Lands and the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands and their subsidiary bodies.<sup>127</sup>

For simplicity, in the remainder of this study, the term Village Tract Administrators (VTAs) will be used when referring to both Village Tract and Ward Administrators (WAs).

<sup>125</sup>FAO. Myanmar at a Glance <http://www.fao.org/myanmar/fao-in-myanmar/myanmar/en/>

<sup>126</sup>Clerks are full-time GAD staff, receive a salary from the government and are eligible for promotion within the Department.

<sup>127</sup>Details on specific services provided to these two bodies is detailed later in this study when discussing each institution and mechanism.

## Selection of Village Tract Administrators

Identification and selection of individuals who will be independent, unbiased, fair and incorruptible when making decisions on land administration or resolving disputes or grievances is critical for establishing and building the trust parties need when seeking assistance to achieve just outcomes of issues of concern. The WVTAL, passed under the Constitution of 2008 states “administration of ward, or village-tract shall be assigned in accord with the law to a person whose integrity is respected by the community”.<sup>128</sup> This criterion will later be seen to be important when exploring introduction, implementation and institutionalization of CDR in the work of VTAs.

To achieve the above goal, the WVTAL and its Amendments established qualifications for community members eligible to serve in this position and the method by which they are to be selected.<sup>129</sup> The process for appointing VTAs, as detailed in the WVTAL is complex and has multiple steps designed to identify and secure the services of individuals who have credibility with and support of members of the ward or villages tracts they will administer.<sup>130</sup>

Once elected, the Ministry of Home Affairs (MOHA), with the approval of the Union Government, provides VTAs with small monthly subsidies or lump sum subsidies if he or she serves his or her entire term efficiently. The amount paid, however, is often seen by VTAs to be inadequate.

VT Administrators maybe dismissed by the GAD Township Administrator if they do not carry out the functions and duties of their role as prescribed by laws, rules, regulations, orders or directives; or abuse their power, engage in malpractice or corruption, or use undue influence in their role.<sup>131</sup>

<sup>128</sup>Constitution of 2008, Article 289.

<sup>129</sup>Some of the qualifications include being citizens and born of citizen parents, having reached 25 years old or older, and having continuously resided in the relevant ward or village tract for at least five years. To make the position of the Village Tract Administrator non-political, the WVTAL requires VTAs who are members of political parties not perform any work for their party from the date of their appointment until the end of their term.

<sup>130</sup>The process begins with the Township Administrator identifying and selecting five elders from villages in the VT who are “respected by the majority and the powerful” who will serve as members of a supervisory board. The supervisory board’s function is to oversee the process of election of VT or Ward Administrators. After the supervisory board is formed it oversees the selection of a head for each group of 10 households. Selection is to be made “according to the people’s will.” One of the group of 10-household heads is then selected to be the head of a group of 100-households, again “according to the people’s will.” The pool of candidates for the position of the VTA is drawn from the group of 100 household heads. Unless there is only one person running for the position of VTA, selection is conducted using a secret ballot with one resident person per household, generally the head of household, voting. Once elected, the winner of the election must be approved and appointed by the Township Administrator who is an official of the GAD, which answers to the military controlled Ministry of Home Affairs. If a Village Tract has more than one village, members of the village may also select, again “according to the public will”, a village focal person for each of the villages in the Tract, who serves as a liaison between the village and the VTA. Candidates for this position are to be drawn from the heads of either 10 or 100 households.

<sup>131</sup>The Ward and Village Tract Administration Law, Chapter V, Ethics to be Obeyed and Upheld, 11, (a) and (b); and Chapter VIII, Permit to Resign, Temporary Suspension from Office or Termination of Office and Appointment in Substitution, 15, (b). Many civil society groups believe that people living in villages, wards or townships should have a complaint mechanism and the ability of villagers to recall VTAs rather having their position overseen exclusively by GAD officials. Grassroots Democracy: Analysis of the Ward or Village Tract Administration Law, 8.

## Guiding Principles, Functions and Responsibilities of VTAs

VTAs follow a number of principles. Those specifically related to the resolution of disputes include:

- (a) Safeguarding the fundamental rights of citizens contained in the Constitution of the Republic of the Union of Myanmar;<sup>132</sup>
- (b) Causing to enable to work and live the ward or village tract people peacefully and tranquilly;<sup>133</sup>

The functions and duties assigned to VTAs in the WVTML are diverse. Those specifically related to land and potential land disputes include:

- (a) [Assuring] Security, prevalence of law and order, community peace and tranquility and carrying out the benefit of the public;
- (b) Prohibiting the activity to cause, disturb danger and injure the public or quarreling...;
- (c) [Preventing] Trespassing on State-owned land, town and village land, agriculture land, alluvial land, road land, forest land, village owned firewood plantation land, pasture, village communal land and cemetery land without permission, prohibiting the construction of new collected house, forming new ward and village and construction swelling house and informing to take action if not obeyed;
- (d) Inspecting boundary post or stone pillars connected to land surveying posts in the ward or village tract and submitting the unusual situations arise along the boundary to the Township Administrator;
- (e) Administering the land of cultivation under the power conferred by any existing law;
- (f) Submitting to the relevant and carrying out in accord with laws of Towns and Village Lands if the plots are placed for the village lands and in the village lands;
- (g) Collecting land revenue and government loans.<sup>134</sup>

It should be noted that many of VTAs functions and duties are related to security within the VT, prohibiting or preventing specific actions, administering land and collecting land revenue and government loans. While the WVTAL does note some areas where land disputes might occur – such as trespassing, boundary issues or differences over administration of cultivated land – it does not explicitly include dispute resolution as function of VTAs or provide guidance on any procedures to be used. This is interesting as VTAs currently help resolve a wide range of disputes, including those over land, both informally, as respected members of their communities, and as chairs of Land Committees providing mandated services under the two land-related laws and the Presidential Order. Details on VTAs roles and functions concerning the resolution of land disputes are, however, provided in the Farmland Law of 2012 (FL), the Vacant, Fallow and Virgin Lands Management Law (VFVLMML) of 2012, and the Presidential Order creating the Central Reconciliation Committee for Confiscated Farmlands and Other Lands (CCRCFOL) of 2016.

<sup>132</sup>In relation to land, the Constitution for the Republic of the Union of Myanmar of 2008, Chapter I, Basic Principles of the Union, Section 37, states “The Union ... shall permit citizens right of private property, right of inheritance, right of private initiative and patent in accord with the law”.

<sup>133</sup>Ibid, Chapter VI Basic Principles of Function.

<sup>134</sup>Ibid., Chapter VII, Functions and Duties of the Ward or Village Tract Administrator, 13.

## Village Tract and Ward Dispute Resolution Mechanism and Procedures

As noted earlier, numerous studies and interviews with villagers indicate their strong preference for resolving disputes locally and at the lowest feasible level.<sup>135</sup> If, however, they cannot resolve their differences informally in their villages with the assistance of informal facilitators, Village Heads, elders or committees, the next step for seeking assistance is to approach a VTA. This level, although not part of customary procedures, is still considered by most disputants to be a local process.

In 2015 UNDP released a study, *The State of Local Governance: Trends in Myanmar*, jointly conducted by the GAD and UNDP. The research focused on 7 States/Regions – Chin, Kayin, Ayeyarwaddy, Bago, Mon, Tanintharyi and Kayah. The goal of the study was to “provide an overview of people’s perceptions of the quality of governance in general and the quality of governance in service delivery at the township and village tract or ward level...”<sup>136</sup>

Participants in the study identified three major roles for Village Tract and Ward Administrators: 1) mediation of conflicts between villagers (49%), 2) ensuring peace and security in the village (42%), and 3) bringing village problems to the township administration (35%).<sup>137</sup> A section of the research also examined participant views on who they preferred to go to first for help in settling land disputes. 63% of all respondents indicated that their first choice for assistance was either their VTA or WA. Second choices for assistance were the heads of 10 and 100 household at 22%.<sup>138</sup> Interestingly, respondents in this study did not go to other family members, elders, agricultural staff at the township level or Township Administrators for help.<sup>139</sup>

Since the passage of the WVTAL in 2012, VTAs and their committees have been given new responsibilities for the resolution of land disputes under two laws and one Presidential Order. The Farmland Law (2012) states that “Land disputes in respect of the right for farming shall be decided by the Ward or Village Tract Administrative Body of the Farmland after opening the case file and making actions such as enquiry and hearing about the land disputes.”<sup>140</sup>

The Vacant, Fallow and Virgin Lands Management Law (VFVLM), mandates VTAs and their committees to accept requests for and complaints over land allocation under the Law and forward them to the Central Committee for Management of Vacant, Fallow or Virgin Lands or other upper level committees of this body to address and resolve. This committee may ask for the involvement of VTAs and their committees in conducting township level investigations of applications for VFVL and when applications are contested.

<sup>135</sup>Denney, et al, 2016; Access to Justice and Informal Justice Research, Shan State; Ms. Aye Gets Hurt Twice, Access to Justice and Informal Justice Systems Research, Rakhine State; and Access to Justice and Informal Justice Research, Yangon Region, 2017.

<sup>136</sup>The State of Local Governance: Trends in Myanmar. Yangon, UNDP, 2015. The study involved a total of 8,500 citizens and 3,000 government officials in 14 Regions and States, 56 sample townships, and 112 sample communities.

<sup>137</sup>Unfortunately, the study did not provide any description of the mediation process used by VTAs. As there are a variety of ways mediation is and can be practiced. This information would be invaluable for understanding what VTAs really do when meditating.

<sup>138</sup>The State of Local Governance: Trends in Myanmar. Yangon, UNDP, 2015, 65.

<sup>139</sup>Similar preferences of disputants to go directly to either Ward or Village Tract Administrators to resolve land disputes were found by in Mon State and the Yangon region. Denney, et al, 2016.

<sup>140</sup>Constitution of 2008, Chapter VIII, Settlement of Dispute on Right to use the Farmland and Appeal, 22.

The Presidential Order establishing the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands (2016) mandates the establishment of committees from the central level to VT “to urgently address the land-grabbing issues for the people so that they do not face losses of farmland and other lands in the Republic of the Union of Myanmar.”<sup>141</sup> Often, however, the VTA does not create a separate committee to address issues related to confiscated farmlands. Instead, the same members as serve on the VT ABF perform this function.

Many land issues for which VTAs provide dispute resolution assistance under their mandate to establish Administrative Bodies of the Farmland, which will be explained in more detail in the next section of this study, are ‘private disputes’ between or among members of a VT or members of two or more villages within a Tract. (A number of these issues were listed earlier in this study.) Some VTAs also handle inheritance issues (how use rights of customary or statutory land are divided between or among successors, who gets how much land, its location, women’s and children’s rights of inheritance, etc.) and debts concerning land. Others prefer to send these disputes to courts for judicial rulings.

Finally, VTAs and their committees handle and land disputes between villages within a Tract. Common sources of these problems are concerns about boundaries or access to natural resources.

VTAs can also accept and address grievances against Village Heads concerning their decisions over land issues, if they do not involve charges of criminal activity. It should be noted, however, that while VTAs may often be the first place that disputants go to register grievances against a powerful private party or government entity – over such issues as an illegal land sale, land confiscation, or perceived misallocation of vacant, fallow or Virgin Lands – these authorities are generally not the dispute resolution providers who can resolve these kinds of issues.<sup>142</sup>

VTAs generally have limited authority, if any, to resolve grievances against the government or powerful private parties. They commonly refer these grievances, or grievants go directly, to Township Authorities and/or one or more of the committees established by the government at district, region, state or central levels to handle grievances over land. More will be said later about these committees.

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For land cases that VTAs and their committees do have authority to handle, which are referred by Village Heads or elders or, brought to them directly by disputing parties, they may play a variety of roles. In some disputes, VTAs are the lead third party and engage committee members as needed as observers of the dispute resolution process, to give relevant information or to provide input or advice on how to settle cases.

<sup>141</sup>Letter No.../1-Committee/Land (Central) 2016, Date, June 10th, 2016, 1.

<sup>142</sup>Once grievances have been formally registered and are being processed by one of the central administrative committees established by the GORUM to address land issues, Ward and Village Tract Authorities and their committees may be asked to conduct investigations and gather information for use by upper level government committees to make decisions on the outcome of the case.

In other disputes, VTAs may be the lead third party but do not actively involve members of their Land Committees. Instead, they ask Village Heads to work with them as informal co-mediators and other local community or disputants' family members who are familiar with the dispute and issues in question to participate in discussions and deliberations.<sup>143</sup>

In yet other disputes, VT land committee members may play more active roles. Some members, often those who are 10 or 100 Household Heads may lead the dispute resolution process with the VTA principally observing, intervening only periodically and significantly engaging if and when a decision is required.<sup>144</sup>

When VTAs and their committees are involved in cases referred from upper level bodies or committees of the CABF, CCMVFVL or the CCRCFOL, they principally serve as investigators to help gather information used by Township Administrators and the Department of Agricultural Lands Management Statistics (DALMS). This function frequently involves talking with local parties and conducting site visits to land in question. VTAs and their committees may draw conclusions about their findings that are forwarded to upper level committees, but do not have authority to make final recommendations or decisions.

When VTAs and their committees are involved in cases referred from upper level bodies or committees of the CABF, CCMVFVL or the CCRCFOL, they principally serve as investigators to help gather information used by Township Administrators and the Department of Agricultural Lands Management Statistics (DALMS).

When VTAs in diverse areas of the country are asked about approaches and procedures they and their committees commonly utilize to help parties reach agreements or resolve disputes, there is not one universal response. Some first mention procedures common to justice facilitators or other dispute resolvers at village levels, such as talking with individual disputants privately either prior to convening any meetings to address contested issues or later during the process. Others mention conducting investigations and site visits to gather additional information.<sup>145</sup>

Other frequently used procedures by VTAs and committees when intervening – as negotiators or mediators – include: meeting with parties separately to negotiate (Hnyi Hnainag Chin in Myanmar) settlements<sup>146</sup>, convening joint meetings between or among involved parties, facilitating talks, listening to all views, and leading discussions to search for potential solutions that will be acceptable to the parties. In addition, VTA mediators may call witnesses who can provide additional information or corroborate or call into question information or views provided by disputants. They may also conduct investigations and make site visits to contested land to gather additional first-hand information about issues in question.

<sup>143</sup>This division of roles was found in some communities in Southeast Myanmar. See Shaun Butta and Justine Chambers, A Survey of Customary Land Dispute Mechanisms in Kayin State, Eastern Bago Division and Shan State. 36.

<sup>144</sup>Helene Maria Kyed, Community-based Dispute Resolution: Exploring everyday justice provision in Southeast Myanmar. Yangon, Myanmar, Danish Institute for International Studies, January 1, 2018. 61.

<sup>145</sup>Denny, L. et al, 2016.

<sup>146</sup>Helene Maria Kyed, Community-based Dispute Resolution: Exploring everyday justice provision in Southeast Myanmar. 60.

Beyond the above approaches and procedures, VTAs as well as WAs who are mediating diverge regarding how much they provide only process assistance, or whether they are more actively engaged in discussing substantive issues in dispute, providing advice or suggesting potential outcomes. If the latter, they may provide either more general advice or suggestions, either their own or advice from committee members, concerning how to address issues in question, make specific recommendations for potential settlements or make decisions for parties, which they try and persuade disputants to accept. The diversity of views is captured by statements of two Ward Administrators:

When I try to resolve disputes, I give each party the space to present their case, and then I present them with options for a better agreement. I negotiate the whole process and give them the time to carefully consider their decision. After this, the dispute is hopefully resolved. I don't think that I necessarily need to make a decision in order for a mediation to be successful. A Ward Administrator

I believe that I do need to make decisions for mediations to be successful. People rely on the decisions I make. That is why they come to my office. I have to identify the root causes of conflict and then make a decision about how to best address the issues. As people come to me for my decision-making, I feel that I don't always need to explain my reasoning, but it does depend on the type of dispute in question. However, on the whole, I feel that most people are satisfied with my decision-making ability as I am able to get the different parties to reach an agreement. A Ward Administrator<sup>147</sup>

Other VTAs spend minimal time helping disputing parties negotiate or providing mediation. These VTAs frequently rapidly shift to third-party decision-making. This is often the case when one or more parties have a Form 7 (Land Use Certificate) or some other form of written evidence supporting a claim.

When making decisions, VTA and committee members commonly review any documents that parties possess as evidence and use a combination of customary or village laws and practices as well as Union law as standards and criteria for their deliberations and decision-making. Many VTAs say they use 10 and 100 household heads, and religious leaders to discuss issues with disputing parties, and secure guidance and advice from committee members on how a case should be resolved or handled.<sup>148</sup>

VTAs have authority to require disputants who have voluntarily engaged in a VTA decision-making process, and who have not objected to its outcome or appealed it to a Township Administrator or other higher level official, to comply with its terms. One method to encourage compliance is the use of a *khan wan*, a hold-over from British colonial times that requires a guilty party to sign a letter of admission in which they state what they have promised to do in the future and affirm that they will not commit the previous offense again.<sup>149</sup>

Appeals of decisions on land disputes made by VTAs can be made by disputants only to one of the three GORUM's administrative mechanisms and procedures for the resolution of land disputes. More will be said about each of these in the next sections of this study.

<sup>147</sup>"Interest-based training of Ward and Village Tract Mediators in Myanmar". <https://myjusticemyanmar.org/news/interest-based-mediation-training-ward-and-village-tract-administrators-myanmar>

<sup>148</sup>Denney et al, 2016, 34.

<sup>149</sup>Denney et al, 35; and Furnivall, 88.

Generally, land disputes, unless they involve criminal acts or contests between parties over the distribution of confiscated land returned by the government, cannot be appealed to GORUM government courts for a judicial ruling. There is no judicial review of decisions by VTAs or other GORUM administrative bodies mandated to allocate land or resolve land disputes.

In parts of Mon and Karen States, where political wings of Ethnic Armed Organizations control part of the states' territories, disputants can request that VTAs refer their cases to the New Mon State Party (NMSP) or Karen National Union (KNU) officials. Disputing parties can also appeal decisions by VTAs to these entities. (More will be said about the KNU and its dispute resolution process later in this study.)

### Performance of Village Tract Dispute Resolution Procedures and Activities relative to the UNGPs “Effectiveness Criteria” and an Analysis of the feasibility of Introducing, Implementing and Institutionalizing CDR

Detailed below is an assessment of the performance of VTAs, their land committees and dispute resolution activities relative to the UNGP “Effectiveness Criteria” and an analysis of the feasibility of introducing, implementing and institutionalizing CDR to resolve land disputes.<sup>150</sup> It presents:

- Opportunities where the VTAs and land committees are in compliance with the “Effectiveness Criteria” and conditions that support current or future use of CDR;
- Challenges where there are gaps in VTAs and land committees’ compliance with the “Effectiveness Criteria” and potential or actual barriers to the use of CDR; and
- Recommendations to move the VTAs, land committees and their land dispute resolution mechanism and activities toward compliance with the UNGP “Effectiveness Criteria” and enhance existing procedures for the resolution of disputes by introducing, implementing and institutionalizing new CDR procedures.

### Opportunities

#### Legitimate

- VTAs and their committees are effective in helping individuals and/or groups in villages involved in private disputes over land to reach voluntary settlements, which are generally seen as legitimate by involved parties and other community members. Private land disputes are generally easier for VTAs and their committees to resolve than grievances or public disputes that involve the government as a party because of differences in power and influence between parties.
- Villagers generally go to VTAs as their first choice for resolution assistance if Village Heads, elders or village committees are not able to settle their land disputes or grievances. Multiple interviews and studies across all regions and states in the country indicate that between 55% and over 60% of respondents in most Regions and States in Myanmar prefer and go to VTAs (or WAs) for help in resolving land disputes.<sup>151</sup>

<sup>150</sup>A similar analysis will be provided for the CABF, CCMVFVL, the CCRCFOL and KNU grievance and dispute resolution mechanisms in later sections of this study.

- Elections of VTAs can help promote their accountability and increase trust by users of VT dispute resolution services and procedures. This may result even if election procedures are not yet perfect. While some administrators may be corrupt,<sup>152</sup> others are seen as a major source of relatively trustworthy dispute resolution assistance.<sup>153</sup> Ongoing efforts to improve election procedures can help elect VTAs who have greater accountability to their constituents.
- Active engagement of land committees, their individual members and/or other respected and knowledgeable leaders of villages in the resolution of land disputes can help increase the legitimacy of procedures and outcomes in the eyes of concerned stakeholders. Multiple third parties, as opposed to just the VTA, can provide a broader range of perspectives and potentially limit bias that may occur if there is only one intermediary. It can also help prevent corruption as it is harder to corrupt a group than an individual.<sup>154</sup> This is true for mediation where committees help parties negotiate voluntarily settlements, or where they may need to make recommendations or decisions.
- VTAs and committees that identify and/or build consensus between or among disputants on outcomes of disputes – either agreements reached by parties or their voluntary acceptance of a recommendation or decision – enhances the legitimacy of the dispute resolution process and its results. Consensus by disputants is normally seen by them as a more acceptable and legitimate outcome than a third-party decision.
- VTAs and their committees can serve as effective bridges between individuals and groups involved in inter-village disputes. Land committees with members from multiple villages are able to serve as more independent third-parties than a single intermediary and have more legitimacy in the eyes of disputants and members of involved villages.

### Accessible

- VTAs and committees that addresses land issues are located in every VT and are generally easily accessible to users. The location of VTAs and land committees near sites where disputes occur and villagers live makes it physically easier for parties to take issues to be resolved to these individuals and groups. It also makes it easier for VTAs and their committees to form investigation groups and conduct in-person site visits to examine issues related to disputes.

<sup>151</sup>The State of Local Governance: Trends in Myanmar – A Synthesis of people’s perspectives across all States and Regions. Yangon, Myanmar, UNDP, 2017. 65; Searching for justice in the law: Understanding access to justice in Myanmar - Findings from the Myanmar Justice Survey. Yangon, Myanmar: British Council, 2018. 6.

<sup>152</sup>Corruption on the part of VTAs was mentioned in a significant number of interviews and focus groups conducted in multiple states by the NRC.

<sup>153</sup>The 2017 national survey, Searching for justice in the law: Understanding access to justice in Myanmar, 2008, 48, found that approximately 60% of the 3565 participants viewed VTA and WAs as incorruptible, unbiased, respectful and reliable.

<sup>154</sup>Panels of dispute resolvers, such as mediators or arbitrators, who are selected by members of their communities, the concurrence of disputants or appointed by independent boards have been found to be highly effective in resolving a range of types of disputes, including those over land. Panels, whose members are selected and appointed independently of their chair and each of which has authority to be fully engaged in dispute resolution activities, have been found to lower the possibility of corruption. Examples are the Sri Lankan Ministry of Justice Mediation Boards, the Barangay Justice in the Philippines (which has panels of both mediators and arbitrators) and the Liberia Land Commission’s Mediation Committees.

- Administrative appeal procedures are available if one or more disputants is dissatisfied with the dispute resolution procedures used by VTAs and their committees or their recommendations or decisions. If one or more parties does not accept either the procedures or outcomes of VTAs' and committees' actions or decisions, they have the right to appeal to higher level government committees – Administrative Bodies of the Farmland; Committees on Management of Vacant, Fallow and Virgin Lands; and Committees for Rescrutinizing Confiscated Farmlands and other Lands.

### Predictable

- Dispute resolution procedures used by VTAs and their committees, and potential outcomes that may be achieved by their use, are generally known to disputants. Community members, either from their own past experience or that of others in their village, generally know or are familiar with their VTA and members of the land committee, dispute resolution procedures used and, potentially, past decisions on similar cases. This knowledge generally results in more predictability for disputants concerning procedures that may be used and potential outcomes of current or future cases.

### Equitable

- VTAs and their land committees provide disputing parties with relatively similar information and advice on dispute resolution procedures that will be used to settle their disputes and how specific issues may be handled. This information helps but does not always guarantee that parties can engage in the dispute or grievance resolution process on relatively fair, informed and respectful terms. Significant variables concerning the provision of advice or information by VTAs and their committees are their orientations toward doing so, how they treat parties from different backgrounds – such as women, youth, minorities, LGBTQs, etc. – and the level and amount of knowledge they possess on issues in question and relevant statutory laws and/or customary practices.
- VTA and committee use of customary practices augmented by CDR procedures has the potential to impact the resolution of other village disputes beyond those that involve land. Enhancing land dispute resolution procedures at the VT level with CDR processes will likely both increase the settlement of village land cases and will likely result in a “halo effect” that will impact how VT land committee members use the procedures to settle other kinds of disputes in their communities.

### Transparent

- As in many village dispute resolution initiatives, dispute resolution activities of VTAs and their committees are fairly transparent. Disputants and observers are generally allowed to participate directly or observe VT dispute resolution proceedings. Direct involvement of disputants and/or observers helps keep them informed about progress toward resolution and promotes consideration of any public interest at stake.
- Disputants generally are generally aware of the length of time it will take to address and resolve a dispute or grievance at the VT level. Information on when a VTA and its committee will handle a case is often available when a case is first brought to them, and because of their

proximity to disputants, the latter can easily contact them to find out information on the progress of their case at the VT level.

### Rights-compatible

- VTAs are generally knowledgeable about customary practices and familiar with, but are not experts on, national statutory land laws. They are much less knowledgeable about international human rights standards. The knowledge of the VTA can often help guide parties and committee members to reach agreements or make decisions that are congruent with customary rights and practices. This is not always the case where national statutory land law or international human rights standards may be applicable.

### Based on engagement and dialogue

- VTAs can and do provide a range of procedures to assist villagers to voluntarily engage in dialogue with each other to resolve land disputes. Procedures currently provided include conducting fact-finding and site visits to contested land, separate negotiations with parties to develop mutually acceptable agreements, joint process-focused mediation, and conciliation (investigation, mediation and a recommendation for a settlement).
- VTAs provide back-up substantive dispute resolution assistance in the form of recommendations or decisions, if parties cannot negotiate mutually acceptable settlements on their own or with mediation assistance. If parties, after negotiating on their own or with mediation assistance from the VTA his or her committee, are not able to agree, they can request, or VTAs can initiate on their own, non-binding substantive recommendation for a settlement for parties to consider or make a non-binding decision for them. Often, if a third party is trusted and considered to be unbiased and fair, parties are willing to accept their recommendation or decision. If the decision is not acceptable, parties can appeal it to a statutory administrator and administrative institutions.
- Consensus decisions based on dialogue and voluntary resolution of land disputes can have positive impacts on broader parties concerned about the issues at stake, the legitimacy of dispute resolution procedures and social harmony in communities. Settlement of land disputes in a manner that is amicable and widely perceived by parties and their wider communities to be fair can help promote social harmony between villagers and prevent negative spill-over effects of interpersonal or intergroup land disputes affecting the relationships and interactions between or among larger groups of people.
- A number of dispute resolution procedures used by VTAs and their committees are similar or identical to customary and/or CDR processes. These similarities should facilitate introduction, implementation and institutionalization of CDR procedures to augment and enhance existing procedures and reduce resistance to their use.

A number of dispute resolution procedures used by VTAs and their committees are similar or identical to customary and/or CDR processes.

## Challenges

### Legitimate

- Multiple functions and roles of VTAs and their committees can create potential or actual conflicts of interest, which may impact their neutrality and/or impartiality or result in corruption.<sup>155</sup> Perceived or actual conflicts of interest may arise when either a government institution or an official appears to or actually has an institutional or personal interest in a subject that that needs to be decided or resolved. Institutional or personal interests may be based on “any advantage to family, relatives, close friends, or persons or organizations with whom there are, or have been, business or political relations”.<sup>156</sup> Such interests may bias either institutional or personal views about involved parties, issues to be addressed, appropriate procedures to be used to resolve them or acceptable outcomes.

Multiple functions and roles of VTAs and their committees can create potential or actual conflicts of interest, which may impact their neutrality and/or impartiality or result in corruption.

- Because of the multiple functions and roles related to land that VTAs and their committees perform – their role in land registration, the enforcement of various components of the WVTAL and other national laws, and land dispute resolution – there are multiple situations where either a potential or actual conflicts of interest may arise. In the vast majority of cases at the VT level, conflicts of interests are more likely related to a VTA’s or committee members’ personal views rather than those of an institution, although a whole committee could have a conflict of interest.
- VTAs can only be suspended or removed from office by Township GAD Administrators.<sup>157</sup> The result of this provision in the WVTAL is that even though VTAs are elected by members of villages, they are ultimately only accountable, with the exception of at election time, to GAD Township Administrators.

### Equitable

- Disputants – especially those that are poor, women or minorities who lack resources or power to advocate effectively for their interests report that the system is not always fair to them. These parties often do not have adequate information and skills to use dispute resolution processes effectively. Also, VTAs or their committees may also not have the capacity or will to provide what is needed. Some of these disputants also report that government authorities are often not always responsive or respectful to them. Finally, there are limited numbers of NGOs/ CBOs with knowledge and effective advocacy skills to provide need assistance.

<sup>155</sup>Neutrality – Freedom from favoritism, bias or prejudice and not “taking sides” due to the relationship between the intermediary and parties. Impartiality – Freedom from favoritism, bias or prejudice regarding issues in dispute, parties’ interests or potential outcomes of a dispute, grievance or conflict.

<sup>156</sup>Land in Our Hands et al., A Promise Unfulfilled: A Critique of the Land Rescrutinization Committee, December 2017. <https://www.slideshare.net/EthnicConcern/a-promised-unfulfilled-a-critique-of-land-reinvestigation-committeeenglish-version>

<sup>157</sup>The Ward or Village Tract Administration Law, Chapter VII Permit to resign, temporary suspension from office or termination of office and appointment in substitution, 15.

## Rights-compatible

- Some VTAs lack adequate knowledge and information on national statutory land laws and international human rights standards. Assessments conducted by GORUM agencies, NRC and other international actors have identified a lack of information and knowledge on the part of VTAs, land committee members, villagers and residents of tracts on HLP rights as established by national law and international human rights standards.<sup>158</sup> For example, dispute resolution outcomes solely based on a review of documents – such as Land Use Certificates, tax forms or loan documents – may or may not comply with legal requirements that require consideration of testimony by community leaders and elders on the history and use of customary land. Treatment of women and minorities may also not be congruent with international human rights standards.
- Tensions between plural legal systems – This challenge is often less about specific dispute and grievance resolution mechanisms and procedures, although it can be, than norms, standards and criteria used by VTAs, disputing parties and their communities to guide or determine the outcomes of disputes. VTAs are required to reconcile differences between customary practices, statutory laws and international human rights standards, and apply the latter two to the greatest extent possible. Where customary norms and practices differ significantly from statutory laws and international standards, there are likely to be tensions between what community members, the state and international actors consider to be fair, equitable and acceptable resolutions.

## Based on engagement and dialogue

- There was limited consultation with stakeholders on the design of mechanisms and procedures to address land disputes and grievances. Farmers, CBOs and NGOs, for the most part, were not consulted when drafting and approving the Ward and Village Tract Administration Law; Farmland Law; Vacant, Fallow and Virgin Lands Management Law; and the Presidential Order creating the Central Committee on Rescrutinizing Confiscated Farmlands and Other Lands.
- The Vacant, Fallow and Virgin Lands Management Law has been amended.<sup>159</sup> None of the revisions, however, specifically focus on dispute resolution.
- The GORUM is taking initiative to update the Farmland Law so that it is more responsive to current land issues in the country.<sup>160</sup> In 2017, the government prepared a 16-point 2012 Farmland Law Amendment Bill for discussion in Parliament and initiated a public consultation process to solicit input. None of the proposed amendments, however, address dispute resolution.
- The GORUM has not provided a formal mandate, guidance, standards or criteria on if and when CDR procedures can be used to resolve land disputes – The absence of a mandate or guidance relegates any use of CDR approaches and procedures to ad hoc decisions and practices by VTAs and their committees. This is a major barrier to institutionalization of CDR in VTs across the country.

<sup>158</sup>This issue and need were raised in a meeting in February 2018 between of State level GORUM actors involved in the resolution of land disputes and NRC staff and consultants. NRC interviews in multiple States with government officials, Village Tract Administrators and villagers also indicated a lack of information on HLP laws and rights, and the need for additional training on these topics either by the government or NGOs.

<sup>159</sup>Amendment to the Vacant, Fallow and Virgin Lands Management Law, October 23, 2018.

<sup>160</sup>Draft Farmland Amendment Law, 2017.

- VTAs and their committees may resist the use of CDR procedures because of their preferences for authoritative decision-making – Although some VTAs and their committees currently use dispute resolution procedures that are more collaborative and similar or identical to CDR processes, others see their role primarily as administrative judges and authoritative decision-makers.<sup>161</sup> This tension between potential roles and procedures may create resistance to change.

## Recommendations

Below are recommendations that will enable the dispute and grievance resolution procedures of VTAs and their committees to be more congruent with UNGP “Effectiveness Criteria” and facilitate introduction, implementation and institutionalization of CDR approaches and procedures.

### Legitimate

- Many VTAs and their land committees already use some dispute resolution methods similar to CDR procedures, which are seen as legitimate in the eyes of the stakeholders for whose use they are intended. These procedures can be enhanced by more sophisticated CDR methods and augmented with new ones. Because of the similarities of procedures there should be less resistance to enhancing existing ones with new methods.
- The CABF should authorize VTAs and their land dispute resolution committees, either through amendments to existing legislation or revisions to the current Presidential Order, to use CDR procedures, when appropriate, to resolve land disputes at the VT level. The authorization should also include guidelines for the use of CDR procedures.

The CABF should authorize VTAs and their land dispute resolution committees, either through amendments to existing legislation or revisions to the current Presidential Order, to use CDR procedures.

- Providers of CDR training should conduct site visits to VTs to identify VTAs and committees that have a strong interest and commitment to enhancing their existing dispute resolution procedures and skills and learning new approaches. Random selection of VTs for training is not a strategic approach for enhancing existing procedures, introducing new ones and institutionalizing the use of CDR. Presentation of training for VTAs and committees that do not have a keen interest in improving their dispute resolution procedures and skills and learning about CDR is not cost-effective in terms of resources, time or effort. Training should be conducted for targeted VTAs and committees that are very interested in learning about CDR as they will be more likely to use and implement the procedures. These VTs can then serve as models for other VTs on effective application of CDR.

Prospective training participants should be informed that there are limited sources of funding and personnel to conduct training, and that only VTAs and committees that express a strong interest in learning more about CDR will be eligible to participate. (In other countries and contexts, creating some level of competition among potential training participants has increased their commitment to learning and institutionalizing new procedures.)

<sup>161</sup>No information is available on how many WVTAs or committees prefer or use one approach and related procedures over the other.

## Equitable

- VTAs should facilitate coordination between their committees and civil society legal and technical advisors and advocates that can assist disputants who are poor, women, youth or minorities to fully participate in CDR dispute resolution initiatives. The GORUM and its administrative bodies should actively encourage VTAs and their committees to accept involvement of NGOs/CBOs as participants in their dispute and grievance resolution activities to provide potentially weaker parties with information and advice that will enable them to engage more effectively in settlement efforts. NGOs/CBOs should be seen by VTAs and their committees as allies in achieving informed, fair and just outcomes.

VTAs should facilitate coordination between their committees and civil society legal and technical advisors and advocates that can assist disputants who are poor, women, youth or minorities to fully participate in CDR dispute resolution initiatives.

## Transparent

- The CABF should encourage VTAs and VT ABSF to directly involve disputants and other concerned parties in open and transparent dispute resolution processes. This should include disputants' participation in committee site visits to conduct investigations and meetings to try and reach voluntary settlements. Other concerned parties should be involved as appropriate, either as witnesses who can provide relevant information or observers of committee processes to promote and assure fair procedures and outcomes. Opportunities for direct participation will keep disputants and others informed about the progress of a case and build their confidence in the dispute resolution procedure's effectiveness and fairness.

## Rights-compatible

- Government agencies, NGOs and CBOs should provide HLP Legal Awareness Training for VTAs, their committee members and targeted respected village leaders. Increasing awareness and understanding by these individuals and groups about national laws and international human rights standards will facilitate their application when they are conducting CDR procedures and engaging in third-party decision-making. Training should also include a module on reconciling customary practices with GORUM statutory laws, procedures and international standards. In locales where EAOs are governing and have developed their own laws and practices, a section of the training should focus on how to address differences between these and GORUM statutory laws and procedures.

Government agencies, NGOs and CBOs should provide HLP Legal Awareness Training for VTAs, their committee members and targeted respected village leaders.

## A source of continuous learning

- The National Land Use Council and GORUM Central Committees administering land dispute and grievance resolution mechanisms should develop pilots in VTs and at other levels of administrative entities that can demonstrate the utility and value of CDR approaches and procedures for resolving land disputes. The GORUM National Land Use Policy states "In order to improve the public understanding of land use rights, strengthen implementation of the National Land Use Policy, and

increase protection of citizens' land tenure rights, there shall be effective cooperation between international experts and local communities, implementation of pilot activities as indicated in the National Land Use Policy, and enactment of the National Land Law."<sup>162</sup> Further, as priorities for research, the policy states, "(e) Determine the best dispute resolution mechanisms for resolving different types of historic and recent land disputes and develop methods and procedures for effective implementation"; and "(n) Encourage and support individuals and organizations to conduct independent research initiatives, capacity building activities, educational programs and pilot projects".<sup>163</sup>

#### **Based on engagement and dialogue**

- Potential VT participants in CDR training programs should be consulted by training service providers prior to conducting training. Consultation should assess whether there is an interest on the part of potential participants in learning new dispute and grievance resolution procedures and skills and identify the kinds of procedures they want to learn about.
- CDR training should be provided for VTAs and their land committee and focus on interest-based negotiation (IBN), mediation and conciliation. decision-making. Modules on mediation should cover process-focused mediation and procedures for giving advice and making interest-based recommendations in conciliation.

<sup>162</sup>National Land Use Policy, Part XII Research and Development, 79.

<sup>163</sup>Ibid. 80, (e) and (n).

## Central to Ward and Village Tract Administrative Institutions, Mechanisms and Procedures Established by the GORUM to Resolve Land Disputes and Grievances

In 2012, the GORUM began what would become an ongoing initiative to develop national administrative bodies with mandates to address and resolve a range of types of land disputes and grievances. In that year, the Pyidaungsu Hluttaw, the Assembly of the Union of Myanmar, passed the Farmland Law (FL), which created the Central Committee for Administrative Bodies of the Farmland (ABsF).<sup>164</sup> In the same month and year, it also passed the Vacant, Fallow and Virgin Lands Management Law, which established the Central Committee for Management of Vacant, Fallow and Virgin Lands (CCMVFL). In 2016, as a follow-up to the Thein Sein government's Parliamentary Land Investigation Committee and in response to an overwhelming number of grievances and claims over land confiscations by the GORUM, the President, by Presidential Order, instituted the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands (CCRCFOL). These bodies are important for the resolution of land issues in the country as they are the only government-mandated procedures to settle land disputes and grievances.<sup>165</sup>

This section of the study will briefly analyze each of the above bodies – their mandates, organization, dispute and/or grievance resolution mechanisms, procedures and personnel. It will also, as for VTAs above, compare the institutions and mechanisms to the UNGP “Effectiveness Criteria” and identify where there are opportunities to enhance their performance and challenges to be overcome.

The existence of the above administrative bodies provides possibilities for the introduction and institutionalization of CDR. If these methods are inserted into existing institutions and their dispute and grievance resolution mechanisms, especially at lower administrative levels, they have the potential to increase disputants' access to justice, expand opportunities for them to directly participate in the resolution of their differences and can increase community harmony and solidarity.

<sup>164</sup>The Republic of the Union of Myanmar Pyidaungsu Hluttaw, The Farmland Law (2012).

<sup>165</sup>The GORUM has determined that land disputes and grievances, unless they involve criminal matters, will be resolved administratively rather than utilizing the government's judicial system.

## The Central Administrative Body of the Farmlands (CABF) Dispute Resolution Mechanisms and Procedures

Effective management and administration of farmland and resolution of farmland disputes is critically important in Myanmar because of the large number of people who live in rural areas and that rely on access to land and predictable land tenure for farming to secure their livelihoods. CDR approaches and procedures are relevant because people need early, cost-effective, efficient, fair and trusted ways to resolve land disputes. These procedures, in many circumstances, can help achieve these goals

### Mandate

The Farmland Law of 2012 prescribes who has permission to use farmland, rights for farmland use, terms and conditions to be complied with by a person who has a right to use farmland, actions to be taken for failure to comply with the terms and conditions and standards for indemnities and compensation. It also establishes and defines the authority and duties of a Central Administrative Body of the Farmland (CABF), and the formation of various subsidiary Administrative Bodies of the Farmland (ABsF). Each of these bodies has responsibilities for administering and settling disputes concerning farmland.<sup>166</sup>

### Organization, Personnel and Functions

The Union Minister for the Ministry of Agriculture, Livestock and Irrigation (MOALI), is the Chairperson of the CABF. Other members include the Deputy Minister of the MOALI as the Vice-chairman, the Director General of the Department of Agricultural Lands Management and Statistics (DALMS) as Secretary, and the heads of relevant Ministries and government departments and organizations.

The FL mandates the CABF to establish Administrative Bodies of the Farmland at Region, State, District, Township, and Village Tract levels.<sup>167</sup> ABsF at the Region and State levels (RABsF and SABsF) are chaired by Chief Ministers. District and Township ABsF are chaired by GAD Administrators. ABsF at the VT level are chaired by the VTA.

ABF committees, from the Region and State to the Township levels, have similar government agency and personnel members from Departments of MOALI - Agricultural, Planning, Fisheries, Rural Development and Agricultural Land Management and Statistics (DOALMS). There are no civil society members on any ABFs except at the VT level where the ABFL mandates a representative of farmers and a community elder. In practice these representatives may also members of Civil Society Organizations (CSOs).

<sup>166</sup>Administrative Bodies of the Farmland are called Farmland Management Committees in the guidance document for these institutions. Notification No 62/2012, 14 Waxing Wagaung 1374 ME (31, August 2012) Designating the Date of Coming into Force of Farm Land Law.

<sup>167</sup>Administrative Bodies of the Farmlands for the most part, have been formed at all levels of the government, although at Ward and Village Tract level they may one of the functions performed by a multi-purpose land committee.

There are no dedicated full-time government personnel on ABsF.<sup>168</sup> Ministry or department staff members serving on ABsF do so as collateral duty in addition to their normal assigned work responsibilities. To date, no additional personnel, support services, equipment or funding have been provided at any level by the government to support the work and functioning of the ABsF.

There are no dedicated full-time government personnel on ABsF. Ministry or department staff members serving on ABsF do so as collateral duty in addition to their normal assigned work responsibilities.

This staffing pattern in a number of jurisdictions places significant demands on government personnel serving on ABsF. It requires their time away from regular work assignments and makes it difficult to schedule meetings when all members can attend. The result is only periodic that meetings. Staffing also limits time available to go to the field to conduct investigations, which contributes to a backlog of cases and difficulty reaching timely decisions.<sup>169</sup>

### Land Management and Administration

People in Myanmar seeking the right to use farmland make an application to the Township Department of DALMS through their Village Tract ABF. The DALMS scrutinizes the application and submits it to the Township Administrative Body of the Farmland (TABF) for a decision, which is referred to the District ABF for review and approval. If approved the land is surveyed, the applicant pays a registration fee and is issued a Land Use Certificate by the Township DALMS.<sup>170</sup> Individuals or organizations that possess a Land Use Certificate have a “right to sell, mortgage, lease exchange or gift the whole or part of the right to use the farmland” as long as it is used for the stipulated terms and conditions in the initial land use right.<sup>171</sup>

### The Administrative Body of the Farmlands’ Dispute and Grievance Resolution Mechanism and Procedures

The FL mandates ABsF to serve as institutions with mechanisms, procedure and personnel to address and resolve disputes concerning land. In general, ABsF are a hierarchy of administrative bodies in which government personnel primarily review claims and disputes and make decisions. The exception is at the VT and occasionally the Township level where committee members may engage in negotiation, mediation and conciliation.

Disputes handled by ABsF are commonly between private entities, such as those listed earlier in this study. As noted earlier, the FL states that: “Land disputes in respect of the right for farming shall be decided by the Ward or Village Tract ABF after opening the case file and making actions such as enquiry and hearing about the land disputes.”<sup>172</sup> For more complex cases, however, in which the VTA does not believe he (or very rarely she) has the authority to make a final determination or one or more disputing parties do not accept an outcome reached by a Village Tract Administrative Body of the Farmland (VTABF), the case may be referred to the Township Administrator and Township ABF (TABF)

<sup>168</sup>This same organizational structure has been created for staffing Committees for Management of Vacant, Fallow and Virgin Lands and the Committees for Rescrutinizing Confiscated Farmlands and Other Lands.

<sup>169</sup>Shaun Butta e-mail to the author concerning an HLP assessment in Kachin State, August 6, 2018.

<sup>170</sup>Farmland Law of 2012. Chapter II, Permission to Use the Farmland, 4, 5 and 6.

<sup>171</sup>Ibid. Chapter III, Rights of a Person who has the Right to Use the Farmland, 9, (b).

<sup>172</sup>Ibid. Chapter VIII, Settlement of Dispute on Right to use the Farmland and Appeal, 22.

for a decision or to a higher level ABF for a final determination. ABsF at the Township level and above may also address grievances against the government and its personnel over land management, administration, allocation and or land use decisions made by ABsF at lower levels.

“Land disputes in respect of the right for farming shall be decided by the Ward or Village Tract ABF after opening the case file and making actions such as enquiry and hearing about the land disputes.”  
Farmland Law (2012), Chapter VIII, Settlement of Dispute on Right to use the Farmland and Appeal. 22

The FL gives VTAs and ABsF authority to “decide” the outcome of a case and issue an order within 15 days of receiving it if involved parties cannot reach a voluntary agreement or accept the advice or recommendation of the VTABF. The decision, however, is a recommendation for a settlement and is non-binding unless all involved parties accept it. The VTBF may also elevate the case to a higher-level ABF.

While the FL explicitly grants ABsF authority to make non-binding decisions to resolve disputes or grievances, it does not preclude the use of other dispute resolution procedures – such as negotiation, facilitation, mediation, conciliation or fact-finding – to assist parties to reach voluntary agreements prior to the 15-day deadline for decision-making. As noted earlier, when discussing VTAs and their procedures for resolving disputes, they frequently provide mediation assistance.<sup>173</sup>

While the FL explicitly grants ABsF authority to make non-binding decisions to resolve disputes or grievances, it does not preclude the use of other dispute resolution procedures – such as negotiation, facilitation, mediation, conciliation or fact-finding – to assist parties to reach voluntary agreements.

If one or more disputants is dissatisfied with the dispute resolution process or outcome at the VTABF level, they have the right to appeal the decision to the Township ABF (TABF) within 30 days of the VT ABF’s decision.<sup>174</sup> Additionally, if one or more disputants has a Land Use Certificate, they can go directly to the Township Administrator and ABF to have their dispute resolved.

Dispute resolution at the Township level is generally a review by the Township Administrator, his committee and DALMS of proceedings of the VTABF, documents submitted by disputing parties, records held by the government and any other information provided by the VTABF.<sup>175</sup> Occasionally, deliberations by TABsF may be augmented by information provided by investigation committees composed of designated staff members of government departments that are part of a TABF. These individuals conduct field investigations. During site visits, members generally inspect the land in question, and may, but do not always, talk with involved parties, community leaders and elders about the dispute and past use of the land in question.<sup>176</sup>

<sup>173</sup>The State of Local Governance: Trends in Myanmar. 2015.

<sup>174</sup>For any appeal, the person who is not satisfied with the outcome of the case at any level of the Administrative Body of the Farmland, must submit: (a) The order or decision by the Administrative Body of the Farmland on the appropriate form, which is signed and certified to be true and correct; and b) any related documents or other written evidence.

<sup>175</sup>At the time of this research, all Township Administrators are men.

Frequently, TABsF deliberate and make decisions concerning land issues without the direct involvement or presence of any disputants. While involved parties may be asked to attend Township ABF meetings to provide additional information to inform decision-making, it is unclear how frequently it occurs. Additionally, ABsF do not seem to have authority to compel attendance by all disputant at their meetings, which can be especially problematic if one or more of them is a powerful party or government entity.

On some occasions, Township Administrators and or TABsF may try to mediate settlements. One Township Administrator said, “The Farmland Management Committee (Administrative Body of the Farmland at the Township level) always brings in all parties. We do not give orders but make suggestions and negotiate/mediate. We promise to proceed with issuing official documents according to the law if they settle [the dispute] peacefully.”<sup>177</sup> It is not clear, however, how frequently across the country mediation actually occurs.

Standards and criteria for ABF decision-making, unless the case involves customary practice, are statutory laws and whether one of the parties has a valid Land Use Certificate. As in a number of other disputes involving land and GORUM institutions, however, possession of a Land Use Certificate is not always enough to guarantee that a disputant or grievant will prevail and be able to obtain a favorable decision by the relevant committee.<sup>178</sup>

On some occasions, Township Administrators and/or Administrative Bodies of the Farmland may try to mediate settlements. One Township Administrator said, “The Farmland Management Committee (Administrative Body of the Farmland) always brings in all parties. We do not give orders but make suggestions and negotiate/mediate.

If one or more parties involved in an appeal to a TABF is dissatisfied with its decision, or the Township Administrator or TABF believes it does not have authority to make a final decision on the dispute and issues in question, the case may either be appealed or referred to the District ABF within 30 days of the TABF’s decision.

Like TABsF, District Administrative Bodies of the Farmland (DABsF) body can approve, amend, cancel or presumably make a totally new decision than that reached by a TABF. Again, if a decision is not acceptable to one or more parties, they can appeal to a Region or State ABF (RABF or SABF) within 60 days of the DABF’s decision. Referrals to RABsF or SABsF can also be made by a DABF if it believes it does not have the authority to make a final determination on the case.

The RABF and SABF have similar authorities as lower bodies at the Township and District levels in that they can approve, amend or cancel or presumably make a new decision than that reached by a lower level ABF. Unlike, however decisions made by lower ABsF, decisions by Region or State ABsF are final and conclusive. No further appeals are entertained.

<sup>176</sup>Interviews conducted by NRC indicated that site visits to collect all information necessary for TABFs to make informed determinations on cases do not seem to be as frequent as might be needed or desirable. Also, investigation committee members do not always talk with community leaders, elders or others familiar with local community history and customary land use. Additionally, if one of the parties is powerful and absent from the community, talking with them is not always acceptable or possible.

<sup>177</sup>Access to Justice and Informal Justice Research, Shan State. Yangon, Myanmar, UNDP, 2017, 76.

<sup>178</sup>Evidence is Not Sufficient to Secure Land Rights in Myanmar.

If in the course of resolving a dispute, it becomes evident that some form of compensation may be needed or required for a party that has lost the right to use land due to confiscation by the government for the interests of the state or some other public interest, the CCABF is authorized to address compensation issues.

Assuring compliance with the outcome of a dispute resolution process is always an important component of a dispute or grievance resolution mechanism. Administrative Bodies of the Farmland at all levels generally try to achieve voluntary compliance with mutually agreed upon terms and conditions for land use. If, however, a party fails to comply, the FL and proposed 2016 amendments authorizes an ABF appointed by the Ministry to impose a range of penalties on non-compliant parties. These include: 1) requiring the party to pay a stipulated fine, 2) requiring a party to carry out required farm activity, 3) evicting the party from the farmland, or 4) requiring the party to remove buildings that were constructed without permission. The ABF may also refer the dispute to a relevant court if non-compliance is not remedied by the date ordered in its decision.<sup>179</sup> If an accused is convicted, the Farmland Law prescribes a range of punishments including imprisonment, fines or both.

### Performance of the ABF's Dispute Resolution Mechanism relative to the UNGPs "Effectiveness Criteria" and an Analysis of the feasibility of Introducing, Implementing and Institutionalizing CDR

Detailed below is an assessment of the performance of the ABF's dispute resolution mechanism relative to the UNGP "Effectiveness Criteria" and an analysis of the feasibility of introducing, implementing CDR to resolve land disputes.

#### Opportunities

##### Legitimate

- CDR approaches and procedures are recognized at the highest level of government as effective methods for the resolution of disputes. Daw Aung San Suu Kyi, the State Counsellor, in her opening speech at the conference on Justice Sector Coordination for Rule of Law on 7th of March 2018 noted;

“ Myanmar has a long tradition of setting disputes through their village and ethnic leaders according to long-held customs in each region of Myanmar; they do not resolve their problems in courts. We should consider improving these practices of traditional dispute resolution in the future. The courts are not the only forum in which to solve disputes.

She went on state that:

“ It is my observation that at the community level, the majority of people continue to use long-standing local methods for solving disputes and are reluctant to take cases to the formal or official justice system of the State.... Therefore, in formulating our national justice strategy, we should take into consideration the use of mediation in resolving disputes systematically and the development of various modes of alternative dispute resolution to settle disputes.

<sup>179</sup>Farmland Law of 2012 as amended in 2018, No. 13-18.

- Disputants generally have more trust in dispute resolution assistance provided by ABsF at the VT levels than services provided at the Township level and above. Farmers have few institutions or people they trust and can turn to for help in the resolution of farmland disputes. Trust is significantly related to who is the VTA and on their land committee, who commonly serve as the members of the ABF, and whether they have the confidence of people in the VT and its villages.

VTAs are elected. Presumably this may help increase their accountability to constituents and make them more trusted by potential users of their services. (Township Administrators and those above them are appointed government officials.)

Some Township Administrators have the trust of stakeholders, but again this is often dependent on the individual in the position. Multiple studies and interviews indicate that stakeholders perceive a level of corruption at all levels of the ABsF as well as other government institutions.<sup>180</sup>

### Accessible

- ABsF appear to be the most institutionalized and functional bodies of the GORUM's land dispute resolution mechanisms, especially at lower levels. ABsF have committees from the VT to the Central level. Established in 2012, ABsF have had a number of years to become established and operational at all levels of government. Because they often focus on the resolution of private disputes within and between villages, members of ABsF at all levels of government are familiar with the kinds of disputes commonly brought to them for resolution assistance. Their procedures, at least at the VT and Township levels are generally known by disputants.
- ABsF have a vertical decision-making and appeal procedures. The structure establishes the possibility that errors made or corruption at lower level bodies may be identified and corrected by higher ones.

### Based on engagement and dialogue

- Some ABsF utilize procedures that are similar or identical to CDR. Some VT and Township Administrators utilize negotiation, site-visits and investigations, meeting facilitation, mediation, conciliation, and provision of advice or recommendations to help disputants resolve their differences. Use of these procedures should make them more open to utilizing CDR approaches and procedures to enhance their dispute and grievance resolution activities.

Some ABsF utilize procedures that are similar or identical to CDR.

<sup>180</sup>For example, in a study in Kachin State, "Several key informants highlighted corruption within administrative bodies as a concern, including in relation to IDP land. Some IDPs stated explicitly that they have bribed Township level officials in order to receive favourable decisions on land claims. They did not complain about corrupt practices, only that it was difficult to compete with Chinese companies who they alleged were able to pay much larger bribes, such as cars."

"On a smaller scale, Village-tract officials were open in suggesting that payments to officials are a common occurrence, though this was described as "tea-money", the colloquial term for petty bribes. The views expressed by many informants were that tea-money is not even equated with corruption; it is simply the cost of getting any administrative process done with expediency." Shaun Butta, e-mail correspondence with the author concerning an HLP assessment in Kachin State, August 6, 2018.

## Challenges

### Legitimate

- While CDR processes are recognized at the highest level of government as being valuable for the resolution of disputes, there are currently few influential champions at any level of the ABSF who are actively advocating for and working to implement and institutionalize the procedures. Successful introduction, implementation and institutionalization of CDR in other countries has been highly dependent on one or two champions who are high enough in government or other institutions that they can serve as advocates and catalysts for using new procedures and protect those who practice them.
- There is the potential for, and have been, conflicts of interest and corruption of personnel involved in ABSF. As noted earlier, multiple mandates, roles and responsibilities of VTAs and members of their committees for land allocation and registration and the resolution of disputes create the potential for conflicts of interest and corruption. ABSF above the VT levels may also have institutional, personal or both forms of conflicts of interest, because of the multiple mandates, roles and responsibilities of the ABSF and the fact that the same government personnel may also serve on other GORUM land dispute resolution mechanisms that may have conflicting mandates and responsibilities.

### Accessible

- There no of official GORUM mandates to use CDR in the resolution of land disputes. There are currently no government laws, Presidential Orders or guidance that mandate or allow voluntary use of CDR approaches and procedures, either by ABSF, or the two other GORUM land dispute resolution institutions and mechanisms. This gap means that CDR is presently only being provided on an ad hoc basis or as a result of a personal interest by an Administrator who believes he or she has the authority and flexibility to use CDR. If the use of CDR is to be introduced and institutionalized, some form of government authorization will probably be needed.

There no of official GORUM mandates to use CDR in the resolution of land disputes.

- The National Land Use Policy (NLUP) does not include any provisions for research, development and use of CDR to assist in the resolution of land disputes and grievances. This is a remarkable omission and a major gap in procedures being explored by the GORUM given that these processes are being extensively used by international, governmental and non-governmental organizations around the world to resolve land disputes.
- Lack of dedicated staff and funding for activities of ABSF prevent them from functioning as efficiently, in as timely a manner as desirable and being accessible to stakeholders who use the mechanism. As noted earlier, to date the GORUM has not added additional staff or provided funding for the ABSF or the other two government land dispute and grievance resolution institutions and mechanisms. Staff at the township level and above serve on ABSF, and other GORUM land dispute resolution committees as collateral duty, in addition to other work responsibilities in their ministries and departments. Funding for all activities of ABSF is expected to come from the operating budgets of departments that are members of the ABSF.

At the VT level, VTAs serve as chairs of ABsF. Although they are paid a small stipend by the government for their service, it is not a full-time salary or living wage and must be augmented by other work and income.

The above structural barriers constrain the ABsF and other GORUM land dispute and grievance resolution institutions, mechanisms and personnel at the township level and above from scheduling and holding regular meetings, conducting site-visits and investigating disputes and grievances, and making timely decisions.

## Transparent

- There are limited specific timeframes for the steps of the ABF dispute resolution process above the District level. While the FL does provide timeframes for VTA decisions and appeals by disputants to Township and District Administrators, there are no explicit timeframes for Region, State or Central authorities and their actions. Disputants commonly complain about the length of time it takes to resolve a dispute and their lack of knowledge concerning the time for each stage of the process.
- Field visits to investigate disputes and grievances are not always conducted by ABsF nor do investigation teams always talk with knowledgeable community leaders about the history of use of the land in question or explore with disputing parties the feasibility of reaching voluntary agreements. Township Administrators, the administrative level along with VT ABsF that are most appropriate to conduct field visits, and users of ABF dispute resolution services indicated that field visits are not conducted as frequently as desirable and legally expected.<sup>181</sup> (In part this may be due to lack of personnel and financial resources for members of Township ABsF to go to the field.)

Additionally, when field visits are conducted, the investigation team often focuses primarily on gathering official documents and observing facts on the ground rather than interviewing village heads, elders or other respected community members about the history of the land in question, its use and by whom. Investigation teams also do not always make any significant efforts to talk with disputing parties to explore whether a voluntary settlement of differences might be possible.

Field visits to investigate disputes and grievances are not always conducted by ABsF nor do investigation teams always talk with knowledgeable community leaders about the history of use of the land in question or explore with disputing parties the feasibility of reaching voluntary agreements.

- Dispute resolution activities of ABsF at the Township level and above are not transparent and rarely, if ever, enable either direct participation or observation by disputants, grievants, their representatives or other concerned community members. The lack of transparency of ABsF at upper levels is problematic both for administrative decision-making and the potential use of CDR, the latter of which requires opportunities for direct participation in dispute resolution processes. Lack of transparency in administrative procedures can significantly contribute to a lack of credibility that procedures and outcomes used to resolve land disputes and grievances are just and fair.

<sup>181</sup>Lack of field visits were reported in interviews by the NRC Team with Township Administrators and a number of VT Administrators.

- There is not a transparent accountability and reporting mechanism that enables concerned parties to track the status of their cases, understand who makes final decisions and the standards, criteria, logic and rationale used to make final determinations. The lack of a transparent accountability and reporting mechanisms is incongruent with the performance standards required in the UNGP “Effectiveness Criteria”.

There is not a transparent accountability and reporting mechanism that enables concerned parties to track the status of their cases.

- There is an absence of implementation monitoring mechanisms. While implementation of decisions by ABsF is expected by disputants, and enforcement mechanisms and potential punishments are in the FL, there appear to be limited ABF mechanisms to monitor and assure compliance with agreements. The exception may be at the VT and Township levels where VTAs and TAs are closer to the site of disputes and can more easily be in contact with former disputants to monitor follow-through.

### Rights-compatible

- There is not an independent body that is separate from the CCAB with authority to review its administrative decisions and responses to appeals and make authoritative, legally binding and enforceable decisions to address them. The CABF and other ABsF conduct administrative reviews of recommendations and decisions made by lower-level ABsF and appeals of outcomes unacceptable to disputants. The GORUM has determined that administrative decisions and appeals will be reviewed by committees and personnel that are part of the same organization as subsidiary bodies and personal that made earlier decisions being reviewed, rather than the judiciary or an independent body. Final administrative reviews are made by the CABF and its personnel.

The use of administrative review for final decision making is not congruent with the National Land Policy which authorizes “the use of impartial land dispute resolution mechanisms across the whole country” and “independent arbitration tribunals, courts and other dispute resolution mechanisms.”<sup>182</sup> The delegation of decision-making authority to an executive agency that reviews and makes final determinations on its own actions rather than the judiciary or an independent review body denies disputants and grievants due process and is likely unconstitutional.<sup>183</sup>

### Based on engagement and dialogue

- There was minimal, if any, consultation with stakeholder groups prior to passage of the Farmland Law or the Vacant, Fallow or Virgin Lands Management Law in 2012. Specifically, little public input was solicited on the mandate and procedures to be used for dispute or grievance resolution.

<sup>182</sup>National Land Use Policy, Part (VI) Land Dispute Resolution and Appeal, Chapter (I), Land Disputes Resolution, Introduction and (e).

<sup>183</sup>The Constitution of 2008, Chapter I Basic Principles of the Union, 19 in referring to the judiciary states: The following are prescribed as judicial principles:

(a) to administer justice independently according to law;  
 (b) to dispense justice in open court unless otherwise prohibited by law;  
 (c) to guarantee in all cases the right of defence and the right of appeal under law.

Additionally, it has been argued that these laws were designed to promote increased domestic and foreign investment in large-scale agricultural projects that would require a significant amount of land.<sup>184</sup> The laws have been seen by some as prioritizing investors' interests over those of small farmers, and as means to enable confiscation and allocation of land designated as "vacant" or "fallow" for large projects when it is actually being actively cultivated by farmers using swidden agriculture.<sup>185</sup>

- Dispute resolution procedures used by the CABF and ABFs at the Township level and above are principally focused on making administrative decisions. There is relatively little involvement of mechanism users in dialogue at District, Region, State and Central levels.

On occasion, there may direct involvement of disputants in dialogue and deliberations in ABF meetings at the Township level, however, this appears to be the exception not the rule. When stakeholders are involved, it is primarily to observe ABsF proceedings and/or to make their case in an administrative adjudicatory hearing process.

Dispute resolution procedures used by the CABF and ABFs at the Township level and above are principally focused on making administrative decisions.

- Resolving private disputes between companies, farmers and other members of civil society over claims of illegal land confiscation is very difficult. Some private disputes, especially at the local level, are often easier to resolve because parties know or are known to each other, live and work in the same village or village tract and have similar amounts of power and influence to obtain desirable outcomes. This is not, however, the case when disputes are between local farmers and companies. When disputing parties have significant differences in the amounts and forms of power and influence, reaching mutually acceptable agreements is more problematic.

Potential reasons why company-community disputes are difficult to resolve include: 1) companies need the land in question for continued operations; 2) company executives and lawyers believe use-rights for the land in question are protected by the law and are not likely to be reversed; and 3) companies believe their right to use the land was granted by the government, and it is the latter and not the company that should be challenged by grievants over contested land.<sup>186</sup>

Resolving private disputes between companies, farmers and other members of civil society over claims of illegal land confiscation is very difficult.

<sup>184</sup>Daniel Aguirre. "A sound basis for land reform." *Frontier Myanmar*, 19 February 2016. <http://frontiermyanmar.net/en/sound-basis-land-reform>

<sup>185</sup>See: R. Obendorf "Legal review of recently enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law: Improving the legal and policy frameworks relating to land management in Myanmar." 2012. Food Security Working Group: Land Core Group. [http://www.forest-trends.org/documents/files/doc\\_3274.pdf](http://www.forest-trends.org/documents/files/doc_3274.pdf); and Jessie Baver et al, *Securing livelihoods and land tenure in rural Myanmar*, 2013, pages 75-77. [https://sipa.columbia.edu/sites/default/files/UN-HABITAT%20Final%20Report\\_17May2013.pdf](https://sipa.columbia.edu/sites/default/files/UN-HABITAT%20Final%20Report_17May2013.pdf)

<sup>186</sup>*Ibid.* 5 -6.

There are, however, instances where companies have reached agreements over land with individual citizens or communities. Potential reasons why agreements were reached in these cases include: 1) the company had already used the land and had no further need for it, 2) wanted to avoid reputational risks that might result from an ongoing conflict, or 3) did not want to expend the time and resources to engage in a prolonged fight with other parties. Additionally, some companies have found alternative benefits they can provide to individuals or communities other than a return of land. Some of these include jobs or building schools or clinics as compensation for lost land.<sup>187</sup>

Interestingly, there are only a few companies in Myanmar that have invested in the development of local project-based corporate-community grievance mechanisms, even though they have been found to be effective in many other countries for both preventing and resolving community issues that involve companies.<sup>188</sup>

- Use of voluntary arbitration to resolve land disputes is in its infancy. On January 5, 2015, the Pyidaungsu Hluttaw passed the Arbitration Law of 2016.<sup>189</sup> The new law contains provisions for both domestic and international arbitration.

Use of voluntary arbitration to resolve land disputes is in its infancy

<sup>187</sup>Ibid. 5.

<sup>188</sup>Susan Wildau, David Atkins, Christopher Moore, and Elizabeth O'Neill, *A Guide to Designing Grievance Mechanisms for Development Projects*, Washington, D.C.: Office of the Compliance Advisor/Ombudsman, International Finance Corporation, 2008; and *Stakeholder Engagement & Grievance Mechanisms: Project Level Impacts*, <http://www.myanmar-responsiblebusiness.org/pdf/SWIA/Oil-Gas/07-Stakeholder-Engmt-Grievance-Mechanisms.pdf>. This report noted, "Few companies had grievance mechanisms. There might be a contact to take complaints, but not always. Sometimes those responsible for community relations were stationed in Yangon, leading to clear physical barriers for communities to interact with such contacts." 81.

Two examples of corporate community-grievance mechanisms in Myanmar is the Chevron Myanmar Grievance Mechanism Procedure, August 31, 2015. <https://www.chevron.com/-/media/chevron/worldwide/documents/myanmar-grievance-mechanism.pdf>. MPRL E&L Community Grievance Mechanisms. <https://mprlexp.com/csr/grievance-mechanisms/>

Other initiatives to create grievance mechanisms have been for the Thilawa Special Economic Zone in the Yangon Region. [http://mjtd.com.mm/sites/default/files/Thilawa%20SEZ%20Complaints%20Management%20Procedure\\_%20%28website%29version%20%28final%29.pdf](http://mjtd.com.mm/sites/default/files/Thilawa%20SEZ%20Complaints%20Management%20Procedure_%20%28website%29version%20%28final%29.pdf) This effort, however, has been complicated by the development of a parallel community-driven grievance mechanism. "Myanmar: Thilawa Economic Zone launches complaint mechanism, NGO says it falls short of intl. standards; inc. responses from company & other agencies", Business & Human Rights Resource Center. <https://www.business-humanrights.org/en/myanmar-thilawa-economic-zone-launches-complaint-mechanism-ngo-says-it-falls-short-of-intl-standards-inc-responses-from-company-other-agencies>.

<sup>189</sup>Arbitration Law, Pyidaungsu Hluttaw Law No. 5/2016, 5th January 2016. (Unofficial English Translation) [http://www.myanmarlegalservices.com/wp-content/uploads/pdf/Myanmar-Arbitration-Law\(Unofficial-English-Translation-140116\)\\_1\(1827166\\_1\).PDF](http://www.myanmarlegalservices.com/wp-content/uploads/pdf/Myanmar-Arbitration-Law(Unofficial-English-Translation-140116)_1(1827166_1).PDF) Arbitration is considered to be a voluntary CDR process because disputing parties voluntarily submit their dispute to a mutually acceptable third party to secure a binding decision. Parties are not compelled to use the process, as can be the case in either administrative or judicial decision-making.

For cases that involve government departments, organizations, farmers and the private sector, Section 42 of the Policy mandates the establishment of a tripartite arbitration process with a three-member panel.<sup>190</sup> These procedures, however, have yet to be established or used.

- Some VTA's and TAs have voiced a concern about the potential additional time it might take to use CDR, time they say they do not have<sup>191</sup> – It is true that using CDR procedures may initially take more time to reach a voluntary agreement than a third-party decision. There are, however, structural approaches to reduce the overall time required of members of ABsF, such as using smaller panels of ABF members. Additionally, any additional time required to help parties reach voluntary agreements is often compensated by less time to implement them.
- To date, there has been only limited training in CDR approaches and procedures for members of ABsF, or either of the other two land-focused committees, at the Township level or above. Mercy Corps has provided a significant number of two-day negotiation and mediation training programs followed by mentoring and coaching sessions for a number of VTAs.

<sup>190</sup>The National Land Use Policy, Part (VI) Land Dispute Resolution and Appeal, Chapter (I), Land Disputes Resolution, authorizes: “(d) Establishing an independent tripartite arbitration process to settle land disputes, comprised of Government departments, organizations, farmers and private sector”; and “(e) Establishing accurate and clear procedural processes in relevant departments and organizations to improve easy access to, and use of, independent arbitration tribunals...”

A tripartite arbitration process involves a panel of three independent individuals, arbitrators, empowered by disputants to hear their case and make either a recommendation for a settlement or a final binding decision on contested issues. There are two models for this mechanism and procedure, a standing panel and an ad hoc panel. Standing panels are commonly appointed by a respected person, institution or independent commission with widely recognized legitimacy and authority to make appointments. Ad hoc panels are established by mutual agreement of the disputing parties. Each party selects one member of the arbitration panel. The third is chosen by the two arbitrators selected by the parties.

Arbitrators on tripartite arbitration panels may be independent individuals without an affiliation with any of the involved parties or their organizations or may be drawn from organizations similar to those of disputants. For example, if arbitration is between an administrative body responsible for making decisions on land disputes and a farmer, one arbitrator might be selected by the administrative body involved in the case from another administrative body that deals with land issues but is not involved in the current dispute. The farmer might select an arbitrator from a farmers' organization or a CSO affiliated with farmers. The third arbitrator would be a neutral and impartial individual selected by the other two intermediaries.

Arbitration panels reach decisions on awards by voting and majority rule. Arbitration decisions, or awards, may include rulings on the merits of parties' cases, remedies or damages, injunctions ordering or prohibiting an action or required performances or the rectification or cancellation of a decision or contract.

<sup>191</sup>A participant in a CDR training program conducted by NRC staff in Rakhine State in September 2018 noted that in Rakhine there is little patience by GORUM officials for a long mediation process. This is seen by the VTA's use a faster process of negotiation with disputing parties where the Administrators suggest concrete solutions. Most time there is negotiation in consultation with disputants, but the outcome is not a win-win solution. The VTA is looking to save time. Focus Group Discussion of NRC Staff in Sittwe, Rakhine State, September 2018.

## Recommendations

Below are recommendations that will enable the dispute and grievance mechanism and procedures of ABsF to be more congruent with UNGP “Effectiveness Criteria” and facilitate introduction, implementation and institutionalization of CDR approaches and procedures.

### Legitimate

- The GORUM and NGOs interested in the introduction and institutionalization of CDR should actively identify champions within the government, and specifically in the CABF or subsidiary ABsF, who can effectively advocate for its implementation and use. Champions are people in positions of authority who understand and have a vision about how CDR can be used to resolve land disputes. They have significant political influence that enables them to persuade or require others to introduce CDR approaches and procedures, defend their use from critics and supervise over-all implementation.

Champions should be identified by the GORUM, CABF and civil society groups. They should be sought at all levels of the CABF and ABsF depending on the strategies chosen to implement CDR.

One strategy for champions – the Bottom-Up strategy – is to advocate for informal use of CDR, primarily at lower levels of ABsF – the VT and Township levels. If the procedures are effective, measures can be taken to institutionalize them.

The GORUM and NGOs interested in the introduction and institutionalization of CDR should actively identify champions within the government, and specifically in the CABF or subsidiary ABsF, who can effectively advocate for its implementation and use.

Another strategy is more Top-Down. This approach institutionalizes CDR procedures by identifying champions who can advocate for amending legislation or a Presidential Order, providing additional guidance for existing land dispute resolution institutions and mechanism and mandate training for institutional service providers. Securing formal institutional approval and a mandate for the use of CDR approaches in the land sector, or more broadly to resolve in a range of grievances or disputes, is more likely to result in institutionalization than exclusive use of a Bottom-Up approach. It should be noted, however, that the two approaches are not mutually exclusive and can be pursued simultaneously. More will be said about the two strategies, plus another – a middle way – in the final section of this study on Strategies for Introduction, Implementation and Institutionalization of CDR Approaches and Procedures to Resolve Land Disputes and Grievances in GORUM and KNU Institutions and Mechanisms

- Members of civil society – farmers and CSOs with technical knowledge about agriculture and customary and statutory land law – should be included as full members of ABsF at all levels. Members of civil society are already on ABsF at the VT level. Having credible and trusted representatives of civil society on ABsF and other land dispute and grievance resolution committees at Township to Central levels can help assure a range of perspectives on issues in dispute or grievances are considered when assisting parties to try and voluntarily settle their differences or when decision-making is required. Additionally, the involvement of members of civil society as members of ABsF, as opposed to only government officials, can help increase credibility of these bodies by users of dispute resolution services and in the eyes of the public.

Members of civil society – farmers and CSOs with technical knowledge about agriculture and customary and statutory land law – should be included as full members of ABsF at all levels.

ABF civil society members should be nominated and selected by farmer associations and civil society organizations from geographic and administrative areas in which they will serve, so they have credibility with the communities that select them. When members of civil society are selected to be on bodies and committees, they should:

- Be in adequate numbers that they are not merely tokens and have enough “voices” to assure “voice legitimacy” and their views will not be dominated by government members;
- Have a mandate and clear guidance on their roles and authorities on committees – as full committee members with equal rights and authorities as government members to participate in all committee activities and decisions;<sup>192</sup> and Be paid a stipend, as needed, to cover travel, meals and lodging expenses and assure their availability as full participants.

### Accessible

- Authorize ABsF to require participation by all involved disputants or grievants in a mediation or conciliation meeting, specifically at VT and Township levels, prior to an ABF making a decision on a case. Participation in such meetings will provide an opportunity for disputing or grieving parties to attempt to reach a voluntary settlement with assistance from the ABF prior to the need for a third-party decision. Participation in mediation or conciliation meetings, however, does not require disputing parties to reach an agreement. Mandatory participation in mediation has been used by a significant number of contexts, including judicial proceedings, in a variety of countries around the world.<sup>193</sup> The requirement to try mediation before a court will hear a case and render a decision has resulted in a high level of voluntary settlements, and significantly lowered the case load of adjudicatory bodies.

Authorize ABsF to require participation by all involved disputants or grievants in a mediation or conciliation meeting, specifically at VT and Township levels, prior to an ABF making a decision on a case.

<sup>192</sup>It is important to clarify the roles and authorities of civil society members of government bodies or committees. Government agencies and their personnel in most countries have final authority to make decisions on issues that are in their purview or mandate. When a government agency forms a committee that includes members of civil society, the government usually retains final decision-making authority unless some other arrangement is agreed upon by the agency and committee members. For example, on some government committees, members of civil society have authority to fully participate in all committee deliberations, make recommendations and engage in decision-making if a consensus process is being used. If, however, civil society members disagree with government members of the committee or the agency or agencies involved, the latter have authority to make a final decision. An example of government committees that involve members of civil society in rulemaking is described in U.S. Code Chapter 5 – Administrative Procedure, Subchapter III Negotiated Rulemaking Procedure, (§561-570a). <https://www.law.cornell.edu/uscode/text/5/part-I/chapter-5>

<sup>193</sup>Jennifer Winestone, “Mandatory Mediation: A Comparative Review of How Legislatures in California and Ontario are Mandating the Peacemaking Process in Their Adversarial Systems”, February 2015, Mediate.com. <https://www.mediate.com/articles/WinestoneJ4.cfm>

If a disputant or grievant declines to participate in a mediation process and does not attend a scheduled ABF dispute resolution meeting, that body can still proceed with activities to help settle a case. It may either make a recommendation for a settlement or decision on the case or refer it to the next higher ABF for a decision. If the latter, the ABF that referred the case, can issue a Certificate of Non-Participation for the party that did not take part in mediation.<sup>194</sup> While a Certificate of Non-Participation does not automatically prejudice any future decision by a higher ABF, it does inform that body that one of the parties refused to participate in a voluntary effort to reach a settlement. Because of the potential of receiving a Certificate of Non-Participation, and the possibility that it could impact future dispute resolution decisions, many disputants agree to participate in a mediation or conciliation process.

- The GORUM should increase the accessibility and efficient provision of GORUM dispute resolution assistance by providing ABsF, and other land dispute resolution mechanisms, with dedicated professional and support staff, offices, appropriate equipment and independent budgets. Having designated staff and funding will enable ABsF to hold more regular meetings, conduct in-depth site visits and investigations and provide additional time to assist disputing parties to reach voluntary agreements. It will also enable ABsF to engage in in-depth consideration of cases and make more informed decisions.
- Create smaller panels of mediators or conciliators, composed of fewer ABF members than are on the full committee, to lower the time required for individual members to provide dispute or grievance resolution assistance. As mediation or conciliation do not involve decision making by the full committee, a smaller group of committee members can provide this assistance. Generally, a panel of three members is suggested to provide a range of views and skills and to prevent any bias or corruption from affecting the process.<sup>195</sup>
- Create joint technical teams, composed of appropriate government and CSO technical staff, to engage in case investigations and joint fact-finding for complex cases. For more complex disputes, or those that involve multiple parties, joint technical teams should be formed with appropriate involvement of Administrators, technical staff from GORUM Ministries and Departments that are members of ABsF and CSO technical experts. Teams should conduct site-visits, investigations and advise ABsF on technical and legal issues related to resolving disputes or grievances. Use of joint technical teams commonly increases the quantity and quality of information gathered, can help reconcile differences concerning data and provide input on potential components of settlements.

<sup>194</sup>The Sri Lankan Ministry of Justice Mediation Boards Program separates the roles of mediator and decision-maker. The former is a panel of mediators who assist disputants to reach voluntary agreements. They have no authority to make decisions for involved parties. The decision-maker is a separate person, a government judge. The program also uses Certificates of Non-Participation to induce parties to participate in mediation.

The Barangay Justice Program in the Philippines, a local government community justice initiative, uses separate panels of mediators and arbitrators that are drawn from a common pool of intermediaries. Parties in dispute first work with a mediation panel to try and reach a mutually acceptable agreement. Failing to do so, they can request the formation of an arbitration panel with different members than those on the mediation panel. The arbitration panel is authorized by the government to make a binding decision for disputants. If the parties do not reject the arbitration decision within a prescribed period of time, the ruling by the panel has the same standing as a judicial decision. If parties reject it within the prescribed period of time, they have the option of taking their case to court.

<sup>195</sup>This model for the creation of smaller mediation panels is used by the Sri Lankan Ministry of Justice Mediation Boards and by the Barangay Justice System in the Philippines.

Farmers and CSOs should select their technical and/or legal experts to be involved in providing input on cases in their area. Experts do not have to be full-time employees or consultants and can be engaged on a case-by case basis. They should, however, be paid for their time and services from a government fund established for this purpose.<sup>196</sup>

- Require that Region or State, Township and VT ABsF always conduct field visits and on-site investigations if cases are especially complex, involve multiple parties or are requested by one or more disputants or grievants. ABF investigation teams, in addition to gathering background information related to a dispute or grievance, should be authorized to explore options for voluntary settlements with involved parties. If an ABF investigation team includes members who have authority to make a decision on issues in question, the team should work with involved parties to formalize an agreement.<sup>197</sup> If, however, members of an investigation team do not have an Administrator with authority to make a decision, the team should only gather information and identify potential voluntary agreements. Possible options for settlement should be taken to the appropriate level of ABF for its use in future mediation or conciliation efforts or deliberations or decision-making.

Require that Region or State, Township and VTABsF always conduct field visits and on-site investigations if cases are especially complex, involve multiple parties or are requested by one or more disputants or grievants.

If involved parties reach a voluntary agreement in the field, the appropriate level of AFB should review it. If the ABF determines the settlement complies with statutory law and/or customary standards, the ABF can accept it as a stipulated agreement by involved parties. If, however, the ABF has questions about information gathered by the investigation team or a proposed agreement by disputants or grievants, the body should convene a dispute resolution meeting with all parties to discuss its issues or concerns. Parties should also be allowed to request a meeting with the ABF to present their case if they have questions about the investigation or potential agreement.

During the dispute resolution meeting noted above, the ABF should assist parties to try and reach a voluntary settlement. Failing to do, it should make a decision that is appealable up to the Region or State level, which has authority to make a final and binding decision.

### Predictable

- The CABF should assure that a transparent public and on-line case tracking system is in place. An efficient case tracking system is important for disputants and grievants who want to know the progress and status of their cases and for the ABsF engaged in providing dispute or grievance resolution services. The system should be easy for all users to access and use to obtain information they need.<sup>198</sup>

<sup>196</sup>In many countries, legal services are provided for people with low incomes, both by government appropriations and private grants or donations, so they can be adequately represented in dispute resolution initiatives or legal proceedings. In the U.S., government agencies, such as the U.S. Environmental Protection Agency and agencies of the U.S. Department of the Interior (which manages Federal land) have established funds to provide financial assistance to civil society organizations and Indian Tribes so that they can conduct technical analysis and engage as fully informed participants in dispute resolution activities.

<sup>197</sup>Mediation is conducted, and agreements reached in a number of countries during field visits and investigations. Customary authorities, NRC and other dispute resolution providers use this process in Afghanistan, Democratic Republic of Congo, Liberia, Sri Lanka, Timor-Leste and many others.

An efficient case tracking system is important both for disputants and grievants who want to know the progress and status of their cases and for the ABF to inform the public about the status of cases. They can do so via monthly reports on cases completed, in process and rejected; quarterly press conferences and on an easily accessible website.

An efficient and accurate case tracking system is also valuable for ABsF because it enables them to evaluate their performance, communicate information to the public, build institutional credibility and identify systemic sources of disputes or grievances, which if addressed can eliminate their causes and prevent similar issues from arising in the future.

- The CABF should mandate how frequently ABsF should meet to process cases, undertake dispute resolution initiatives to seek voluntary agreements, and, if necessary, make decisions about land disputes or grievances. Requiring meetings according to a schedule will help promote case processing in a timelier manner. The CABF should also monitor whether ABsF are conducting meetings as required and impose consequences for those that are not in compliance.

### Equitable

- The GORUM and NGOs should continue providing information and HLP Awareness Training Programs on statutory land law and national and international human rights for ABsF, Ward Administrators, CSOs, village heads and villagers currently involved in initiatives to resolve land disputes or grievances or that may be in the future. Existing HLP Awareness programs, which provide substantive knowledge, are needed both by third parties and individuals or groups involved in disputes or grievances. Programs with a substantive HLP focus complement training on CDR procedures. They provide guidance, standards and criteria for voluntary dispute resolution using either /CDR processes or administrative decision-making.

The GORUM and NGOs should continue providing information and HLP Awareness Training Programs on statutory land law and national and international human rights for ABsF, Ward Administrators, CSOs, village heads and villagers... Programs with a substantive HLP focus complement training on CDR procedures.

<sup>198</sup>Some of the components of an effective case tracking system include:

- Case intake information (parties, date of intake, issues, and relevant demographic information),
- The date and ABF to which a dispute or grievance has been referred,
- Dates and subsequent referrals to other ABsF,
- The status of current resolution activities,
- The projected date for an outcome or a final decision by an ABF
- The results – details on an outcome or decision/outcome and when it was reached or made,
- The logic and rationale for the outcome/decision,
- When disputants or grievants have been or will be notified of the outcome/decision,
- Information the entity mandated to implement the outcome or decision and date the order was sent,
- Date when the outcome/decision is expected to be implemented, and
- Date when the outcome/decision has been fully implemented.

- The Chair of the CABF should require directors and staff of government entities that are members of ABsF at all levels to share all available information about cases with civil society members of ABsF. All ABF members should have equal accesses and knowledge about cases being handled. No information should be considered proprietary by any entity.<sup>199</sup>
- CSOs should create expert teams composed of individuals with both legal and technical expertise to provide assistance to non-governmental parties involved in ABsF dispute resolution initiatives. Experts should be advisors and not members of ABsF. If one party is a farmer and the other is not, the expert should serve as an advisor, and if the farmer wishes, a legal and technical advocate for them in ABF proceedings. If both parties are farmers, members of the expert team should provide legal and technical information to both parties, and not give preferential advice or serve as an advocate for either of them.<sup>200</sup>

### Transparent

- Parties whose disputes or grievances are to be addressed, mediated, conciliated and/or decided by any level of the ABF should be informed about the date, time and location of the dispute resolution meeting one week before it is convened – Public notices should be placed in multiple places, including in the village(s) where disputed land is located, so disputants and other concerned villagers are likely to see and read them. Radio announcements should be aired, and postings made on social media such as Facebook or other platforms commonly used by members of the public, at least one week prior to the date and time of the ABF meeting.
- Require all meetings, deliberations and decision-making of ABsF be open for observation by disputants, grievants, their representatives and members of the public. Enabling parties and members of the public to observe dispute resolution processes can increase their understanding of procedures and outcomes and help minimize corrupt decision-making and collusion that can occur in private meetings. If ABsF do engaged in biased decision-making or corruption, and it is observed, witnesses will be present who can testify to the fact if and when the case is appealed to a higher- level body.

Require that all meetings, deliberations and decision-making of ABsF be open for observation by disputants, grievants, their representatives and members of the public.

- When ABsF make decisions on cases, they should provide the logic and rationale for their conclusions, draft it in language that will be easily understood, provide copies to all involved parties and make the information available to members of the public. Disputants and grievants deserve and should have the right to know the reason for a decision or outcome of their case. If needed, they can also use this information in future appeal. The logic and rationale for an outcome or decision on a case should also be available to the public in ABsF monthly reports.

<sup>199</sup>This is a recommendation by NAMATI in its report Myanmar's Foray into Deliberative Democracy: Citizen Participation in Resolving Historical Land Grabs. While this recommendation is focused on needed changes in Central Committee for Rescrutinizing Confiscated Farmlands and other Lands, it is equally appropriate for ABsF.

<sup>200</sup>NRC has used this model of providing legal and technical advice to diverse parties in many countries around the world.

## Rights-compatible

- The GORUM and National Land Council should operationalize components of the National Land Use Policy concerning people’s rights to use impartial land dispute resolution mechanisms and procedures. In January of 2016, the President’s cabinet of the former military-led civilian government formally endorsed the National Land Use Policy (NLUP). Part (VI), of the Policy on Land Dispute Resolution and Appeal, defines provisions for how “to hear and decide land disputes through the use of impartial land dispute resolution mechanisms across the whole country”.<sup>201</sup> They include:
  - (a) Allowing the rights to make a complaint, defend oneself or with representation, and appeal for land disputes;
  - (b) Resolving land disputes in public, and use of appropriate local language and translation as necessary;
  - (c) Resolving land disputes transparently, fairly and free from corruption.<sup>202</sup>
- The GORUM should separate the responsibilities and roles of institutions and their members – such as the CABF and ABsF – that are involved in both land allocation and land dispute resolution activities. Separation will help prevent potential or actual conflicts of interest or corruption that can occur if the two responsibilities are combined in the same institutions and personnel. Separation of responsibilities and roles can significantly help increase the legitimacy of dispute resolution mechanisms, procedures and personnel in the eyes of users.

The GORUM should separate the responsibilities and roles of institutions and their members – such as the CABF and ABsF – that are involved in both land allocation and land dispute resolution activities.

If the responsibilities and roles of institutions and their members involved in land allocation and dispute resolution are not separated, the CABF should implement procedures to help eliminate potential conflicts of interest or corruption by instituting the following measures:

- (1) Insert new CDR procedures into the CABF dispute resolution mechanism that enable parties to a dispute to be more directly involved and have more input into investigations, the development of conclusions and final recommendations or decisions on land claims prior to their being forwarded to upper level ABsF for their consideration and decisions.
- (2) Insert specific provisions into ABF guidelines that encourage parties in dispute to engage in either direct or assisted negotiations, the latter using process-focused mediation, so they have more direct influence and control over outcomes.

The CABF should Insert specific provisions into ABF guidelines that encourage parties in dispute to engage in either direct or assisted negotiations, the latter using process-focused mediation, so they have more direct influence and control over outcomes.

<sup>201</sup>National Land Use Policy, Part (VI), Land Dispute Resolution and Appeal, Chapter (I), Land Disputes Resolution, 41, January 2016.

<sup>202</sup>ibid.

- (3) Require mandatory recusal by individual members of ABsF below the Region or State level, if:
- the members have been involved in making previous land allocation decisions on the same tract of land being addressed by the ABF, or
  - one or more parties to the grievance or dispute request a members to recuse him or herself because of perceived or actual involvement in a past land allocation decision on the same tract of land being addressed by the ABF or the possibility of a potential or actual conflict of interest may exist when resolving the present claim.<sup>203</sup>
- The requirement for recusal could be implemented either through an amendment of existing legislation or its guidance.

Utilize recusals of ABF institutions or members or restructure membership of the bodies to address potential or actual conflicts of interest or corruption.

In the event that one or more recusals prevents an adequate number of members from participating in a neutral and impartial investigation of a claim, drawing unbiased conclusions, preparing neutral recommendations or making impartial decisions, the claim should be elevated to the next highest RC to handle. This process can continue up to the Region or State level if one or more disputants perceive that there is a potential or actual conflict of interest. If there is still a perceived conflict of interest at the Region or State level, one or more grievants or disputants can request that the CAB make a final decision on the claim.

- (4) Assign members to ABsF and any Investigation Groups established to address specific cases, from different levels of ABsF to assure their members have not been directly involved in past decision-making about land in question.
- (5) Involve additional notables from the concerned community, township or district involved in an ABF investigation and joint fact-finding activities and who can serve as independent reviewers of the data being collected, the process being used, and conclusions reached.
- (6) Utilize a “shared neutral process” by bringing in one or more officials from another disinterested government entity, a member of civil society and a member of an NGO/CBO – all of which should have expertise in dispute resolution – to oversee the fairness of the investigation and facilitate the development of a recommendation and/or decision by ABsF.
- (7) Create an independent external monitoring mechanism outside of the CABF to evaluate the performance of its performance of ABsF and their personnel and assure they are performing their functions and roles in a neutral, impartial and unbiased manner.<sup>204</sup>

<sup>203</sup>For example, the GAD chair or a committee member is making a decision on a parcel of land connected with a family member or business associate.

<sup>204</sup>This body could monitor only the performance of ABsF or all three GORUM land committees and include the CCMFVL and the CCRCFOL. The body could potentially be created either by legislation or a Presidential Order.

- The GORUM should establish an independent monitoring body to oversee settlements of land disputes, implementation of voluntary agreements between or among parties and/or decisions made by ABsF.<sup>205</sup> The National Land Use Policy states that “The following shall be carried out when resolving land disputes: [Implement] (e) “Independent monitoring bodies with participation of all stakeholders and appointing monitors that have no direct interest, to observe settlement of land disputes.”<sup>206</sup> It is important that both settlements and implementation be observed and monitored by representatives of all involved parties. If there are difficulties or non-compliance with implementation of voluntary agreements reached with the assistance of an ABF or decisions made by its members, monitoring bodies should be authorized to report them to the CCABF. The CCABF should have authority to follow-up on identified problems and help parties to voluntarily comply before enforcing terms of settlements or decisions.<sup>207</sup>

The GORUM should establish an independent monitoring body to oversee settlements of land disputes, implementation of voluntary agreements between or among parties and/or decisions made by ABsF

- When parties’ engagement in dialogue procedures – such as negotiation, joint-fact-finding, mediation or conciliation – are not feasible or not successful, they should have a range of choices regarding follow-on procedures to secure an authoritative decision to settle their differences – Choices should include decision-making by:
  - A Region or State ABF, or if necessary, the CABF, for a conclusive and binding decision;
  - An independent arbitrator or arbitration panel authorized by involved parties to make a binding decision;
  - An independent and impartial governmental body, as yet to be established, that has authority to review and make legally binding and enforceable decisions.
- Disputants should consider use of voluntary arbitration by an independent and impartial individual or body as an alternative to GORUM administrative decision-making to resolve private land disputes. The Arbitration Law of 2016, with provisions for the settlement of both domestic and international issues, enables parties who want to resolve private civil disputes to use arbitration as opposed to seeking a judicial decision.<sup>208</sup> Myanmar’s National Land Use Policy (NLUP) authorizes the use of arbitration as way to resolve land disputes.<sup>209</sup>

<sup>205</sup>The GORUM could establish either separate independent monitoring bodies for the ABsF and each of the other two land dispute resolution institutions and mechanisms, or a single body that could review settlements and implementation of all voluntary agreements or administrative decisions pertaining to land disputes or grievances.

<sup>206</sup>National Land Use Policy, Part (VI) Land Dispute Resolution and Appeal, Chapter (I), Land Disputes Resolution, 42 (e).

<sup>207</sup>Similar measures should be taken to assure compliance and enforce settlements by both the CCMVFL and the CCRCFOL.

<sup>208</sup>Presumably this option should be available as an alternative to an administrative decision if all parties are amenable.

<sup>209</sup>National Land Use Policy, Part (VI) Land Dispute Resolution and Appeal, Chapter (I), Land Disputes Resolution, (d) and (e).

- The GORUM should establish a new independent land dispute and grievance resolution institution and mechanism authorized to provide impartial dispute resolution assistance and conduct reviews of decisions and conclusions on appeals made by the CABF and ABsF and make binding and enforceable verdicts.<sup>210</sup> Many countries have institutions that provide such services.<sup>211</sup>

The institution should be authorized to provide mediation and conciliation as well as review ABsF decisions. Third-party assistance should be provided by an individual or panel of intermediaries who are not affiliated or connected with the organization or personnel that made the administrative decision being reviewed.<sup>212</sup>

A new institution is desirable because of the complexity of Myanmar's land laws, current laws that limit legal access by disputing parties or grievants to courts for judicial review of administrative decisions and the potential for a large number of land cases that might be brought forward for resolution that might overwhelm courts and produce delays in settlements.

- The GORUM should require public or private companies applying for and receiving a use-right to conduct operations on state land to design and implement an effective corporate--community grievance mechanism that can satisfactorily resolve a range of disputes including those over land. The mechanism should comply with the UNGP "Effectiveness Criteria" and should be designed with significant community input to assure its broad acceptability and use. Having such mechanisms, if effective, can address and resolve some land cases that might otherwise go to ABsF or to an independent GORUM dispute resolution institution and mechanism, once one is created.

The GORUM should require public or private companies applying for and receiving a use-right to conduct operations on state land to design and implement an effective corporate-community grievance mechanism that can satisfactorily resolve a range of disputes including those over land.

### Continuous Learning

- The National Land Use Council and GORUM land dispute resolution institutions should initiate several pilot projects to test the use and effectiveness of CDR approaches and procedures, especially mediation and conciliation. Pilot projects should be located in different states to assure consideration of different cultural norms for dispute resolution. Pilots should include robust monitoring and evaluation components.
- The National Land Use Council and other appropriate GORUM ministries and departments should revise the National Land Use Policy (NLUP) to include and advocate for the use of CDR approaches and procedures in the resolution of land disputes and grievances. Revision of the NLUP will be a significant step in affirming, codifying and institutionalizing the use of CDR

<sup>210</sup>The independent body could be mandated to address only cases involving the CABF or ABsF or could be authorized to resolve cases from all three GORUM administrative land dispute and grievance resolution mechanisms.

<sup>211</sup>See: Access to Justice and Administrative Law in Myanmar. Yangon, Myanmar, USAID and Tetra Tech, October 2014; and Resolving Land Disputes Through Restitution Mechanisms: A Comparative Analysis of Case Studies, 2017; Ghana, Alternative Dispute Resolution Act, 2010. <https://www.wipo.int/edocs/lexdocs/laws/en/gh/gh036en.pdf>.

<sup>212</sup>The independent body could be mandated to address only cases involving the CABF or ABsF or could be authorized to resolve cases from all three GORUM administrative land dispute and grievance resolution mechanisms.

The National Land Use Council should contract for research on the design and implementation of an independent institution and mechanism to review decisions by ABsF and their verdicts on appeals. The National Land Use Policy (NLUP) advocates hearing and deciding land disputes “through the use of impartial land dispute resolution mechanisms across the country”.<sup>213</sup> Further, in defining how land dispute resolution will be carried out the policy mandates “Establishing accurate and clear procedural processes in relevant departments and organizations to improve easy access to, and use of, independent arbitration tribunals, courts and other dispute resolution mechanisms by farmers and other land users in accordance with existing laws.”<sup>214</sup> Additionally, the policy states that research should be conducted on methods “for individuals and organizations to appeal decisions in dispute related to land and land administration”.<sup>215</sup> Finally, the policy mandates that “one or more pilot projects shall be researched and tested in order to establish, organize, implement and monitor accurate practices.”<sup>216</sup> To date the GORUM has not provided any public information on current or potential future studies related to impartial land dispute resolution mechanisms that will handle appeals of decisions made by administrative bodies. It is important that the government begin research on this topic as soon as possible.

The National Land Use Council and appropriate GORUM ministries and departments should; 2) contract for research on the use and effectiveness of CDR, especially mediation and conciliation; 2) revise the National Land Use Policy (NLUP) to include and advocate for the use of CDR approaches and procedures; and 3) conduct research on the design and implementation of an independent institution and mechanism to review decisions and verdicts on appeals by ABsF.

### Based on Engagement and Dialogue

- The GORUM/CCABF should formally mandate, either by passing new or amending existing laws, the use of CDR by ABsF dispute resolution mechanisms at all appropriate levels – New policies, legislation and guidance should be developed in consultation with farmers associations and CSOs concerned with agricultural issues. CDR procedures – especially joint fact-finding, mediation and conciliation – should be utilized by ABsF as the dispute resolution procedures of first resort for the resolution of all private land disputes. These should be used, at a minimum, by VT and Township ABsF, and where appropriate at higher levels.<sup>217</sup>

The GORUM/CCABF should formally mandate, either by amending existing or passing new laws, the use of CDR by ABsF dispute resolution mechanisms at all appropriate levels.

<sup>213</sup>National Land Use Policy (NLUP), Part (VI), Land Dispute Resolution and Appeal Chapter (I), Land Disputes Resolution, 41.

<sup>214</sup>Ibid.42 (e).

<sup>215</sup>Ibid. Part (VI) Land Dispute Resolution and Appeal, Chapter II, Appeal, 44.

<sup>216</sup>Ibid. Chapter (I), Land Disputes Resolution 43.

<sup>217</sup>CDR should also, as appropriate, be considered for use by the Committee for Management of Vacant, Fallow and Virgin Lands, and the Committee for Rescrutinizing of Confiscated Land and other Lands at the VT and Township levels. Policies and guidance pertaining to CDR for these committees should also be developed in consultations with CSOs.

- Assure that ABsF Administrators and committee members are neutral, impartial and unbiased when providing CDR assistance to resolve farmland disputes or grievances and/or making decisions. If a member of an ABF has a perceived or actual conflict of interest, he or she should recuse him or herself from providing dispute resolution on the case the body is addressing.

If there is a conflict of interest by a significant number of committee members at one level of an ABF so that it is difficult to have a quorum, the case should be elevated to the next level of ABF for CDR assistance and/or to make a decision.

- ABsF should explore and consider using separate mediators/conciliators and decision-makers. If an ABF or land committee is large enough, six members or more, smaller separate panels composed of three mediators/conciliators and arbitrators can be formed.<sup>218</sup> Separation of process and substantive assistance and decision-making often encourages parties in mediation or conciliation to be more open to providing more information about their case, examining its strengths and weaknesses and revealing their interests. Parties are also often more willing to explore a range of options for settlement if they know that the third party assisting them will not be a future decision-maker.

If parties cannot reach a voluntary agreement, a new panel of three arbitrators, who are different than members who were on the mediation/conciliation panel, can be assembled to hear and make a decision on the case. If an ABF or VT land committee is not large enough to create both a mediation/conciliation and arbitration panel, a respected independent outsider can be recruited and agreed upon by the disputing parties, two serve on either of the three-person panels.

If a separate mediation or decision-making body is not possible, another option is to use “med-arb”.<sup>219</sup> In med-arb, a third party, such as an ABF, first tries to mediate a settlement. If the parties cannot reach a voluntary agreement, the same third party, with the parties’ permission, shifts to become a decision-maker or arbitrator. This process, in some circumstances, is acceptable to disputants and grievants. In others, it is not. Parties often fear that information revealed during mediation may be used against them later time if the third-party becomes a decision-maker.

<sup>218</sup>This dual panel model, with separate members from a body of intermediaries selected for or a mediation panel and others for an arbitration panel, is used extensively by the Barangay Justice System, a nation-wide community-based mediation/arbitration service in the Philippines.

<sup>219</sup>Katie Shonk, “What is Med Arb? The pros and cons of med arb, a little-known alternative dispute resolution process”, Cambridge, Mass., Harvard Program on Negotiation, January 2017. Interestingly, med-arb is very similar to many customary dispute resolution procedures in which a customary leader first tries to help disputing parties to reach agreement, and failing to do so, provides either a non-binding recommendation for settlement or makes a binding decision.

## The Central Committee for Management of Vacant, Fallow and Virgin Lands



CDR Training at Pain Nel Taw village, Thaton township, Mon State (Saw Htay Lin Aung, NRC)

The determination of land allocation and use in Myanmar is of critical concern both to the majority of the population who are farmers and the State. Farmers want access to land and formal recognition of their customary use rights so that they can secure livelihoods. The State wants to allocate and use land for large development projects that generate income and will benefit the country as a whole. Resolution of potential and actual tensions, disputes and grievances related to these two goals requires an effective mechanism to reconcile them.

<sup>220</sup>The VFVL defines vacant or fallow land as “land on which agriculture or livestock breeding business can be carried out and which was tenanted in the past and abandoned for various reasons and without any tenant cultivating on it and the lands which are specifically reserved by the State.” The Law Amending the Vacant, Fallow and Virgin Lands Management Law (2018) defines Virgin Lands as “wild land and wild forest land whether on which there are trees, bamboo plants or bushes growing or not, or whether geographically (surface) topography of the land is even or not and being the new land on which cultivation has never been done, not even once. The said expression shall include the land of forest reserve, grazing ground and fishery lakes and ponds lands which have been legally revoked to carry out in line with this law and not currently in use.”

## Mandate

In 2012, the Pyidaungsu Hluttaw (Assembly of the Union) passed the Vacant, Fallow and Virgin Lands Management Law (VFVLM).<sup>220</sup> The law required establishment of a Central Committee for Management of Vacant, Fallow and Virgin Lands. (The term CCMVFVL will be used for the institution and mechanism as a whole.) Among the CCMVFVL's principle authorities and duties are: classifying types of land; receiving recommendations for the use of VFVL from a number of ministries and lower-level government bodies and officials; receiving and processing applications and granting "Permission Orders" for use of VFVL to diverse parties including individuals, private investors, government entities and NGOs; cancelling or revising terms for VFVL use and rights; helping holders of land use rights to access technical and financial assistance; and, with coordination and cooperation of other government entities, resolving disputes related to VFVL.<sup>221</sup>

In addition to the above, the CCMVFVL has a number of policy, reporting and financial responsibilities including providing input on the formulation of National Land Policies, submitting semi-annual monitoring reports to the Cabinet of the Union Government on the use of VFV, fixing the rate of security fees to be deposited for use of VFVL and fixing the annual land revenue rate and suitable period for tax exemption in connection with the use of VFVL.

## Organization, Personnel and Functions

The CCMVFVL is a national, multi-ministerial committee formed at the President's discretion. The Minister of Agriculture Livestock and Irrigation (MOALI) is the Chairperson and the Director General of DALMS is the Secretary. Other members are individuals from various government departments or other suitable persons of the Chair's choosing. An amendment of the Law in 2018, on the formation of the Central Committee for Management of VFVL, allows for the appointment of "other suitable persons" on the Central Committee but did not specify who they should be.<sup>223</sup>

The original VFVLM mandated the Central Committee to establish task forces and specialized bodies at the Naypyidaw Council and Region and State levels, establish their functions and duties and authorize them to manage and address issues concerning the allocation of VFVL. An amendment of the Law in September of 2018 mandated that the Central Committee "shall form relevant region or state, union area Committees for Management of Vacant, Fallow and Virgin Lands, with representatives of local ethnic groups, farmer representative, CSO representatives and appropriate experts."<sup>224</sup> These committees replace the task forces.

<sup>221</sup>Land Stakeholder Analysis: Governance Structures and Actors in Burma, Yangon, Myanmar, USAID/Tetra Tech, May 2017, 14.

<sup>222</sup>Members of the CCMVFVL as of 2017 included: MOD Joint Quartermaster - Second in Command; President's Office DG; MOHA DG of General Administration Department (GAD), MOALI DG of Agriculture, MOALI DG of Irrigation and Water Usage Management, MOALI Managing Director of Myanmar Agriculture Development Bank (MADB), MOALI DG of Livestock & Veterinary, MOALI DG of Fisheries, Ministry of Religion and Culture DG of Archaeology & National Museum, MONREC DG of Forestry, MONREC DG of Mines, MFP DG of Inland Revenue, and Ministry of Hotels and Tourism DG of Hotel and Tours. Land Stakeholder Analysis: Governance Structures and Actors in Burma, 15. An amendment to the law in 2018 allows for "Appropriate external representatives".

<sup>223</sup>Law Amending the Vacant, Fallow and Virgin Lands Management Law, Chapter II, Section 3a, September 11, 2018.

<sup>224</sup>Ibid.

Government members of Committees for Management of VFVL (CMVFVL) and investigatory bodies below the CCMVFVL and at the Township level, like those for the ABsF, are composed of personnel from government entities with mandates to address land issues. Like members of other land committees, members of CMVFVL are drawn from existing staff of ministries or departments and perform collateral duty related to allocation of VFVL in addition to their normal work responsibilities. As for the ABsF, no additional personnel, resources or budget have been provided by the government to support the CCMVFVL or its subsidiary committees.

As noted above, the CCMVFVL is authorized to “assign the relevant management committee or form specific bodies, stipulate their functions and duties to scrutinize and coordinate the submitted matters concerning the right to cultivate or utilize the vacant, fallow and Virgin Lands”.<sup>225</sup> The VFVLML prescribes two kinds of investigatory Boards:

(a) Separate Boards – Boards “formed by the Central Committee to inspect cases and matters relating to the rights to work on and utilize vacant, fallow and Virgin Lands submitted by the Naypyidaw Council or respective Region or State”.<sup>226</sup> These boards are established when there is an application for VFVL, there is objection or there are multiple applicants for the same parcel of land.

(b) Special Boards – Boards “formed by the Central Committee on occasion to inspect the situation regarding implementation of projects on vacant, fallow and Virgin Lands.”<sup>227</sup> These boards are established to investigate and determine if a permittee with the right to cultivate or use VFVL is complying with and operating the business according to the terms and conditions of its use.

### The Process for Applying for and Allocation of VFV Land

The land allocation procedure created by the VFVLML, 2018 Amendments to the Law, and promulgated Rules is a multi-step process that involves application, investigation and, if successful, the grant of a permit to the applicant to work and utilize VFVL.

The land allocation procedure created by the VFVLML, 2018 Amendments and promulgated Rules is a multi-step process that involves application, investigation and, if successful, the grant of a permit to the applicant to work and utilize VFVL.

A range of individuals and organizations are eligible to apply for use-rights of VFVL:

- (a) Myanmar citizen investors;
- (b) Government departments, Government organizations and non-Government organizations;
- (c) Persons who are exempted in accord with Section 14 of the Transfer of Immoveable Property Restriction Law, 1987;
- (d) Investors, who make foreign investments to carry out the businesses of mutual benefit with any Government department or organization in accordance with the Myanmar Investment Law;

<sup>225</sup>Law Amending the Vacant, Fallow and Virgin Lands Management Law, 4, Revision of Section 17,

<sup>226</sup>Vacant, Fallow and Virgin Lands Management Rules, Notification No. 1/2012, Chapter I Terms and Definitions, 2 (a), August 31, 2012.

<sup>227</sup>Ibid, 2, (b).

<sup>228</sup>Law Amending the Vacant, Fallow and Virgin Lands Management Law, Chapter III Right to Cultivate or Utilize Vacant, Fallow and Virgin Lands, 5-a.

- (e) Investors who make foreign investments to carry out the businesses of mutual benefit with investors of Myanmar citizen in accordance with the Myanmar Investment;
- (f) The government, governmental organizations and Non-governmental organizations that are responsible to work for the landless citizens, smallholder farmers or resettlement and rehabilitation tasks.<sup>228</sup>

While most applicants for VFVL in the categories above apply directly to the Central Committee, the amended Law states that “The landless citizens and smallholder farmers may apply to [a] relevant management committee...should they...like to get permit to carry out agricultural, livestock breeding and affiliated economic enterprises on the Vacant, Fallow and Virgin Lands within the State.”<sup>229</sup> If applicants apply to a lower level management committee, the application is sent to the Central Committee to begin processing.

Upon receipt of the application, the Central Committee records it in the Register for Application for the Rights to Work on and Utilize Vacant, Fallow and Virgin Lands and refers it to the appropriate Naypyidaw Council or Region or State Management Committee to initiate an investigation and further action. These bodies forward the application to the respective Naypyidaw Department Office or Region or State Department Office for an initial review, which in turn sends it to the appropriate Township Department Office for investigation and any other necessary actions. Township Department Offices are the first government body mandated by VFVLM Rules to investigate an application, consider allocation of VFVL and address a grievance or dispute over a request for a use-right.

To start the process, a Township Department in collaboration with the Township DALMS opens a case file, notifies members of the public about the application and informs them that any objections, with sound evidence, can be submitted by completing a Notification for Objection Form. These forms are required to be available on notice boards of the appropriate Naypyidaw, Region or State Department Office, the District Department Office, the Township Department Office and the Administrator’s office of the VT where the VFVL is located.

Subsequent to notification of the public of the application for VFVL, the Township Department with the involvement of the Township DALMS conducts an investigation. Information is collected on:

- whether the lands are in fact vacant, fallow and Virgin Lands
- whether there is a holder currently using the land
- whether there is any encroachment on the land
- whether the right to work on or utilize the land had been granted in the past
- whether more than one applicant has applied for the vacant, fallow and Virgin Lands or a part of the land<sup>230</sup>

<sup>229</sup>Ibid. Unfortunately, the Amended Law does not provide details on what constitutes a “relevant management committee” to which applications VFVL can be submitted.

<sup>230</sup>“Rules and Regulations to be Observed by Those Granted Rights to Work on and Utilize Vacant, Fallow and Virgin Lands”, 10, (1)- (5), August 31, 2012. Un-official translation by UN-Habitat.

<sup>231</sup>Ibid. 10, (c) – (f).

Additional topics of investigation include whether:

- the applicant has the means to work on or utilize the vacant, fallow or Virgin Lands
- the vacant, fallow or Virgin Lands are suitable for the purpose mentioned in the application
- the environment will be affected
- the applied vacant, fallow and Virgin Lands are free from involvement with the lands managed by respective enterprises, department or organizations, and whether the projects of these enterprises, department or organizations will be affected<sup>231</sup>

If there are no objections to the application, and there is not more than one applicant for the same tract of land, the Township Department Office forwards the case file and any supporting documents to the appropriate District Department Office, the Region or State Department Office Management Committee or the Naypyidaw Council.

The appropriate Region or State Management Committee or Naypyidaw Council reviews the application and evidence and comments provided by lower Departments. If the application is for less than 50 acres of VFVL, the Naypyidaw Council or Region or State Governments have the authority to accept or reject it. Regardless of the outcome, the decision is forwarded to the Central Committee with the comments by Region and State Governments.

The Central Committee submits the application, case file and evidence to concerned Ministries, such as Ministry of Natural Resources and Environmental Conservation or other relevant ministries, for their remarks.<sup>232</sup> After receiving their comments, and if there are no significant objections, the Central Committee can approve the application. If there are significant objections, the Central Committee may engage with the objecting ministry to see if a mutually acceptable agreement can be reached. Ultimately, the Central Committee has the authority to approve, nullify or amend an application reviewed and submitted by subsidiary Management Committees.<sup>233</sup> The decision of the Central Committee is considered to be final and cannot be appealed.<sup>234</sup>

Upon reaching a final decision on a non-contested application, the Central Committee issues a notification to the successful applicant and directs the person or entity that has been granted rights to work and utilize VFVL to record the decision in the Register for Persons Granted Rights to Work on and Utilize Vacant Fallow and Virgin Lands. It also requires the applicant to deposit fees as a guarantee to the Myanmar Agricultural Development Bank.

Copies of the Permission Notification Granting the Rights to Work and Utilize Vacant, Fallow and Virgin Lands are forwarded to the relevant Union Ministry, Region or State Government and the Naypyidaw Council or Region or State Management Committees. The latter three entities send copies of the Permission Notification to the Central Committee and Region or State government. This action concludes the process for allocation of VFVL.

If the application is rejected, the person or entity whose request has not been approved is directed to record the details in the Register for Persons Denied the Rights to Work on or Utilize Vacant, Fallow and Virgin Lands.

<sup>232</sup>It is not clear from the VFVLMML or its Management Rules whether a ministry with an objection to an allocation decision can block an affirmative response by the CCMVFVL.

<sup>233</sup>Law Amending the Vacant, Fallow and Virgin Lands Management Law, Chapter III Right to Cultivate or Utilize Vacant, Fallow and Virgin Lands, 8-c.

<sup>234</sup>Ibid. 8-b.

## The Central Committee for Management of Vacant, Fallow and Virgin Lands Dispute and Grievance Resolution Mechanism for resolution of Land Allocation Issues

Disputes and grievances concerning VFVL focus primarily on settling issues that arise in the context of land allocation, implementation of CCMVFVL decisions, and compliance by right-holders with designated terms and conditions of land-use agreements with the government. As with the procedure for allocation of VFVL described above, the process for resolving disputes and grievances is principally administrative decision-making with a focus on investigations, preparation of written reports, commentary by multiple government entities and presentation of findings to either Region or State Department Management Committees or the Central Committee for an authoritative decision.

Disputes and grievances concerning VFVL focus primarily on settling issues that arise in the context of land allocation, implementation of CCMVFVL decisions, and compliance by right-holders with designated terms and conditions of land-use agreements with the government.

There are relatively few opportunities for direct personal engagement or input by parties to contest a VFVL application or land allocation they disagree with. A provision in the amended Law, however, does allow a dissatisfied applicant, (and presumably other concerned parties), to appeal an unacceptable decision by a subsidiary Management Committee to the Central Committee. The appeal must be made within 60 days of the day when the unsatisfactory decision was made.<sup>235</sup>

There are only two parts of the VFVLML where a CDR procedure, negotiation, is mandated to be used. Additionally, there are no provisions in the law for appeal and review of decisions by the Central Committee by an independent body or the judiciary.

The process for addressing disputes or grievances over allocation of VFVL is as follows. When a Township Department Office receives an objection to an application or there is more than one applicant for the same tract of land, the Township Department Office and DALMS issues a public Notification for Objection and has 7 days from the date of the objection to conduct a second investigation beyond what has already been completed and to prepare a report on its findings.

When there is a dispute or grievance over allocation of VFV land or there is more than one applicant for the same land, a Township Department Office issues a Public Notice of Objection and has 7 days from the date of the objection to conduct a second investigation and prepare a report on its findings.

Upon completion of the report, the case file and report are forwarded by the Township Department Office and to the appropriate District Department Office which in turn refers it to the correct Region or State Department Office. Region or State Department Offices send the report to the applicable Naypyidaw Council or Region or State Management Committee.

To address an objection, the Naypyidaw Council or Region or State Management Committee, in coordination with the Central Committee, forms a Separate Board, which the Central Committee mandates to investigate the case and prepare a report on its findings. Within 7 days of receiving instructions, members of the Separate Board are expected to make a field trip to the land in question, conduct

<sup>235</sup>Ibid. 8-a, (b).

fact-finding, inspect the land and any activities occurring on it and prepare and submit a report with their conclusions and evidence to the Naypyidaw Council or Region or State Task Force for review.

To address an objection, the Naypyidaw Council or Region or State Task Force, in coordination with the Central Committee, forms a Separate Board, which the Central Committee mandates to investigate the case and prepare a report on its findings. After examining the findings of the Separate Board's investigation, and comments and conclusions of other bodies that have previously reviewed the application, the Naypyidaw Council or Region or State Department Management Committee submits the case file and evidence with its comments to the Central Committee for a decision.

After examining the findings of the Separate Board's investigation, and comments and conclusions of other bodies that have previously reviewed the application, the Naypyidaw Council or Region or State Management Committee submits the case file and evidence with its comments to the Central Committee for a decision. Again, the Central Committee submits the application to concerned government ministries and departments for comments, and depending on the outcome, may consult with an objecting entity, accept the objection and reject the application for VFVL or approve it.

It should be noted that while the Central Committee, its subsidiary Management Committees and boards are primarily administrative investigatory, review and adjudicative bodies, there are two sections of the VFVLM and its Rules where the CCMVFVL is authorized to use CDR procedures, principally negotiation and potentially mediation.<sup>236</sup> The Committee Rules state:

- (a) if it is reported, together with sound evidence, that the land areas of the vacant, fallow and Virgin Lands which have been granted the rights to work on and utilize, had long been the cultivated lands of the local peasants currently doing agricultural work, negotiate with the said peasants and take action to ensure that they are not unfairly or unjustly dealt with.
- (b) if there are peasants who had from the past, been given the rights to work on and utilize the land area of the vacant, fallow and Virgin Lands for which rights to work on and utilize are granted, carry out negotiations with the said peasants and take action according to the Vacant, Fallow and Virgin Lands Management Law.<sup>237</sup>

### Central Committee for Management of Vacant, Fallow and Virgin Lands Dispute and Grievance Resolution Mechanism and Procedures to address Use-Right Compliance Issues

Implementation of land allocation decisions involves use-right holders executing and complying with terms and conditions of their agreements with the Central Committee and responding to concerns and activities of other parties potentially affected by the Central Committees' land allocation decision. The VFVML Rules defines a number of conditions to be observed by parties granted rights to work and utilize VFVL.<sup>238</sup> On occasion, issues arise over whether a land-right holder has complied with these rules and terms for use of VFVL and implemented authorized project activities. Disputes that may develop during implementation include:

<sup>236</sup>Chapter VIII, Supporting the Persons who have the Right to Cultivate or Utilize Vacant, Fallow and Virgin Lands, 25, (b) and (c); and Notification No. 1/2012, Vacant, Fallow and Virgin Lands Management Rules.52, UN Habitat unofficial translation.

<sup>237</sup>Notification No. 1/2012, Vacant, Fallow and Virgin Lands Management Rules.52, UN Habitat unofficial translation

- failure of a right-holder to comply with the terms and conditions of the use-right;
- disagreements between the CCMVFVL and a use-right holder over the latter's compliance with the terms and conditions of the use-right;
- consequences enforced by the CCMVFVL on a use-right holder for failure to comply with terms and conditions of a use-right;
- retaking of a use-right or portion of a use-right by the government for various purposes;
- contested views about a fair amount of compensation and timing of payment for VFVL that has been retaken by the government;<sup>239</sup> and
- failure of a right-holder to vacate VFVL if his or her use-right has been revoked.

To assure use-rights holders are complying with the VFVLM and its Rules, the Central Committee has the authority, in coordination with the Naypyidaw Council or Region or State Management Committees, to periodically form Special Boards composed of government officials from entities concerned with land issues, to monitor compliance. Special Boards conduct field visits, meet with land use-rights holders and others who have observed their activities, investigate and conduct fact-finding on whether there has or has not been compliance and prepare reports that are forwarded to the Naypyidaw Council or Region or State taskforces. These bodies review the report and send it to the Central Committee for consideration and a decision. Potential actions by the Central Committee if a use-right holder is found to be non-compliant include:

- Requiring the person holding the right to work or utilize VFVL to submit a report on the conditions and progress in implementing their project on VFVL<sup>240</sup>
- Requiring the person holding the right to work or utilize VFVL, or his or her legal representative, to participate in a field meeting with members of the Naypyidaw Council, Region or State task force or a Special Body to inspect and monitor progress of the permitted project;<sup>241</sup>
- Confiscating guarantee fees and declaring them state funds if the person with the right to work and use VFVL fails to carry out work in accordance with prescribed rules;<sup>242</sup>
- Revoking the right of the of the person holding the right to work or utilize VFVL if he or she has violated any of the rules of the VFVLM, and confiscating deposited guarantee fees;<sup>243</sup>
- Repossessing VFVL that has not been utilized on the expiration of the prescribed period of the permit, and making official announcement of repossession of the land to legally inform the original holder of land utilization rights;<sup>244</sup>
- Making a decision on what will be done with portions of permitted VFVL that have not been utilized within the prescribed period of a permit, when other portions of the land have been used and there has been compliance with other terms and condition;<sup>245</sup> and
- Forming and delegating authority to working groups in Regions and States to take action against parties who occupy and utilize VFVL without proper permits.<sup>246</sup>

<sup>238</sup>Notification No. 1/2012, Vacant, Fallow and Virgin Lands Management Rules.45, UN Habitat unofficial translation

- (a) carry out their project on the vacant, fallow and Virgin Lands within four years from the date rights are granted, with 15 per cent completed in the first year, 30 percent in the second year, another 30 percent in the third year, and 25 per cent in the fourth year, completing 100 percent of the project within that year.
- (b) (if they are rural farmers or a family carrying out a manageable agricultural project, complete each agricultural project in the allowed area within two years.
- (c) only carry out the approved project, and business activities related to it.
- (d) not extract or mine any other natural resources found above and below the surface of the vacant, fallow and Virgin Lands which they have obtained the rights to utilize.
- (e) pay land tax in full for the vacant, fallow and Virgin Lands that they have gained the right to work on or utilize.
- (f) comply with the rules regarding the right to work on and utilize vacant, fallow and virgin lands set out by the Central Committee.

## The Central Committee for Management of Vacant, Fallow and Virgin Lands Dispute and Grievance Resolution Mechanism and Procedures to address Implementation Issues and Criminal Charges

In addition to compliance issues, a number of additional kinds of disputes may develop that impact implementation. Some of them include:

- trespassing or encroachment on VFVL without the permission of the right-holder;
- obstruction of the use-right holder or his or her designee from conducting any lawful business on permitted VFVL;
- harm to the property of persons with valid rights to work and utilize VFVL;
- retaking of a use-right or portion of the use-right by the government for various purposes; and
- opposing views of the CCMVFVL and VFV land-rights holders concerning what constitutes fair compensation and timing of payments for VFVL that has been retaken by the government for various purposes.<sup>247</sup>

The VFVLM and its Amendments allow legal action to be taken to address and settle of a number of disputes that may occur during the exercise of a use-right. For example, Section 27 of the Amended Vacant, Fallow and Virgin Lands Management Law (2018), states:

Any person, if convicted of committing any of the following shall be punished with a jail term not exceeding two years or/and a fine not exceeding five hundred thousand kyats or both;

- Occupying and living or allowing occupying and living working or allowing working on the vacant, fallow and Virgin Lands without proper permits as defined under this law.
- Occupying and working on vacant, fallow and Virgin Lands without the approval from the person having the right to cultivate or use the vacant, fallow or Virgin Lands under this law or their legitimate representative.<sup>248</sup>

The Vacant, Fallow and Virgin Lands Management Rules also allow legal action against any individual whose right to work or utilize land has been revoked and fails to vacate VFV land.

<sup>239</sup>Notification No. 1/2012, Vacant, Fallow and Virgin Lands Management Rules, 56.

<sup>240</sup>Notification No. 1/2012, Vacant, Fallow and Virgin Lands Management Rules, Chapter X General, 76, August 31, 2012. Unofficial Translation by UN-Habitat.

<sup>241</sup>Notification No. 1/2012, Chapter 7 Monitoring, 50 (a)

<sup>242</sup>Notification No. 1/2012, Chapter VIII, Reimbursement of Guarantee Fees, 67 (B)

<sup>243</sup>Notification No. 1/2012, Chapter VI Monitoring, 57

<sup>244</sup>Ibid. 51 (c)

<sup>245</sup>Ibid.

<sup>246</sup>Amendments to the Vacant, Fallow and Virgin Lands Management Law, 7. Section 17 (b) of the Vacant, Fallow and Virgin Lands Management Law, 2012

<sup>247</sup>Notification No. 1/2012, Vacant, Fallow and Virgin Lands Management Rules, 56, August 31, 2012) Unofficial Translation by UN-Habitat.

<sup>248</sup>Law Amending the Vacant, Fallow and Virgin Lands Management Law, 22, Revision of Section 27 a & b). September 11, 2018.

<sup>249</sup>Notification No. 1/2012, Chapter IX Taking Legal Action, 74.

## Performance of the CCMVFVL Dispute Resolution Mechanism relative to the UNGPs “Effectiveness Criteria” and an Analysis of the feasibility of Introducing, Implementing and Institutionalizing CDR Approaches and Procedures

Detailed below is an assessment of the performance of the CCMVFVL’s dispute resolution mechanism relative to the UNGP “Effectiveness Criteria” and an analysis of the feasibility of introducing, implementing CDR to resolve land disputes.

### Opportunities

#### Legitimate

- Procedures for obtaining use-rights to VFVL established by the GORUM in the VFVLMML are the only legally recognized process to do so. VFVLMML procedures are seen as more legitimate by more powerful parties – such as the Tatmadaw, government ministries, national or international investors and local officials — than by local villagers and farmers who are not as familiar with them and often fear that the law will be used to take land that they have used in the past and are currently using under customary tenure.
- CDR approaches and procedures are recognized at the highest level of government, most notably by the State Counsellor, Daw Aung San Suu Kyi, as effective methods for the resolution of disputes. This level of recognition and support legitimizes potential expanded use of CDR procedures in the CCMVFVL dispute and grievance resolution mechanism.

#### Accessible

- Applications for allocation of VFVL can be made by landless citizens and smallholder farmers to a relevant Management Committee rather than having to apply to the Central Committee. Presumably, this measure should increase access as relevant committees are likely closer to where applicants live.<sup>250</sup>

Applications for allocation of VFVL can be made by landless citizens and smallholder farmers to a relevant Management Committee rather than having to apply to the Central Committee.

- Applicants for VFVL have the option of appealing unfavorable decisions by the Naypyidaw Council or Region or State Governments to the Central Committee. It is not clear, however, if opponents of an application for VFVL that has secured a favorable recommendation by the Naypyidaw Council or Region or State Management Committees can object and appeal the decision to the Central Committee.
- The Central Committee and its Management Committees are vertically organized with multiple opportunities for investigations, reviews, inputs and checks on recommendations for decisions. These investigations and reviews, if implemented neutrally and impartially, can help gather accurate information for informed, wise and fair decision making, and catch errors or corruption.

<sup>250</sup>As noted earlier, the Amended Law does not provide details on what constitutes a “relevant management committee” to which applications VFVL can be submitted and how close these committees are likely to be to applicants’ residences.

### Predictable

- More powerful applicants for land-use rights to VFV land – such as government ministries, national or international investors and some local officials – are more likely to know about, trust and find CCMVFVL procedures more predictable than are landless citizens and smallholder farmers that apply for a use-right for VFV land or oppose an application by another party. – It is unlikely however, that either kind of party will know about timeframes for each stage of the process.

### Transparent

- The CCMVFVL has a monitoring mechanism to assess VFV land use-rights holders' compliance with the terms of their permits – Investigations by Special Boards can provide the CCMVFVL and VFVL use-rights holders with information on compliance with the terms and conditions of permits and identify any shortfalls that may have occurred. Such monitoring can provide an opportunity for both the Central Committee and use-rights holders to identify compliance issues and take CDR measures to move the latter into compliance.

### Based on engagement and dialogue

- A section of the VFVLMML authorizes the use of CDR approaches and procedures to resolve issues involving violations of peasants' land-use rights by the assignment of VFVL to other parties.<sup>251</sup>– The CCMVFVL is authorized to negotiate a solution when it is found that VFVL that has long been cultivated by peasants has been allocated to another party. Negotiations are to develop agreements that ensure that that they (the peasants) are not unfairly or unjustly dealt with.

A section of the VFVLMML authorizes the use of CDR approaches and procedures to resolve issues involving violations of “peasants” land-use rights

Additionally, if there are peasants who have been given rights to work and utilize VFV land, and the right to use the land is subsequently allocated to another party, the CCMVFVL is mandated to carry out negotiations with the peasants and take appropriate actions, again to assure that the peasants are not unfairly or unjustly dealt with.

The above provisions in the VFVLMML are a precedent for the use of CDR approaches and procedure by the CCMVFVL.

- There are five places in the VFVLMML's grievance mechanism and procedures where there are opportunities to introduce, implement and institutionalize CDR to help resolve VFVL allocation, implementation and compliance issues and criminal complaints. They include during: 1) investigations of applications for VFV land conducted by Township Departments, 2) field trips and investigations conducted by Separate Boards, 3) field trips and investigations by Special Boards, 4) implementation activities when various types of disputes may arise, and 5) activities to address criminal complaints. More will be said about how CDR approaches and procedures can be inserted into CCMVFVL grievance and dispute resolution practices in the section below on Recommendations.

<sup>251</sup>Vacant, Fallow and Virgin Lands Management Law, Chapter VIII, Supporting the Persons who have the Right to Cultivate or Utilize Vacant, Fallow and Virgin Lands, 25, (b) and (c); and Notification No. 1/2012, Vacant, Fallow and Virgin Lands Management Rules, 52, UN Habitat unofficial translation.

## Challenges

### Legitimate

- While CDR processes are recognized at the highest level of government as being valuable for the resolution of disputes, there currently no influential champions within the CCMVFVL at any level who are actively advocating for and working to implement and institutionalize these procedures. The absence of champions will make it much more difficult to introduce, implement and institutionalize CDR approaches and procedures in the CCMVFVL dispute and grievance resolution mechanism.
- Landless citizens, smallholder farmers, internally displaced persons and other more vulnerable parities such as women or minorities, with lower amounts of power and influence are less likely to view the VFVLM allocation, implementation and compliance mechanisms as trusted and accountable for the fair conduct of VFVL allocation or dispute resolution procedures. Farmers and other vulnerable populations in many parts of Myanmar have lost customarily farmed land due to its designation by the CCMVFVL as VFVL and thus eligible for allocation. Determinations for eligibility have been based on farmers' lack of formal use-rights and documentation, failure of the CCMVFVL to consider different agricultural practices such as allowing fields to lie fallow for periods of time, and problems with the accuracy of demarcation of land and boundaries and issuance of land-use documents. Additionally, villagers have concerns about potential corruption and or undue influence by powerful parties on the CCMVFVL and its Management Committees' decisions on land allocation, implementation and compliance procedures.

Landless citizens, smallholder farmers, internally displaced persons and other more vulnerable parities such as women or minorities, with lower amounts of power and influence are less likely to view the VFVLM allocation, implementation and compliance mechanisms as trusted and accountable for the fair conduct of VFVL allocation or dispute resolution procedures.

- There is significant potential for conflicts of interest and corruption on the part of members of the CCMVFVL and its subsidiary bodies, the vast majority of which, until the VFVLM was amended in 2018, are representatives of government entities. Some of these may, or do, have either a personal or an institutional interest in the outcome of VFVL decisions. For example, conflicts of interest or corruption may occur when Township Department Offices or Separate Boards are investigating applications for use-rights that involve competing parties, one from outside of villages and the other local farmers who have used or are using land under customary tenure. The may also arise when Special Boards are evaluating and making decisions on compliance of use-right holders with the terms and conditions of their permits.

### Accessible

- Landless citizens, smallholder farmers and other villagers, especially women and ethnic minorities, frequently find it difficult to access and fully engage in the VFVL application process, either as an applicant or opponent of an application, because it generally requires literacy in spoken and written Myanmar. This is a major barrier to access in many parts of Myanmar and inhibits the ability of many people to advocate for their interests, apply for VFVL and protect their right to use land they have farmed for many years.

- There are very limited opportunities for significant direct personal involvement and engagement of applicants, opponents of applications, or members of civil society in the steps of VFVLMML for obtaining VFVL. The exception is the requirement of CCMVFVL to negotiate with affected farmers if VFVL has been mis-allocated. There may be informal direct involvement of multiple during investigations and the development of recommendations by Township Department Offices and Separate or Special Boards, but there are no formal guidelines on how these should be conducted and who must be involved.
- There is not an official GORUM mandate for the CCMVFVL to use ARD/CDR to address and resolve disputes or grievances over VFVL. This gap means that presently CDR approaches and procedures can only be used on an ad hoc basis or as a result of the personal interest of a government official involved in the CCMVFVL or its subsidiary bodies who believes he or she has the authority and flexibility to informally use them. If, in the future, CDR is to be introduced and institutionalized, some form of government authorization will likely be needed.

There is not an official GORUM mandate for the CCMVFVL to use CDR to address and resolve disputes or grievances over VFVL.

- As for ABSF, RCs lack dedicated staff and funding for their activities. These factors prevent them from functioning as efficiently and in as timely a manner as desirable and limits their accessibility by stakeholders.
- While addition of members of civil society on Management Committees below the Central Committee level may broaden the perspectives and considerations of committees when engaged in decision-making, unless non-governmental members receive some financial support, they may not be able to attend and fully participate in Management Committee meetings and be as accessible to concerned parties utilizing the VFVL dispute and grievance mechanism. This constraint has been encountered by civil society members of Committees for Rescrutinizing Confiscated Farmlands and Other Lands.

## Transparent

- While there are explicit timeframes for Township Department Offices, Administrators and DALMS, and Separate and Special Boards, to begin and conclude their investigations, there practically no publicly available guidelines on times for transfer of case files and evidence between bodies, times for receipt of comments, deadlines for decision-making and timeframes for implementation of decisions. Lack of timelines makes the process less transparent, poses barriers to applicants and use-right holders to track the status of their case and does not promote timely performance and accountability of the mechanism and its procedures.
- Activities of the CCMVFVL and its subsidiary bodies, above the Township Department Office Level are not transparent and rarely, if ever, enable either observation or direct participation by disputants, grievants, their representatives or other community members – This lack of transparency is problematic both for open and fair administrative decision-making and the use of CDR, which involves opportunities for direct participation in dispute resolution processes. Lack of transparency in administrative procedures may result in a lack of credibility that procedures and outcomes are fair and just.

- There is not a fully transparent and easily accessible accountability and reporting mechanism that enables concerned parties, both applicants for VFV land and parties opposing an application, to track the status of cases – The lack of a transparent accountability and reporting mechanisms results in lack of transparency and predictability.

There is not a fully transparent and easily accessible accountability and reporting mechanism that enables concerned parties, both applicants for VFV land and parties opposing an application, to track the status of cases.

### **Equitable**

- VFVL use-right applicants, individuals or groups that oppose applications, non-compliant permit holders or members of the public are often not always provided with detailed information on the logic and rationale for CCNVFVL or its subsidiary committees' recommendations or decisions concerning acceptance or rejection of an application or non-compliance with the terms and conditions of use-right permits. There is no requirement that the CCMVFVL or Management Committees provide this information. Not having it limits concerned parties' abilities to decide whether or not to initiate an appeal, or in the case of compliance issues to explore and negotiate ways to become compliant.

### **Rights-compatible**

- The Law Amending the Vacant, Fallow and Virgin Lands Management Law (2018), concerning requirements for persons occupying VFVL without permits, is likely to increase the number of land disputes and grievances and result in loss of farmers' rights.<sup>252</sup> The amendment requires persons or organizations occupying and utilizing VFV land without a permit to: 1) apply for a permit to use the land within 6 months of the day the Law Amending the Vacant, Fallow and Virgin Lands Management Law (2018) was enacted; 2) continue or resume utilization of the land they have occupied, or be evicted if they: a) fail to continue land their land use, b) do not apply for a land-use permit or c) their application is rejected; (3) be subject to penalties under the law if they continue to utilize the land without applying for the right to do so, or defying an order by the Central Committee or relevant management committee to leave the land after a reason had been provided or why permission has not been granted.

The Law Amending the Vacant, Fallow and Virgin Lands Management Law (2018), concerning requirements for persons occupying VFVL without permits, is likely to increase the number of land disputes and grievances and result in loss of farmers' rights.

There are a number of critiques to the Law Amending the VFVL Law, especially by civil society groups and international research organizations.<sup>253</sup> Some of them include:

<sup>252</sup>Letter No. 12/ MaLaYa-1(370-2018) October 30th, 2018, Notification to the persons and organizations who are occupying and utilizing the VFV lands without permits, which clarifies provisions of the Law Amending the Vacant, Fallow and Virgin Lands Management Law (September 11, 2018).

- If farmers without formal use-right permits from the government register their land, customary tenure rights will be weakened, registrants will lose their historical and traditional use rights, which do not have time limits, and will receive in exchange only a 30-year use-right permit.
- If farmers do not register land they have occupied and utilized under customary tenure, there is a significant potential for it to be confiscated by the government or other powerful parties and have its use-right granted to others.
- If farmers do not register their land and continue to use it, they risk eviction or imprisonment for two years and/or a 500,000 kyats fine if they do not comply with a decision to vacate it by the CCVFVL or a subsidiary management committee.
- The boundaries of land the government considers to be VFVL are not clear so many people do not know if their lands are considered VFVL and that they need to have it registered.
- Many parties in remote locations, especially in upland areas, do not have access to land administration services and will face serious obstacles in registering their land.
- Even if farmers want to register their land, most lack the financial means to have the area they own mapped or have the financial resources to have DALMS register their land.
- The six-month timeline for registration is very short and poses a barrier for farmers to gather needed information and register their land within the allotted time period.
- The Amendments are not aligned with commitments made by the GORUM and roughly 20 Ethnic Armed Organizations (EAOs) that are signatories in the Nationwide Ceasefire Agreement (NCA) and that has been ratified by the Pyidaungsu Hluttaw.
- First area of non-alignment relates to provisions in the Chapter on interim arrangements of the NCA, which recognizes the governance structures and procedures of ethnic groups and is expected to prevent unilateral decisions or actions GORUM to infringe on them or during the period before the final peace agreement is signed and implemented.<sup>254</sup>

<sup>253</sup>Jason Gelbort, Implementation of Burma's Vacant, Fallow and Virgin Land Management Law: At Odds with the Nationwide Ceasefire Agreement and Peace Negotiations. The Netherlands, Amsterdam, Transnational Institute (TNI), N.D. <https://www.tni.org/en/article/implementation-of-burmas-vacant-fallow-and-virgin-land-management-law>: "41 civil society organisations call on the Myanmar Government to suspend controversial land law which risks evicting millions of farmers from their land". Relief Web, November 16, 2018. <https://reliefweb.int/report/myanmar/41-civil-society-organisations-call-myanmar-government-suspend-controversial-land-law>; "Civil society organizations' statement on Myanmar Vacant, Fallow and Virgin land management", farmlandgrab.org, November 16, 2018. <https://www.farmlandgrab.org/post/view/28590-civil-society-organizations-statement-on-myanmar-vacant-fallow-and-virgin-land-management>; "Amended land law could criminalise millions, obstruct peace talks", Myanmar Times, January 21, 2019. <https://www.mmtimes.com/news/amended-land-law-could-criminalise-millions-obstruct-peace-talks.html>

<sup>254</sup>NCA Sub-article 25(a)2, lists "Environmental conservation" as an area for cooperation under interim arrangements.

Second, NCA meeting decision 25 explains Article 25(a)2 “Environmental conservation” and notes that coordination on land and resources management is included as a component of implementation of the NCA’s interim arrangements and that the GORUM should not act unilaterally in ways that might contradict or conflict with existing ethnic nationality administrations or interests.

- There is not a body independent of the CCMVFVL with authority to review its decisions and responses to appeals and make authoritative, legally binding and enforceable decisions that address them. Like the ABF, the CCMVFVL conducts administrative reviews of recommendations and decisions made by lower-level ABsF and appeals of outcomes unacceptable to disputants. Again, this practice is not congruent with provisions of the National Land Use Policy.

### **Continuous Learning**

- The National Land Use Policy (NLUP) does not include any provisions for research, development and use of CDR to assist in the resolution of land allocation or compliance disputes. This will be an important issue to address in future revisions of the policy.
- To date, there has been no specialized training in CDR for members of the CCMVFVL or its subsidiary bodies to promote continuous learning. While some government officials who are members of these entities may have participated in training because of their involvement as members of other land grievance or dispute resolution bodies or committees, it is probably a very small number. While some members of the CCMVFVL’s subsidiary bodies may informally be using CDR procedures to address violations of peasants’ land-use rights or to achieve compliance with terms and conditions in permits, it is being conducted on an ad hoc basis without the benefit of exposure to training on state-of-the-art procedures and skills in negotiation, mediation or other CDR methods.

To date, there has been no specialized training in CDR for members of the CCMVFVL or its subsidiary bodies to promote continuous learning.

### **Based on engagement and dialogue**

- There was minimal, if any, consultation with stakeholder groups prior to passage of the Vacant, Fallow Virgin Lands Management Law in 2012. There was more consultation with civil society when the law was amended in 2018. No amendments, however, addressed grievance or dispute resolution or CDR approaches or procedures.
- Mechanisms and procedures detailed in the VFVLM, its amendments and Rules principally focus on how administrative decisions are to be made by the CCMVFVL and its subsidiary bodies on land allocation, implementation and assurance of compliance with terms and conditions of permits. There is relatively little involvement of mechanism users in dialogue. The possible exception is at the Township level or in investigations conducted by Special Boards, and even then, it looks more like involvement in information gathering than engagement in dialogue, problem-solving, negotiation or mediation to address contested issues.

## Recommendations

Recommendations for the use of CDR Procedures to address and resolve Disputes over Land Allocation

### Legitimate

- The GORUM and NGOs interested in the introduction and institutionalization of CDR in the dispute resolution mechanism of the CCMVFVL should actively identify champions within the government, and specifically in the CCMVFVL and its subsidiary bodies, who will effectively advocate for its use. (See more on champions and their role in introducing and institutionalizing CDR in the section above on the CAB - Recommendations, Legitimacy.)
- The CCMVFVL should include members of civil society – farmers and CSOs with technical knowledge about statutory land law – as full members of Management Committees at the Region and State level and on Separate Committees – Their involvement will provide a diversity of perspectives and help increase the legitimacy of these bodies and the conclusions they reach about contested land allocation issues. Civil society members should be nominated and selected by farmer associations and civil society organizations from the geographic and administrative areas where land allocations are being requested so that they have credibility with the communities that selected them. Standards and criteria for their selection are similar to those recommended above for ABSF.
- The CCMVFVL should prevent and address potential or actual conflicts of interest or lack of neutrality and impartiality by Township Department Officers conducting investigations of applications for VFV land. If there are potential or actual conflicts of interest, institutions and their members that are conducting investigations or making decisions should consider implementing several of the recusal procedures or referrals to upper-level bodies described earlier for ABSF.

### Accessible

- Township Department Officials and Separate Boards should be given authority to require all parties (applicants, objectors to an application, local leaders and other concerned actors) with an interest in or concerns about a VFV land application to participate in a public investigation and information gathering process. It is critical that all parties engage together in these activities to assure that all relevant information is collected, and diverse perspectives are aired and broadly understood.

Township Department Officials and Separate Boards should be given authority to require all parties (applicants, objectors to an application, local leaders and other concerned actors) with an interest in or concerns about a VFV land application to participate in a public investigation and information gathering process.

### Predictable

- The CCMVFVL should assure that a transparent case tracking system is in place. (Elements and methods for a tracking system are described in the section of this study on the CABF.)

- The GORUM should establish an independent body to monitor CCMVFVL allocation decisions and handling of compliance issues in accordance with the National Land Use Policy.<sup>255</sup>

### Equitable

- The CCMVFVL should assure that information on how to apply for VFVL and procedures for objecting to applications are always posted at Naypyidaw Council and Region, State, District and Township Department Offices.
- The GORUM and NGOs should continue providing information and training programs on HLP laws and human rights to members of VFVL Management Committees and other government officials at all levels. Programs with a substantive focus complement training on CDR procedures.

The GORUM and NGOs should continue providing information and training programs on HLP laws and human rights VFVL Management Committees and other government officials at all levels.

- NGOs and CSOs should create expert teams composed of individuals with both legal and technical expertise to provide assistance to farmers who want to obtain use-rights for VFV land, object to applications and collaboratively address issues over compliance. If one party is a farmer and the other is not, the expert team should serve as an advisor, and, if the farmer wishes, a legal and technical advocate for them in CCMVFVL proceedings. If both parties are farmers, members of the expert team should provide legal and technical information equally to both parties, and not give preferential advice or serve as an advocate for either of them.<sup>256</sup>

### Transparent

- Parties required to attend and participate in investigation activities and joint-fact-finding conducted by Township Department Offices and Separate Boards should be informed about the requirement, date, time and location of meetings one week before they are convened. Public notices should be placed in multiple places, including in village(s) where the land in question is located, so that concerned parties are likely to see them. Radio announcements should be aired, and postings made on social media, such as Facebook or other platforms commonly used by members of the public, at least one week prior to the date and time of the CCMVFVL meeting.
- All investigation and joint fact-finding meetings of Township Department Offices and Separate Boards should be open for observation by all concerned parties and members of the public. Having observers and witnesses helps parties and the public to be informed about investigations and makes collusion and corruption less possible.

All investigation and joint fact-finding meetings of Township Department Offices and Separate Boards should be open for observation by all concerned parties and members of the public.

<sup>255</sup>National Land Use Policy, Part (VI) Land Dispute Resolution and Appeal, Chapter (I), Land Disputes Resolution, 42 (e).

<sup>256</sup>NRC has used this model for providing legal and technical advice to diverse parties in many countries around the world.

- When the CCMVFVL makes a decision, the logic and rationale for the outcome should be written in language that will be easily understood and provided to all involved parties – Parties engaged in land allocation and compliance issues, especially if a grievance or dispute is being addressed, deserve to know the thinking behind the decision or outcome. The logic and rationale for a decision by the CCMVFVL or its subsidiary bodies should also be available to the public in its monthly reports.

### **Rights Compatibility**

- The CCMVFVL should operationalize elements of the National Land Use Policy concerning the rights of Myanmar residents to use impartial land dispute mechanisms and apply them to the work of the CCMVFVL. Specifically,
  - (a) Allowing the rights to make a complaint, defend oneself or with representation, and appeal for land disputes;
  - (b) Resolving land disputes in public, and use of appropriate local language and translation as necessary;
  - (c) Resolving land disputes transparently, fairly and free from corruption.<sup>257 258</sup>
- The GORUM should separate the roles and responsibilities of institutions and their members in the past or are currently involved in both land allocation and land dispute resolution activities. This will increase the legitimacy of institutions and personnel performing both functions in the eyes of stakeholders for whom they are intended, lower the potential for conflicts of interest or corruption and help assure that users' rights are protected.

The GORUM should separate the roles and responsibilities of institutions and their members that in the past or are currently involved in both land allocation and land dispute resolution activities.

- If the responsibilities and roles of institutions and members involved in land allocation and dispute resolution are not separated, the CCRCFOL should implement procedures to help eliminate potential conflicts of interest or corruption by instituting the one or more appropriate measures related to recusals. (See measures for this recommendation under the earlier section on recommendations for the CABF.)
- The GORUM should require companies applying for and receiving use-right permits to conduct operations on VFV state land to design and implement effective corporate-community grievance mechanisms to address and satisfactorily resolve a range of disputes including those over land. The mechanism should comply with the UNGP "Effectiveness Criteria" and should be designed with significant community input to assure its broad acceptability and use. Having such mechanisms in place can help resolve future disputes that may arise during company operations.

The GORUM should require companies applying for and receiving use-right permits to conduct operations on VFV state land to design and implement effective corporate-community grievance mechanisms to address and satisfactorily resolve a range of disputes including those over land.

<sup>257</sup>National Land Use Policy, Part (VI), Land Dispute Resolution and Appeal, Chapter (I), Land Disputes Resolution, 41, January 2016.

<sup>258</sup>Ibid.

- The GORUM should establish a new independent land dispute and grievance resolution institution and mechanism authorized to conduct independent reviews of decisions and verdicts on appeals made by the CCMVFVL and its subsidiary bodies. Reviews of should be conducted by an individual or panel of intermediaries who are not a part of or affiliated with the CCMVFVL and selected and appointed based on their neutrality and impartiality regarding their relationships to parties and issues to be addressed. The mechanism should be given authority to make binding decisions on acceptance, modification or rejection of CCMVFVL verdicts; compel compliance; and have appropriate GORUM institutions enforce its decisions.

### Continuous Learning

- The National Land Use Council should revise the National Land Use Policy (NLUP) to include and advocate for the use of CDR approaches and procedures in how the CCMVFVL addresses objections to VFVL applications, the resolution of differences regarding compliance and settlement of minor criminal offenses. Revision of the NLUP will be a significant step in affirming, codifying and institutionalizing the use of CDR.
- The CCMVFVL should initiate pilot projects to explore the use of CDR approaches and procedures to assist in the resolution of disputes over application of VFVL, implementation issues, problems concerning compliance with terms and conditions of permits and the resolution of minor criminal offenses – Details on potential initiatives are provided in the recommendation section below.
- The National Land Use Council should commission research on the design and implementation of an independent mechanism to review appeals of decisions by the CCMVFVL – The National Land Use Policy (NLUP) advocates hearing and deciding land disputes “through the use of impartial land dispute resolution mechanisms across the country”.<sup>259</sup> Further, in defining how land dispute resolution should be carried out the policy mandates “Establishing accurate and clear procedural processes in relevant departments and organizations to improve easy access to, and use of, independent arbitration tribunals, courts and other dispute resolution mechanisms by farmers and other land users in accordance with existing laws.”<sup>260</sup> Additionally, the policy states that research should be conducted on methods “for individuals and organizations to appeal decisions in dispute related to land and land administration”.<sup>261</sup> Finally, the policy mandates that “one or more pilot projects shall be researched and tested in order to establish, organize, implement and monitor accurate practices.”<sup>262</sup> To date the GORUM has not provided public information on any studies related to impartial land dispute resolution mechanisms that can handle appeals of decisions made by administrative bodies. It is important that the government begin research on this topic as soon as possible.

<sup>259</sup>National Land Use Policy (NLUP), Part (VI), Land Dispute Resolution and Appeal, Chapter (I), Land Disputes Resolution, 41.

<sup>260</sup>Ibid. 42 (e).

<sup>261</sup>Ibid. Part (VI) Land Dispute Resolution and Appeal, Chapter II, Appeal, 44.

<sup>262</sup>Ibid. Chapter (I), Land Disputes Resolution 43.

## Based on Engagement and Dialogue

- The GORUM should authorize the use of CDR approaches and procedures by the CCMVFVL and its subsidiary bodies when addressing land allocation issues by amending existing or passing new legislation, or by the Central Committee issuing new administrative guidance. New legislation and/or guidance should be developed in consultation with farmers associations and CSOs concerned with the allocation of VFVL and issues related to compliance with terms and conditions of permits.

The GORUM should authorize the use CDR approaches and procedures by the CCMVFVL and its subsidiary bodies when addressing land allocation issues by amending existing or passing new legislation, or by the Central committee issuing new administrative guidance.

- The GORUM should provide subsidiary bodies of the CCMVFVL with dedicated professional and support staff, offices, appropriate equipment and independent budgets to enable them to conduct more efficient investigations and use other CDR approaches and procedures – Having dedicated staff and funding will enable these bodies to hold more regular meetings, and conduct in-depth field visits, and engage concerned parties in collaborative dispute resolution initiatives.
- Township Administrators and DALMS should form joint fact-finding committees composed of disputing parties or their representatives, other knowledgeable local leaders or stakeholders and experts from different “sides” of the dispute to investigate applications for VFVL. The Township District Office should facilitate the joint fact-finding investigation process. If the joint fact-finding committee determines that there are no objections to applications and there are not multiple applicants for the same parcel of land, its conclusion, relevant evidence and a recommendation for approval should be forwarded to the appropriate upper-level government bodies for comment and to the Central Committee for a final decision.

Township Administrators and DALMS should form joint fact-finding committees composed of disputing parties or their representatives, other knowledgeable local leaders or stakeholders and experts from different “sides” of the dispute to investigate applications for VFVL.

If there is not agreement by the joint fact-finding committee, the Township Department Office and committee should propose three options to involved disputants:

- (1) forward a report by the joint committee of its findings including the objections to the request for allocation of VFVL to the appropriate upper-level government bodies for their review, comments and appropriate action,
- (2) mediation as a way to try and reconcile different views between or among parties over the application, or
- (3) conciliation to try and find a mutually acceptable solution to contested issues and if not secure an independent recommendation for a potential settlement.<sup>263</sup>

If one or more parties refuses to engage in mediation or conciliation, the report of the fact-finding committee should be sent to appropriate upper-level committees.

<sup>263</sup>Conciliation is commonly used when disputing parties may want a recommendation for a potential settlement if they cannot develop one through mediation.

If disputing parties decide to participate in mediation or conciliation, either procedure may be conducted by a panel composed of: 1) the Township Administrator or his designee, and up to four other members, two of which should be selected by each of the disputing parties; or 2) an independent mediation or conciliation panel composed of an uneven number of members selected by the parties.

If disputants reach a mutually acceptable agreement through either mediation or conciliation, the Township Department Office should forward the conditional settlement to the appropriate higher-level bodies for review, comment and a final decision. The agreement should be considered “conditional” until it is reviewed by the appropriate upper-level bodies and approved by the Central Committee.

If the conditional agreement is not approved by the Central Committee, that body should have two options: First, it could return the agreement to the Township joint fact-finding committee to discuss with disputing parties and request them to make modifications that would make it compliant with the VFVLM or the Committees’ Rules. The outcome of this process would be sent back to the Central Committee for its consideration. Second, the Central Committee could make a final decision on the case and provide details on the logic and rationale for the outcome.

If either mediation or conciliation is not successful, the mediation or conciliation panel should identify key issues or questions to be answered and scope parties’ views, interests and needs. The Township Department Office should forward this information to the appropriate upper-level committees for further consideration and appropriate action, including seeking advice of experts on issues in question, the formation of a Separate Board for further investigation or a decision by the Central Committee.

- When a Separate Board is formed to conduct an investigation to assist in the resolution of an objection for a request for allocation of VFVL, the Central Committee, Naypyidaw Council and Region and State task forces should authorize to use a joint fact-finding process – Members of the joint fact-finding committee should include Board members, involved disputants or their designated representatives and up to four other respected parties selected by the disputants, with each allowed to appoint two.

When a Separate Board is formed to conduct an investigation to assist in the resolution of an objection for a request for allocation of VFVL, the Central Committee, Naypyidaw Council and Region and State task forces should authorize to use a joint fact-finding process

If the joint fact-finding committee reaches a consensus decision that resolves disputed issues to the satisfaction of involved parties, its conclusions should be forwarded to the appropriate upper-level committee(s) for their consideration and suitable action. If the joint fact-finding committee cannot reach a consensus, government members the Separate Board should prepare a report with their conclusions, which should also include information about the views and opinions of dissenting members of the joint fact-finding committee. The report should be shared by government Board members with others on the joint fact-finding committee for comment prior to it being forwarded to the appropriate upper level government committee and the Central Committee for their review, consideration and suitable follow-up action.

- The CCMVFVL should assure that its members and those of any of its subsidiary bodies are neutral, impartial and unbiased in their deliberations and decisions concerning the allocation of VFVL or determining compliance of land-right holders with the terms and condition of their permits. The CCMVFVL should require that any members that may or do have a conflict of interest to recuse themselves from engagement in investigations or making any recommendations or decisions.
- The GORUM should establish a new land grievance and dispute resolution institution that is independent of the CCMVFVL and authorized to review the latter's administrative decisions and appeals and make binding decisions that settle them.

### **Recommendations for the use of CDR Procedures to address and resolve Implementation and Compliance Issues**

- The CCMVFVL should revise its rules and provide guidance to authorize the use of CDR approaches and procedures by its subsidiary bodies to help resolve implementation and compliance issues. Changes will enable these entities and members to use a broader range of procedures – specifically, joint fact-finding, negotiation, mediation and/or conciliation – to more effectively address the myriad of problems that may develop during implementation of VFVL allocation decisions.

Additionally, a shift in how the CCMVFVL addresses problems related to non-compliance, from an emphasis on enforcement and punishment to collaborative procedures that assist rights-holders to become compliant, can help achieve compliance goals and lower personnel and transaction costs and time required to address and settle issues. Negotiation and mediation have been used by governments in a number of contexts and countries around the world to assist non-compliant parties to become compliant with the terms of agreements, contracts or regulations.<sup>264</sup>

- Members of Special Boards should be trained in negotiation, and potentially mediation, so they can better assist non-compliant VFVL use-right holders to comply with the terms and conditions of their permits. Training can be conducted for Boards formed on an ad hoc basis to address especially contentious and difficult disputes or conflicts or presented to government personnel that regularly serve on Boards.<sup>265</sup>

Members of Special Boards should be trained in negotiation, and potentially mediation, so they can better assist non-compliant VFVL use-right holders to comply with the terms and conditions of their permits.

<sup>264</sup>Examples include the U.S. Environmental Protection Agency (USEPA) that uses negotiation and mediation to achieve compliance to a range of environmental regulations by industries and companies. The New Jersey Department of Environmental Protection (NJDEP) negotiates and mediates with developers to assure compliance with the terms and conditions of their permits. The U.S. Federal Reserve Bank uses negotiation and facilitation to assist non-compliant banks it regulates to comply with federal financial regulations.

<sup>265</sup>One model that has been successfully used, is to have some members of a government agency trained as mediators and others as negotiators. Both are trained in the same interest-based negotiation and mediation process.

When a dispute arises, one staff member, with involved parties' approval, serves as a mediator. One or more other staff members serve as negotiators who advocate for the interests of the agency. The mediator and negotiators work together with the non-compliant party to develop an agreement that moves the latter into compliance. One government agency that has effectively used this procedure is the New Jersey Department of Environmental Protection.

## Recommendations for the use of CDR Procedures to address and resolve Minor Criminal Offenses

- The CCMVFVL should introduce and institutionalize the use of CDR procedures to address and resolve charges and address harm resulting from minor criminal activity. CDR procedures are used in many countries around the world as alternatives to going to court for a judicial decision to resolve minor criminal offenses. The procedures provide collaborative means to reach mutually acceptable settlements between victims and offenders, negotiate compensation and can be a step toward restoring more positive relationships between members of the same community.

The CCMVFVL should introduce and institutionalize the use of CDR procedures to address and resolve charges and address harm resulting from minor criminal activity.

Some land issues that have been successfully resolved using CDR include: mischief and property damage, trespassing, access to trails and roads, encroachment, boundary issues, permissions to live on or use portions of allocated land or incidents involving minor assaults.

There are a range of CDR approaches for resolving issues involving minor criminal offenses. Two of them are victim-offender mediation and restorative justice.<sup>266</sup> Both involve facilitated or mediated meetings between victims and offenders to address the impacts of criminal acts, and, in the case of the latter approach, to help restore relationships between the offender, victim and other members of their community that have been adversely affected by the criminal offense.

In some circumstances, members of Special Boards may be able to serve as mediators or facilitators of discussions between land-right holders and individuals or groups accused of a criminal offense. In others, it will be desirable to use other parties as intermediaries, such as TAs and their committees, VTAs and their committees or independent mediators from NGOs or CSOs.

<sup>266</sup>Mark Umbreit, *The Handbook of Victim-Offender Mediation*, San Francisco, Jossey-Bass, 2000; and *Handbook on Restorative Justice Programmes*, Criminal Justice Handbook Series, New York, United Nations Office on Drugs and Crime, 2006.

## The Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands (CCRCFOL)

As noted earlier, confiscation of land by the government and other powerful parties is a critical problem in Myanmar and a major source of land disputes, grievances and conflicts. Understanding current mechanisms and procedures for how land confiscation issues are addressed and resolved is important for analyzing where and how CDR approaches and procedures might be introduced, inserted and institutionalized to assist in the resolution of these complex and highly contested issues.

### Mandate

The President's Office established the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands (CCRCFOL) on May 5, 2016.<sup>267</sup> A subsequent Presidential Order established subsidiary Rescrutinizing Committees (RCs) at lower levels of government.<sup>268</sup> There was no significant consultation with civil society on the establishment of these institutions.<sup>269</sup>

The mandate of the Central Committee is "to urgently address the land-grabbing issues for the people so that they do not face losses of farmland and other lands in the Republic of the Union of Myanmar."<sup>270</sup> The CCRCFOL and its subsidiary RCs are authorized to address and resolve grievances against the government – the Tatmadaw, ministries, department and lower level government bodies – concerning claims of illegal land confiscation. Its primary areas of focus are special old claims that have yet to be resolved, those of unusual significance because of their high value or large number of affected parties or other characteristics that make them unique.<sup>271</sup> Less critical or sensitive cases are to be handled by lower level RCs. The timeframe for cases to be handled by the CCRCFOL is 1988 to the present.<sup>272</sup>

The Central Committee and its subsidiary RCs are the only GORUM institutions explicitly mandated to exclusively address claims over illegally confiscated land. This mandate makes it different than any other government committees, which are authorized to address multiple kinds of land issues and disputes such as land allocation, boundary disputes, or land-use permit compliance.

When first established, the CCRCFOL was expected to settle all grievances and disputes involving land confiscation by the government within six months of the NLD government assuming power. It has not, however, met this goal and continues to work on the resolution of confiscation cases to the present day.

<sup>267</sup>Union of Myanmar President Office order letter No. 14/2016 issued on 5th May 2016. It should be noted that documents, publications and translations referring to this committee often use different names for it. Some of them include: the "Central Committee for Reviewing Confiscated Farmlands and Other Lands", the "Central Committee on Confiscated Farmlands and Other Lands", the "Central Land Grab Rescrutinization Committee", the "Land Rescrutinization Committee" and the "Land Grab Committee".

<sup>268</sup>Letter No. 39/1- Committee/Land (Central) 2016 dated 9-6-2016.

<sup>269</sup>Farmers, farmers' organizations and CSOs working in the agricultural sector reported that there was no consultation with civil society in the design or creation of the Central Committee or lower level RCs. A Promise Unfulfilled: A Critique of Land Rescrutinization Committee. <https://www.slideshare.net/EthnicConcern/a-promised-unfulfilled-a-critique-of-land-reinvestigation-committeeenglish-version>

<sup>270</sup>Union of Myanmar President Office order letter No. 14/2016.

<sup>271</sup>Land Stakeholder Analysis: Governance Structures and Actors in Burma, Yangon, Myanmar, Tetra Tech and USAID, May 17, 2017.

<sup>272</sup>"Dissemination of Amendments to the Policy and Procedures of the Central Committee for Reviewing Confiscated Farmlands and Other Lands", Letter No. 5771/1-Committee/Land (Central)/2018, March 21, 2018.

The mandate of the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands is “to urgently address the land-grabbing issues for the people so that they do not face losses of farmland and other lands in the Republic of the Union of Myanmar.”  
Union of Myanmar President Office order letter No. 14/2016

### Organization, Personnel and Functions

CCRCFOL members include representatives from diverse government ministries and departments with mandates and concerns related to land. Initial members of the Central Committee included: Vice President U Henry Van Thio as the Chairman; the Deputy Minister of Home Affairs, as Secretary; the Union Attorney General and Ministers and Department heads from MOALI, the Ministry of Defense, Ministry of Natural Resources and Environmental Conservation, Ministry of Industry, Ministry of Commerce, the Nay Pyi Daw Council, Ministry of Home Affairs, and the Department Head of DALMS.<sup>273</sup> Additional members have been added since the earlier meetings of the CCRCFOL. To date, however, there are no representatives of civil society on the Central Committee.

The CCRCFOL is mandated to establish an organizational structure, grievance mechanism, policies and procedures for rescrutinizing confiscated land. Specifically, it is authorized to: 1) form lower-level committees; 2) assist them to scrutinize claims; 3) submit reports to relevant Ministries, Departments, Councils, Region or State Governments and the Pyidaungsu Hluttaw; 4) assist Ministries, companies, military, etc. to return illegally confiscated land; and; 5) investigate if lower-level Committees have addressed the cases according to the law.<sup>274</sup>

Region and State RCs are chaired by Chief Ministers of regions or states. Government members of these RCs are representatives of ministries and departments concerned with land issues. Representatives of the Tatmadaw are also members.

Region and State RCs, as do committees at District and Township levels, have civil society members including representatives from parliaments of Region and State Hluttaws and the Farmers Union.<sup>275</sup> It should be noted that, “This [the involvement of members of civil society on a government committee] represents the first instance in contemporary Myanmar of non-government (executive, military, or elected) personnel having a formalized role in such a far-reaching and sensitive advisory body.”<sup>276</sup>

Region and State RCs are responsible for supervising how land claims are addressed at their and District, Township and VT levels. Region and State RCs are instructed to meet every month to review cases for claims, refer them in a “systematic way” to appropriate RCs for further investigations and review recommendations from subsidiary RCs on how to resolve them.<sup>277</sup>

<sup>273</sup>The Ministry of Home Affairs (MOHA) is led by a military-appointed minister who oversees its General Administration Department (GAD), Myanmar’s civil service. Many GAD officials are former military officers. The involvement of the Department of Defense, the Minister of Home Affairs (MOHA), the Deputy Minister of the MOHA as Committee Secretary on the Central Committee and GAD officials that chair and military officers that are on lower levels of RCs indicates the ongoing involvement and capacity of the military to influence decisions over land confiscation issues.

<sup>274</sup>President’s Office Notification No 14, 2016, Date May 5, 2016.

<sup>275</sup>This is required by the Union of Myanmar President’s Office order letter number 14/2016, issued on May 5th, 2016.

<sup>276</sup>Ye Yint Htun and Caitlin Pierce, Myanmar’s Foray into Deliberative Democracy.

<sup>277</sup>“Dissemination of Amendments to the Policy and Procedures of the Central Committee for Reviewing Confiscated Farmlands and Other Lands”, Letter No. 5771/1-Committee/Land (Central)/2018, 15 Actions to Be Taken Seriously By Nay Pyi Daw/State/Region Committees, 8, March 21, 2018.

RCs at District and Township levels are chaired by Administrators from the GAD. Members of these committees include representatives of District and Township departments concerned with land issues and representatives of civil society. Civil society members are commonly MPs from jurisdictional areas they represent, and respected farmers, community elders and members of civil society organizations (CSOs) working on agricultural issues.<sup>278</sup> Representatives of the Tatmadaw are on District-level RCs but not Township committees.

District and Township RCs are responsible for coordinating engagement of representatives of government Departments that have mandates related to or are concerned about land issues and work to process and resolve grievances at each of their levels. District RCs are responsible for maintaining official land acquisition records, comparing claims of land confiscation with against them and making recommendations to Region or State RCs based on their records and recommendations from Township and VT RCs on how cases should be resolved.<sup>279</sup>

At the VT level, where RCs exist, membership includes the VT Administrator, a clerk from the GAD and several members of village communities within the Tract. Members are commonly the same as those on ABSF. They conduct case intake and investigations, especially when directed to do so by upper level RCs.

On May 27, 2016 the Central Committee approved a number of policies to be followed by Union Ministries, the Central Committee and its subsidiary committees to assess grievances and claims for return of illegally confiscated land.<sup>280</sup> The policies establish standards and criteria for whether land is to be released and returned to its original users, and if it is to be released how it is to be conducted. If land is not to be returned one of the policies describes procedures for determining compensation and government parties to be involved.

The Union Assembly Legal Affairs Advisory Committee, the Central Committee and RCs at all levels are authorized to accept claims from grievants for the return of confiscated lands.<sup>281</sup> Lower level Committees can investigate claims, deliberate, and, as appropriate with their level of authority, either make decisions regarding how they should be settled or refer them with recommendations to upper-level committees to consider.<sup>282</sup>

District level RCs, when they receive cases forwarded to them from by the Central Committee, Region or State RCs; Township or VT RCs or directly from disputants or grievants, refer them to appropriate level RCs for investigation. Referrals are generally made to Township and VT RCs. Cases received by Districts and Township that do not involve land confiscation issues are referred to other appropriate government land committees.<sup>283</sup>

<sup>278</sup>There is not a representative of farmers at the level of the Central Committee for Rescrutinizing of Confiscated Farmland or other Land.

<sup>279</sup>*Ibid.* 7.

<sup>280</sup>Letter No...../1-Committee/Land (Central), June 10, 2016, 2.

<sup>281</sup>This provision in CCRCFOL procedures has caused some difficulties as grievants often file the same claim with multiple levels of RCs. This has led to difficulties in coordination between different level of RC and duplication of work. Data is not available regarding whether diverse RCs have reached different conclusions on claims.

<sup>282</sup>The major focus of the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands is on land taken by the government. They can also handle private disputes in which land has been grabbed. These latter cases may be more amenable to the use of CDR.

<sup>283</sup>District RCs have authority to review some non-confiscation cases. See Ye Yint Htun and Caitlin Pierce, Myanmar's Foray into Deliberative Democracy, 7.

Township and VT RCs and land committees are the lowest level bodies for case intake and investigations. Township RCs, review cases forwarded to them by VTAs and their committees, and those sent from committees above them. Both Township and VT committees conduct reviews of involved parties' documents, may solicit personal testimony from concerned parties and others knowledgeable about the history of land in question and its past use and make site visits to conduct investigations.<sup>284</sup>

According to CCRCFOL guidelines, Region or State RCs are authorized to determine if claims are valid or not and can make final decisions on whether confiscated land should be released and returned to their original users or compensation be paid. Some decisions about the final dispensation of land, however, are referred by them to the Central Committee. This is frequently the case if a Region or State RC believes that issues involved are politically sensitive, such as when the Tatmadaw has seized land, or there are a large number of claimants.

According to CCRCFOL guidelines, Region or State RCs are authorized to determine if claims are valid or not and can make final decisions on whether confiscated land should be released and returned to their original users or compensation be paid. Some decisions about the final dispensation of land, however, are referred by them to the Central Committee.

At the national level, after grievances have been investigated by multiple levels of RCs, the CCRCFOL has authority to review, make a final determination and settle all claims over confiscated land. This is especially the case if lower level RCs have not been able to reach a decision on a claim, do not have the authority to do so, or refer a case to the Central Committee for a final decision.

Once a final determination is made by the Central Committee, it is responsible for negotiating with the Tatmadaw, ministries or departments that have illegally confiscated land on how seized land will be addressed. Negotiated agreements with government entities are expected to result in either relinquishment and return of illegally confiscated land or provision of fair compensation by the GORUM.

Significant issues in establishing fully functional RCs at multiple levels are the staffing and funding patterns for the CCRCFOL, which are identical to those for ABsF and the CCMVFVL. Government institutions and personnel that are members of RCs below the Central Committee are often the same as those on the other two entities. Members serve on RCs as collateral duty in addition to performing their normal responsibilities in their ministries or departments. Like ABsF and CCMVFVL and their subsidiary entities, no additional personnel, support services, equipment or funding have been provided by the GORUM to the CCRCFOL to facilitate the work and functioning of RCs.<sup>285</sup>

<sup>284</sup>Letter No. ..../1- Committee/ Land (Central)/2016, 4, (O), requires that "The Committees on Confiscated Farmlands and Other Lands [Rescrutinizing Committees] must go down to the field township-wise to address the land issues and inform people about the land issue management in line with Land Laws". This is especially important of especially if documents concerning parties' use-rights are not conclusive. Interviews conducted by the NRC Team with members of RCs, grievants and other villagers found that site visits are not always conducted by Township or other levels of RCs. One Township Administrator and RC committee members interviewed by the NRC research team explicitly said that they never conduct site visits.

<sup>285</sup>"The expenditures for field visits of the committee members and for conducting training on laws and procedures have to be supported through concerned state/region government budgets." "Dissemination of Amendments to the Policy and Procedures of the Central Committee for Reviewing Confiscated Farmlands and Other Lands", Letter No. 5771/1-Committee/Land (Central)/2018, 15 Actions to Be Taken Seriously by Naypyidaw/State/Region Committees, 8.

Like ABsF and CCMVFVL and their subsidiary entities, no additional personnel, support services, equipment or funding have been provided by the GORUM to the CCRCFOL to facilitate the work and functioning of RCs. Additionally, civil society members of RCs serve without pay.

These factors impact RC members' accessibility and availability to meet with grievants, hold regular meetings with all members present and adversely affects RCs' abilities to engage in CDR or reach timely recommendations or decisions.

Another RC staffing issue is that civil society members of RCs serve without pay. They often have difficulties balancing competing time commitments – serving on RCs, participation in field investigations, earning an income and meeting family and community obligations.

These staffing patterns, lack of funding and limited other government support limit RC members' accessibility and availability to meet with grievants, hold regular meetings with all members present and adversely affects RCs' abilities to engage in CDR or reach timely recommendations or decisions.<sup>286</sup>

It should also be noted that while civil society membership on RCs is mandated by Presidential Order, there is no government guidance on qualifications for members serving in this position; their roles, responsibilities and authorities; transparent and fair selection procedures; or guarantees of their access to relevant information related to land claims.<sup>287</sup> Some government RC members and farmer or CSO members see the role of civil society participants principally as observers.<sup>288</sup> Others see civil society members as advocates for farmers or liaisons between the RC, a grievant and/or their community.<sup>289</sup> Yet others see these members a source of local knowledge, which can link knowledge from “here” (local and customary knowledge) with knowledge from “afar” (statutory law, administrative procedures and technical information), and inform the Committee's work.<sup>290</sup> Lack of clarity of civil society members' roles, responsibilities and authorities has, in some cases, enabled them to be sidelined and excluded by GAD and other government agency members from full participation in committee meetings, investigations, deliberations and signing final recommendations or decisions.<sup>291</sup>

### The Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands' Grievance and Dispute Resolution Mechanism

The Presidential Order that establishes the CCRCFOL allows grievants to apply for return or compensation for illegally confiscated land. They may apply to any level of RC for consideration of their claim.

Procedures for resolution of grievances over confiscated land primarily involve a series of sequential administrative reviews of claims and decisions by appropriate RCs with the authority to determine final outcomes. Specific resolution activities include review of documents related to the land

<sup>286</sup>RCs are expected by the Central RC to meet regularly to address land issues brought before them, but like ABsF, it appears that in some cases they meet only periodically.

<sup>287</sup>Ye Yint Htun and Caitlin Pierce, *Myanmar's Foray into Deliberative Democracy*, 13.

<sup>288</sup>“Assessment on Formal Institutions: Feedback on Pending Questions from Field Interviews and ICLA Staff”, Mon State, September 18, 2018.

<sup>289</sup>*Ibid.* 1.

<sup>290</sup>Peter Adler, P. and Juliana Birkhoff. “Building Trust: When Knowledge from “Here” meets Knowledge from “Afar””. Washington, D.C.: Resolve, 2002. [www.resolve.org/wp-content/uploads/2011/02/building-trust.pdf](http://www.resolve.org/wp-content/uploads/2011/02/building-trust.pdf)

<sup>291</sup>Ye Yint Htun and Caitlin Pierce, *Myanmar's Foray into Deliberative Democracy*, 3-4.

claim, field trips to the land in question, development of conclusions and/or recommendations, and either decisions by lower-level RCs or referrals by them to upper level committees – Region or State RCs or the Central Committee – for a final decision.<sup>292</sup>

Although there are some variations in steps and procedures used by different Regions, States, Districts and Townships for the resolution of grievances over confiscated land, the general process is presented in Table 2: Grievance Mechanism and Dispute Resolution Procedures of the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands.<sup>293</sup>

**Table 2: Grievance Mechanism and Dispute Resolution Procedures of the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands (CCRCFOL)**

- 1) Grievant submits an application to one or more RCs, from VT to Central Committee levels, for resolution of a claim concerning illegally confiscated land.
  - Ideally, submissions include copies of one or more documents – a Land Use Certificate, tax forms (for one or multiple years), or loan documents– which demonstrate a past use right to the land in question.

Kwin maps or cadastral maps may also be submitted, or requested by an applicant from DALMS, if they are available.
- 2) The Secretary of the recipient RC, and on occasion the Committee as a whole, reviews the application, makes a determination if it is a potentially eligible claim and refers it to the appropriate RC for further action.<sup>294</sup>
  - Cases received and determined eligible by the Central Committee or a Region or State RC are commonly forwarded to a District RC for referral to a Township RC for investigation.
  - Claims received by a Township RC, may be referred to a District Committee to determine next steps, which may include referral back to the Township RC to conduct an investigation.
  - Claims received by a VT RC may be referred to a Township or District RC to determine appropriate action.
  - Claims that do not involve confiscated land are either rejected for consideration by the recipient RC or are referred to ABsF or the CCMVFL for their consideration or appropriate action.

<sup>292</sup>Frequently, members of lower level RCs do not believe they have authority to make decisions on land claims. Many cases are referred to higher-level committees for appropriate action. In some instances, especially if land claims do not involve sensitive issues or multiple parties, multiple referrals of such claims can create congestion in processing cases and result in additional time to settle them.

<sup>293</sup>Neither the NRC Team nor the author was able to obtain documents from the GORUM or CCRCFOL that provide a detailed description of steps and procedures used by Committee and subsidiary committees to process and make decisions on claims or grievances. This outline of steps is extrapolated from A Promise Unfulfilled: A Critique of the Committees for Rescrutinization of Confiscated Land and other Lands, December 2017. 2018 <https://www.slideshare.net/EthnicConcern/a-promised-unfulfilled-a-critique-of-land-reinvestigation-committeeenglish-version>

<sup>294</sup>The Secretary is often, but not always, in charge of case intake and determination as to whether or not the case is accepted, rejected or referred to another GORUM land dispute resolution mechanism.

3) The RC to which the claim has been referred conducts an investigation.<sup>295</sup>

- Investigations may involve a review of relevant documents, site visits to the land in question, interviews with involved parties and others knowledgeable about the history of the land in question and its use and preparation of a report with conclusions and recommendations for how the claim should be addressed.
- If the investigation is conducted by a Township RC, it usually requests assistance from the appropriate VTA and VT RC or land committee.
- RCs do not have authority to compel a party accused of illegally confiscating land to appear before a Committee or a Special Investigation Group to provide evidence or testimony.<sup>296</sup>

4) The RC that conducted the investigation of the claim makes a determination on appropriate action to address it.

- If the RC believes it has authority to make a decision on the claim, it may do so.
- If the RC is not for various reasons able to make a decision on the validity of the claim, does not believe it has the authority to do so or concludes that the final determination on a claim must be made by a higher-level RC, it makes an appropriate referral with its conclusions and recommendations.

5) Conclusions and recommendations of investigations are referred to and commented on by one or more RCs.

- Results of investigations are referred to and reviewed by sequentially higher RCs.
- Reviewers may approve, amend, cancel or presumably make a totally new decision than that of subsidiary RCs.

6) Region or State RCs or the Central Committee may form Special Investigation Groups (SIGs) if additional investigation of a claim is needed.

- SIGs are composed of members from appropriate RCs to examine issues in question. Investigations by these Groups commonly involve a review of relevant documents submitted by the grievant, any other official papers related to the land in question held by the GAD or DALMS, talking with the applicant and, if possible but not always, the party accused of illegally confiscating land.<sup>297</sup>
- Results of investigations are forwarded to Region or State RCs or the Central Committee for appropriate action

<sup>295</sup>Some civil society members of RCs have complained that they have not been given adequate notification of when investigation visits will occur or invited to participate in them. A Promise Unfulfilled, 17.

<sup>296</sup>RCs having authority to compel participation by a government agency in the investigation or settlement process could provide an opportunity for more voluntary and customized settlements.

<sup>297</sup>NAMATI estimates that 30-40% of farmers have some sort of documentation to verify past land-use rights. They often, however, do not have access to accurate government maps, either because they are old and out of date or their land has not yet been surveyed by DALMS (“Evidence is Not Sufficient to Secure Land Rights in Myanmar”. In A Promise Unfulfilled, 18, the authors speculate that DALMS may not conduct surveys because the agency is over-stretched and does not have human or other resources to conduct surveys or may not want to survey farmland that it could allocate at a later date to another party. Another potential reason for lack of surveys could be the cost to land-users for government surveys and land registration. Interviews conducted by NRC indicate that schedules for the cost of surveys are often not posted in DALMS offices and may vary from place to place and for different applicants. A MyJustice study found that people in Mon State were asked by DALMS to pay MMK 50,000 (\$40 U.S.) for land registrars to come to their land to validate their boundaries (Denney, et al, 2016, 21). NAMATI also reported that some DALMS personnel require payment of “unofficial fees” or “tea money” for a survey to be prioritized and conducted. This is often the case when parties involved in a dispute or grievance do not have documents. (“Evidence is Not Sufficient to Secure Land Rights in Myanmar”).

7) An RC with authority to make a decision on the claim makes a final determination on whether or not it is affirmed or denied.

- If a claim involves a significant amount of land, multiple parties or is politically sensitive, the decision is made either by a Region or State RC or the Central Committee.
- If the amount of land in question is smaller, there are fewer parties and it is not politically sensitive, a decision may be made by a lower level RC in consultation with upper-level Committees.
- Decisions of the Central Committee are final, binding and may not be appealed to any GORUM entity, including government courts.
- There is not a timeframe or deadline by which decisions must be made by upper-level RCs – Region or State RCs or the Central Committee.<sup>298</sup>
- Once a judgement is made, the Secretary of the Committee writes up the decision and obtains all required signatures of Committee members to confirm the outcome.

8) Affirmative decisions on claims accepted by grievants are referred to the Central, Region or State RCs to oversee implementation.

- Implementation involves negotiation by the Central Committee with concerned ministries, departments on how illegally confiscated land will be returned to its valid use-right holder, and/or how fair compensation will be paid if only some of the land is returned.

9) Grievants whose claims have been denied are informed of their rejection.<sup>299</sup>

- The Central Committee sends a letter to the grievant with this information.

10) The ministry, department or other party that illegally confiscated land is expected to release the land to the Union Government and the Central Committee within two months and it is to be handed back systematically to the original land-use holder “in line with the Land Law, rules and regulations.”<sup>300</sup>

- State/Region and Township RCs are responsible to oversee the transfer of land to the legal use-right holder.

<sup>298</sup>NAMATI’s study, Myanmar’s Foray into Deliberative Democracy, 9, found that the time required to conduct investigations was not necessarily problematic. The time for RCs to make decisions and return land to its rightful user was. The study – which involved 61 cases involving the military, 42 cases with a government ministry or department as the confiscator of land, 21 cases involving a company and 11 cases involving individuals – found that over 50% of the cases had been investigated (75% of the government cases and 60% in which the military was involved). It took an average of 4 months between the time the case was submitted to an RC and when an investigation was completed. In only 5% of these cases, however, had an RC at an appropriate level to decide a case made a decision, returned land to the valid claimant, paid compensation or informed the applicant that their request for return of land was denied. The researchers speculated that potential causes of delays in decision-making and implementation of returns or paying compensation could be due to: 1) lack of human resources at levels where decisions can be made (Central Committee, Region and State RCs), 2) inadequate investigations so that sufficient information is known to make a decision, 3) guidelines for decision making are not clear, or 4) higher-level officials do not want to take responsibility and make decisions that may be politically problematic or unpopular with the public.

<sup>299</sup>Some RC civil society members and MPs have stated that they have not been able to participate in investigations, review written reports prepared by the Secretary or been able to sign them. Some recommendations or outcomes forwarded to upper level RCs have been returned to the lower committee that conducted the investigation and made a recommendation or decision for re-investigation, inclusion of missing documents or to secure signatures of all committee members. A Promise Unfulfilled, 20.

<sup>300</sup>Letter No...../1-Committee/Land (Central), June 10, 2016, 2 (a) 5, 2.

11) If one or more grievants or disputants does not accept an RC's decision, it can be appealed to a higher-level RC.

- Multiple appeals are allowed.
- Guidance is not available on whether appeals must be made sequentially to higher RCs or taken directly to a Region or State RC or the Central Committee for a final decision.
- There is not a timeframe for responses to appeals or when decisions will be made.
- No appeals are allowed after a final decision by the CCRCFOL.

Current procedures for grievance resolution, especially when cases are received and initially handled by lower level committees at Township and VT levels, focus extensively on desk reviews of relevant documents. While "committees for reviewing confiscated farmlands and other lands are to make field visits to deal with land cases in respective townships and communicate the public to inform what the committees have done in accordance with land laws," this is not always done.<sup>301</sup> Often if an RC believes that documents such as a Land-Use Certificate or tax forms submitted by one or more grievants and/or a respondent are valid they do not conduct interviews with local leaders or elders about the historic occupation or use of the land in question.<sup>302</sup>

Occasionally, if deemed appropriate or needed, RCs at the Township level may form a smaller committee, an Investigation Group, to gather additional information on the grievance or dispute. Investigation Groups are expected to conduct site-visits to the land in question and talk with respected community leaders or elders about past use and related use-rights of the land in question.

The authority Township and VT RCs have to resolve grievances over claims is not explicit either in the Presidential Orders creating the Central Committee or subsidiary RCS or in subsequent guidance.

Generally, if cases are fairly simple, not politically sensitive, do not involve multiple parties, disputing parties are willing to engage in dispute or grievance settlement activities and Township Authorities and their committees believe they have the authority to make decisions on the issues in question they may try to help parties reach voluntary agreements or make a recommendation or decision.

If, however, Township and VT RCs are "dealing with the complicated cases on the ground, the cases shall be referred to upper levels of committees and the guidance shall be sought from the Central Committee and if necessary, the cases shall be put forward to the Union Government for decisions".<sup>303</sup> Prior to decisions by upper-level Committees, however, Region or State RCs or the Central Committee committees a may form Special Investigation Groups (SIGs) composed of members from appropriate

<sup>301</sup>Ibid. 4. NRC interviews with Township Authorities and their RCs found that they do not always conduct field visits if they believe that documents they receive from involved parties are adequate to determine a valid use-right.

<sup>302</sup>Unfortunately, a party accused of land grabbing may have obtained valid documents during the time when a grievant or disputant was customarily working and utilizing the land in question but failed to register it and get a Land-Use Certificate. By not interviewing local leaders and elders and determining the history and time in which various parties have used the land in question valid information from "on-the-ground" may not be available to RCs to make fully informed decisions.

<sup>304</sup>Dissemination of Amendments to the Policy and Procedures of the Central Committee for Reviewing Confiscated Farmlands and Other Lands", Letter No. 5771/1-Committee/Land (Central)/2018, 10 Point Policy Related to Application of Original Land Owners for Release of Land Confiscated by the State, (8), March 21, 2018.

<sup>305</sup>"Dissemination of Amendments to the Policy and Procedures of the Central Committee for Reviewing Confiscated Farmlands and Other Lands", Letter No. 5771/1-Committee/Land (Central)/2018, 15 Actions to Be Taken Seriously By Nay Pyi Daw/State/Region Committees, (15)

levels of RCs to further investigate claims.<sup>304</sup> SIGs “are to make field visits to deal with land cases in respective townships and communicate with the public to inform [them] about what the committees have done in accordance with land laws.”<sup>305</sup>

When SIGs conduct investigations, they appear to focus exclusively on gathering information and engage in few, if any, in discussions with involved parties on possible ways to settle the claim through negotiations or mediation. Ultimately, findings of Special Investigation Groups, which are not investigating issues related to communal land, write reports and forward them to Region or State RCs for their review and then on to the Central Committee for a decision. SIGs investigating communal land issues write reports and forward them directly to the Central Committee for its deliberations and determination of the outcome of a claim.<sup>306</sup>

Significant issues concerning the functioning of the CCRCFOL and other RCs are the time it takes to: 1) make final decisions on the validity of a land claim, 2) release and return land to its rightful user, and 3) pay adequate compensation for lost land.<sup>307</sup> Interviews conducted by NRC and other research found that that RCs take extended periods of time to make decisions, make relatively few of them and return a only a modest amount of land. Additionally, interviews for this study found that even when a favorable decision is made on a land claim, there are extensive delays in grievants’ receipt of compensation or they are still waiting for it.

An additional problem is that when the CCRCFOL does determine that land should be returned to its rightful user and it is released, it becomes state land and publicly available for allocation. When this occurs, individuals who do not have a legal use right to the returned land can often apply to the ABF and DALMS for allocation of the land and receive a Land Use Certificate before the rightful land user has received the land and had an opportunity to obtain their own Land Use Certificate. The process for a farmer to contest this action by the GAD is complex and lengthy.<sup>308</sup>

There are also some additional issues related to the performance of DALMS and land returns and registrations. For example, a significant number of participants in multiple HLP Legal Awareness Sessions in Kayin State reported that:

The land record department [DALMS] does not work well as the registration process normally takes longer than the procedure mentioned in the law. Also, there is a lot of corruption: if a farmer pays more, they get a faster response on the application. Farmers lack information on procedures. The registration time is excessively long and full of requests for bribes by land registration officials. Usually, the DALMS staff are unwilling to visit the site for demarcation unless a bribe is paid. Without unofficial payments, [the] land registration process takes an unpredictable length of time.<sup>309</sup>

<sup>306</sup>“Dissemination of Amendments to the Policy and Procedures of the Central Committee for Reviewing Confiscated Farmlands and Other Lands”, Letter No. 5771/1-Committee/Land (Central)/2018, 15 Actions to Be Taken Seriously by Nay Pyi Daw/State/Region Committees, (15).

<sup>307</sup>See 283 above. It does appear, however, that since the time of earlier research, conducted by NAMATI, the CCRCFOL has begun to return more land.

<sup>308</sup>A Promise Unfulfilled, 22.

<sup>309</sup>Myat Thiri Aung and Jose Arraiza, *Improving Access to Justice through Community Based Dispute Resolution (CBDR) for Housing, Land and Property Disputes in Myanmar*. Yangon, Myanmar: Norwegian Refugee Council, September 2018, p.3.

Similar issues related to corruption within government offices, the extensive time required to process registration applications and the requests for bribes to speed up the process were reported by participants in other HLP Legal Awareness Sessions conducted by NRC in Eastern Bago Region, Rakhine and Shan States.<sup>310</sup>

### Performance of the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands and its subsidiary RCs relative to the UNPP “Effectiveness Criteria” and feasibility of Introducing, Implementing and Institutionalizing the use of CDR Approaches and Procedures

Detailed below is an assessment of the performance of the CCRCFOL’s dispute resolution mechanism relative to the UNGP “Effectiveness Criteria” and an analysis of the feasibility of introducing, implementing and institutionalizing CDR to resolve land disputes.

#### Opportunities

##### Legitimate

- CDR approaches and procedures are recognized at the highest level of government, most notably by the State Counsellor, Aung San Suu Kyi, as effective methods for the resolution of disputes.
- The GORUM has publicly stated that it supports addressing and resolving issues related to confiscated land, which may help members of the public and civil society organizations hold it accountable for follow through. At a meeting of the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands on June 27, 2018, it was reported that President U Win Myint pledged that farmers should have unfairly confiscated farmland returned to them or given proper compensation for land that cannot be returned. “The President said confiscated land must be swiftly returned to their rightful owners and squatters must be dealt with in accordance with the law. He called on the central committee, Nay Pyi Daw Council Chairperson and chief ministers to properly review confiscated land for the good of the nation and the public and follow legal procedures without delay”.<sup>311</sup>
- The election of the NLD government and greater advocacy for democracy has created potential opportunities for more parties to engage in greater collaboration to resolve land disputes. The 2015 NLD election manifesto states:

It is essential to improve the quality of life and reduce levels of poverty in rural areas, which are home to the majority of the country’s population. Restrictions on agricultural freedoms and absence of land tenure security greatly harm farmers. 11 .1. We will work towards... the fair resolution of farmland disputes, the establishment of land tenure security, and transparency in line with laws and regulations regarding the protection and transfer of farmland.... 11 .4. We will strive, in accordance with the law, to ensure the return to farmers of illegally-lost land, and payment of compensation and restitution... 11 .6. We will defend against illegal land confiscation practices.<sup>312</sup>

<sup>310</sup>Ibid. 3. and NRC Taunggyi Team Discussion September 2018.

<sup>311</sup>“President Pledges to Return Confiscated Land to Farmers”, The Global New Light of Myanmar, June 27, 2018. <http://www.globalnewlightofmyanmar.com/president-pledges-to-return-confiscated-farmland-to-farmers/>

<sup>312</sup>National League for Democracy, 2015 Election Manifesto (paragraph 4 (ii)) page 11: and Htet Naing Zaw. “Return of Seized Land a top NLD Priority: Deputy Agriculture Minister”. Irrawaddy, May 12, 2016. <https://www.irrawaddy.com/news/burma/return-of-seized-land-a-top-nld-priority-deputy-agriculture-minister.html>

- Government initiatives are currently emphasizing greater public participation and collaboration, including in the area of dispute resolution. In the area of dispute resolution, examples include the Union level Committee for Rescrutinizing of Confiscated Farmlands and Other Lands requirement that farmers, members of civil society and their organizations and MPs, as appropriate, be appointed as members of RCs at Region, State, District, Township and Ward/Village levels.

Additionally, the Ward or Village Tract Administration Law of 2012 and subsequent amendments authorize the election of Village/Ward Tract Administrators by representatives of village groupings. While the election process has some problems, holding local elections for individuals who are actively involved in dispute resolution is a step toward increasing public participation in the selection of authorities who can help disputants voluntarily settle their differences or make acceptable third-party recommendations or decisions.<sup>313</sup>

- President U Win Myint has instructed state and region chief ministers throughout the country engaged in investigating and resolving claims over illegal land confiscation to complete their work by December 31st, 2018.<sup>314</sup> The President's announcement, however, has both up and downsides. One positive aspect is that the government has established a deadline and is pushing for rapid processing and resolution of claims of illegal land seizures. Deadlines are frequently important for driving a decision-making process to its conclusion, and not letting it drag on for an unreasonable period of time.

One of the downsides of the announcement, however, is that there are a tremendous number of cases for the CCRCFOL to process. The Central Committee in early September issued a new 52-point set of guidelines to be followed when investigating land-grab cases, which potentially may take more time to implement.

As noted earlier, subsidiary RCs lack full-time staff to process cases, a constrained budget and little time to convene and conduct the investigations and field visits required to have a complete understanding of the cases they are handling. While it is critical to increase the speed of the settlement process, and a deadline can do this, it is also important to not have a cutoff date for case processing that either forces or allows the CCRCFOL cut short investigations and legitimate decision-making procedures and increase denials of valid claims to meet a deadline.

If, however, the CCRCFOL does not meet the deadline it will be seen by many claimants, the general public and the international community as ineffective, delaying decision-making or corrupt. The Committee was strongly criticized when it was first created, and it was announced that it was expected to resolve all land claims within six months, which it failed to do.

<sup>313</sup>Kyed et al, "Local democracy in Myanmar: Reflections on ward and village tract elections in 2016; and Htike Nanda Win, "The Election that Wasn't", Myanmar Times, December 1, 2017. <https://www.mmmtimes.com/news/election-wasnt.html>

<sup>314</sup>Salai Thant Zin, "President Tells State, Regional Officials to Wrap Up Land-Grab Probes", The Irrawaddy, September 20, 2018. <https://www.irrawaddy.com/news/burma/president-tells-state-regional-officials-wrap-laalso-nd-grab-probes.html>

- The CCRCFOL grievance mechanism is the only institutionalized means for farmers or others to obtain redress for illegal confiscation of their land. If they want any possibility of recovery, they have little choice but to use the mechanism. It is difficult to parse the “legitimacy” of the mechanism from how much it is actually “used”. In spite of some concerns about the effectiveness and fairness of the mechanism and its potential outcomes, it is extensively being used by grievants and disputants and some land is being returned.<sup>315</sup>

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For example, in Shan State the State Committee for Rescrutinizing Confiscated Farmlands and Other Lands reported that as of January 31, 2018, out of a total of 2,252 claims for restitution, the Committee returned land in 54 cases and negotiated compensation in 84 others. It had made decisions not to return land in 700 cases. The remainder of cases were in some stage of the review process.

### Accessible

- The large number of claims submitted to the CRCFOL indicates that the mechanism is known to many stakeholders for whom it was intended. This does not mean, however, that there are not potential users who are not familiar with the mechanism. As one FGD participant noted, “I have no knowledge, because I and my family are uneducated.”<sup>316</sup>
- The CCRCFOL allows grievants and disputants to submit claims for illegally confiscated land to all levels of RCs, from the Central Committee to the Village Tract RCs or land committees. This is an unusually high level of access for users of a grievance or dispute resolution mechanism.<sup>317</sup>

The CCRCFOL allows grievants and disputants to submit claims for illegally confiscated land to all levels of RCs, from the Central Committee to the Village Tract RCs or land committees.

<sup>315</sup>Reported examples of returns of confiscated land are described in: Win Naung Toe, “Myanmar Government to return Seized Land to Farmers in Sagaing Region”, Radio Free Asia, June 25th, 2016. <https://www.rfa.org/english/news/myanmar/maynamr-government-to-return-seized-land-to-farmers-in-sagaing-region-05252016162027.html> ; Htet Naing Zaw, “Govt. Committee to Settle All Land Grab Cases in Six Months”, The Irrawaddy, July 1, 2016. <https://www.rfa.org/english/news/myanmar/maynamr-government-to-return-seized>; “Myanmar returns more confiscated land to farmers in northern region” News Asia and Pacific Edition, May 16, 2018. [http://www.xinhuanet.com/english/2018-05/16/c\\_137182658.htm](http://www.xinhuanet.com/english/2018-05/16/c_137182658.htm); “Vice President U Henry Van Thio praises Mandalay Region for topping the list among states and regions in returning confiscated lands”, The Global New Light of Myanmar, August 7, 2018. <http://www.globalnewlightofmyanmar.com/vice-president-u-henry-van-thio-praises-mandalay-region-for-topping-the-list-among-states-and-regions-in-returning-confiscated-lands/>; and Myanmar returns confiscated land to farmers in central region”, News Asia & Pacific Edition, August 26, 2018. [http://www.xinhuanet.com/english/asiapacific/2018-08/26/c\\_137419600.htm](http://www.xinhuanet.com/english/asiapacific/2018-08/26/c_137419600.htm); and “Unused Land Seized from Farmers Has Been Returned, Myanmar Military Says”, Radio Free Asia, July 18, 2018. <https://www.rfa.org/english/news/myanmar/unused-land-seized-from-farmers-has-been-returned-myanmar-military-says-07182018145134.html>

<sup>316</sup>NRC Team Focus Group Discussion with end-users, Lar ka Daung Village, Hap-an, September 2018.

<sup>317</sup>Having so many points of access, while an admirable component of the mechanism, has created coordination problems. Multiple case filings with one or more RC has resulted in a lack of clarity regarding which RC is conducting investigations and making determinations and duplication of work.

## Based on engagement and dialogue

- There are instances in the CCRCFOL mechanism where CDR procedures are identified as elements in the resolution of land confiscation issues – Negotiation is noted:

- (1) To obtain the cooperation and concurrence of a ministry to return confiscated land.”<sup>318</sup>
- (2) When a relevant ministry or organization is investigating records of past compensation paid for land that was not released and in the preparation of a budget for any future payments in line with financial rules for compensation. When “compensating, the amount must be negotiated and designated by relevant region/state government so as to avoid the controversial rate and for the owners not to face losses”.<sup>319</sup> Additionally, “To avoid any grievances for the land owners and any disputes about the rates of compensations, compensations should be paid at the fair rates negotiated and specified by the concerned state/region governments.”<sup>320</sup> “In case of land confiscation for urbanization and establishments of industrial zones, the concerned state/region governments shall lead tripartite discussion with companies and farmers and deal with the cases without causing any grievances to both companies and farmers.”<sup>321</sup>

The inclusion of negotiations in the CCRCFOL’s mechanism can be a precedent for incorporating other CDR procedures in the future.

- There are number of times and activities in CCRCFOL procedures where CDR is could be integrated to enhance existing or add new processes for handling and resolving land claims. Many of them are during investigations and field trips by various levels of RCs, Investigation Groups or SIGs. Others involve negotiating with concerned government agencies on the return of land or terms for compensation.

There are number of times and activities in CCRCFOL procedures where CDR could be integrated to enhance existing or add new processes for handling and resolving land claims.

## Challenges

### Legitimate

- In some States, there is significant distrust by farmers of government institutions and mechanisms that address land issues – For example in Shan State, where NRC conducted multiple HLP Legal Awareness Sessions, “Some farmers bitterly expressed their lack of trust in government institutions responsible for land management. Such feelings are grounded in a history of land grabbing, imprisonment and abuses by both GORUM and EAOs, even in cases where farmers had HLP related documents, including Form 7.”<sup>322</sup>

<sup>318</sup>“For the land dispute cases ... concerning ministries, measures must be taken only with approval of the relevant ministry.” Letter No. ..../1- Committee/ Land (Central)/2016, 4, (J), June 10th, 2016.

<sup>319</sup>Letter No. ..../1- Committee/ Land (Central)/2016, 2, (A), (5), June 10th, 2016.

<sup>320</sup>Amendments to the Policy and Procedures of the Central Committee for Reviewing Confiscated Farmland and Other Lands, Letter No. 5771/1-Committee/Land (Central)/2018, Steps to Be Taken to Make Sure That Land Owners Receive Released Lands without Delay (4), March 21, 2018.

<sup>321</sup>Ibid. 10 Point Policy Related to Application of Original Land Owners for Release of Land Confiscated by the State (9).

<sup>322</sup>Myat Thiri Aung and Jose Arraiza, Improving Access to Justice through Community Based Dispute Resolution (CBDR) for Housing, Land and Property Disputes in Myanmar. Yangon, Myanmar: Norwegian Refugee Council, p. 2.

- Notwithstanding the return by the GORUM and the CCRCFOL of some illegally confiscated land there has been growing dissatisfaction among a number of farmers and members of civil society organizations with the efforts, procedures and speed of the NLD government to deliver on its promise to have a more inclusive and fair process for resolving complex land issues, and that farmers who had their land unfairly confiscated would have it returned or be given fair compensation for its loss. There have a number of significant critiques of the process from national and international civil society groups.<sup>323</sup> A recent report by Human Rights Watch noted:

Notwithstanding the return by the GORUM and the CCRCFOL of some illegally confiscated land there has been growing dissatisfaction among a number of farmers and members of civil society organizations with the efforts, procedures and speed of the NLD government to deliver on its promise to have a more inclusive and fair process for resolving complex land issues.

It is not surprising that the NLD government has struggled to solve the myriad longstanding problems associated with Myanmar's confusing land laws and knot of competing claims. Many cases are extremely complicated, as military confiscations were followed by additional sales to corporations and businesses, followed by additional sales to others, making it difficult to create a system that is fair to the original owners, subsequent tenants, and those who later bought the land in good faith. During different periods of Myanmar's history, dozens of laws were enacted, making the body of laws regulating land acquisition and sales a confusing web of overlapping, and sometimes contradictory, rules difficult to navigate by the vast majority of people it affects. And given the powerful individuals and institutions involved in past land transfers, many farmers and land rights activists have little hope the NLD can quickly solve the problem.<sup>324</sup>

The result of delays in processing land claims, often over a number of years, many farmers have lost their ability to secure their livelihoods in agriculture and have had difficulty feeding their families. Many have been forced to seek employment as day-laborers or to leave the country for Thailand to find other work.<sup>325</sup>

In response to continuing land confiscations and the slow return of illegally confiscated land many farmers and others have engaged in protests and demonstrations to voice their views. A number of protests have resulted in arrests, criminal charges, court cases and punishments including incarceration.<sup>326</sup>

<sup>323</sup>Land in Our Hands: A Promise Unfulfilled: A Critique of the Land Rescrutinization Committee, December 2017. <https://www.slideshare.net/EthnicConcern/a-promised-unfulfilled-a-critique-of-land-reinvestigation-committee-english-version>; and "Nothing for Our Land": Impact of Land Confiscation on Farmers in Myanmar, New York, July 17, 2018.

<sup>324</sup>Nothing for Our Land, 5.

<sup>325</sup>Ibid.

<sup>326</sup>See: When the Farmer becomes the Criminal: Land Confiscation in Burma's Karen State. New York: Human Rights Watch, 2016. Reports on protests and court cases include, "Two Detained in New Letpadaung Mine Protest in Myanmar", Radio Free Asia, March 29, 2018. <https://www.rfa.org/english/news/myanmar/protest-03292018170435.html>; Kyaw Ko Ko "Over 1000 Mandalay farmers protest land seizure, suits", Myanmar Times, June 30, 2017 <https://www.mmtimes.com/national-news/mandalay-upper-myanmar/26615-over-1000-mandalay-farmers-protest-land-seizure-suits.html>; Teza Hlaing, "350 Mandalay farmers facing court over land grabs, Frontier Myanmar," February 23, 2017. <http://frontiermyanmar.net/en/350-mandalay-farmers-facing-court-over-land-grabs>; Evidence is Not Sufficient to Secure Land Rights in Myanmar; Wa Lone, "Freed Myanmar farmers renew fight against army over land," Reuters, January 20, 2017 <http://www.reuters.com/article/usmyanmar-military-land-idUSKBN1540QT>.

- Grievances against government entities or powerful parties – specifically powerful ministries, departments, the Tatmadaw or large companies –over claims of illegally confiscated land have been difficult to resolve by the CCRCFOL due to significant differences in the amounts of power and influence of involved parties, including that of the CCRCFOL.<sup>327</sup> This dynamic raises questions about the capacity of the CCRCFOL to effectively resolve disputes. It will also likely adversely affect settlements that might be achieved through the use of CDR approaches and procedures.

Grievances against government entities or powerful parties – specifically powerful ministries, departments, the Tatmadaw or large companies –over claims of illegally confiscated land have been difficult to resolve by the CCRCFOL due to significant differences in the amounts of power and influence of involved parties, including that of the CCRCFOL.

- There is a significant potential for structural conflict and conflicts of interests between the current roles of government institutions and members serving on the CCRCFOL and its subsidiary RCs as they may have been decision-makers on land allocation cases when serving on ABsF. This potential structural source of conflict has raised concerns by farmers, members of civil society and other groups concerned about civil and human rights. As one leader of a farmers organization said, “Under previous governments, the Forest Department, Land Record Department and City Development Committees were involved in land confiscations. People who worked for these organizations at that time are now working for region and township committees currently under the purview of the Central Committee on Confiscated Farmlands and Other Lands [The Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands],...this means that the people the government has made responsible for settling land seizure cases may have participated in land grabs. That is why we are concerned,”<sup>328</sup>

This potential, or actual, structural conflict will be extremely difficult to reconcile given current functions of the CCRCFOL, ABsF and the CCMVFL and the roles of its member agencies and personnel play on them.

<sup>327</sup>NAMATI in a 2017 study, examined the outcome of 298 cases involving grievances over illegally confiscated land against the military, other government agencies or companies. The study found that in cases that involved the Tatmadaw, 32% of the cases settled. This was the highest rate of settlement of grievances involving land confiscations. In 62% of these cases, over half of the clients had documents. Another 64% of cases, however, in which the majority of clients had documents, remained unresolved. All of the cases, whether settled or not, involved paralegals to assist grievants to better advocate for their interests. Evidence is Not Sufficient to Secure Land Rights in Myanmar.

Similar problems in the rate of processing and returning land was also found in cases involving government ministries and departments. Guidelines for the CCRCFOL state that “, “For the land dispute cases of concerning ministries, measures must be taken only with approval of the relevant ministry”. Letter No. ..../1- Committee/ Land (Central)/2016. 4, (J).

The NAMATI study found that the second highest rate of resolution of land confiscation grievances involved government ministries. The settlement rate was 15%. In 90% of the cases, over 50% of the grievants had documents. However, in cases where the majority of grievants had documents, 80% remained unresolved. All of grievances involved paralegals to assist the non-governmental parties.

The settlement rate of grievances against companies was only 13%, which is low in comparison to the two other categories of parties involved in land confiscation cases. This level of settlement, however, could potentially be related to the small number of cases, only 50.

<sup>328</sup>Htoo Thant, “Committee for solving land disputes accused of conflict of interest”, Myanmar Times, September 28, 2016. <https://www.mmtimes.com/national-news/nay-pyi-taw/22765-committee-for-solving-land-disputes-accused-of-conflict-of-interest.html>

- Farmers and other parties with less political or financial influence, or who do not possess statutory Land Use Certificates, are less likely to view the CCRCFOL and its subsidiary RCs as trusted and accountable for the fair conduct of grievance or dispute resolution procedures. Villagers in many parts of Myanmar have lost customarily farmed land due to land confiscations by more powerful parties. Confiscations have often been based on farmers' lack of formal use-rights and Land Use Certificates. If the only standard used by the CCRCFOL and RCs for making a decision on the return of land is possession of formal documents, local farmers are at a severe disadvantage.
- There has been dissatisfaction on the part of some villagers with the process of selection of VTAs and civil society members of RCs (and likely ABsF), specifically at the VT and Township levels. Many farmers and civil society groups believe that the selection process for VTAs is not fully democratic and excludes many members of 10 Household groups, especially women and youth. They advocate for direct elections of VTAs by all members of villages. Additionally, there have been complaints that villagers have not been consulted in the selection of civil society members of all levels of RCs.<sup>329</sup>

There has been dissatisfaction on the part of some villagers with the process of selection of VTAs and civil society members of RCs (and likely ABsF), specifically at the VT and Township levels.

- While CDR processes are recognized as being valuable for the resolution of disputes at the highest level of government, there currently no influential champions within the GORUM, CCRCFOL or RCs at any level who are actively providing legitimacy, engaged in advocating for or working to implement and institutionalize these procedures. The absence of champions with high status and authority will make it much more difficult to insert and implement CDR approaches and procedures in CCRCFOL or RCs' procedures and practices.

### Accessible

- Administrative procedures for resolving claims over confiscated land, although used by many applicants, are not know by many others. Participants in one Focus Group Discussion noted, "We don't familiar with the administrative procedure available to help us. We do not know so well government official procedure; the system is complicated. There is not effective help from government officials..."<sup>330</sup>
- There are no official GORUM or CCRCFOL mandates that authorize the Central Committee or any of its subsidiary RCs to use ARD/CDR approaches and procedures to resolve grievances over land confiscation. This gap means that CDR is presently only used on an ad hoc basis by government officials involved in the CCMVFL mechanism who believe they have the authority and flexibility to informally implement them. The public is not aware of the possibility of using these procedures, even on an ad hoc basis. If CDR processes are to be introduced and institutionalized, some form of government authorization for their use will be needed as well as a public awareness campaign to increase public knowledge of their availability.

<sup>329</sup>Helene Maria Kyed, et al – Local Democracy in Myanmar: Reflections on ward and village tract elections in 2016; The State of Local Governance: Trends in Myanmar. Yangon, UNDP, 2015, 61; and Nay Aung, "Farmers seek reform of seized lands scrutiny ", Myanmar Times, August 16, 2016. <https://www.mmmtimes.com/national-news/mandalay-upper-myanmar/21963-farmers-seek-reform-of-seized-lands-scrutiny.html>

<sup>330</sup>NRC Team Focus Group Discussion with mechanism end-users, Shwe Pyi Taung, Hap-an, September 2018.

There are no official GORUM or CCRCFOL mandates that authorize the Central Committee or any of its subsidiary RCs to use ARD/CDR approaches and procedures to resolve grievances over land confiscation.

- There is a lack of specific designated staff members and funding for activities of Region, State and subsidiary RCs inhibits them from being fully accessible, functioning efficiently and responding in as timely a manner as desirable. This is not in line with the amendment to the Policy and Procedures of the Central Committee for Reviewing Confiscated Farmland and Other Lands that requires, “The offices of the committees for reviewing confiscated farmlands and other lands have to assign dedicated staff members in sufficient number and have to work hard to win public trust and confidence.”<sup>331</sup>
- There have been a number of problems below Region, State and District levels that have prevented implementation of a fully functioning land claim grievance resolution mechanism. Vice President U Henry Van Thio in a speech on August 7<sup>th</sup>, 2018, described that “four confiscated lands reviewing groups were formed with deputy ministers from union ministries to respond to reports of confiscated lands and to strengthen reviewing them. On-ground inspection in states and regions reveal[ed] that the Lands Reviewing Committees [RCs] at the ward, village and township levels are not properly organized, nor are they fully aware of the 52 policies set by the central committee.”<sup>332</sup> Similar observations of the CCRCFOL’s failure to form RCs, especially below the township level, or these committees’ inactivity or ineffectiveness have also been reported by a number of civil society groups.<sup>333</sup>

## Transparent

- There are a significant lack of timeframes and deadlines for completing activities mandated for the CCRCFOL and its subsidiary RCs. These include absence of information on timing for when initial investigations should take place, how long they and report preparation should take, time and timing for reviews and comments, and the time expected for a final decision to be made. One Focus Group Discussion, noted, “We have no idea how long it will take the process every step. There are different department with difference staff with difference skill and attitude.”<sup>334</sup>

<sup>331</sup>Amendments to the Policy and Procedures of the Central Committee for Reviewing Confiscated Farmland and Other Lands, Letter No. 5771/1-Committee/Land (Central)/2018, Actions to Be Taken Seriously by Nay Pyi Daw/State/Region Committees. (3)

Amendments to the Policy and Procedures of the Central Committee for Reviewing Confiscated Farmland and Other Lands, Letter No. 5771/1-Committee/Land (Central)/2018. (9)

<sup>332</sup>“VP U Henry Van Thio praises Mandalay Region for topping the list among states and regions in returning confiscated lands”, New Light of Myanmar, August 7th, 2018, Issue 113, Volume 5. <http://www.globalnewlightofmyanmar.com/vice-president-u-henry-van-thio-praises-mandalay-region-for-topping-the-list-among-states-and-regions-in-returning-confiscated-lands/>

<sup>333</sup>Land in Our Hands: A Promise Unfulfilled: A Critique of the Land Rescrutinization Committee, December 2017, <https://www.slideshare.net/EthnicConcern/a-promised-unfulfilled-a-critique-of-land-reinvestigation-committeeenglish-version> (accessed June 14, 2017).

<sup>334</sup>NRC Team Focus Group Discussion with mechanism end-users, Shwe Pyi Taanf, Hap-an, September 2018.

The only explicit timeframe is for the release of illegally confiscated land by concerned ministries or other government bodies to the Union Government and the CCRCFOL for return to the original use-right holder.<sup>335</sup> Lack of timelines makes the process less transparent, poses barriers to applicants and use-right holders to track the status of their cases and does not promote timely performance and accountability of the mechanism and its procedures.

- Activities of the CCRCFOL and subsidiary RCs are generally not transparent and generally do not enable either direct participation or observation of their procedures or deliberations by grievants, their representatives, concerned community members, NGOs, CBOs or legal advocates. This lack of transparency is problematic both for open and fair administrative decision-making and the potential use of CDR, the latter of which requires opportunities for direct participation in dispute resolution processes. Lack of transparency significantly impacts mechanism users' views on the credibility of resolution procedures, personnel and outcomes and their perceptions that they are fair and just.

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- The CCRCFOL lacks a transparent, timely and easily accessible mechanism to inform parties involved in a grievance about the status of their cases. Grievants often have to make numerous visits to Township Department Offices or other RCs to obtain this information, which is often not immediately available.
- When a decision has been made to return confiscated land to its original use-right holder there are further opportunities for the GAD or DALMS to negatively influence the outcome of grievances over confiscated land. When land is released, it becomes state land. Individuals who do not have a legal right to the returned land can apply to the ABF and DALMS for its allocation and receive a Land Use Certificate (LUC) before the rightful land-user has received the land and had an opportunity to obtain their own LUC.

## Equitable

- There is currently not adequate information available from the GORUM, CCRCFOL, RCs, NGOs and CBOS on HLP rights and how to use the CCRCFOL's grievance mechanism. The absence of providers and needed information prevents some potential or actual users of the CCRCFOL mechanism from being fully informed about their rights and redress procedures available to them.<sup>336</sup>

<sup>335</sup>"If a certain relevant department is going to release the confiscated land that are not being used for the state and the people, they need to return the lands to the Union Government and the Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands within 2 months and to hand them back to the original owners in line with the Land Law, rules and regulations, systematically. Letter No. ..../1- Committee/ Land (Central)/2016, 2, (a), 5, June 10th, 2016.

<sup>336</sup>This issue and need were raised in a meeting on February 1, 2018 between State level GORUM actors in Shan State involved in the resolution of land disputes and NRC staff and consultants.

## Predictable

- The CCRCFOL grievance resolution mechanism and procedures are better known by powerful parties – such as high-level government officials, the Tatmadaw, ministries, departments and large private enterprises – than by local farmers. Procedures and outcomes for more powerful parties are also more predictable. These entities, some of which have been involved in land confiscations, have more and stronger political and financial connections, knowledge, and abilities to utilize and influence procedures to achieve outcomes in their favor. This is indicated by the relatively low ratio of land returns to farmers versus continued possession of seized land and lack of or low amounts of compensation for land seized by more powerful parties.

Additionally, lack of timeframes for the resolution of grievances are likely to be less important to powerful parties who already possess confiscated land and may resist returning it. Delays in processing claims are in their interest.

- The time for RCs to conduct investigations, make decisions and implement them is unpredictable. It has been noted that in some cases, the time needed by the CCRCFOL and RCs to conduct investigations is reasonable.<sup>337</sup> The time required, however, for the CCRCFOL and RCs to make timely decisions is often problematic. One study noted that difficulties in reaching timely decisions “could stem from four likely causes: 1) human resources at the decision-making levels (state/region and higher) are too scarce to render decisions on cases, even after investigation; 2) the quality of investigations are not sufficient to render decisions; 3) guidelines are not clear enough for decisions to be taken; or 4) higher-level officials do not want to be responsible for making decisions that might be unpopular with the public or politically problematic with the government or military.”<sup>338</sup>

The time it takes to implement decisions is a second problem. Vice President U Henry Van Thio has said some cases of returning confiscated lands are being hindered due to a number of reasons including delayed return of ownership for land abandoned by ministries, relayed ownership to an entity other than the rightful owner, disputes between the original successor and current successor, and clearing of squatters.<sup>339</sup> The Tatmadaw has blamed delays and the unpredictability of returns on the GAD and DALMS.<sup>340</sup>

## Rights-compatible

- There is not an independent body that is separate from the CCRCFOL with authority to review its administrative decisions and responses to appeals and make authoritative, legally binding and enforceable decisions to address them. Like the ABF and CCMVFL, the CCRCFOL conducts administrative reviews of recommendations and decisions made by lower-level ABsF and appeals of outcomes unacceptable to disputants. Again, this practice is not congruent with provisions of the National Land Use Policy.

<sup>337</sup>Caitlin Pierce and Nyi Htwe, *Myanmar’s Foray into Deliberative Democracy*, 2017.

<sup>338</sup>*Ibid*, 9.

<sup>339</sup>“VP U Henry Van Thio praises Mandalay Region for topping the list among states and regions in returning confiscated lands”. *New Light of Myanmar*, August 7th 2018

<sup>340</sup>“Unused Land Seized From Farmers Has Been Returned, Myanmar Military Says”, *Radio Free Asia*, July 18, 2018. <https://www.rfa.org/english/news/myanmar/unused-land-seized-from-farmers-has-been-returned-myanmar-military-says-07182018145134.html>

There is not an independent body separate from the CCRCFOL with authority to review its decisions or verdicts on appeals and make authoritative, legally binding and enforceable decisions that address them.

### Based on engagement and dialogue

- There was no significant consultation with stakeholder groups prior to implementation of the Presidential Orders that established the CCRCFOL and its subsidiary RCs. No amendments have promoted engagement or dialogue or that utilize CDR procedures.
- The National Land Use Policy (NLUP) does not include any provisions for research, development and use of CDR to promote engagement and dialogue as means to resolve claims over illegally confiscated land and determine restitution and/or fair compensation. This will be an important issue to address in future revisions of the policy.
- The NLUP does not include detailed provisions and their appears to be little guidance for how restitution and/or compensation should be negotiated and standards and criteria for outcomes that will be broadly acceptable to the government and grievants. Disputants and grievants are often dissatisfied with terms of restitution or compensation.
- Mechanisms and procedures of the CCRCFOL and its RCs focus almost exclusively on how administrative decisions are to be made, not engagement and dialogue. There is no specific mandate requiring direct in-person engagement of RCs during any steps of the CCRCFOL resolution process with parties involved in a land claim. Additionally, there are no specific guidelines on how investigations are to be conducted, conclusions reached and who must be involved.
- The current structure of the CCRCFOL grievance resolution mechanism provides only a limited number of times where parties to a grievance or dispute might directly engage in dialogue or some other voluntary resolution process. There currently is neither a mandate nor guidelines for how this might be inserted into existing procedures. While some forms CDR – negotiation, facilitation, mediation or conciliation – have been implemented by lower level RCs, they appear to have been used only on an ad hoc basis and with no institutional authority or guidance to do so.<sup>341</sup>

The current structure of the CCRCFOL grievance resolution mechanism provides only a limited number of times where parties to a grievance or dispute might directly engage in dialogue or some other voluntary resolution process.

- To date, there has been no specialized training specifically for members of the CCMVFVL or RCs in CDR approaches to address and resolve claims concerning illegally confiscated land. While some government officials on these bodies may have participated in training because of their involvement as members of other land management or administrative bodies, it is probably a very small number.

<sup>341</sup>A number of aforementioned UNDP reports indicate that Township Administrators do, on occasion, mediate settlements of disputes. It is not clear how many of these involve land, and especially claims over illegal confiscation of farmland or other land.

## Recommendations

### Legitimate

- The GORUM should separate the responsibilities and roles of institutions and their members that are involved in both land allocation and land dispute resolution activities. The separation of roles and responsibilities will help address potential structural conflicts and conflicts of interest of involved personnel. (See logic for this recommendation under the section above on the CABF.)
- If the responsibilities and roles of institutions and their members involved in land allocation and dispute resolution are not separated, the CCRCFOL should implement procedures to help eliminate potential conflicts of interest or corruption by instituting the one or more appropriate measures related to recusals or restructuring RCs. (See measures for this recommendation under the section above on the CABF.)
- The CCRCFOL should develop and institute new transparent and consultative processes for the selection of farmers, civil society and others to serve on RCs. This includes development of standards and criteria for individuals who will be serving in this capacity and transparent and democratic procedures for their selection and appointment. Standards and criteria for their selection are similar to those recommended above for ABsF. Civil society members should be nominated and selected by farmer associations and civil society organizations from the geographic and administrative areas where land allocations are being requested so that they have credibility with the communities that selected them. NAMATI has developed an excellent list that should be considered of potential criteria and procedures for selection of non-government representatives.<sup>342</sup>

The CCRCFOL should develop and institute new transparent and consultative processes for the selection of farmers, civil society and others to serve on RCs.

- The CCRCFOL should assure that a minimum of four members of each RCs are from civil society – farmers, CSOs, and other community members and/or notables. This number can help assure that inputs and views from these parties are considered in RC deliberations and help avoid the dynamic in which an individual party is accused of “selling out” because of his or her contact with an opposing party during grievance resolution activities without an adequate number of his or her peers present to observe his or her independent and interactions.<sup>343</sup>
- The CCRCFOL and other parties interested in introducing and implementing CDR in the work of this mechanism should identify highly respected and influential individuals who can serve as champions and advocate for the use of the procedures by the CCCFOL and RCs. (See more on champions and their role in introducing and institutionalizing CDR in the section above on the CAB - Recommendations, Legitimacy.)

The CCRCFOL and other parties interested in introducing and implementing CDR in the work of this mechanism should identify highly respected and influential individuals who can serve as champions and advocate for the use of the procedures by the CCCFOL and RCs.

<sup>342</sup>Pierce, C. and Nyi Nyi Htwe, Myanmar’s Foray into Deliberative Democracy.

<sup>343</sup>Robert Blake and Joyce Singley Mouton, Solving Costly Organizational Conflicts, San Francisco, Jossey-Bass, 1984.

## Accessible

- The CCRCFOL and its subsidiary RCs should be assigned full time staff and allocated a budget so grievants to have greater accessibility to them and for committees to process claims for illegally confiscated land more rapidly. When this is accomplished, a realistic deadline for completion of case processing can be set. In the meantime, independent monitoring is needed to assure that the CCRCFOL is performing its duties in an efficient and timely manner.
- Authorize RCs at the Township and VT levels to require all parties with an interest in or concerns about a claim concerning illegally confiscated land to participate in a public and joint investigation/ fact-finding and information gathering process. It is critical that all parties engage together in these activities to assure that all perspectives are aired and broadly understood.
- Include “knowledge experts” from government agencies and civil society as advisors to the Central Committee and RCs. The CCRCFOL, RCs and other participants engaged in either adjudicatory or collaborative dispute resolution processes need the best and most comprehensive information available to reach voluntary agreements, develop sound recommendations or make wise and informed decisions. Knowledge experts are individuals or organizations that have relevant information and expertise on issues being addressed in a grievance resolution process.<sup>344</sup>

Include “knowledge experts” from government agencies and civil society as advisors to the Central Committee and RCs.

Knowledge experts are generally of two types: legal/technical/scientific knowledge experts and customary knowledge experts. The former bring “knowledge from afar”, such as information on land demarcation, surveying, use of GPS, satellite mapping, natural resources or statutory laws. The latter bring “knowledge from here”, local knowledge about historic land occupation and use, community norms and practices and customary land rights.<sup>345</sup>

Technical knowledge experts may be enlisted from civil society organizations, government agencies or independent specialists. Customary knowledge experts may be recruited from groups of local leaders or elders with “local knowledge”.

It is important to note that knowledge experts are not decision-makers and do not make decisions about how a claim should be resolved. They provide expertise and information on “what can or cannot be done to address a specific issue or problem”, but not “what will be done”.

There are several models for providing knowledge expertise: 1) serving as knowledge providers and advisors to all parties engaged a grievance or dispute; or 2) serving as knowledge providers, and potentially advocates for only one party; or 3) serving as knowledge providers for the third party, in this case the CCRCFOL or RCs. In the first model, all parties are usually engaged in selecting and approving the knowledge provider(s). His, her or their responsibility and obligation is to all parties, not a particular one.

<sup>344</sup>Pielke, R., *The Honest Broker: Making Sense of Science in Policy and Politics*, Cambridge, Cambridge University Press, 2007.

<sup>345</sup>Adler, P. and Birkhoff, J. “Building Trust: When Knowledge from “Here” meets Knowledge from “Afar”. Washington, D.C.: Resolve, 2002

None of the above models are appropriate for all cases. The CCRCFOL, RCs and involved parties need to discuss what model(s) for involving knowledge experts will be most acceptable and helpful to accomplish their joint and individual goals.

### **Predictable**

- Assure that the CCRCFOL and its subsidiary RCs have a transparent public and on-line case tracking system.
- Establish an independent body, according to provisions in the National Land Use Policy, with full-time personnel and adequate funding to monitor CCRCFOL and RCs handling of claims concerning illegally confiscated land.<sup>346</sup>

### **Equitable**

- The CCRCFOL should assure that that information is widely available on how to submit a claim for the return of illegally confiscated land and that standardized forms are easily obtained at all Nay Pyi Daw Council and Region, State, District and Township Department and VT Offices. Additionally, the GORUM and NGOs should continue providing information and training programs on HLP laws and human rights to government officials at all levels. Programs with a substantive focus will complement training on CDR procedures.
- The CCRCFOL should guarantee that all information available to government members of RCs is also available to all civil society members, and if requested to grievants. No information should be considered to be proprietary and withheld from members of RCs or parties. GAD chairs of each RC should assure that this is done.
- The CCRCFOL should establish an internal complaint resolution mechanism to accept, address and resolve complaints from any party involved in a claim over illegally confiscated land concerning their treatment by RCs, their members or perceived procedural violations. The mechanism should address issues such as disrespectful treatment, failure to inform civil society members of RCs about meetings or investigations, absence of RC civil society members' signatures on reports and recommendations resulting from investigations, failure of RC members to meet with concerned members of the public, RCs holding private meetings, RCs failing to provide complete information to civil society members of RCs or other concerned members of the public and charges of bias or corruption. The CCRCFOL should investigate and take action to correct claims that are found to valid, inform complainants about results of the Central Committee's actions and issue apologies as appropriate.

CCRCFOL should establish an internal complaint resolution mechanism to accept, address and resolve complaints from any party involved in claims over illegally confiscated land concerning their treatment by RCs, their members or perceived procedural violations.

<sup>346</sup>National Land Use Policy, Part (VI) Land Dispute Resolution and Appeal, Chapter (I), Land Disputes Resolution, 42 (e).

## Transparent

- The CCRCFOL and subsidiary RC should inform all parties that need to be involved in CCRCFOL or RC investigations and joint fact-finding initiatives about the date, time and location of projected meetings at least one week before they are convened. Public notices should be placed in multiple places, including in the village(s) where the land in question is located. Radio announcements should be aired, and postings made on social media.
- The CCRCFOL should mandate that all investigation meetings and activities of RCs and any Investigation Groups be open for observation by all concerned parties and members of the public. Having observers and witnesses enables parties and the public to be informed about investigations and make collusion and corruption less possible.

The CCRCFOL should mandate that all investigation meetings and activities of RCs and any Investigation Groups be open for observation by all concerned parties and members of the public.

- The CCRCFOL should monitor and guarantee that all recommendations/decisions by subsidiary RCs, reports prepared for submission to higher level bodies or binding decisions issued by the CCRCFOL clearly provide the logic and rationale for the outcome and should be written in language that will be easily understood by all involved parties. Parties involved in illegal land confiscation claims deserve to know the thinking behind the decision or outcome of the CCRCFOL process. The final decision and the logic and rationale for decisions on a case should be available to the parties as rapidly as possible after it is made and publicly in Central Committee monthly reports.

## Rights-compatible

- The CCRCFOL should operationalize elements of the National Land Use Policy concerning the rights of Myanmar residents to use impartial land dispute mechanisms and apply them to the work of the CCRCFOL. Specific elements to be operationalized are those that allow residents of Myanmar to make complaints, defend themselves with representation and appeal decisions on land disputes; resolve disputes in public and use local languages and translation as needed; and have transparent procedures that are free from corruption.<sup>347</sup>
- The CCRCFOL and RCs should ensure that their member agencies and personnel are neutral, impartial and unbiased in their deliberations, recommendations and decisions concerning the resolution of claims over illegally confiscated land. The CCRCFOL should require that any members of RCs that have a potential or actual conflict of interest recuse themselves from engagement in investigations or making any recommendations or decisions on confiscated land in question.
- When claims concerning confiscated land are against a company that has been granted a use-right to state land by the GORUM, the CCRCFOL should encourage companies to negotiate with grievants to try and address their concerns prior to taking the claim to the CCRCFOL or RCs for their consideration. Companies should be given flexibility to request the government to modify the conditions of their permits to address valid concerns of grievants and/or terms of negotiated

<sup>347</sup>Ibid.

agreements between or among concerned parties. If necessary, tripartite negotiations should be conducted involving the government, company and grievant(s). These talks may be conducted by the parties on their own or with the assistance of a facilitator from the government or independent mediator. Should negotiations fail, grievants should be free to take their grievances to the CCRCFOL for a final decision.

When claims concerning confiscated land are against a company that has been granted a use-right to state land by the GORUM, the CCRCFOL should encourage companies to negotiate with grievants to try and address their concerns prior to taking the claim to the CCRCFOL or RCs for their consideration.

- The GORUM should establish a new independent land dispute and grievance resolution institution and mechanism authorized to conduct independent reviews of decisions and verdicts on appeals made by the CCRCFOL and RCs. The mechanism should have personnel who are independent, neutral and impartial; and have authority to review CCRCFOL decisions on cases and appeals; make binding decisions on their acceptance, modification or rejection; compel compliance; and have appropriate GORUM institutions enforce its decisions.<sup>348</sup>

### Continuous Learning

- The National Land Use Council should revise the National Land Use Policy (NLUP) to include and advocate for the use of CDR approaches and procedures in grievance resolution assistance provided by the CCRCFOL and RCs. Revision of the NLUP will be a significant step in affirming, codifying and institutionalizing the use of CDR.

The National Land Use Council should revise the National Land Use Policy (NLUP) to include and advocate for the use of CDR approaches and procedures in grievance resolution assistance provided by the CCRCFOL and RCs.

- The CCRCFOL should initiate pilot projects to explore the use of CDR approaches and procedures to assist in the resolution of illegal land claims. Details on potential initiatives are provided later in this section.
- GORUM land dispute resolution institutions and National Use Land Council should initiate research on the design and implementation of an independent institution and mechanism to review appeals of decisions and verdicts of appeals made by the CCRCFOL and its subsidiary RCs. The National Land Use Policy (NLUP) advocates hearing and deciding land disputes “through the use of impartial land dispute resolution mechanisms across the country”.<sup>349</sup> Further, in defining how land dispute resolution will be carried out the policy mandates “Establishing accurate and clear procedural processes in relevant departments and organizations to improve easy access to, and use of, independent arbitration tribunals, courts and other dispute resolution mechanisms by farmers and other land users in accordance with existing laws.”<sup>350</sup> Additionally, the policy states

<sup>348</sup>This body could handle only cases decided by the CCRCFOL or also those from the CABF and CCMFVL. National Land Use Policy (NLUP), Part (VI), Land Dispute Resolution and Appeal

<sup>349</sup>Chapter (I), Land Disputes Resolution, 41.

<sup>350</sup>Ibid. 42 (e).

<sup>351</sup>Ibid. Part (VI) Land Dispute Resolution and Appeal, Chapter II, Appeal, 44.

<sup>352</sup>Ibid. Chapter (I), Land Disputes Resolution 43.

that research should be conducted on methods “for individuals and organizations to appeal decisions in dispute related to land and land administration”.<sup>351</sup> Finally, the policy mandates that “one or more pilot projects shall be researched and tested in order to establish, organize, implement and monitor accurate practices.”<sup>352</sup> To date the GORUM has not provided public information on any studies related to impartial land dispute or grievance resolution mechanisms that will handle appeals of decisions made by administrative bodies. It is important that the government begin research on this topic as soon as possible.

### Based on Engagement and Dialogue

- The GORUM and CCRCFOL should authorize the use of CDR approaches and procedures – either through amendments to the enabling Presidential Order, its guidance or new legislation – to increase the level of stakeholder engagement and dialogue in CCRCFOL and RC processes.<sup>353</sup> New policies, legislation and guidance should be developed in consultation with farmers associations and CSOs concerned with the resolution of claims over illegal land confiscation.

The GORUM and CCRCFOL should authorize the use of CDR approaches and procedures – either through amendments to the enabling Presidential Order, its guidance or new legislation – to increase the level of stakeholder engagement and dialogue in CCRCFOL and RC processes.

- RCs, rather than conducting investigations with only their members, should form joint fact-finding committees composed of disputing parties or their representatives, other knowledgeable local leaders or stakeholders and knowledge experts from different “sides” of the dispute to investigate a claim of illegally confiscated land. The Township Administrator or his or her designee should coordinate the joint fact-finding investigation process with involved parties. Either a government or civil society member should be eligible to facilitate the joint fact-finding process, which is a different than the role of the GAD official who chairs the RC.

RCs, rather than conducting investigations with only their members, should form joint fact-finding committees composed of disputing parties or their representatives, other knowledgeable local leaders or stakeholders and knowledge experts from different “sides” of the dispute to investigate a claim of illegally confiscated land.

If as a result of joint fact-finding, the members of the RC and other concerned parties reach an agreement on how to address issues related to illegally confiscated land, their conclusion and any relevant evidence should be forwarded to the appropriate upper-level RCs for comments and ultimately to the CCRCFOL for review and a final decision.

If there is not agreement by the joint fact-finding committee, the Township RC should offer involved grievants three options: 1) forward a report by the joint fact-finding committee to the appropriate upper-level RC with conclusions and any objections concerning the return of illegally confiscated land, 2) offer mediation by a panel of intermediaries to try and reach an agreement between or among concerned parties over the claim, or 3) offer conciliation to try and find a mutually acceptable agreement for the resolution of the claim, and if this is not possible, to secure an independent recommendation from a panel for a potential settlement.<sup>354</sup>

<sup>353</sup>If legislation is used to allow or mandate the use of CDR approaches to resolve claims over illegally confiscated land, it could also be used to allow or mandate its use by the ABF and the CCMVFL.

If one or more parties refuses to engage in mediation or conciliation, the report of the joint fact-finding committee should be sent to the appropriate upper-level RCs.

If the grievant or other parties decide to mediate or engage in conciliation, either procedure may be conducted by a panel composed of: 1) the Township Administrator or his or her designee, and up to four other members of the RC, two of which should be selected by each of the disputing parties; or 2) an independent mediation or conciliation panel composed of an uneven number of members selected by the parties.<sup>355</sup>

If disputants reach an acceptable agreement through mediation or accept the recommendation of the conciliator, the outcome should be considered conditional until it is reviewed and approved by the appropriate upper-level RCs or the CCRCFOL.

If the conditional agreement is not approved by the CCRCFOL, it would have two options:

- (1) Return the conditional settlement to the Township RC, or any other involved RC, to discuss with disputing parties and make modifications that would make the agreement comply with laws and rules related to the return of illegally confiscated land. The results of deliberations by this process would be sent back to the Central Committee for its consideration and a final decision.
- (2) The CRC could make a final decision on the case and provide details on the logic and rationale for the outcome.

If either mediation or conciliation are not successful, the mediation or conciliation panel should identify key issues or questions to be answered and scope parties' views, interests and needs. The Township Department Office should forward this information to upper-level RCs for further consideration and appropriate action, including seeking advice of experts on outstanding issues in question.

- Members of RCs and Investigation Groups should be trained in negotiation and mediation, so they can assist grievants to negotiate agreements to address illegal land confiscation issues. Ideally, training should be conducted on a regular scheduled basis, but can also be presented for members of Investigation Groups prior to initiation of investigations and joint fact-finding. Training-for-Trainers programs should also be presented for government officials who can serve as future trainers for the CRCCFOL and government and civil society members of RCs so that the knowledge and use of CDR approaches, procedures and skills are sustainable.<sup>356</sup>

Members of RCs and Investigation Groups should be trained in negotiation and mediation, so they can assist grievants to negotiate agreements to address illegal land confiscation issues.

<sup>354</sup>Conciliation is commonly used when disputing parties want or need a recommendation on a potential settlement if they cannot develop one through mediation.

<sup>355</sup>Panels of intermediaries are recommended, rather than single mediators or conciliators, because a larger group promotes a more in-depth analysis of the issues in question, provides a broader range of views or perspectives and is less likely to be corrupted.

<sup>356</sup>Another model that has been used successfully is where some members of an agency are trained as mediators and others as negotiators. Both are trained in the same interest-based negotiation and mediation process. When a dispute arises, one staff member is appointed, with involved parties' approval, to serve as a mediator. One or more staff members serve as negotiators. The mediator and negotiators work together with the non-compliant party to develop an agreement that will move the latter toward. One government agency that has effectively used this procedure is the New Jersey Department of Environmental Protection.

## The Karen National Union (KNU) Administrative Structure and Land Dispute and Grievance Resolution Mechanism



Farmer Couple in Hpa An, Kayin State (Jose Arraiza, NRC)

### The Karen National Union (KNU)

The Karen National Union (KNU) was established by Karen leaders and nationalists after Myanmar's independence from Great Britain in 1947, to advocate for self-determination of the Karen people. Between 1949 and the present, the KNU and its armed wing, the Karen National Liberation Army (KNLA), have been the leading Karen organizations that have advocated for a semi-autonomous state within the Republic of the Union of Myanmar.

During years of war between the KNLA and the Tatmadaw, the KNU and its army were able to seize and hold territory in the southern part of the country and create a Karen State – the Karen National Union. Territory administered by the KNU consists of seven districts, twenty-six townships, village tracts and independent villages. KNU considers the area it governs to encompass all of Karen State, Tanintharyi Region, most of Mon State, and parts of East Bago.<sup>357</sup>

Townships are divided into village tracts and independent villages.<sup>358</sup> As of 2016, approximately 800,000 people in rural areas were to some extent governed by the KNU. These individuals and families are taxed by the KNU, receive its social services and are subject to its justice and land management systems.<sup>359</sup> Since the 1990s, the KNU has supported the NLD and continues to advocate for establishment of a federal, democratic union.

<sup>357</sup>Some territories considered by the KNU to be under its governance are also claimed and governed by the GORUM. Kim Jolliffe, *Ceasefires, Governance, and Development: The Karen National Union in Times of Change*, Yangon, Myanmar, The Asia Foundation, December 2016. 14.

<sup>358</sup>*Ibid.* 14.

## Organization, Personnel and Functions

On March 31, 2018 the 16th Congress of the Karen National Union (KNU) approved a new charter that details its governing principles and administrative structure.<sup>360</sup> The Karen National Union's organization is similar to that of a one-party state. Members of the "party" form administrative bodies at each political and geographic level – Central, District and Village Tract.

**The Legislature** – The KNU Congress is the KNU's highest legislative body. It meets every four years and is composed of elected and appointed members from seven Districts under total or partial control of the KNU. Congress members include Chairman of Districts, Chairmen and appointed members of District Standing Committees and Brigade Commanders of the KNLA. The Foreign Affairs Department also appoints some members of the Congress. These members represent Karen communities that live outside of the territory governed by the KNU, either in Myanmar or in other countries, who support KNU political goals and objectives.

**The Executive** – Congress elects members of the executive – the President, Vice President, General Secretary and Joint Secretaries 1 and 2, and members of the Central Executive Committee (CEC) and Central Standing Committee (CSC). The CSC meets annually or may call emergency sessions when important issues arise that require a more immediate response.

Members of the CSC serve as Ministers for fourteen Departments including: Agriculture, Alliance Affairs, Breeding and Fishery, Defense, Education and Culture, Finance and Revenue, Forestry, Foreign Affairs, Health and Welfare, Interior and Religion, Organisation and Information Department, Justice, Mining, and Transportation and Communication.

**The Judiciary and Justice Department** – The KNU's Justice system includes its judiciary and Justice Department. The judiciary is comprised of independent judges located at three administrative levels – central, district and township. At the central level, three Supreme Court Judges are elected at the by the Central Standing Committee. Judges at the district and township levels, with one judge in each jurisdiction, are elected by their respective District and Township Congresses. Formal courts with KNU judges have not been established at village or village tract levels.

Land cases that cannot be resolved at the village level or by temporary land dispute resolution committees formed to address and resolve specific cases (see more on these bodies later in this report) can be forwarded to Township Courts, or to VTAs, Township Administrators and ultimately to the KNU Central Land Committee's subcommittee on tenure disputes and conflict resolution.

The KNU's Justice Department is part of the executive branch of the KNU administration at the central level. The Department is responsible for drafting laws, reviewing current laws and updating them and promoting legal awareness.<sup>361</sup>

<sup>359</sup>Kim Jolliffe, *Ceasefires, Governance, and Development*. 2016, 1.

<sup>360</sup>"KNU's constitution and rules approved after long debate", Karen Information Center, Friday, March 31, 2017 <https://www.bnionline.net/en/news/karen-state/item/2895-knu-s-constitution-and-rules-approved-after-long-debate.html>

<sup>361</sup>Jolliffe, 25.

<sup>362</sup>*Ibid.* 25- 26.

<sup>363</sup>*Ibid.* 21.

KNU has also created a Karen Legal Affairs Committee, an interdepartmental committee under the Central Court that includes a representative of the Karen Women's Organization (KWO). "The committee is mandated to promote rule of law and legal awareness, reform the legal system strengthen knowledge of legal issues, and train police, judges, and village heads."<sup>362</sup>

District and Township Governance<sup>363</sup> – Districts have significant autonomy from the central level of administration. Each District is responsible for electing its own District Chairperson, District Standing Committee, District Executive Committee and Brigade Commanders of KNLA. Elections for these positions are held every two years.

The District Chairperson is the leader of the District's Executive Committee. He/she has the right to determine broad policy for the District and has ultimate decision-making authority. District Executive Committees are required to meet at least once a year, but in practice meet much more often.

The District Secretary and District Joint Secretary are authorized to manage and oversee district level departments. They have roles similar to that of the General Secretary at the central level. District line departments are supervised by both the central departments of their sector and their respective district executive committees.

Township Committees and their executive committees have structures and procedures similar to those at the District level.

Village Tracts and Village Governance – Village Tracts, as in other parts of Myanmar governed by the GORUM, are composed of groups of villages in rural areas. VTAs, in collaboration with Village Tract committees, oversee villages in the tract and provide land dispute resolution assistance.

Villages are geographic areas and political jurisdictions that are not included within a town boundary. In general, villages govern themselves and resolve disputes, including those over land, using customary procedures.

### KNU Land Policy

The KNU's first Land Policy (Land Policy or "Policy") was approved at its 9<sup>th</sup> Congress in 1974. The most recent version was approved by its Executive Committee after the 15<sup>th</sup> Congress in December 2015.

KNU authorities and the Policy strive "to uphold international human rights standards and promote the welfare of all Karen peoples and long-standing resident village communities..."<sup>364</sup> The Policy addresses land tenure rights as well as identification of parties eligible to claim them. It strives to reform land tenure and "promote in Karen land (hereafter, "Kawthoolei") enduring peace grounded in social justice".<sup>365</sup> It seeks to legitimize and legally recognize customary occupation, tenure rights and agricultural practices on land (such as swidden agriculture ("ku"), community forestry and grazing), as they are currently practiced.

<sup>364</sup>KNU Land Policy, Chapter 1: Preliminary, Article 1.2 Objectives, 1.2.1, Basic Principles of Kawthoolei Land Policy, December 15, 2015, 6.

<sup>365</sup>KNU Land Policy, Preamble, 2.

<sup>366</sup>IBID, 3.

The Policy also contains procedures to redress loss of community use rights due to past and current conflicts. Finally, it strives to lay “the foundations for social inclusion and empowered political participation (especially in development-related decision-making) and for ensuring cultural and collective identities.”<sup>366</sup>

### The KNU Central Land Committee

The KNU Land Policy authorizes the establishment of a Central Land Committee (CLC) under the Karen Agricultural Department (KAD). The Committee is mandated to “address all issues related to this KNU Land Policy and its implementation including, in relation to cross-departmental and transboundary issues, and the tenure system established herewith...”<sup>367</sup> The CLC is mandated to coordinate with relevant departments or administrative authorities and do cost sharing or secure external funding for activities involved in policy implementation.

Current members of the CLC include representatives from the KAD, the CEC of the KNU, multiple other government departments, representatives of civil society/community-based organizations (CBOs) and land rights experts. Decisions are made by voting and majority rule.

The CLC is empowered to establish an advisory board to assist it in addressing technical matters. The board, however, is only authorized to provide advice and has no formal role in decision-making.

The CLC has three working groups, all of which involve relevant local customary authorities (“Masters of the Kaw”) and CBO/NGO members, who are expected to participate in addressing issues and making decisions on cases.<sup>368</sup> One of the working groups focuses on tenure disputes and conflict resolution. The scope of cases it can address include, but are not limited to, “grievances and complaints related to any changes in tenure rights related to restitution, redistribution, rescission, readjustment, and investment, including valuation and compensation issues.”<sup>369</sup>

The Central Land Committee (CLC) has three working groups, one of which focuses on tenure disputes and conflict resolution.

### KNU Land Dispute Resolution Mechanism and Procedures

The KNU Land Policy commits its authorities to: “Provide access to justice to deal with infringements of socially-legitimate tenure rights; provide effective and accessible means to everyone, through judicial authorities or other customary approaches, to resolve disputes over tenure rights; and provide affordable and prompt enforcement of outcomes.”<sup>370</sup>

<sup>367</sup>KNU Land Policy, Chapter 2: General Policy Matters, Article 2.4 Policy, legal and organizational frameworks related to land governance, 2.4.1, 22.

<sup>368</sup>KNU Land Policy, Chapter 1: Preliminary, Article 1.4 Definitions, 1.4. 9, 12. “Customary Authorities: In the “kaw system”, these are village heads who make decisions concerning the “kaw”. Customary authorities’ decision-making position derives from the social, cultural and spiritual norms and institutions of the local community.

<sup>369</sup>Ibid. 2.4.3.

<sup>370</sup>KNU Land Policy, Chapter 2: General Policy Matters, Article 2.1, 2.1.7, 17.

<sup>371</sup>Ibid. 2.1.9, 17.

<sup>372</sup>KNU Land Policy, Chapter 1: Preliminary, Article 1.3 Nature and Scope, 1.3.3, 8.

In the area of conflict prevention, the Policy strives to “Prevent tenure disputes, violent conflicts and corruption; take active measures to prevent tenure disputes from arising and from escalating into violent conflicts; endeavour to prevent corruption in all forms at all levels, and in all settings.”<sup>371</sup>

Principles – A number of basic principles and guidance in the KNU Land Policy inform the approaches, and procedures to be used for land dispute resolution. Some of them include:

- The policy will “be interpreted and administered in a manner consistent with international human rights principles and standards” including the Pinheiro Principles on housing and property rights of restitution for IDPs and refugees.<sup>372</sup>
- Socially-legitimate tenure rights holders and their rights are recognized, regardless of whether they have been formally recorded or not.<sup>373</sup>
- “Land, forests, fisheries, water and other related natural resources have social, cultural, spiritual, economic, environmental and political value to indigenous peoples and other communities with Kaw (customary tenure). KNU Authorities must recognize, respect and take into account these non-monetized values for peoples and village communities with Kaw tenure systems”.<sup>374</sup>
- “All disputes should be resolved in a fair, gender-sensitive and accessible manner...”<sup>375</sup>
- “The distinct right of women to claim effective access to land, as peasants, rural labours, forest dwellers, and as women” is recognized.<sup>376</sup> When changes are made in the Constitution or laws that strengthen the rights of women, but are in conflict with customary practice, all parties involved in resolving disputes must “clearly and actively strive to cooperate and accommodate such changes in the “Kaw” system.”<sup>377</sup>
- “Internally displaced persons have the right to reoccupy their land, which they may have owned previously, and to receive compensation.”<sup>378</sup>
- Local communities have the right to participate in decision-making on issues that might impact their lands, territories or natural resources; have the right to give or withhold their free, informed, prior consent (FPIC); and the right to negotiate and use traditional decision-making procedures to address issues that may affect them.<sup>379</sup>
- Disputes that develop between villagers shall, to the greatest extent possible, be resolved using the customs of the village where they reside.<sup>380</sup>
- Parties charged with the responsibility to resolve disputes should be “free from conflicts of interest”.<sup>381</sup>
- Parties charged with the responsibility to resolve disputes, and disputing parties themselves, are directed to strive for consensus agreements to settle land issues.<sup>382</sup>
- “KNU authorities must provide access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving disputes over tenure rights, and must

<sup>373</sup>Ibid., Chapter 2: General Policy Matters, Article 2.1, Basic principles, 2.1.2.

<sup>374</sup>Ibid. Chapter 3: Recognition and Allocation of Tenure Rights, Article 3.3 “Kaw” Lands, 3.3.1, 28.

<sup>375</sup>Ibid. Chapter 5: Administration of Tenure, Article 5.5 Resolution of tenure rights and tenure rights related disputes, 5.5.4, 63

<sup>376</sup>Ibid. Chapter 2: General Policy Matters, Article 2.1 Basic principles, 2.1.3, 16.

<sup>377</sup>KNU Land Policy, Chapter 3: Recognition and Allocation of Tenure Rights, Article 3.3 “Kaw” Lands, 3.3.7, 29.

<sup>378</sup>KNU Land Policy, Chapter 1: Preliminary, Article 1.1. Basic Principle of Kawthoolei Land Policy, Article 1.4 Definitions, 1.4.14. This component of the Land Policy complies with the UN Principles for Housing and Property Restitution for Refugees (the Pinheiro Principles) that provides guidance on the rights and fair treatment of refugees and IDPs.

<sup>379</sup>Ibid. 1.4.13, 14.

<sup>380</sup>Ibid. Chapter 5: Administration of Tenure, Article 5.5 Resolution of Tenure Rights and Tenure Rights Related Disputes, 5.5.2, 27

provide effective remedies, which may include a right of appeal, as appropriate. Such remedies must be promptly enforced and may include restitution, indemnity, compensation and reparation.”<sup>383</sup>

### The KNU Land Dispute and Grievance Resolution Mechanism

The Land Policy establishes multiple forums, procedures and sequences of steps for resolving land disputes and grievances. These can be categorized into forums for resolving general land disputes, such as boundary or encroachment issues; and specialized forums to settle issues such as disputes between members of two or more villages, boundaries between villages or taking of land for a public purpose. These forums and procedures are presented below in Table 4: KNU Dispute and Grievance Resolution Mechanism: Forums and Procedures for Resolving General Disputes and Grievances.

**Table 3: KNU Dispute and Grievance Resolution Mechanism:  
Forums and Procedures for Resolving General Land Disputes and Grievances**

#### **Village-Level Dispute Resolution**

- Parties – Villagers living in the same village
- Forum – Meetings conducted in villages and may be public
- Dispute Resolution Assistance – Provided by customary authorities and Village Land Committees (VLCs)
- Procedures – Customary procedures with the goal of reaching consensus agreements
- Outcomes – Consensus agreements between or among parties, recommendation for a settlement by the committee and its acceptance by parties or a decision by one or more of parties to elevate the dispute to the next level forum

#### **Temporary Land Dispute Resolution Committees**

- Parties – Villagers living in the same village
- Forum – Meetings of Village Land Conflict Resolution Committee
- Dispute Resolution Assistance – A committee with 5-7 members (See below for membership)
- Procedures – Customary procedures conducted on a case-by-case basis with the goal of consensus
- Outcomes – Consensus agreements between or among parties, recommendation for a settlement by the committee and its acceptance by parties or a decision by one or more of parties to elevate the dispute to the next level forum

<sup>381</sup>Ibid. Chapter 5: Administration of Tenure, Article 5.5 Resolution of tenure rights and tenure rights related disputes, 5.5.4, 28.

<sup>382</sup>The directive to try and reach consensus decisions to resolve disputes is stated multiple times in the KNU Land Policy.

<sup>383</sup>KNU Land Policy, Chapter 2: General Policy Matters, Article 2.3 Rights and Responsibilities, 2.3.7, 21.

**Table 3: KNU Dispute and Grievance Resolution Mechanism:  
Forums and Procedures for Resolving General Land Disputes and Grievances**

**Village Tract, Township and District Dispute Resolution**

- Parties – Villagers living in the same village or villagers and/or others living in different villages, VTs, Townships or Districts
- Forums – VT, Township or District offices, or potentially at sites of disputes or grievances
- Dispute Resolution Assistance – Provided by VTA, TA, DA and their land committees
- Procedures – Investigation, mediation or conciliation with a recommendation/decision appealable to a KNU court
- Outcomes – Consensus agreements between or among parties, a recommendation/decision by an Authority or sequential appeals from VT to Township, District and, if necessary, the next level forum

**Judicial Dispute Resolution**

- Parties - Villagers living in the same village or villagers and/or others living in different WVTs, or Townships
- Forums – Township, District or Central Courts
- Dispute Resolution Assistance – KNU judges
- Procedure – Adjudication with legally binding decisions
- Outcomes – Acceptance of judicial rulings or elevation of cases to sequential levels of courts. Central Court has final decision-making authority

Village-Level Dispute Resolution – The KNU Land Policy states that disputes among villagers should, to the greatest extent possible, be resolved at the village level. Research indicates that as in GORUM administered areas, villagers in locales that are partially or totally under control of the KNU prefer to resolve all kinds of disputes within their villages.<sup>384</sup> As in GORUM administered areas, villagers in KNU areas generally first use informal justice facilitators as their first step in resolving disputes.<sup>385</sup> Subsequent parties approached for assistance, in the order of disputants' preferences, include village leaders, elders, VTAs and people connected with the KNU.<sup>386</sup>

Villages with the kaw system to govern land tenure use one or multiple customary leaders and a small committee with knowledge of their community and members' customary land rights to conduct dispute resolution procedures.<sup>387</sup>

Leaders convene and conduct discussions with disputants and help them develop consensus agreements – either mutually acceptable negotiated settlements or voluntary acceptance by all parties of leaders' recommendations. Some village committees also utilize third party decision making. Decisions are

<sup>384</sup>Helene Maria Kyed, Community-Based Dispute Resolution: Exploring everyday justice in Southeast Myanmar. ; and IRC/PLE Law and Justice in Karen Settlement Areas: a Survey of citizen awareness, legal service providers' competencies, and gaps in law and justice, IRC, 2016.

<sup>385</sup>Denney, et al.

<sup>386</sup>IRC/PLE survey 2016. This IRC survey found that 38% of respondents said they would go to their village leader, 17% a village elder, 13% to a VTA and 14 % to a person in the KNU as their later choices for dispute resolution assistance.

<sup>387</sup>Village leaders in areas under dual control by both the KNU and GORUM, may on occasion conduct dispute resolution proceedings as individuals rather than convene a committee.

often accepted by involved parties. If they are not, they can be appealed to Village Tract or Township Administrators and their committees focused on land issues.

Communities and villages without traditional “Kaw” land tenure and governance structures may establish Village Land Committees with an appropriate number of elected local leaders and at-large community members. VLCs are mandated by the Land Policy to handle all administrative issues related to land, including disputes.

VLCs also, to the greatest extent possible, use customary consensus-building procedures to resolve disputes over land tenure. VLCs receive support and guidance, as needed, from the Central Land Committee through District and Township structures.

Temporary Land Dispute Resolution Committees – If resolution cannot be reached with the assistance of one or more customary authorities and/or a village committee, disputants can request that a temporary Land Conflict Resolution Committee be formed to help resolve their issues. Temporary Committees are established on a case-by-case basis, and do not continue after the case they were formed to address has been settled or referred to another forum.

Committees are commonly composed of five to seven people. Members should include a local customary authority, the village administrator, one to two Karen Agricultural Workers Union (KAWU) members (if appropriate), and representatives from a women’s and youth organization. Two to three members must be women.

Again, Temporary Land Dispute Resolution Committees generally strive to assist disputing parties to reach consensus agreements reached either through discussions or a recommendation by committee members of a mutually acceptable settlement.

Village Tract, Township and District Dispute Resolution. If a dispute cannot be settled with the assistance of a Temporary Land Dispute Resolution Committee, disputants can take their differences sequentially to Village Tract, Township or District Administrators and their committees for resolution assistance. Administrators handling disputes at these levels and villagers involved as disputants are expected to consult with the Land Committee and the KAWU when working to settle parties’ differences.

Procedures at this level may involve investigations, discussions, recommendations for potential settlements or decisions. If one or more parties are dissatisfied at one of these administrative levels, they may take the case to court.

Judicial Dispute Resolution – Unlike the GORUM’s administrative dispute resolution mechanisms in which government administrators are authorized to make final decisions, the KNU mechanism allows individuals or groups to submit cases to KNU courts. At township administration level and above, villagers, with legal representation by the KAD, can submit their case to the Government’s court system and sequentially appeal decisions to higher courts up to the Central Court.

Land tenure disputes that involve claims by multiple parties, and that have not been successfully resolved by customary authorities and the KAD with a Land Committee can be submitted to a Township Level Court for adjudication.<sup>388</sup> While KAD Township and District Courts use KNU law as a basis for making decisions, they also may use mediation and reconciliation procedures commonly found at the village level.<sup>389</sup>

Disputes that involve large businesses or a commercial project are to be referred to the District Level Court and then to the Central Court.

In addition to the above dispute resolution mechanism and procedures, the KNU has established other forums and procedures to address specific kinds of disputes. These mechanisms are described in Table 6: KNU Mechanisms and Procedures for Resolving Specific Kinds of Disputes and Grievances.

**Intervillage Dispute Resolution** – When disputes occur between villages, a local land dispute resolution committee is established to help resolve them. Members include leaders of the concerned villages and representatives of the KAWU under the Federation of Trade Unions of Kawthoolei. Concerning committee decision-making processes<sup>390</sup>, “The committee should strive to achieve consensus and a fair balance of the competing claims, utilizing customary law to the extent relevant and appropriate. If consensus is not reached, or in townships that does [do] not yet have such a Union, the matter may be referred to a dispute resolution committee, such as within the Land Committee, KAD and or/court at the township level”.<sup>391</sup>

**Public Dispute Resolution** – One of the principles for resolution of public issues and disputes mandated in the Land Policy is participation by and consultation with potentially affected parties that may be impacted by projects proposed and constructed in the public interest. “When any particular land is needed for public purpose in implementing development projects by the government institutions and authorities, land acquisition shall be conducted in consultation with local residents on the basis of recognizing the ownership rights of individuals, with limitation, the collective right of indigenous people who own and use land, and customary ownership of land respectively.”<sup>392</sup>

The Central Committee of the Administration of the KNU approved a new Karen National Union Land Policy in 2015. The Policy is one of the most comprehensive documents of its type.

<sup>388</sup>KNU Land Policy, Article 5.5 Resolution of tenure rights and tenure rights related disputes, 5.5.5, 63.

<sup>389</sup>Justice provision in south east Myanmar. 18.

<sup>390</sup>KNU Land Policy, Article 5.5 Resolution of tenure rights and tenure rights related disputes, 5.5.3, 63.

<sup>391</sup>Ibid, 5.5.5, 63.

<sup>392</sup>KNU Land Policy, Chapter 1: Preliminary, Article 1.1 Basic Principle of Kawthoolei Land Policy, 1.1.6, 5.

**Table 4: KNU Mechanisms and Procedures for Resolving Special Kinds of Disputes and Grievances**

**Village-Level Dispute Resolution**

- Parties – Villagers or others living in different villages
- Forums – Meeting(s) at a mutually acceptable location
- Dispute Resolution Assistance – Leaders of concerned villages and representatives of the KAWU under the Federation of Trade Unions of Kawthoolei.
- Procedures - Consensus decision making utilizing customary procedures as relevant and appropriate
- Outcomes – Consensus agreements or referrals to a land committee, KAD or Township level court

**Public Dispute Resolution**

- Parties – Individuals or groups that potentially may be affected by a project in the public interest and the KNU administration
- Forums – Venue mutually acceptable to the parties or a government facility
- Dispute Resolution Assistance - Administration officials facilitating the decision process and also project proponents
- Procedures – Public consultations with potentially affected parties (PAPs) with recognized land rights
- Outcomes – Administrative decision with potential for modification to address interests of PAPs)

**Inter-Jurisdictional Dispute Resolution**

- Parties – Parties living in two or more villages involved in a dispute over boundaries
- Forums – Meeting at a mutually acceptable location
- Dispute Resolution Assistance – KAD [Karen Agricultural Department], Central Land Committee and customary authorities or Village Land Committee. All agreements on boundary adjustment must be approved by the KAD, Central Land Committee, relevant customary authorities and concurrence of any parties that may be adversely affected by the change
- Procedures – Consultation with affected people and villages and efforts to reach a consensus between or among them on the exact location of boundaries  
Outcomes – Consensus agreement by involved villages on boundaries with the approval of the Central Committee or referral to a dispute resolution committee within the Land Committee, KAD or township level court for a binding decision

Inter-Jurisdictional Boundary Dispute Resolution – If disputes arise over the boundaries between two or more villages, the “KAD [Karen Agricultural Department], in cooperation with the Central Land Committee and the FPIC [free, prior and informed consent] of customary authorities or Village Land Committee, shall consult with all affected people and communities and reach consensus with the communities on the exact location of boundaries.”<sup>393</sup> All agreements on boundary adjustment must be approved by the KAD, Central Land Committee, relevant customary authorities and concurrence of any parties that may be adversely affected by the change. If consensus cannot be reached, and the involved village community still wants to proceed with the adjustment, the issues should be submitted for mediation.

## Performance of the KNU Land Dispute and Grievance Resolution Mechanism relative to the UNGP “Effectiveness Criteria” and feasibility of Introducing, Implementing and Institutionalizing the use of CDR Approaches and Procedures

Detailed below is a comparison of the performance of KNU land dispute resolution mechanism with the UNGPs “Effectiveness Criteria” and an analysis of the feasibility of implementing and institutionalizing CDR approaches and procedures.

### Opportunities

#### Legitimate

- Influential champions at all levels of the KNU administration and in Karen communities have advocated for the inclusion, implementation and institutionalization of customary procedures in KNU Land Policy and its dispute resolution mechanism. Many customary procedures are similar to CDR processes. Successful implementation of ACR/CDR in other countries has been highly dependent on finding one or two champions who are high enough in government or other institutions that they can act as strong advocates and catalysts for introducing new procedures to enhance existing ones and protect those who utilize them.
- The Central Committee of the Administration of the KNU approved a new Karen National Union Land Policy in 2015. The Policy is one of the most comprehensive documents of its type. The policy establishes a hierarchy of forums and procedures, many of which are semi-autonomous and independent from central control, to resolve a range of kinds of disputes and grievances, including those over land. It also authorizes the use of public consultations, negotiation and mediation in multiple forums of the dispute resolution mechanism with the goal of reaching consensus agreements on various types of disputes, grievances and public controversies.

The KNU Land Policy commits the Karen National Union and its authorities to “uphold international human rights standards, to promote the welfare of all Karen peoples and long-standing villages and resident village communities, and to protect local food production systems and ecosystems and food security throughout Kawthoolei”.<sup>394</sup> This statement of commitment provides a baseline by which the performance of the government and the outcomes of the KNU dispute and grievance mechanism can be measured.

The KNU Land Policy commits the Karen National Union and its authorities to “uphold international human rights standards, to promote the welfare of all Karen peoples and long-standing villages and resident village communities.

<sup>393</sup>KNU Land Policy, Chapter 3: Recognition and Allocation of Tenure Rights, Article 3.5, Village Lands, 3.5.6, 33.

<sup>394</sup>KNU Land Policy, Chapter 1: Preliminary, Article 1.2 Objectives, 1.2.1, 6.

- The Policy legitimizes customary occupation of land and use rights (Kaw tenure), and “the design provides for “institutional frameworks for mediating competing claims for administering land, forests, fisheries and associated natural resources...”<sup>395</sup> The right of indigenous people and communities to own their land customarily is recognized, which increases the legitimacy of the government and land policy. The formal recognition and authorization of a specific dispute resolution process, specifically one that enable disputing parties and/or grievants to directly participate in the resolution of their disputes, also increases perceptions of legitimacy by users

The Policy legitimizes customary occupation of land and use rights (Kaw tenure), and “the design provides for “institutional frameworks for mediating competing claims for administering land, forests, fisheries and associated natural resources...”

- The Central Committee has established a Central Land Committee to oversee implementation of the Land Policy. The Committee is a key part of the administrative infrastructure to implement effective land administration and dispute resolution. The Central Land Committee is mandated to have at least three Working Groups with the following responsibilities: 1) oversee the overall tenure system management and governance; 2) tenure rights documentation, demarcation, registration and mapping, and 3) tenure dispute resolution and processing. 25% of the heads of working groups are to be CBO/NGO representatives. Working Groups must also involve appropriate local customary authorities (“Masters of the Kaw”).
- The Central Land Committee is to engage in multiple kinds of consensus-building-processes with other bodies – such as customary authorities, Village Land Committees, community members and relevant administrative authorities and departments – to address and resolve land issues.
- The KNU has approved and significantly implemented elements of its Land Policy that address many UNGPs and “Effectiveness Criteria” concerning human rights, rights of women and indigenous people and procedures grounded in deliberation and dialogue. For example, the KNU has promulgated and implemented a rule that “requires a representative from the Karen Women’s Organisation (KWO) on each village ‘council’ in areas under its administration. These representatives also sit on the KNU-managed Village Land Committee that helps mediate disputes.”<sup>396</sup> Since 2003, central-level KWO has been conducting training programs for women on women’s rights and dispute resolution.<sup>397</sup>

The KNU has approved and significantly implemented elements of its Land Policy that address many UNGPs and “Effectiveness Criteria”.

<sup>395</sup>KNU Land Policy, Preamble, 2-3.

<sup>396</sup>Shaun Butta and Justine Chambers, A Survey of Customary Land Dispute Mechanisms in Kayin State, Eastern Bago Division and Shan State. 63.

<sup>397</sup>Justice provision in south east Myanmar. 16.

- Village Land Committees have been established in communities where the “Kaw” land governance system is in place – Members are village heads and at-large community members. They have the authority to create their own structure.
- Elected Village Land Committees, with an appropriate number of local leaders and at-large community participants, have been established in communities where “Kaw” land governance systems are not in place. These committees are in charge of local land registration, enforcement of regulations and dispute resolution.<sup>398</sup>
- The Policy recognizes the right of internally displaced persons (IDPs) to re-occupy land they occupied and used. This provision helps increase the legitimacy of government’ land allocation and dispute resolution mechanisms in the eyes of this stakeholder group.
- Committees formed to resolve land disputes involve representatives of farmers organizations, legal academics, and representatives of women’s and youth organizations as well as KNU authorities. This level of inclusion and participation should help to increase the legitimacy of the mechanism, the procedures used to resolve disputes and grievances and their outcomes.
- The Policy confers the right to local communities to “participate in decision making about issues that affect their land, territories and natural resources”. Communities that may be affected by a proposed project have the right to be informed, have all relevant information and give or withhold their Free Prior Informed Consent (FPIC) prior to its implementation. If consent is given for a project to proceed, it is to be given by the potential project-affected community “free from force, intimidation, manipulation or coercion”.<sup>399</sup>

The Policy confers the right to local communities to “participate in decision making about issues that affect their land, territories and natural resources”.

- In May 2018, the KNU Agricultural Department (KAD) established its annual priorities of measuring land, assisting the public to secure their land ownerships rights and resolving land disputes.<sup>400</sup> This has been and currently is important for farmers living in territory controlled by the KNU and in mixed-controlled areas under dual administration by both the KNU and GORUM.

### Accessible

- The Policy mandates the establishment of an “accessible and effective system for addressing and remedying tenure-related grievances and disputes”.<sup>401</sup> The system has multiple forums and procedures from village to central levels. It also allows for appeals of outcomes from lower structures to higher ones that are independent of each other.

<sup>398</sup>KNU Land Policy, Chapter 1: Preliminary, Article 1.3 Nature and Scope, 1.4.8, 12.

<sup>399</sup>Ibid. 1.4.13, p 14.

<sup>400</sup>“KNU Agricultural Department decide[s] to prioritize measuring land, solving land disputes, BNI Multimedia Group, Friday, June 1, 2018. <https://wee/bmionline.net/en/news/knu-agricultural-department-decide-prioritize-measuring-land-solving-land-disputes>

<sup>401</sup>KNU Land Policy, Chapter 1: Preliminary, Article 1.2 Objectives, 1.2.9, 7.

Principles for implementation of the Policy emphasize equality and justice and “recognizing that equality between individuals may require acknowledging differences between individuals, and taking positive action, including empowerment, on order to promote social justice with equitable tenure rights and control of land, forests, fisheries, water and associated natural resources for all, with special emphasis on women, youth, poor and vulnerable and marginalized people”<sup>402</sup>

Further the policy strongly supports gender equality and ensures “the equal right of women and men to the enjoyment of all human rights...and taking specific measures aimed at accelerating de facto equality when necessary.”<sup>403</sup>

### Predictable

- Explicit forums and procedures of KNU land dispute and grievance resolution processes are detailed in the KNU Land Policy. This is a significant step in promoting public awareness and knowledge of available dispute and grievance resolution procedures and their predictability.
- The Policy authorizes the Central Land Committee’s Land Working Group – in cooperation with the KAD, customary authorities and civil society organizations – to rapidly respond to disputes or grievances and engage in ongoing monitoring and evaluation (M&E) of how they are being resolved and settlements implemented. An explicit focus of M&E on dispute resolution procedures, case status, settlements and implementation of outcomes helps increase the predictability of a mechanism in the eyes of users. It also helps administrators identify repeated disputes, understand their causes and make structural changes that can help eliminate them.

The Policy authorizes the Central Land Committee’s Land Working Group – in cooperation with the KAD, customary authorities and civil society organizations – to rapidly respond to disputes or grievances and engage in ongoing monitoring and evaluation (M&E) of how they are being resolved and settlements implemented.

### Equitable

- One of the Policy’s major objectives is: “To recognize, protect, prioritize and promote the tenure rights of Karen peoples and long-standing resident village communities, with emphasis on the occupation and use rights of the poor, marginalized and vulnerable and with special attention to the rights of women and youth...”<sup>404</sup> It further states that the objective of the policy is to “to protect them from any loss of enjoyment of these rights and benefits of use.”<sup>405</sup>

### Transparent

- Parties to a dispute or grievance are normally aware of its progress at lower levels of the KNU mechanism because of their direct participation as parties in Village, Temporary or Village Tract dispute resolution committee activities. The Policy is not, however, specific about how parties are informed about the status of their cases above these levels.<sup>406</sup>

<sup>402</sup>KNU Land Policy, Chapter 2: General Policy Measures, Article 2.2 Principles of Implementation, 2.2.4

<sup>403</sup>Ibid.2.2.5.

<sup>404</sup>KNU Land Policy, Chapter: Preliminary, Article 1.2 Objectives, 1.2.2, 6-7.

<sup>405</sup>Ibid.

<sup>406</sup>The author was not able to obtain any subsequent guidance documents that detail how this Effectiveness Criteria is or is not being implemented.

- The Policy commits the government to transparency in dissemination of information about the mechanism and its performance. It states that the government will engage in “clearly defining and publicizing policies, laws and procedures in applicable languages, and widely publicizing decisions in applicable languages and in formats accessible to all”.<sup>407</sup>
- Instructions in the Policy require the KNU administration to comply with Free Prior Informed consent (FPIC) to assure that parties that may or will be affected by a proposed development project have input into whether or not it should be approved and implemented and are kept informed progress to address their issues, concerns or potential disputes or grievances.
- A robust stakeholder engagement and public involvement process can effectively inform and engage concerned parties in addressing issues of concern and decision-making about current or potential project impacts.

Instructions in the Policy require the KNU administration to comply with Free Prior Informed consent (FPIC) to assure that parties that may or will be affected by a proposed development project have input into whether or not it should be approved and implemented and are kept informed progress to address their issues, concerns or potential disputes or grievances.

### **Rights-compatible**

- The Policy promotes adherence to the rule of law. It adopts “a rules-based approach through laws that are widely publicized in applicable languages, applicable to all, equally enforced and independently adjudicated, and that are consistent with their existing obligations under international human rights law and instruments.”<sup>408</sup>
- Occupation and use rights under the Policy will be administered according to the Pinheiro Principles which gives primacy of IDPs to have their land restored to them. When, however, there is land restitution and original land cannot be returned, the KAD in coordination with the Central Land Committee will work with local authorities and the affected village community to build a consensus on an appropriate alternative. If land in another to be allocated to IDPs, the KAD, Central Land Committee and local authorities and communities will use a similar consensus-building process to achieve resettlement.
- Rescission, taking back occupation and use rights by the KNU Authorities, will be conducted “in consultation and cooperation with the Central Land Committee and the consent of customary authorities, and in a manner consistent with procedural due process of law”.<sup>409</sup> Additionally, the Policy mandates that the planning process for rescission should be transparent and participatory, and that all potentially affected parties “will be identified...properly informed and consulted at all stages”.<sup>410</sup>

<sup>407</sup>KKNU Land Policy, Chapter 2: General Policy Measures, Article 2.2 Principles of Implementation, 2.2.9, 19.

<sup>408</sup>KNU Land Policy, Chapter 2: General Policy Matters, Article 2.2 Principles of Implementation, 2.2.8, p. 19.

<sup>409</sup>KNU Land Policy, Chapter 4: Changes to Tenure Rights and Duties, Article 4.4 Rescission, 4.4.2, 54.

<sup>410</sup>IBID, 4.4.5, 55.

- The Policy requires the KNU administration to provide access to courts to address and settle disputes or grievances over land. “Authorities must provide access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving tenure rights, and must provide effective remedies, which may include a right of appeal, as appropriate. Such remedies must be promptly enforced and may include restitution, indemnity, compensation and reparation.”<sup>411</sup>

### Continuous Learning

- KNU Authorities, as authorized by the Land Policy, should improve mechanisms for monitoring and analysis of tenure governance to promote ongoing improvements. These include identifying and implementing better ways to achieve the principles and objectives of the Policy.
- Per the Land Policy, States should monitor results of land allocation programs to determine their impacts.<sup>412</sup> Some issues to be monitored include impacts on food security and eradication of poverty on women and men and achievement of the Policy’s social and environmental objectives. Where objectives have not been achieved, the KNU should take appropriate corrective measures.

### Based on engagement and dialogue

- There was consultation at Township and District levels before the Land Policy was approved by the Central Committee. Consultation at lower levels of government and communities – and incorporation of their values, goals and input – helps increase trust and support for a dispute or grievance mechanism by potential stakeholders – both potential users and dispute resolution service providers.
- The Policy mandates that “Full and effective participation of peoples and communities in decisions regarding their tenure systems and must be promoted through their local or traditional institutions.”<sup>413</sup> KNU authorities are encouraged to assertively strive for full participation of concerned communities when developing policies, laws related to “Kaw” tenure systems of indigenous people or other communities that use the same systems. The Policy advocates that vulnerable or marginalized people should also be included.

The Policy mandates that “Full and effective participation of peoples and communities in decisions regarding their tenure systems and must be promoted through their local or traditional institutions.”

- Some customary procedures currently used for land or grievance resolution are similar or identical to CDR processes. This is especially true for procedures used by lower level bodies of the KNU dispute resolution mechanism – village dispute resolution committees, temporary land conflict resolution committees and potentially by township committees. Procedures used are variations of joint fact-finding, negotiation, mediation and conciliation.

<sup>411</sup>KNU Land Policy, Chapter 2: General Policy Measures, Article 2.3, Rights and Responsibilities, 2.3.7, 21.

<sup>412</sup>KNU Land Policy, Chapter 6: Implementation, Article 6.2, Monitoring and Evaluation, 6.2.2

<sup>413</sup>KNU Land Policy, Chapter 3: Recognition and Allocation of Tenure Rights and Duties, Article 3.3 “Kaw” Lands, 3.3.6, 29.

Some customary procedures currently used for land or grievance resolution are similar or identical to CDR processes.

Current use of these procedures should make customary and other service providers in the KNU mechanism more open to augmenting their practice by utilizing CDR approaches and procedures.

- Consultation followed by mediation is mandated to address overlapping spatial boundaries between two or more village communities. Consultation with the concerned communities is first conducted by the Karen Agriculture Department (KAD) in cooperation with the Central Land Committee and customary authorities. If a consensus agreement cannot be reached the issue is to be forwarded to a mutually acceptable mediator and mediation process.<sup>414</sup>

## Challenges

### Legitimate

- As with the three land dispute resolution institutions and mechanisms of the GORUM, there is the potential for conflicts of interest and corruption both by the institutions and personnel involved in the KNU dispute and grievance resolution mechanism. This is due to the multiple functions and roles of involved institutions and their members.<sup>415</sup> A principal source of potential tension is between various entities roles in land administration, granting of land occupancy and use rights and resolving disputes over the same parcels of land about which they may have previously been decision-makers.<sup>416</sup> This is the case for the Karen Agricultural Department (KAD), the Central Land Committee, Village Land Committees and customary authorities.
- While the KNU has promulgated and implemented a rule that requires a representative from the Karen Women's Organisation (KWO) on each village 'council' in areas under its administration, and these representatives also sit on KNU-managed Village Land Committees that help mediate disputes, their level of involvement is problematic. NRC research found that while representatives of the KWO are members of councils and land committees, in practice they have little authority and there were no instances of women mediating land disputes
- Issues and problems have developed between the GORUM and KNU concerning jurisdictional authorities over land allocation and dispute resolution in areas under dual control. The National Ceasefire Agreement (NCA) states that "The Government and individual Ethnic Armed Organizations shall coordinate the implementation of tasks that are specific to the areas of the respective Ethnic Armed Organization."<sup>417</sup>

Issues and problems have developed between the GORUM and KNU concerning their jurisdictional authorities over land allocation and dispute resolution responsibilities in areas under dual control.

<sup>414</sup>KNU Land Law, Chapter 3: Recognition and Allocation of Tenure Rights and Duties, Article 3.5 Village Lands 3.5.6, 33-34.

<sup>415</sup>For example, the KAD, Central Land Committee, Village Land Committee and customary authorities all have responsibilities in land administration and granting of occupation and use rights, and in the resolution of disputes and grievances. See KNU Land Policy, Chapter 3 Recognition and Allocation Tenure Rights and Duties, Article 3.7 Regulating Use Rights, 3.7.1 and Chapter 5: Administration of Tenure, Article 5.5 Resolution of tenure rights and tenure rights related disputes.

Some tensions, however, have emerged over coordination.

There is a “lack of clarity over which local leaders and armed and governance actors have authority in the village [s] has led to diminished legitimacy and less effective dispute resolution, as well as reduced ability to access the higher-level justice authorities of either the GORUM or KNU.”<sup>418</sup> Issues that have caused problems include: which laws, rules and regulations take precedence, the authorities of KNU and GRUM administrative bodies, which entities are authorized to survey land and issue use-right permits or LUCs and where this can occur; whether land allocation decisions or resolutions of disputes reached by each entity are recognized by the other; and what entity has responsibility for resolving land disputes and grievances and where this may happen.<sup>419</sup>

Another issue that may be exacerbated in dual control areas is “forum shopping”. If one or more parties are dissatisfied with the process or outcome of a dispute settled by either the GORUM or KNU the disgruntled party may take their issues to the mechanism of the other government or administration to see if they can obtain a more favorable result. This variety of forum shopping results in duplication of efforts for disputants, grievance mechanisms and their personnel. It can also result in contradictory outcomes that may not be recognized by either government or administration, are likely to be difficult to implement or enforce and may result in a continuation of the parties’ dispute. It can also contribute to ongoing tensions between the KNU and GORUM.

## Transparent

- There is a lack of specific timeframes for the steps of KNU dispute and grievance resolution processes.<sup>420</sup> These are important for disputants and grievants, so they know what to expect concerning timing and outcomes.<sup>421</sup>
- Administrative dispute or grievance resolution procedures above the township level are not fully transparent and may not enable either observation or direct participation by disputants, grievants, their representatives or other community members. This lack of transparency is problematic both for administrative decision-making or the use of CDR, the latter of which generally involves direct participation in dispute resolution processes. Lack of transparency in administrative procedures may result in a lack of credibility that procedures used and resulting outcomes are fair and just.

<sup>416</sup>This possibility is somewhat mitigated in the KNU dispute and grievance resolution mechanism by the involvement of multiple committees at the village and temporary committee level, which may have different members, and the fact that multiple bodies, some of which do not directly report to each other, may be involved in upper-level dispute resolution efforts. For example, the fact that customary authorities and village residents are expected to engage in consensus-building efforts can be a check on KNU bodies that may have conflicts of interest and vice versa with local individuals and committees having checks on KNU bodies.

<sup>417</sup>National Ceasefire Agreement, Chapter 6 Future Tasks, Tasks to be implemented during the interim period, Article 25. c

<sup>418</sup>Justice provision in south east Myanmar. Yangon, Myanmar, Saferworld, 2018, ii.

<sup>419</sup>In NRC Team interviews for this study in Yae Aye village, Hatta Lite village tract, Hpa, an, a GORUM Township and a Village Tract Administrator mentioned that Yae Aye village is under dual control, but villagers have only land documents issued by KNU. Villages in the surrounding area have similar documents. The GORUM Village Tract administrator tried several times to talk with KNU officials about allowing DALMS staff into area principally controlled by the KNU to measure land and issue Myanmar Government LUCs. The KNU did not accept the proposal and the situation continues with villagers having only KNU land use documents.

<sup>420</sup>These, if they do exist, may be available in KNU guidance for implementing the Land Policy, but neither the NRC Team nor the author was able to obtain them.

<sup>421</sup>This information may be included in guidelines issued by the Central Land Committee, but NRC’s Team was not able to obtain them.

- It is not clear that there is a transparent accountability and reporting mechanism that enables concerned parties to track the status of their cases beyond the Village Tract level, understand who makes final decisions and the standards, criteria, logic and rationale used to make a final determinations. The lack of a transparent accountability and reporting mechanisms is problematic both for disputing or grieving parties who want to know the status of their cases, and for the government to assess its effectiveness and progress in handling cases.

It is not clear that there is a transparent accountability and reporting mechanism that enables concerned parties to track the status of their cases beyond the Village Tract level, understand who makes final decisions and the standards, criteria, logic and rationale used to make a final determinations.

### **Rights-compatible**

- Reconciling multiple legal systems and potentially contradictory rights – which may include individual household, communal, community, KNU and GORUM rights as well as international human rights – is not easy. This may be especially difficult in areas of dual control where KNU and GORUM land policies and some practices are not congruent with each other. Some issues include: which laws, rules and regulations take precedence; the authorities of KNU and GORUM administrative bodies; which entities are authorized to survey land and issue use-right permits, and where this can occur; whether land allocation decisions or resolutions of disputes reached by each entity are recognized by the other; and what entity has responsibility for resolving land disputes and grievances and where this may happen.

Reconciling multiple legal systems and potentially contradictory rights – which may include individual household, communal, community, KNU and GORUM rights as well as international human rights – is not easy.

- Resolving disputes or grievances over illegal land confiscation by the GORUM or KNU militaries in areas under mixed administrations will be complicated. Often, neither government recognizes the laws, jurisdiction, procedures or outcomes of the other. Additionally, frequently neither has the authority or capacity to return land confiscated by the other.

### **Based on engagement and dialogue**

- To date, there has been only limited training in CDR approaches and procedures for service providers involved in the KNU dispute and grievance mechanism. While existing procedures used by KNU dispute and grievance resolution providers may be effective, they can always be enhanced by augmentation or addition of new culturally appropriate structured approaches, procedures and skills.

## Recommendations

The KNU has made significant strides in developing a dispute and grievance resolution mechanism and procedures that are congruent with the UNGP “Effectiveness Criteria”. Many policies, institutional structures, forums and procedures are in place that promote dialogue and engagement as methods to resolve disputes and grievances.

Below are a number of activities that should be considered by the KNU Central Committee and Central Land Committee to enhance their compliance with the “Effectiveness Criteria” and advance the use of CDR procedures in its mechanism.

### Legitimate

- The Central Land Committee should continue to identify, cultivate and empower champions from village to central levels of the KNU administration who support the use of customary procedures and their augmentation by CDR processes. Champions are needed to continue advocating for the use of customary procedures and who see value of their enhancement by adding new CDR processes.
- The KNU, INGOs and NGOs should support initiatives of the Karen Women’s Organization (KWO) started in 2013 to train women in women’s rights and dispute resolution. Special training programs should be developed and conducted for women on land rights and CDR.
- The Central Land Committee should take measures to address potential or actual conflicts of interest or lack of neutrality and impartiality by authorities providing services in KNU’s dispute and grievance resolution mechanism. The CLC should consider formalizing and implementing one or both of the recusal procedures or restructuring bodies with responsibilities for helping to resolve disputes or grievances described earlier in this study for ABSF.

### Accessible

- KNU authorities – specifically the Central Land Committee and VT Administrators – should be authorized to require participation by all involved disputants or grievants involved in a land dispute or grievance in a mediation meeting prior to any body making a decision on a case. This level of involvement assures that all parties’ views and interests will be heard and considered when working toward a resolution.
- The Central Land Committee should create joint technical teams, composed of government staff and CSO technical experts to assist both dispute and grievance resolution committees and parties in dispute to engage in informed case investigations, joint fact-finding and provide them, as needed, with technical and legal information. Joint technical teams often can increase the quality of information available in dispute resolution initiatives, reconcile differences over data or views of disputants and identify potential satisfactory arrangements for settlements.

<sup>422</sup>In many countries, legal services for people with low incomes are supported both by government appropriations and private grants or donations.

Farmers and CSOs should select the technical and/or legal experts to be involved in providing input on cases in their area. The experts do not have to be full-time employees or consultants but should be paid for their time and services from a government fund established for this purpose.<sup>422</sup>

Teams should participate in site-visits, investigations and advise involved committees and parties on technical and legal issues related to resolving disputes or grievances.

- The Central Land Committee should assure that a transparent public and on-line case tracking system is in place. The system should be easy for disputants, grievants, KNU agencies and individuals or committees providing dispute resolution assistance to access and use to obtain the information they need.
- The Central Land Committee and its Land Dispute Working Group – in cooperation with the KAD, customary authorities and civil society organizations – should continue to refine and implement ongoing monitoring groups that operate in appropriate geographic areas to oversee procedures used to resolve disputes and grievances, their outcomes and follow-up on any post-settlement issues. Effective monitoring helps make procedures and outcomes of the KNU dispute and grievance resolution mechanism more predictable.

### **Equitable**

- The Central Land Committee, NGOs and CBOs should continue to provide information and training programs on KNU and GORUM HLP laws and international inhuman rights for KNU administration officials at all levels, Village Heads, customary authorities and their committees. HLP Awareness programs that provide substantive knowledge are needed both by third parties and individuals or groups involved in disputes or grievances. This is especially important for KNU staff involved in land dispute resolution in areas under dual control.

The Central Land Committee, NGOs and CBOs should continue to provide information and training programs on KNU and GORUM HLP laws and international inhuman rights for KNU administration officials at all levels, Village Heads, customary authorities and their committees.

Substantively-focused HLP programs complement training on CDR procedures. Information provided in each program can re-enforce that provided in the other and help prevent better and more equitable outcomes for dispute and grievance mechanism users.

### **Transparent**

- Parties whose disputes or grievances are to be addressed by a body at any level of the KNU dispute and grievance resolution mechanism should be informed about the date, time and location of the meeting one week before it is convened. All concerned parties should have an option to schedule time to participate. If one or more key parties are not available, the dispute or grievance resolution meeting should be rescheduled to accommodate their availability.
- All dispute resolution meetings conducted by committees of the KNU dispute and grievance mechanism should be open for observation to disputing or grieving parties, their representatives and members of the public. Open meetings help prevent collusion and corruption.

## Rights-compatible

- Utilize the monitoring mechanism described above to assure agreements or decisions reached through use of the KNU dispute or grievance resolution mechanism comply or are congruent with international human rights standards and KNU law. Conferences and seminars, such as the first Karen customary Land Kaw Seminar organized by the Karen National Union (KNU) Central Land Committee in June of 2018, to address how Kaw systems operate, should be used to explore ways to reconcile any differences between Kaw systems and outcomes with international human rights standards.<sup>423</sup>

## Based on Engagement and Dialogue

- CDR training service providers should visit and meet with the KNU Central Land Committee, its Working Group focused on Dispute Resolution, TAs and VTAs to identify and discuss the kinds of land disputes they are encountering, difficulties in resolving them, and how CDR procedures might be of assistance. Future CDR training programs should be customized to address real-life issues dispute resolution providers are encountering.
- Train targeted KNU Authorities in CDR approaches and procedures to promote continued development and institutionalization of CDR for the resolution of land issues. To further institutionalize the use of collaborative dispute resolution, KNU Authorities should be trained in the procedures. Their proficiency in the use of these methods will not only help to resolve specific disputes but also model their effectiveness for working with other government bodies and lower level committees engaged in dispute and grievance resolution.

Train targeted KNU authorities in CDR approaches and procedures to promote continued development and institutionalization of collaborative land dispute resolution procedures.

Government staff members that should be trained include members of the Central Land Committee, and KAD personnel and Township and Village Tract Administrators and committees that work on land disputes and grievances. Additionally, government staff engaged with communities in building consensus and making decisions concerning land and projects in the public interest, or granting permits for private enterprises, should be trained in effective stakeholder engagement and related CDR dispute resolution procedures.

Training should also be provided for dispute resolution service providers working in other forums, such as Village Land Committees. Consideration should be given, for the sake of economy of effort and impact, to training members of several Village Land Committees together in one program, to develop more standardized procedures and cross pollinate ideas and information on procedures they have found to be effective. Ideally, training for these committees should be conducted with VT Authorities to help coordinate the use of procedures between different levels of service providers.

<sup>423</sup>Karen Indigenous People, Burma Link, June 28th, 2018. <https://www.facebook.com/burmalink/posts/on-june-28-karen-indigenous/1782222405205795/>

- INGOs and NGOs with expertise in CDR should train KNU and GORUM authorities that interact on land issues in dual control areas. The National Ceasefire Agreement (NCA) states that “The Government and individual Ethnic Armed Organizations shall coordinate the implementation of tasks that are specific to the areas of the respective Ethnic Armed Organization.”<sup>424</sup> There are currently ongoing interactions on land issues by authorities from the KNU and GORUM in dual control areas. Some tensions, however, have emerged over jurisdictional authority and coordination of their individual and joint work. Similar training in problem-solving and negotiation procedures for KNU and GORUM personnel can improve their coordination and help avoid unnecessary tensions and disputes. This is important both for the staff of involved government and administrative entities and the villagers they serve.

NGO’s should train KNU and GORUM authorities that interact on land issues in dual control areas on CDR processes.

There are two potential options for training: 1) separate training programs for KNU and GORUM authorities with identical content, or 2) joint training programs with KNU and GORUM authorities together in the same program. If either or both the KNU or the GORUM are interested in training, but neither wants to participate in a joint program, Option 1 is appropriate.

Option 2, however, is the superior choice. In this format, representatives of both the KNU and GORUM are trained together and learn the same information and procedures at the same time. During the program, participants experience working together, learning about and practicing application of CDR procedures and skills on hypothetical but relevant issues, and have opportunities to get to know each other and build relationships that can help them coordinate their future work on land issues and disputes.<sup>425</sup>

- When engagement and dialogue procedures to resolve land disputes have been tried and not been successful or are not possible, parties should have a choice regarding how to secure an authoritative decision to settle their differences. Choices should include:
  - Taking the case to a Township court;
  - Requesting a binding decision by a KNU Administrator and their committee, most likely at the Township level, after they have provided mediation assistance. and the parties have been unable to reach an agreement;
  - Requesting the Central Land Committee and appropriate agencies to convene an arbitration process in which the government would be the convener, but parties would select members of the arbitration panel and authorize it to make a binding decision for them; or
  - Submitting the case to an independent arbitration body, privately organized by the disputing parties, or their representatives, for a binding decision.

<sup>424</sup>National Ceasefire Agreement, Chapter 6 Future Tasks, Tasks to be implemented during the interim period, Article 25. c

<sup>425</sup>Joint training will be the most difficult to implement given the current relations between the KNU and GORUM.

## Theories of Change and Strategies for Introduction, Implementation and Institutionalization of CDR in GORUM and KNU Land Dispute and Grievance Resolution Institutions and Mechanisms



Monks in Taningtharyi (Jose Arraiza, NRC)

Theories of change and strategies for introducing, implementing and institutionalizing CDR approaches and procedures are culture, context, issue and institution specific. If members of a culture have some values that support cooperation to resolve differences over land, do not see contested issues and potential settlements exclusively in win-lose terms and have institutions, mechanisms and processes that use some form of collaborative problem-solving, it is often possible to build on and augment what currently exists with CDR procedures. Additionally, if a culture is open to and/or enables the emergence of new ideas and practices from the ground-up, as opposed to from the top down, members are more likely to accept innovation, experimentation and ultimately institutionalization of new methods using either informal or formal procedures.

Conversely, if members of a culture have values that favor Top-Down authoritative decision-making on land issues, principally frame contested issues and potential settlements in win/lose terms and have institutions, mechanisms, procedures that achieve these orientations, it is generally more difficult to introduce CDR procedures. Under these conditions, introduction, implementation and institutionalization of new procedures for settling differences over land can often only be achieved by approval and authorization by people in positions of power who lead formal institutions.

As noted throughout this study, Myanmar is a very diverse country. Its population has a range of values that support both cooperation and authoritative decision-making for resolution of land issues. Its members also have a variety of views about how disputes or grievances should be framed and what constitutes satisfactory settlements. Finally, the country has diverse institutions, mechanisms and procedures to achieve resolution of contested issues.

## Broad Theories of Change and Strategies

Described below are three theories of change and broad strategies that can be applied by the GORUM, its administrative bodies, the KNU, NGOs/CBOs and donors interested in introducing, implementing and institutionalizing CDR in Myanmar. They include:

### Box 7: Broad Theories of Change and Strategies

There are three broad theories of change and related strategies:

1. Bottom-up,
2. Top-down and
3. “Both/and”

**The Bottom - Up Theory of Change and Strategies** – This theory and related strategies hypothesize that CDR approaches and procedures can most successfully be introduced, implemented and institutionalized by initiatives at the “grass-roots” level, commonly at lower levels of government or in communities. Often, the dispute and grievance resolution procedures introduced enhance and/or augment processes currently being used or add new ones where needed. Because of the similarities between current procedures and CDR, entities promoting change expect to encounter less resistance to their introduction and use from institutions, service providers and stakeholders for whom they are intended. When the success of Bottom-Up Strategies has been demonstrated, it can be used to encourage introduction, implementation and institutionalization of CDR in higher- levels of institutions and to address more complex and difficult disputes.

**The Top-Down Theory of Change and Strategies** – This theory of change and related strategies hypothesize that CDR approaches and procedures can most successfully be introduced, implemented and institutionalized if leaders of an organization – a government or administration, administrative agencies or other institutions – who have authority to make and require implementation of their decisions, allow or mandate insertion of new CDR approaches and procedures into existing institutions and mechanisms. The theory postulates that decisions made at the top of an institution can and will be successfully implemented by designated entities and personnel below the leader(s) that made them.

**The “Both/And” Theory of Change and Strategies** – This theory and related strategies hypothesize that CDR approaches and procedures can most successfully be introduced, implemented and institutionalized by using a combination of Bottom-Up and Top-Down strategies. It involves planning and executing, either sequentially or simultaneously, components of both. It assumes that the cumulative impact of multiple activities, ideally with significant coordination of Bottom-Up and Top-Down strategies will result in institutionalization of CDR approaches and procedures at multiple levels of institutions and potentially in diverse arenas where they will be useful.

### Sub-Strategies for Introduction, Implementation and Institutionalization

Before looking at the broad strategies, it is important to clarify three sub-strategies that are building blocks for the three larger ones. They include more specific strategies for 1) introduction, 2) implementation and 3) institutionalization of CDR.

**Introduction** of CDR involves activities to raise awareness of future champions, institutional and community leaders, potential or actual service providers and end-users about the procedures and

their potential value and utility to resolve land disputes and grievances. Awareness raising activities commonly familiarize participants with a range of CDR approaches and procedures, provide examples of their successful use, describe how they are similar or identical to processes currently being used (or that were used in the past) or are totally new.

Examples of awareness raising activities include preparing and disseminating written, audio or visual information on CDR; making presentations at conferences, for institutions or communities; presenting brief CDR Awareness Raising Sessions for groups that may be interested in implementing the procedures; and study tours or visitor exchanges.<sup>426</sup>

Awareness raising activities also provide excellent opportunities to identify, cultivate and secure commitments of future champions for the use of CDR approaches and procedures.

Implementation of CDR involves going beyond raising awareness of individuals or groups about the range of potential procedures that can be used to resolve disputes and grievances. It encompasses building their capacities to deliver effective CDR assistance.

Two critical first steps for implementation involve identification of champions who will lead the initiative and communities, institutions and mechanisms where leaders, staff or members are interested in exploring the use of CDR. A second step is identification of appropriate procedures and skills desired or needed by the institution or community where CDR will be introduced.

The third step is developing an implementation strategy. In general, there three ways of implementing CDR:

- Augmenting capacities of existing institutions, mechanisms, procedures and dispute resolution practitioners where current processes are similar or identical to CDR. This strategy builds on, enhances and refines procedures currently being used with state-of-the-art CDR approaches and procedures. New procedures are added only if needed. This approach is most appropriate for GORUM and KNU institutions and communities that use customary practices and strive to develop consensus decisions to resolve differences.
- Integrating new CDR procedures in existing governmental institutions and mechanisms where they are only infrequently or informally being used, or not utilized at all. This strategy is appropriate for the three GORUM land-focused grievance mechanisms and in some upper level KNU institutions to increase their use of collaborative procedures.

<sup>426</sup>Study tours involve individuals or groups with capacities to potentially champion implementation and institutionalization of CDR visiting institutions or countries that have successfully institutionalized the procedures. Visitor exchanges are one or two-way exchanges of individuals interested in or with expertise in CDR.

Ideally, visits are planned with entities handling the same kinds of disputes or grievances participants want to address. Tours provide effective ways to learn about strategies used to introduce and implement CDR, examine potential organizational and mechanism structures, explore utilization of different procedures and observe initiatives in action.

An additional benefit of study tours is their capacity to build future change teams. If two or more participants are from the same country or institution, they can establish and build relationships with each other, begin to develop a common vision for what might be possible “back home” and form a core group of champions to develop strategies to introduce, implement and institutionalize CDR.

- Establishing new institutions and mechanisms that utilize CDR procedures and provide independent, fair, trusted and broadly acceptable processes for the settlement of disputes and/or grievances. This strategy is appropriate if concerned governmental and non-governmental parties identify significant gaps in existing institutions and grievance mechanisms and their abilities to deliver widely accepted and fair outcomes. An example might be the establishment by the GORUM of an independent body with formal authority to review decisions and hear appeals of decisions by government administrative bodies with mandates to resolve land disputes.

Implementation in all of above approaches involves the development and presentation of CDR training programs. It is critically important that procedures presented be culturally, situationally and institutionally appropriate and will be acceptable to parties for whose use they are intended. Training should provide extensive opportunities for participants to practice procedures and skills using realistic and culturally appropriate simulations before they apply what they have learned in the resolution of real disputes.

It is important to note that conducting “scatter-shot” training programs for a large number of participants who are not connected in some way to each other, an institution or dispute resolution mechanism generally results in only random success in implementation of CDR and very little institutionalization. This approach to training, while it may potentially produce a number of outstanding dispute resolvers, generally lacks methods to connect them with parties who need and want assistance or institutions that provide resolution assistance.

A more effective strategy is to train either in-tact groups of people connected with an existing institution or grievance resolution mechanism, or individuals, who after training, will become staff or members of these bodies. Examples of in-tact groups that can be targets for training include Village Land Committees, VTAs and their land committees, TAs and VTAs and their committees, or people in government or administrative dispute and grievance mechanisms with government and civil society members.

Beyond initial training initiatives, it is important to develop post-training support that will further implementation of CDR. One example of support is holding case conferences where trainees can discuss cases they have completed or are currently handling and explore and share strategies they used or could use in the future. Another is conducting periodic in-service programs on topics of interest to participants.

**Institutionalization** of CDR involves initiatives to formally embed CDR values, approaches and procedures into either existing or new institutions and their dispute and/or grievance resolution mechanisms. There is not a single way to institutionalize the use of CDR. It depends on the country, its culture(s) and organizational procedures for making changes.

Some common activities and products that can be used to help institutionalize the use of CDR approaches and procedures include:

- Seeking endorsements from prominent leaders or figures (champions),
- Creating a vision and mission statement affirming their use,
- Revising existing policies or creation of new ones that promote their use,
- Developing strategic plans with specific steps to implement and institutionalize their use,
- Developing best practices and model codes of conduct for dispute and grievance resolution institutions and practitioners,
- Passing legislation that allows for or authorizes their use,

- Issuing executive orders that permit or mandate their use, and
- Making administrative decisions within specific institutions that allow or authorize their use.

Beyond the above, a number of support mechanisms, procedures and documents frequently need to be created to facilitate operations of the mechanism and assure its institutionalization and sustainability.<sup>427</sup>

More detailed descriptions of approaches for introduction, implementation and institutionalization of CDR in Myanmar's land dispute resolution institutions and mechanisms will now be examined from Bottom-Up, Top-Down and both/and strategies.

### Applying Bottom-Up Strategies in Land Dispute and Grievance Resolution Institutions and Mechanisms of the GORUM

Common Bottom-Up strategies for introducing, implementing and institutionalizing CDR, if a totally new institution and/or mechanism is not being created, involves: 1) identifying institutions, mechanisms and people currently providing dispute or grievance resolution assistance, or that are open to doing so; 2) finding champions and other supporters who will advocate for enhancement of existing procedures or addition of new ones; 3) providing training for champions and other interested parties, 4) applying the new procedures and skills in the resolution of disputes, and 5) taking measures to formalize their use and assure their sustainability.

An assumption of many bottom up strategies is that individuals and groups currently providing dispute resolution assistance similar or identical to CDR will more likely be to be open and less resistant to new methods that will enhance their practice.

It is important to note that often the best target audiences for Bottom-Up Strategies have some degree of autonomy from other institutions or authorities above them. This relationship enables

<sup>427</sup>Examples of support mechanisms and procedures to be established, if they are not already in place, include:

- (a) Identification of predictable leadership, financial resources and personnel needed to sustain the CDR initiative;
- (b) Development of methods to assure ongoing support of champions and their sustainability over time;
- (c) Establishment of standards and criteria for kinds of disputes and/or grievances that will or will not be accepted by the mechanism;
- (d) Development and implementation of case intake systems and processes;
- (e) Creating procedures to determine appropriate dispute or grievance resolution providers for specific kinds of disputes or grievances;
- (f) Developing case assignment and acceptance procedures;
- (g) Establishing and implementing case supervision procedures;
- (h) Designing appropriate formats for dispute resolution meetings, so "the forum matches the fuss";
- (i) Creating guidelines for utilization of appropriate dispute and grievance resolution procedures;
- (j) Developing standardized procedures for concluding cases;
- (k) Creating case tracking systems that are transparent and easy to access;
- (l) Developing systems and procedures for keeping records of outcomes of cases;
- (m) Fostering methods to encourage compliance with case outcomes, and development of procedures to enforce it in the event of non-compliance;
- (n) Developing procedures for appeals of unacceptable outcomes;
- (o) Establishing quality control standards and procedures;
- (p) Developing of systems for monitoring and evaluating the use and performance of CDR, institutional learning and making appropriate changes;
- (q) Establishing best practices and codes of conduct for dispute and grievance resolution institutions and practitioners;
- (r) Developing internal training capacities to prepare future providers of CDR assistance; and
- (s) Creation of a complaint mechanisms that can be used by mechanism users who are dissatisfied with procedures used or performance of service providers.

them to adopt CDR practices on their own without requiring permission from others. In Myanmar, potential target audiences for the introduction and implementation of Bottom-Up strategies include village heads, their land committees and customary authorities; Ward and Village Tract Administrators and their committees; and Township Authorities, and their land committees.

Ideally, Township, Ward and Village Tract Administrators and their committees should be the main initial audience for Bottom-Up capacity building and institutionalization of CDR. These individuals and groups have formal institutional authority to receive and handle a range of types of disputes and grievances, are commonly approached to resolve difficult cases that have not been able to be settled at the village level and often have more flexibility than authorities above them to implement CDR procedures.

While village heads, elders and their committees focused on land issues may be receptive to capacity building in collaborative dispute resolution, they may not need these skills as much as Township, Ward and VT Administrators and their committees.<sup>4 8</sup> Additionally, leaders and committees at the village level often do not have the authority to handle difficult cases, especially those involving government agencies or other powerful parties. Finally, while a focus on capacity building for individuals and groups in villages can significantly impact the ways that local disputes are addressed and settled, it is not likely to create broad institutional change on a national level that can result from capacity building and institutionalization of the procedures in formal government institutions.

### Bottom-Up Strategies for Introduction of CDR

Described below are potential Bottom-Up Strategies for introducing CDR to resolve land disputes and grievances. Although strategies involve approaches most appropriate for individuals and committees at Ward, VT, or Township levels, many of them are also appropriate and effective for introducing the procedures at either village or higher levels of institutions involved in dispute or grievance resolution. As noted throughout this study, champions are the foundation for introducing and implementing CDR. Additionally, appropriate groups need to be identified to work champions to advocate for and support the implementation and use of the procedures. Without committed and active champions and supporters, it is unlikely that CDR procedures will be implemented or used.<sup>429</sup>

There is not one way to identify individuals and groups that will become champions and supporters of CDR and to begin the process of its introduction. Listed below, however, are several approaches.

- Review existing or conduct new HLP assessments of multiple villages in a VT and targeted Wards in Townships where CDR might potentially be introduced. Identify: a) communities where there have been or are a significant number of disputes between or among members or between villages or wards;<sup>430</sup> b) respected VT, Ward, or Township Administrators and community leaders

<sup>428</sup>Interviews conducted by NRC in multiple villages indicate that a significant number of minor disputes are able to be resolved at that level. Villagers often report that they can settle most disputes unless they involve stubborn parties, significant differences in power and influence between them or land grabbing by government or other powerful parties.

<sup>429</sup>Whenever possible, it is better to have two or more champions who can advocate for the use of CDR and oversee implementation and institutionalization. If there is only one champion, he or she may become tired of advocating for or providing dispute resolution assistance, have multiple competing demands on time, move away, be assigned to a different position, become disabled or die, all of which can or will inhibit or prevent him or her from filling this role. This can lead to significant problems in assuring the sustainability of CDR initiatives. Having two or more champions assures that there will always be a person who can serve in this capacity.

with significant influence who may be interested in augmenting current dispute or grievance resolution procedures and skills or learning new ones, and who might become champions for the initiative; and c) members of standing Township or VT land committees or Ward committees whose members might be interested in learning new CDR procedures.

- Prepare a short brochure on CDR. The pamphlet's content and language should be appropriate for the level of education and/or literacy of prospective audiences.<sup>431</sup> It should also be available in local languages.

The brochure should be disseminated to appropriate authorities, community leaders and prospective participants in future awareness training programs prior to their presentation. When the brochure is distributed, a resource person or future trainers should be available, if needed, to verbally read and explain it and answer any questions recipients may have about the ideas and concepts that are presented.

- Conduct Housing, Land and Property (HLP) Awareness Programs for targeted audiences with a module on CDR. Prospective participants in training programs on land issues are almost always interested in their HLP rights. For this reason, the first training program may be focused on HLP Awareness. A module of this program should present CDR as potential procedures to resolve land disputes. Toward the end of the training session, participants should be asked who they commonly go to for assistance in resolving differences over land. If these individuals or groups are participants in the HLP Awareness Program, they can be asked if they would be interested in participating in future training on CDR. If people identified as providers of help are not in the Awareness Program, trainers should follow up with them to see if they might be interested in future dispute and grievance resolution training.
- Conduct an Introductory Awareness Program on CDR or a more in-depth Procedure and Skill-based Program. Depending on the level of interest and number of potential trainees, resource people or trainers can conduct either an Introductory Awareness Program on CDR or a longer process and skill-based program. An Awareness Program on CDR should be between three-hours and a half-day in length, as potential participants are often willing to spend that amount of time before committing to more extensive training.

Introductory Awareness Programs on CDR should, if possible, include a presentation on CDR procedures; the logic, rationale and potential benefits for using them; information on interest-based negotiation (IBN); a mediation demonstration and a negotiation or mediation simulation for participants to practice an CDR procedure.

<sup>430</sup>Private disputes are easier to focus on and provide successful assistance at the beginning of a new initiative because both parties and intermediaries may have adequate authority to settle them. Disputes over allocation of land to large land applicants or returns of land confiscated by the government will be difficult if not impossible to settle at this level because of differences in power and influence between and among the parties and the lack of intermediaries' authority to resolve them.

<sup>431</sup>A good example of the kind of brochure that is appropriate – regarding content, level of language and graphics – is one prepared by the NRC ICLA program on “Why is it Important to have a Citizenship Scrutiny Card?”

## Bottom-Up Strategies for Implementation of CDR

Implementation involves three activities: 1) developing culturally and situationally appropriate curriculum and training materials, 2) conducting a more in-depth procedure and skill-based training program on CDR approaches and procedures, and 3) providing support for the ongoing use of the procedures. Below are details about these activities.

- Develop a culturally and situationally appropriate curriculum and training materials. Initial training for VTAs, village heads, elders and their land committees is often conducted by an external provider – an NGO, CBO or government agency – with skills in teaching and applying CDR. Ideally, training providers should also have knowledge and expertise in addressing and resolving HLP disputes.

Many providers often have their own training curriculum. If they do, it is important to assure that it is focused on specific topics, procedures and skills relevant for the resolution of HLP disputes and be culturally appropriate and acceptable to the group being trained.<sup>432</sup> Training materials should also be tailored to the literacy level of training participants.

- Conduct more in-depth skill-based training programs on CDR approaches and procedures. The duration and format for this type of training is flexible, but in general it should be no less than 24 hours or 3 days. Additional training may be conducted at a later time to augment and deepen information and skills presented in the first program.

Potential content for an initial and follow-up programs may include: a) how to identify and analyze sources and causes of disputes, grievances and conflicts; b) an overview of major CDR procedures – principally fact-finding/dispute analysis, interest-based negotiation (IBN), mediation, conciliation and third-party decision-making; c) steps and procedures for engaging in IBN; d) steps and procedures for mediation and conciliation; e) communication skills for dispute resolvers;<sup>433</sup> f) techniques for working with parties separately and shuttling between them; g) methods for giving advice or making recommendations; h) methods of avoiding and breaking deadlocks, i) working with diverse parties;<sup>434</sup> j) procedures for handling multiparty disputes, k) processes for formalizing agreements and recording agreements; l) methods of encouraging compliance; m) strategies for working in committees; and n) ethics for dispute resolvers.

Training procedures should be suitable for adult learners, be highly interactive and include discussions, small group exercises and simulations to practice various procedures and skills. Simulations used during training should focus on common issues participants are likely to encounter when serving as dispute or grievance resolvers and should include a full range of potential parties – villagers, government officials, women, youth, minorities and differently abled.

<sup>432</sup>CDR training should be tailored to address the kinds of disputes or grievances to be resolved. Training to resolve HLP disputes should be different than if a program focused on family, commercial, or employment issues. Training focused on the specific kinds of disputes and grievances to be resolved enables trainees to more easily directly apply procedures and skills they have learned to help resolve disputants' or grievants' disputes.

<sup>433</sup>Common communication skills used by dispute resolvers include: active listening for emotions, restatement and summarization of content, identification and reframing of parties' issues and interests, reframing issues and interests in forms that make problem-solving possible and asking a range of types of questions.

<sup>434</sup>Women, youth, minorities, LGBTQ, differently abled, etc.)

### Bottom-Up Strategies for Institutionalization of CDR

It is important to note that training people in CDR approaches and procedures does not assure they will be institutionalized and used by either an institution or practitioners on a predictable and routine basis. It is possible to conduct many outstanding training programs and train a large number of people and not have the procedures used. Unless specific measures are taken to institutionalize CDR approaches and procedures, the result of training may only be a group of trained individuals with few opportunities to apply what they have learned.

Described below are a number of activities that can be undertaken by champions, leaders in institutions and participants that have been trained in CDR approaches and procedures to promote their institutionalization.

- Assure continuing engagement and support of initial champions and broaden the number of people serving in this role. Institutionalization of CDR from the bottom up requires champions who continue over time to nurture and advocate for use of the approaches and procedures. It also requires the involvement of authoritative and respected leaders and customary authorities in villages and VTs, who if not active champions of CDR procedures, can support, live with, or at a minimum, do not object or oppose their use.
- Secure ongoing institutional support, financial and human resources required to continue the provision of CDR services. Champions and institutional leaders should work together to determine the institutional support and resources needed to continue provision of dispute and grievance resolution services and secure them from appropriate entities. Ideally, support and resources should come from government or private entities within the country, and not external donors or NGOs whose priorities and targets for funding may change.
- Educate prospective users of CDR procedures about the range of options available to help them resolve their disputes and the potential benefits of using them. Conduct CDR Awareness Programs in communities where members are or are likely to be engaged in initiatives to resolve land disputes and grievances. Increase their awareness about the benefits of customized outcomes they reach themselves with the assistance of a skilled CDR practitioner as opposed to a decision by a third party.<sup>435</sup>
- Assure that CDR approaches and procedures are being used. Institutionalization involves sustained ongoing use of CDR approaches, to the extent that either augmented or new CDR procedures become the new norm and not the exception. This means “institutionalization by practice”. Whenever possible and appropriate, augmented existing or new procedures should be the procedures of first resort for the settlement of disputes and grievances.

Institutionalization by practice can be enhanced by training providers setting up ongoing case conferences with practitioners to discuss strategies used to resolve disputes, methods of breaking deadlocks and to discuss emerging issues from their work. Training providers can also conduct one-on-one mentoring as needed and periodic in-service training to further explore issue of interest to practitioners.

<sup>435</sup>Occasionally, in cultures where the norm is to use third party decision-makers to resolve disputes or grievances, disputing parties need to be educated about the use of assisted procedures that enable them to reach their own agreements.

- Train CDR practitioners to be trainers so they can educate future dispute resolution providers and meet increased demand for services. Ideally, institutions or groups of institutions are using CDR services should invest in developing trainers. Trainers can come from and work in only one institution – a government agency or community – or be members of a pool that can provide programs for multiple groups.
- Develop and implement support mechanisms, procedures and documents needed to facilitate mechanism operations and assure sustainability of institutionalization. Examples of potential components were described earlier under the initial description of institutionalization.
- Initiate activities to formalize institutionalization of CDR procedures. A number of potential activities have already been presented in the section above on institutionalization. Some of them include amendment to or creation of new legislation, revisions to existing or creating new executive orders or administrative decisions within institutions with dispute or grievance resolution mechanisms.

### Applying Top-Down Strategies in Land Administration Institutions and Dispute and Grievance Resolution Mechanisms of the GORUM

Top-Down Strategies for introducing, implementing and institutionalizing CDR posit that desired change will occur if key high-level decision-makers see the value and utility of using the procedures, approve or mandate modifications of existing institutions and their dispute resolution mechanisms or create new ones.

Just as for Bottom-Up Strategies, the success of the Top-Down Strategies is highly dependent on the involvement and effective actions of champions and/or institutional leaders who have vision, political savvy, authority and influence. These individuals are commonly either high-level leaders who manage or administer a number of entities and activities below them, or leaders of specific organizations.<sup>436</sup> They often have either direct authority to authorize or mandate the use of CDR as a result of their positions and/or the ability to persuade others with authority to do so.

Champions or institutional leaders commonly use one or more Top-Down strategies to effect desired change. Broadly, they fall into three categories: 1) Executive strategies, 2) legislative strategies, and administrative strategies.

#### Executive Strategies

These strategies utilize the authority and power of one or more high level individuals who advocate for and can mandate desired change. Executive strategies for change can be implemented at the highest level of government or an organization or by administrators in specific institutions.

<sup>436</sup>Examples of champions in other countries of land dispute resolution mechanisms and the use of CDR procedures include the Land Commissioner of the Liberia Land Commission, the Director of the Timor-Leste Land and Property Directorate, and the Commission and Secretary of the Sri Lankan Ministry of Justice's Mediation Boards.

The Myanmar Constitution of 2008 is the central guiding document for all issues related to executive, legislative and judicial decision-making and the structure of the GORUM, including issues concerning land. Chapter V of the Constitution details the Executive and its functions. Section 217 vests executive power of the Union in the President.<sup>437</sup> Section 216 explains that “the executive power of the Union extends to administrative matters over which the Pyidaungsu Hluttaw has the power to make laws”. The President “has the right to issue necessary rules on matters to be performed by the Union government, on allocation of the said matters to the Ministries of the Union Government, and on allocation to the person responsible to act under any law” (Section 218(b)).

Under the above provisions, the executive has authority to establish specialized committees to address land issues deemed to be important for the Union and empower them to make administrative decisions on their internal management rules and procedures.

The highest-level executive strategy for introduction, implementation and institutionalization of /CDR would entail building on State Counselor Daw Aung San Suu Kyi’s statement in her opening speech at the conference on Justice Sector Coordination for Rule of Law on 7th March 2018 that “In formulating our [Myanmar’s] national justice strategy, we should take into consideration the use of mediation in resolving disputes systematically and the development of various modes of alternative dispute resolution to settle disputes.”

If the State Counselor’s support can be secured, use of CDR could be institutionalized in GORUM’s administrative bodies mandated to resolve land disputes and grievances by an executive order. The order could either require government administrators and disputing or grieving parties to use CDR as procedures of first resort to settle differences involving land or indicate their acceptability and voluntary use.<sup>438</sup> The procedures might initially be tried at lower levels – in Townships and Ward and Village Tracts – and if successful could be introduced in higher level bodies.

### Legislative Strategies

These strategies utilize passage of legislation by a legally constituted legislative body. The Pyidaungsu Hluttaw (Assembly of the Union) is the bi-cameral national legislature of the GORUM. Some of the functions of the Pyidaungsu Hluttaw include “submitting, discussing and resolving on a bill” (Section 80 (c)), and “discussing and resolving on the remark of the President concerning a Bill approved by the Pyidaungsu Hluttaw” (Section 80 (d)). Bills initiated in either Hluttaw and approved by both are considered to be approved by the Pyidaungsu Hluttaw. Once a law has been enacted, the Pyidaungsu Hluttaw may “issue rules, regulations and by-laws concerning that law to any Union level organization

<sup>437</sup>While Myanmar currently has a President, Win Myint, the de facto authority of the country’s chief executive rests with Aung San Suu Kyi, the State Counsellor. Under Article 59 (f) of the Constitution of 2008, a person cannot be President if his or her spouse or children are citizens of a foreign country. Aung San Suu Kyi’s spouse was, and her children are British citizens, thus she is barred from serving as president. In April of 2016, after Aung San Suu Kyi’s National League for Democracy won a landslide electoral victory, the Pyidaungsu Hluttaw passed legislation that the President signed creating the position of Chief Counsellor.

The position of State Counsellor is similar to that of a Prime Minister. The office holder is authorized work across all areas of government and coordinates actions of the executive and legislature. As State Counsellor, Aung San Suu Kyi has assumed many of the powers of the President.

<sup>438</sup>Government or judicial requirements for implementation of mandatory mediation – a requirement that parties try CDR, most commonly mediation, must try to reach a voluntary settlement with the assistance of a third party prior to a case being heard by a third-party decision maker – has resulted in a high number of settlements of a range of types of cases. It should be noted that mandatory mediation means that the parties must engage in and try the process. It does not mandate that parties must agree.

formed under the Constitution and “issue notifications, orders, directives and procedures to the respective organization or authority” (Section 97 (a) (i & ii).

Champions and leaders pursuing a legislative strategy need to develop and sponsor bills and build coalitions of supporters, both within and outside of the legislature, to pass them. Examples of legislative initiatives to introduce, implement and institutionalize CDR could include amendments to existing laws or new bills and laws that either allow or mandate the CABF and CCMVFVL to use the approaches and procedures and provide details on how this is to be accomplished.

A broader legislative strategy might involve passage of comprehensive legislation that allows or mandates the use of CDR to address and resolve a range of disputes or grievances occurring in Myanmar. Potential issues that could be addressed, beyond those over land, include but are not limited to: divorce, commercial transactions, debt, minor criminal complaints, employment issues, water access and development projects.

### Administrative Strategies

These strategies are a lower level version of executive strategies described above which are implemented by high-level administrators or leaders in specific institutions or organizations. In this approach, authoritative leaders or committees of leaders within an institution advocate for, allow, or mandate a desired change, in this case, the use of CDR. Institutionalization generally involves revising the institution’s rules or issuing new guidance on how the procedures are to be used and implemented.

There are a number of institutions in Myanmar that can encourage, facilitate or directly make changes in their operations to allow or mandate the use of CDR. Described below are a number of them.

The first is the National Land Council. It has authority, in coordination with other government bodies, to develop and make changes to land policies. Although new policies do not have the standing and force of law, they can encourage and authorize GORUM land-focused institutions to make changes in their operations to utilize CDR.

The second institution is the Union level Coordination Body for Rule of Law Centres and Justice Sector Coordination Body (JSCB). This entity is multi-member body, with both government and civil society members, authorized to identify and develop proposals for the country’s justice reform priorities.

The third institution is the GAD, which provides civil servants at all levels of the GORUM. Successful introduction, implementation and institutionalization of CDR will significantly depend on the GADs support or acceptance of the use of the procedures.

The fourth and fifth institutions are the Ministry of Agriculture, Livestock and Irrigation and Livestock (MOALI) and the Ministry of Forestry and Natural Resources Conservation (MFNRC).

The fifth through seventh administrative institutions are the CABF, CCMVFVL and CCRCFOL. These governmental bodies and their leaders have significant discretion regarding implementation of internal dispute and grievance resolution procedures and can specify when and where CDR procedures can be used.

Described below are potential strategies for engaging the above administrative bodies in the introduction, implementation and institutionalization of CDR.

### Strategies for working with the National Land Use Council and amending the National Land Use Policy

In January of 2016, the President’s cabinet of the former military-led civilian government formally endorsed the National Land Use Policy (NLUP). The policy was developed after extensive consultation with multiple sectors of Myanmar society.

The National Land Use Policy mandated the Union Government to establish a National Land Use Council (NLUC), which was created on the 17<sup>th</sup> of January 2018. It convened its first meeting on the 7<sup>th</sup> of April 2018. The Council is composed of a Vice-President appointed by the President of the Union, relevant Union Ministers and Chief Ministers of Regions and States, and a person designated by members as the Secretary.<sup>439</sup>

The National Use Land Policy identifies a number of goals, one of which is to “develop transparent, fair, affordable and independent dispute resolution mechanisms in accordance with rule of law”.<sup>440</sup> It also defines a number of provisions for how “to hear and decide land disputes through the use of impartial land dispute resolution mechanisms across the whole country”, two of which are: “Resolving land disputes in public, and use of appropriate local language and translation as necessary”, and “ Resolving land disputes transparently, fairly and free from corruption.”<sup>441</sup>

When describing institutions that should be established to resolve land disputes, the policy advocates the establishment of specialized courts to hear special cases related to land, with, if necessary, trained judges and law officers. Additionally, it advocates that settlements of disputes should be monitored and conducted by independent monitoring bodies whose members have no direct interest in the outcomes and are appointed with the participation of all stakeholders.

The policy also advocates the use of arbitration to resolve land disputes, and that entities implementing the land policy are responsible for “Determining the process to settle land disputes between businessmen and farmers, or between farmers, through independent arbitration.”<sup>442</sup> For land disputes that involve government departments, organizations, farmers and the private sector, Section 42 of the Policy mandates the establishment of a tripartite arbitration process with a three-member panel.<sup>443</sup>

To date, the National Land Council has not made significant progress in establishing special courts or implementing arbitration. It has also yet to form an independent body to monitor settlements of land disputes or grievances.

<sup>439</sup>Vice President U Henry Van Thio is currently the Chairman of the Council. Chairman

<sup>440</sup>National Land Use Policy, Part (I), Objectives and Principles, Chapter (I) Objectives – (b), (c) and (d), January 2016.

<sup>441</sup>National Land Use Policy, Part (VI), Land Dispute Resolution and Appeal, Chapter (I), Land Disputes Resolution, 41, January 2016.

<sup>442</sup>It is not clear if “independent” arbitration is to be implemented by administrative bodies of the government or if it is to be performed by “independent” private arbitrators. Ideally, it would be the latter.

<sup>443</sup>These arbitration panels have not yet been created.

Unfortunately, the National Land Use Policy does not explicitly mention the use of CDR approaches and procedures as potentially effective methods to resolve land disputes. Amending the NLUP to include the use of CDR could create opportunities to use the procedures more broadly, enable the Council to supervise its implementation and institutionalization in the three GORUM land dispute resolution mechanisms and encourage its use at village and VT levels.

An additional possible strategy to address the use of CDR might be to pursue an option described in Section 43 of the Policy. This section authorizes the establishment of one or more pilot projects to research and test the provisions in section 42 – the establishment of special land courts and the use of arbitration and other dispute resolution mechanisms – to establish, organize, implement and monitor accurate practices for the impartial resolution of land disputes.<sup>444</sup> Establishing one or more pilots that utilize CDR – interest-based negotiation, joint-fact finding, mediation or conciliation – either within or independent of the three GORUM mechanisms could be a significant step in introducing, implementing and institutionalizing the procedures.<sup>445</sup>

Other possible changes to the National Land Use Policy and its implementation, as noted earlier in this study, include: requiring the appointment of an adequate number of farmer and members of civil society at every level of the three GORUM dispute and grievance resolution institutions and mechanisms; providing guidance that would give them equal authority to engage in investigations, develop recommendations, participate in deliberations and make decisions as members from government agencies; and requiring that all land disputes in which the government is a disputing party be conducted in public with appropriate local language and translation.

### Strategies for working with the Union level Coordination Body for Rule of Law Centres and Justice Sector Coordination Body (JSCB)

This body provides a platform for coordination between institutions in all branches of government, national justice stakeholders (such as members of the legal profession and civil society) and international partners for identification and development of proposals for justice reform priorities. Chaired by the Union Attorney General, it is a forum for participatory approaches to policy development.

In May 2017 the Coordination Body established similar bodies in each of the fourteen Regions and States of the country to promote dialogue and solicit input on local concerns and solutions to justice issues that should be incorporated in future national justice policies.

The national body is well situated to engage with policy makers at national, region and state levels to introduce, advocate for and develop new policies on the use of CDR to address a range of types of disputes and grievances, including those over land. Parties interested in promoting the use of the procedures should engage with this body to explore the development of new policy recommendations.

<sup>444</sup>The MyJustice I and II projects implemented by NRC could be considered as one of the pilots that is exploring “other dispute resolution mechanisms”.

<sup>445</sup>Independent introduction of CDR could be provided to interested villages, although this may not be the most cost-effective approach in terms of personnel and financial resources. Pilots at the VT or Township level for ABF may be more useful, or for investigation committees of CCMVFL or the CCRFOL.

## Strategies for Securing Support of the Ministry of Home Affairs (MOHA) and the General Administration Department (GAD)

Making changes in Myanmar to introduce, implement and institutionalize CDR – whether by executive order, legislation or introduction of new procedures in land-focused institutions or dispute or grievance resolution mechanisms – is not straight-forward. To garner adequate political backing and leverage for needed changes, high level leaders in the GORUM need to have the support, acceptance or at a minimum lack of resistance from the MOHA and GAD.

The MOHA administers Myanmar's internal affairs. The Constitution requires that MOHA's Minister and all Deputy Ministers be military officers of the Tatmadaw. They are nominated by the Commander in Chief and appointed by the President.

One of the MOHA's departments is the GAD. The GAD is Myanmar's civil service. It is directly accountable to the MOHA, President's Office and the Union Government. Active or retired military officers form the leadership of the MOHA and GAD.

GAD administrators or staff play a central role at multiple levels of government in convening, coordinating and promoting communications between and among members of subnational committees composed of representatives of other government agencies with a focus on land and land dispute resolution. Given the GAD's location in the MOHA, the military's role in this ministry, and the major role the GAD and its personnel play in public administration, it has significant decision-making authority over all aspects of land administration and confiscated land, including that taken by the military to which it is accountable. In their roles as chairs, GAD officials can and do have a significant say over procedures to resolve land cases.

If CDR procedures are to be effectively introduced and implemented into current administrative mechanisms to resolve land disputes and grievances, and GAD officials continue in their current roles, any champion will need to assure that the initiative has the support of the GAD, and potentially the MOHA.

Of note is that the GAD has supported CDR training of Ward and VTAs in five townships in three Regions/States. The training program involves over 18 months of procedure and skill-based sessions with a number of mentoring/coaching meetings and exchange visits among participants.<sup>446</sup>

Additionally, to increase awareness of GAD officials about CDR and build their commitment to introduce, implement and institutionalize the procedures, training has been offered to GAD township personnel through the GAD Institute for Development Administration (IDA). All deputy staff officers, who will be promoted across the country as Deputy Township Administrators, were introduced to the concept of CDR in 2017-18.

Finally, a Training -of-Trainers program on CDR was conducted for IDA trainers and senior GAD officials from all states and regions. The program is expected to help build the internal capacity of IDA staff to continue providing training on the topic.

<sup>446</sup>This training program and all those the two paragraphs below have been conducted by Mercy Corps with the support of MyJustice. Mercy Corps training programs have primarily focused on Interest-Based Negotiation (IBN). More recently, however, the organization has added modules on interest-based mediation.

While one-off training programs do not guarantee implementation or institutionalization of CDR, inclusion of the topic in the IDA's curriculum and ongoing training of existing and future GAD officials can contribute to achieving this goal.

### **Strategies for working with the Ministry of Agriculture, Livestock and Irrigation (MOALI) and the Ministry of Natural Resources and Environmental Conservation (MONREC)**

Overall responsibility for management and administration of land in Myanmar is assigned to the Ministry of Agriculture, Livestock and Irrigation (MOALI) for lowland agricultural land, and the Ministry of Natural Resources and Environmental Conservation (MONREC) for upland (forest) lands. Residential land is managed at the level of city government. MOALI, is the primary GORUM Ministry responsible for agricultural policy and farmland administration, rural land-use planning, settlement, land records and a range of other functions.<sup>447</sup>

One of MOALI and its personnel's' responsibilities is land dispute resolution.

The Minister of MOALI chairs both the CABFB and CCMVFV. MOALI officials and those of its Department of Agricultural Land Statistics (DALMS), sit on almost all committees of the three GORUM dispute resolution institutions and mechanisms. MONREC officials also sit on many of the committees when issues being addressed involve forestry.

Strategies for champions and others working with MAOLI and MONREC to promote implementation and institutionalization of CDR include: 1) introducing and raising awareness of Ministers and members of the CABF and CCMVFVL about CDR and the approaches and procedures can be used to effectively address and resolve a range of types of land disputes and grievances, 2) encouraging Ministers and committees to allow or mandate the use of CDR by the CABF and CDMVFVL, 3) assisting committees to provide guidance on what kinds of cases are appropriate for CDR and which procedures should be used, 4) supporting committees to develop organizational guidance on the use of CDR, and 5) assisting committees to arrange for training for officials that can provide direct dispute resolution services in collaborative dispute resolution.

### **Strategies for integrating CDR Approaches and Procedures into the Dispute and Grievance Resolution Mechanisms of the ABF, CCMVFVL and the CCRCFOL**

As noted earlier in this study, there are several places in the current dispute and grievance resolution mechanisms of the CABF, CCMVFVL and the CCRCFOL where CDR procedures could be integrated to augment or provide new processes for the voluntary resolution of disputes. In addition to working with the Minister of MOALI, the CABF and CCMVFVL, the President and Daw Aung San Suu Kyi and the CCRCFOL to implement changes from the Top-Down, it may also be possible to work with Ministers at the Region and State levels to make changes in the procedures used in all the institutions' dispute and grievance mechanisms. Listed below are potential changes that could be made in each mechanism.

- ABsF and the Resolution of Disputes. CDR approaches and procedures – especially joint fact-finding, negotiation, process-oriented mediation and conciliation – are appropriate methods for resolving a range of principally private disputes between or among members of the same village,

<sup>447</sup>Forest Lands are managed by (MONREC) and the Central Committee for the Management of Vacant, Fallow and Virgin Lands (CCMVFL)

different villages, or villagers and outsiders if differences in parties' power and influence are not too great.<sup>448</sup> While the procedures can be used by ABsF above the level of the township, they are more likely to be effective at the Ward, Village Tract and Township levels where administrators and their committees are able to have direct contact with involved parties.

- The CCMVFVL and resolution of disputes and grievances. New applications of CDR, beyond those mandated in the VFVLMML for the Central Committee to negotiate with involved parties if VFV land has been misallocated, can be introduced in decision-making over land allocation, procedures for assuring compliance with terms of permits and in handling minor criminal complaints that may arise during implementation of CCMVFVL decisions. Disputes and grievances concerning decisions by the CCMVFVL and its investigation bodies on allocation of VFV land may be able to be amicably settled using joint fact-finding and potentially mediation. Details on how these procedures can be implemented has been described earlier in this study.

Negotiation, and on occasion mediation, can be used when CCMVFVL Boards are conducting investigations over use-right holders' compliance with terms and conditions of their contracts. If a use-right holder is found to be out of compliance, the CCMVFVL or one of its task forces can negotiate steps to move the party into compliance rather than immediately taking enforcement actions.

Negotiation or mediation can also be used by the CCMVFVL to reach agreements with parties blocking implementation of administrative decisions on land allocation. These procedures can be alternatives to referring potential or actual criminal offenses to a court for a judicial ruling.

- The Central Reconciliation Committee for Confiscated Farmlands and Other Lands and the settlement of land confiscation issues. Some claims concerning illegal confiscation of land by the government can likely be resolved using joint fact-finding, and potentially mediation between or among contending parties. Mediation could also be used to resolve disputes between multiple farmers to determine fair allocation of land that has been released and returned.

### Sub-Strategies for Top-Down Introduction, Implementation and Institutionalization of CDR

Many of the sub-strategies used in the Bottom-Up Strategy are also applicable for the Top-Down Strategy including:

- Identifying and working with champions and organizational leaders to develop a long-term strategy and first steps to Implement and institutionalize CDR in their dispute and grievance resolution mechanisms,
- Preparing a brochure on CDR for dissemination to decision makers and their committees at all levels of mechanisms,
- Presenting HPL Awareness Programs for agency personnel with a brief module on CDR,
- Conducting longer CDR Programs to build the skills of committee dispute and grievance resolution services, and
- Implementing a number of strategies identified above in the Bottom-Up Strategy for institutionalization of CDR and adapting them to meet the specific needs of each the three GORUM mechanisms.

<sup>448</sup>Potential differences in power can to some extent be mitigated by the involvement of influential third-parties, paralegals or lawyers.

## Implementation of “Both/And” Strategies in GORUM Land Dispute Resolution Institutions and Mechanisms

As noted above, “Both/And” strategies are plans and activities to introduce, implement and institutionalize CDR using elements of both the Bottom-Up and Top-Down Strategies simultaneously or sequentially. There are many possible combinations of initiatives using this strategy. One possible grouping, with five potential components, is listed below.

- Undertake an initiative to introduce, implement and institutionalize CDR to address land issues handled by Administrative Bodies of the Farmland at the Township, VT and village level. A focus on the ABsF may be more acceptable to officials of the GORUM because they often work to resolve smaller, private and less political disputes.

Conduct HLP Awareness programs, with a module on CDR, for Township and VT Administrators, their ABsF committees and appropriate village heads who indicate an interest in pursuing the use of the procedures. Follow-up with one or more longer training programs focused on procedures and skills. Develop follow-up case conferences, mentoring programs and ongoing training on topics of interest to trainees.

As members of many ABsF are also members of task forces, Special Boards or investigation committees of the CCMVFVL; and subsidiary committees the Committees for Rescrutinizing Confiscated Farmland and Other Lands; training members of ABsF will also transfer procedures and skills for use in these other bodies.

- Identify champions in the National Land Use Council who support the introduction and use of CDR in the resolution of land disputes, and work with them to amend the National Land Use Policy to include and advocate for the use of these procedures. The inclusion of CDR in the policy will legitimize the processes and may encourage committees in charge of the GORUM’s three land dispute resolution mechanisms to implement them.
- Make presentations on CDR for individual or multiple committees at the national level whose members have oversight of the ABF, CCMVFVL and CCRCFOL. Presentations should be used to help identify champions who will advocate for the introduction, implementation and institutionalization of CDR, at appropriate levels and procedural steps in the three mechanisms. Further work should be conducted with champions and the committees of the mechanisms to develop new rules and guidance that can be implemented by the institutions. If necessary, work with champions to develop amendments to existing legislation or revisions to the current Presidential Orders that will allow or mandate the use of CDR.
- Make presentations at appropriate meetings or groups of GAD officials to introduce concepts and procedures of CDR and provide the logic and rationale for using the processes. Use the presentations and later follow-up to identify GAD champions who can advocate for the introduction and implementation of CDR in the three GORUM dispute and grievance resolution mechanisms.
- Work with appropriate GORUM Ministries and Departments with mandates to address land issues, and which have training institutes programs for their personnel, to develop and incorporate a module, workshop or seminar on the use of CDR in their curriculum. These “courses” can encourage the use of the procedures by current and future personnel.

## Applying the Bottom-Up, Top-Down and Both/And Strategies for Land Dispute and Grievance Resolution Institutions and Mechanisms of the KNU

Implementation and institutionalization of approaches and procedures similar or identical to CDR, as defined in the KNU Land Policy, have already been initiated by the KNU. Institutions such as Village Land Committees, Temporary Land Dispute Resolution Committees, Inter-Village Dispute Resolution Committees and Inter-Jurisdictional Dispute Resolution Committees have all been authorized to use mediation and seek consensus decisions on outcomes.

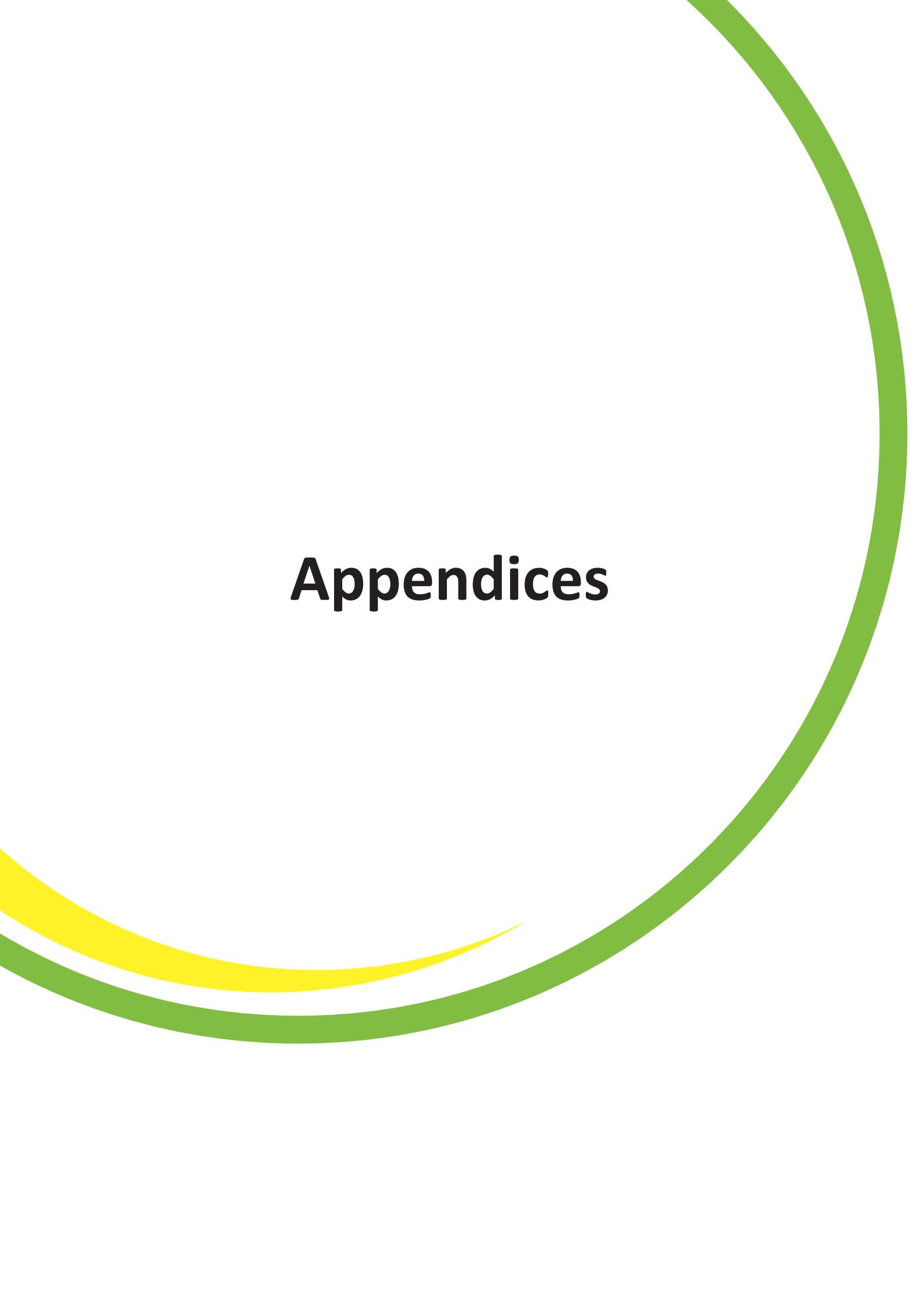
Due to the level of institutionalization of collaborative dispute resolution procedures in KNU policies and activities, potential CDR initiatives should focus on providing training for land dispute resolution practitioners and establishing procedures to continue to build their capacity. A Top-Down Strategy could be used to get approval by the Central Committee and the Central Land Committee for future training, although the approval could also come from approval of training at lower levels of committees as a result of a Bottom-Up Strategy. Ideally, approval of a training initiative will come from multiple levels of KNU governance.

Potential audiences for CDR training include appropriate staff of the KAD, Central Land Committee, and Township and Village Tract Authorities. A targeted number of members of Village Land Committees (for example at least three respected leaders or customary authorities from multiple villages) could also be trained, to facilitate coordination of processes at different levels.

Potential content and process for the training should be similar to that described for government and civil society members of GORUM institutions, with the addition of a specific module on how to resolve potential or actual disputes over land that is under dual control by the KNU and GORUM.

A specialized training program could also be prepared and presented to both KNU and GORUM officials together, on how to address disputes and grievances in areas under dual control.<sup>449</sup>

<sup>449</sup>This kind of training program is often termed “training as intervention”. Participants from entities experiencing inter-organizational tensions, that need to interact and coordinate their activities first participate in modules on collaborative dispute resolution. The modules include hand-on training in procedures and skills on negotiation, meeting facilitation and effective communications. Simulations in these modules focus on non-controversial hypothetical issues similar to, but not the same, as those causing problems for the two organizations and their personnel. Simulations provide opportunities for extensive practice in the application of collaborative dispute resolution procedures and skills. These modules are followed by dialogue sessions among participants in which they apply what they have learned to address problems related to the interface of the two organizations and their work on land issues such as the conduct of surveys, decisions on land allocation, issuance of LUCs, mutual recognition of decisions and actions by each of them and how contested land issues that potentially involve both government’s administrative bodies will be handled.



# Appendices



## Appendix A: Interview Protocols

### Questions for Interviews with GORUM/KNU Institutions and Others involved in Land Dispute Resolution

Date: \_\_\_\_\_

Name of Interviewee(s): \_\_\_\_\_

**Government Institution(s) or Civil Society Organization(s) (CSO)** (Circle one and identify level – Ward/Village Tract, Township, District, State/Region, Central government)

- Committee for Rescrutinizing Confiscated Farmlands and Other Lands (Level: \_\_\_\_\_.)  
(Level: \_\_\_\_\_.)
- Administrative Body of the Farmland - Land Committee authorized to resolve land disputes under the Farmland Act of 2012 – Chapter VIII – Settlement of Dispute on the Right to Use the Farmland and Appeals (Level: \_\_\_\_\_.)
- Central Committee for Management of Vacant, Fallow and Virgin Lands operating under the Fallow and Virgin Lands Management Law of 2012 (Level: \_\_\_\_\_.)
- Department of Agricultural Lands Management and Statistics (DALMS) – Formerly Settlement Land Record Department (SLRD) – Surveyors and Land Records (Level: \_\_\_\_\_.)
- Farmers, civil society organization/MPs: (Name: \_\_\_\_\_.)
- KNU Dispute or Grievance Resolution Institution and Mechanism (Level: \_\_\_\_\_.)

#### Questions:

- 1) When was the committee you are involved with, or know about, formed? (Date: \_\_\_\_\_.)
- 2) What is the mandate of the committee? (Describe.)
- 3) How are potential users educated about how the committee can help them and how they can access its services? Do you think community members/potential users are aware of and knowledgeable about the work of the committee and how to file a case?
- 4) How does the committee get cases?
  - Direct application by a party?
  - Application by a representative of a party – lawyer, paralegal CSO, etc.?
  - Referral from an entity below the committee – village headman/woman, village tract headman/woman
  - Referral from an entity above the committee – District or State Committee?
- 5) If a party files a case, is the other party or parties required to cooperate and participate with the committee to resolve it, or is participation voluntary?

- 6) What are some examples of cases the committee has received?
  - Who are the most frequent parties? Farmers, companies, non-military government departments, military, other powerful parties?
  - What the most frequent kinds of disputes brought to the committee?
- 7) How were committee members – government, farmers, politicians and CSOS – identified, selected and appointed? (Especially farmers and civil society members.)
- 8) How many members are on the committee and what constitutes a quorum of committee members for deliberations to occur and decisions made? (Number of members\_\_\_\_\_, and quorum\_\_\_\_\_.)
- 9) How often does the committee meet and for how long? (Time:\_\_\_\_\_, and length of meetings\_\_\_\_\_.)
- 10) How does the committee investigate a claim/case/dispute? (Circle all appropriate and ask for descriptions of the process)
  - Review of written documents – Land Use Certificate(s), tax forms, bills of sale, others
  - Oral testimony from parties? (If they don't do this, why not?)
  - Oral testimony by respected community members or others knowledgeable about the history of ownership or use of land in question? (If they don't do this, why not?)
  - Oral or written testimony by some kind of expert – Government official(s), surveyor(s), others? (If they don't do this, why not?)
  - Site visits by committee members? (If so, who goes? If not, why not?)
  - Maps/surveys any other customary records?
  - Other?
- 11) Do all committee members have the same information about a claim or dispute, or do some have more than others? (If different amounts of information, explain.)
- 12) How does the committee handle contradictory information – questionable or competing Land Use Certificates, tax forms, different testimonies, etc.?
- 13) What is the average time it takes for the committee to process and reach an outcome on a case? Does this differ based on parties' possession of documents?
- 14) How does the committee reach outcomes or decisions?
  - Does the committee or its members ever negotiate with parties claiming the same land to reach a negotiated agreement/settlement?
  - Does the committee or its members ever serve as a third party and mediate between parties claiming the same land and help them reach a mutually acceptable agreement/settlement?
  - If the committee does not negotiate or mediate, do committee members reach a consensus on a decision?
  - If the committee does not negotiate or mediate, do members vote to reach a decision? (Majority vote or some other number?)
- 15) Are the outcomes of the committee's decisions considered to be recommendations or advisory opinions, which may or may not be accepted by the parties, or binding on the parties?
- 16) How many total cases have been accepted by the committee? (Number:\_\_\_\_\_.)

- 17) How many cases have been settled with parties accepting the outcome - advice/recommendation/decision? (Insert number if known \_\_\_\_\_.)
- 18) In how many cases have one or more disputants not accepted the committee's recommendation/decision and appealed the outcome to a higher level of government? (Number: \_\_\_\_\_.)
- 19) What do you consider the strengths and successes of the committee and its work?
- 20) What are major challenges faced by the committee, its members or parties to disputes?
- 21) Would you and other committee members be interested in receiving training from the NRC in collaborative dispute resolution (CDR) to increase skills in cooperative problem-solving, mediation, or voluntary third-party decision making?

## Questions for Village Focus Groups

Date: \_\_\_\_\_

Name of Interviewee(s), village and location: \_\_\_\_\_

There are two broad questions that we would like to discuss with you today, hear your ideas and get your input:

- 1) *How do village heads, the Village Land Committee and the village as a whole resolve big differences, arguments or disputes over land, especially where encroachment or land grabbing many have happened; and*
- 2) *What have been the experiences of villagers taking their land disputes to either the Township Land Management Committee or the Committee for Rescrutinizing of Confiscated Farmlands and Other Land (the "Land Grabbing Committee") for help in resolving them? (We are especially interested in those involving land grabbing.)*

Below are some specific questions on which we would like your input:

***How do village heads, the Village Land Committee and the village as a whole resolve big differences, arguments or disputes over land?***

- 1) When a significant land dispute happens in the village, who do people go to for help to resolve it?
- 2) What does this person do to help resolve the land disputes?
- 3) Does the person to whom the dispute was first brought meet separately with the people who are involved, or does he/she bring them together in some form of meeting?
- 4) Is the Village Land Committee involved in holding meetings to resolve land disputes?
- 5) Who is on the Village Land Committee? What qualifications are desirable or required to be on the Committee? How are members selected or appointed?
- 6) What does the Village Land Committee do to help resolve land disputes?
- 7) If a meeting is used, who calls it and who is invited to participate? (Just the people who are involved in the dispute? People knowledgeable about land issues, the whole village?)

- 8) What happens in the meeting? How is the meeting conducted? Who leads it? What happens first, second, third...?
- 9) Do the people directly involved in the dispute have a chance to speak? If so, what do they usually say? If they do not speak, who speaks for them?
- 10) Are the involved parties questioned, and if so, by whom?
- 11) What kinds of evidence is presented and used to justify a claim? Verbal statements by the involved parties? Testimony by witnesses or people who know about the history of the land, written documents (Land Use Certificates, tax documents, customary documents, others)?
- 12) How do either the people in dispute or the members of the Committee or village reach a decision?
- 13) What kinds of outcomes do meeting participants expect?
  - An agreement between or among the people in dispute – reached either through direct talks and negotiation between or among the parties or assistance from an acceptable trusted person (a third party) – that they can all accept and live with?
  - Talks among meeting participants other than the people involved in the dispute, such as among members of the Village Land Committee or all members of the village, that result in *a recommendation for how the dispute might be settled, which parties can either accept or reject?*
  - *A final decision by the Committee (or village)?*
- 14) What is done to encourage former disputants to follow through on their agreements or a decision by a committee or the village? Public verbal promises, written agreements, rituals that encourage compliance?
- 15) How are agreements or decisions implemented? Who monitors and assures that parties follow through with their agreements or committee/village decisions? What happens if one or more person does not do what they said they will do or do not follow a decision by the meeting?
- 16) If a person disagrees with a recommendation/decision by the Committee or village, what can they do to try and get another outcome? Who do they go to, what procedures do they use and why?

***What have been the experiences of villagers taking their land disputes to either the Township Land Management Committee or the Committee for Rescrutinizing of Confiscated Farmlands and Other Land (the "Land Grabbing Committee") for assistance in resolving them?***

- 1) Are villagers familiar with each of these committees and what they are supposed to do to resolve land conflicts?
- 2) Why might a villager select one committee rather than the other?
- 3) Who takes their land dispute to one of these committees? One or more people who are involved in the dispute? Both men and women? The village leader or the Village Administrator (Village Tract)?
- 4) What assistance is available to villagers to help them file a claim?
- 5) If one of the people takes the dispute directly to one of these committees, do they file it only at the Township level or also at the District, State or Central Government levels? If they file at multiple levels, why do they do this?
- 6) How does each of the committees at the Township level investigate a claim? Is their investigation process different? Do they:
  - Exclusively look at documents – Land Use Certificates, tax documents, others?
  - Take verbal testimony from the people involved in the dispute?
  - Take verbal testimony from local people, such as elders, knowledgeable about the history of land ownership and use?
  - Conduct site visits to the land in question?
  - Ask for surveys to be conducted?
  - Other methods?
- 7) Are people involved in the dispute regularly informed about the status of their case and when they will get a decision?

- 8) Generally, how long does it take to get a decision from either of the committees?
- 9) How are Committee decisions implemented? What do each of the committees expected to do? What are people involved in the dispute expected to do?
- 10) Do the people in the dispute have to pay anything to get a decision or a decision in a shorter period of time?
- 11) If surveys are needed, are they easy to get? Are payments needed for surveys? Are they affordable for villagers?
- 12) What are major barriers to villagers using either of the two committees to help them resolve their dispute?
- 13) What recommendations do you have for how land dispute resolution by the Government could be more effectively implemented?

## Appendix B – List of Locations of Interviews and Focus Groups

Listed below are villages, village tracts, townships and districts where interviews and focus groups were conducted by the NRC Team and the author for this study, and Shaun Butta and Justine Chambers for a companion study on customary dispute resolution practices. Interviews for both studies covered issues related to both customary processes and those used by GORUM and KNU administrative institutions and their dispute and grievance resolution mechanisms.

### East Bago Region

- Ker Der Village Tract
- Tone Tadah Village
- Kaw Tha Say Village Tract
- Hoo Pu Village Tract
- Si Pin Kyi Village
- Sa Leh village, Wa Dee Village Tract

### Karen/Kayin State

Hpa-an and Hlaingbwe Districts and Village Tracts

- Hla Ka Daung, Hpa-an District
- Bin Chi, Hpa-an District
- Mi Tha Yaung, Hpa-an District
- Nat Kyun, Hpa-an District
- Naung Pa Lein, Hpa-an District
- Hlain Ka Bar, Hpa-an District
- San Pa Ree, Hpa-an District
- Kun Bi, Hlaingbwe District
- Kawt Hlaing, Hlaingbwe District
- Hti Lon, Hlaingbwe District
- Ta Khin Lone, Hlaingbwe District
- Shwe Pyi Taung, Hpa An

### Mon State

- Sit Kwin Village, Moak Kha Mowt Village Tract
- Ahnan Pin, Ahnan Pin Village Tract, Thaton Township
- Dawn Ywar Village, Ta Bet Swea Village Tract, Bilin Township
- Sit Kwin Village, Moak Kha Mowt, Village Tract, Kyaikhto Township

### Rakhine State

- NRC ICLA Sittwe Team focus group
- Thet Kae Pyin Ywar Ma Village
- Maw Lawi Chan Village, Sittwe Township
- Done Pyin Village
- Nga Pone Gyi Village
- Bu May Viullage Village
- Hla Ma Shay Village
- Mae Zali Kone Village

- Pyin Shay Village
- Par da Lape Village
- Set Yone Su Village
- Thet Kae Pyin Village
- Kyak Tan Gyi Village
- Kaung Dokkar Village

**Shan State**

- NRC ICLA Sittwe Team focus group, Taunggyi
- Namkhok Village Tract
- Mong Pawn Village Tract
- Pinlaung Village Tract
- Ywangan Village Tract
- Inle Lake Village Tract

## Appendix C: Bibliography and References

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