



IMPROVING ACCESS TO JUSTICE IN MYANMAR: PROSPECTS FOR USE OF COLLABORATIVE DISPUTE RESOLUTION (CDR) TO RESOLVE DISPUTES AND GRIEVANCES OVER LAND ALLOCATION, USE AND ILLEGAL CONFISCATION

- Christopher Moore -



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ACKNOWLEDGEMENTS

'Improving access to justice in Myanmar: prospects for use of Collaborative Dispute Resolution (CDR) to resolve disputes and grievances over land allocation, use and illegal confiscation' is one of four policy briefs which analyses the potential role of Collaborative Dispute Resolution that may play in Myanmar in promoting access to justice and participation in the peace process for vulnerable communities. This policy brief was drafted by Mr. Christopher Moore in the context of the NRC project on "Improving Access to Justice through Community Based Dispute Resolution (CBDR) for Housing, Land and Property disputes in Myanmar", funded by the MyJustice programme of the British Council. The author would like to thank Sadia Rani, Naw Khin Thu, Saw Htay Lin Aung, Thandar Soe, Saw Tin Moe Win, Myat Thiri Aung, Saw Yoe Har for their involvement in data collection and Swati Mehta and Zaw Myat Lin (MyJustice), Alexa Magee, Scott Leckie and Theo Hollander for providing comments on the report.

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Christopher Moore

INTRODUCTION

Disputes, conflicts and grievances related to housing, land and property (HLP) are widespread in Myanmar.¹ People across the country, frequently farmers, experience tensions with neighbors over a number of land-related issues. Many of these are resolved informally by members of disputants' communities or more formally using customary dispute resolution mechanisms and procedures provided by village authorities – village heads, elders, other trusted individuals or committees.²

Other controversies over land – commonly those that involve more people, larger tracts of property, powerful parties or that are politically sensitive – are generally handled by one or more Government of the Republic of the Union of Myanmar (GoRUM) institutions and their dispute and grievance resolution mechanisms. The three key institutions are the



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

Some of the most contentious issues handled by GoRUM institutions and mechanisms concern allocation, use and legal or illegal confiscation of land. When a government institution, companies or powerful individuals or groups are involved as parties, these disputes are often very difficult to settle and achieve fair and equitable outcomes.

Successfully responding to and addressing land disputes and grievances requires approaches and procedures that both help prevent them from occurring in the first place (“preventions”), and methods to effectively resolve them when they do arise (“interventions”). In recent decades, governments, international and national non-governmental organisations (INGOs and NGOs), Civil Society Organizations (CSOs) and customary leaders have experimented with and implemented a number of ways to creatively address controversies over land allocation, use and land confiscation.³ Governmental and non-governmental bodies in Myanmar are also involved in these initiatives.



1. The term “dispute” will be used in this Policy Brief to describe both disputes and conflicts, the latter of which may involve serious harm. “Grievance” will be used when a dispute involves a grievant and a government entity or company. 2 A dispute is a significant disagreement or argument, frequently between private parties.
2. A conflict is 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. A grievance is a complaint initiated by an individual or group against a government, government institution a private entity and/or their personnel over something or an action that is believed to be wrong or unfair.
3. Examples are the Sri Lankan Ministry of Justice’s Mediation Boards Program, the Timor Leste Ministry of Justices Land and Property Directorate, The Liberia Land Commissions’ Land Coordination Centers and mediation committees and the work of the Norwegian Refugee Committee (NRC) in Afghanistan, Democratic Republic of Congo, Jordan, Lebanon, Liberia, South Sudan and Uganda. Also see: Resolving Land Disputes Through Restitution Mechanisms: A Comparative Analysis of Country Case Studies. Chicago: University of Chicago, The Law School, 2017.

This policy brief examines how Collaborative Dispute Resolution (CDR) can help address land allocation, use and confiscation issues in Myanmar. CDR encompasses a number of procedures that facilitate voluntary engagement of parties with a common problem or that are involved in a dispute or grievance to cooperate and discover or develop mutually acceptable agreements that settle their differences. CDR approaches and procedures can effectively be for both “preventions” and “interventions”.

This Policy Brief will address the following five questions:

- What is CDR?
- What benefits might result for stakeholders, customary leaders and their communities and GoRUM land dispute and grievance resolution mechanisms and their personnel from introduction, implementation and institutionalization of CDR?
- What conditions promote the successful use of CDR?
- Where might CDR be introduced, implemented and institutionalized in customary and GoRUM land dispute and grievance resolution mechanisms?
- What measures can be taken to introduce, implement and institutionalize CDR in customary and GoRUM dispute and grievance resolution mechanisms?

The goals of the Policy Brief are to:

- Provide policy and action recommendations on how to improve the resolution of disputes over land allocation, use and confiscation.
- Identify places in current institutional mechanisms and procedures where CDR might be incorporated.
- Suggest specific strategies and steps for the introduction, implementation and institutionalization of CDR.

The target audiences for this policy brief are:

- Senior leaders of the GoRUM – Union executives, Ministers and parliamentarians – with authority to authorize or mandate the use of CDR.
- The National Land Policy Council and the Union and State/Regional-levels of the Coordination Body for Rule of Law Centres and Justice Sector Affairs that can make policy recommendations on the use of CDR to resolve land disputes and grievances; Ministers, senior administrators, lower-level administrators and related committees involved at all levels of the three GoRUM land dispute and grievance resolution mechanisms who can allow, encourage and/or authorize the use and implementation of CDR.
- Donors that can provide policy advice and financial support for the introduction, implementation and institutionalization of CDR; and INGOs, NGOs and CSOs that can provide CDR technical assistance, capacity building and programming for GoRUM land dispute resolution mechanisms and their personnel, and for to communities and civil society groups in the country.
- This Policy Brief is based on research presented in A Feasibility Assessment on the Introduction of Alternative Dispute Resolution (ADR)/Collaborative Dispute Resolution (CDR) to Resolve Land Disputes in Myanmar (2019), a study prepared for MyJustice by the Norwegian Refugee Council and CDR Associates. Methodologies for this study included a desk review of government documents, relevant monographs and articles and interviews with providers and users of GoRUM and community-based dispute resolution mechanisms and services in Kayin, Mon, Shan, and Rakhine States and Eastern Bago District, South East Myanmar and Shan State.

ACCESS TO JUSTICE AND THE RESOLUTION OF LAND DISPUTES AND GRIEVANCES

Access to justice refers to the ability of people to seek and obtain objective, fair and equitable solutions or remedies that resolve disputes and grievances. It involves the use of informal or formal institutions, mechanisms and procedures that comply with international human rights standards.⁴ Securing access to justice, especially when it pertains to land issues, has been problematic in Myanmar.

Access to land and the ability to effectively resolve issues related to it are of critical importance to people who reside in the country. 66% of the population live in rural areas⁵, and 70% are engaged in agriculture and depend on predictable access to and utilization of land to secure their livelihoods.⁶ Access to land is also important to the government for construction of projects in the public interest or to lease to private enterprises and earn income for the state and economic development.

Land allocation and use involves people, groups or institutions with authority to determine how land is distributed among parties that want to occupy



4. Two examples of international standards are the Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework. New York and Geneva, United Nations, 2011 (The Ruggie Principles); and the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, June 28, 2005 (The Pinheiro Principles).
5. Burma, Country Profile, LANDLINKS. <https://www.land-links.org/country-profile/burma/>
6. FAO. Myanmar at a Glance <http://www.fao.org/myanmar/fao-in-myanmar/myanmar/en/>

and utilize it and how designated is actually used. Authorities that can make decisions on land allocation commonly include leaders or committees in customary communities and villages and government institutions with mandates to allocate land. Standards, criteria and evidence for decision-making on land allocation, and use generally, include laws, provisions in executive orders, policies, institutional rules or guidelines, use-right documents (such as Land Use Certificates -LUCs) or customary norms and practices. Authorities utilize a range of procedures to make decisions on land allocation, which range from authoritative administrative decision-making to collaborative processes that engage involved parties in determining final outcomes.

Land confiscation and related disputes or grievances may involve legal repossession of land by a government with the authority to take private property for public use (eminent domain), or illegal seizure of land by governmental or non-governmental parties with the power to do so. Disputes and grievances in both cases often arise over either or both the process of the taking or its outcome, and if land has been illegally seized, whether it will be returned, compensatory land will be provided or adequate compensation in other forms will be paid.

LAND ALLOCATION, USE AND DISPUTE AND GRIEVANCE PREVENTION

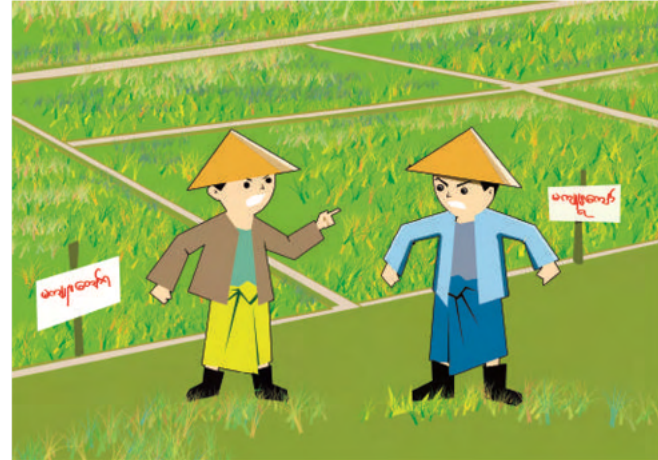
Customary Land Dispute Resolution

In customary communities in Myanmar, disputes over land commonly arise between neighbors over boundaries, movement of markers and encroachment. They also may develop over payment of debts and among family members over inheritance and divorce settlements.

Village headmen (and rarely headwomen), elders, respected community members or informal or formal committees are frequently involved in addressing and helping disputants to resolve contested issues.

Decision-making procedures commonly involve engagement and dialogue between or among land disputants, their supporters or detractors and village leaders or committees. Often, members of parties' families and the broader village participate.

Generally, village authorities try to help parties reach consensus decisions— developed by parties on their own or with third-party assistance, or disputants' voluntary acceptance of a recommendation or decision by an authoritative village-level leader or committee.⁷ Village leaders and their members generally strive for consensus decisions that will be widely recognized, accepted and respected by involved parties, their neighbors and the broader community and that help preserve community harmony.



The Central Administrative Body of the Farmland (CABF) and subsidiary Administrative Bodies of the Farmland (ABsF)

The two GoRUM institutions responsible for the resolution of land allocation and use disputes, the CABF and the CCMFVL, focus on different types of land. The CABF and its subsidiary bodies, Administrative Bodies of the Farmland (ABsF), were established as part of the Farmland Law of 2012 as multi-purpose institutions. Three of their primary functions are the allocation of farmland, facilitating issuance of Land Use Certificates (LUCs) to permit holders and addressing and resolving disputes over farmland.

Members of the CABF include the Union Minister for the Ministry of Agriculture, Livestock and Irrigation (MoALI), as Chair, the Deputy Minister of MoALI as Vice-Chair, the Director General of the Department of Agricultural Lands Management and Statistics (DALMS) as Secretary and other Union-level officials. Region or State ABsF are chaired by Chief Ministers and have members from MoALI and relevant departments concerned with land issues. District and Township ABsF are chaired by GAD Administrators and have members from appropriate levels of MoALI and other relevant departments. Participation by all members on the CABF and its subsidiary bodies is collateral duty in addition to their normal work responsibilities.

ABsF are generally present from Village Tract (VT) to Region and State-levels across the country, although they may be designated as general land committees that provide a variety of services for all three GoRUM dispute and grievance resolution mechanisms.⁸

7. A consensus decision is an agreement made without voting, which all participants can support, "live with", or at a minimum, not oppose.

8. Village Tracts are – Geographic and political jurisdictions composed of 3-6 villages and their households identified in the Ward or Village Tract Administration Law of 2012.

Village Tract ABsF are chaired by an elected Village Tract Administrator (VTA) who is assisted by a committee composed of a member of a village in the tract, a farmers' representative and a clerk from the government's General Administration Department (GAD), Myanmar's civil service. VTAs, the lowest level government administrators, are not formal government employees. They are, however, paid a small allowance by the GoRUM for village administration.

When Village Tract ABsF make decisions on land allocation, use or resolve disputes they commonly review relevant documents, interview involved parties and knowledgeable local authorities and often conduct site visits. If a VTA and members the ABF believe they have the authority to settle a case over land allocation, use or confiscation, they often use a combination of customary consensus-building procedures and making authoritative recommendations or decisions. The choice regarding how much dialogue and consensus-building is conducted versus making recommendations or decisions varies by VTA and committee.

If a VTA and/or Village Tract ABF believes they do not have the authority to settle a case, it is forwarded or taken by one or more parties to a township-level ABF. Personnel involved at the township level are a Township Administrator (TA), who is a staff member of the GAD, and a Township ABF, which includes DALMS staff member. Township ABsF conduct administrative investigations and develop conclusions and recommendations that are forwarded to upper-level ABF Administrators for appropriate action. Investigations commonly involve a review of documents – LUCs, tax forms, bills of sale, etc. – to assess whether a party has a valid use-right for contested land. Investigations may also involve site visits to inspect land in question and/or to hold discussions with knowledgeable village authorities about the historic occupation or use of the land in question.

Some TAs meet with concerned parties separately or convene joint meetings to gather additional information about contested issues or to negotiate or mediate acceptable settlements. During these procedures, TAs may provide advice, or make a recommendation or decision on issues in question.

If at any stage of development of a recommendation or a decision by an Administrator or ABF, from Village Tract to District levels, if either or both the process or proposed outcome is unacceptable to one or more disputants, they may sequentially appeal to ABsF above those that made unsatisfactory determinations for reconsideration of procedures or outcomes. Appeals, however, are administrative in nature and conducted by upper-level officials serving in the same dispute mechanism that made earlier decisions. Region or State bodies have authority to make final and binding decisions on issues in question. Decisions on contested farmland issues or judgements on appeals by ABsF are not appealable to an independent body or a GoRUM court.

The Central Committee for Management of Vacant, Fallow and Virgin Land (CCMVFVL)

In 2012, the Pyidaungsu Hluttaw (Assembly of the Union) passed the Vacant, Fallow and Virgin Lands Management Law (VFVLM). The law requires establishment of a Central Committee for Management of Vacant, Fallow and Virgin Lands (CCMVFVL) at the Union-level.

The CCMVFVL's principle authorities and duties, among others, are: classifying types of land; receiving recommendations for the use of VFVL from ministries and lower-level government bodies and officials; receiving and processing applications and granting "Permission Orders" for use of VFVL to diverse parties (individuals, private investors, government entities and NGOs); cancelling or revising terms for VFVL use and rights; and, with coordination and cooperation of other government entities, resolving disputes related to VFVL.⁹

The CCMVFVL is a national, multi-ministerial committee formed at the President's discretion. The Minister of Agriculture Livestock and Irrigation (MOALI) is the Chair and the Director General of DALMS is the Secretary. Other members include senior officials from various government ministries or departments and other suitable persons of the Chair's choosing. An amendment of the VFVLM in 2018 mandated the Central Committee to "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."¹⁰

9. Land Stakeholder Analysis: Governance Structures and Actors in Burma, Yangon, Myanmar, USAID/Tetra Tech, May 2017, 14.

10. Law Amending the Vacant, Fallow and Virgin Lands Management Law (2018) Pyidaungsu Hluttaw Law No. (24), September 11, 2018.

Government members of Committees for Management of VFVL and other investigatory bodies that may be formed at the Township level, like those of ABsF, are personnel from government entities with mandates to address land issues. Members are drawn from existing staff of ministries or departments and serve as collateral duty in addition to their normal work responsibilities.

When an application for VFVL is made to either the Central Committee, or in the case of landless citizens and smallholder farmers to a “relevant” Management Committee, which is not specified, it is referred to the appropriate Township Office to initiate an investigation of the request.¹¹ Township officials and staff of DALMS conduct an investigation, draw conclusions and make recommendations on land allocation to a Region or State Management Committee and ultimately the Central Committee. If an application is contested for some reason, or there is more than one applicant for the same parcel of land, the Township office is expected to conduct a second investigation and again forward its conclusions and recommendations to the appropriate Region, State and ultimately the Central Committee. If issues involved are complex, contentious or politically sensitive, a Region or State Management Committee may convene a Specialized Board to conduct another investigation, which must involve a site visit to the land in question.

Depending on the amount of land requested, either a Region or State Management Committee or the Central Committee has authority to make final decisions on land allocation or resolution of other disputes. Appeals of decisions made by Committees for Management of VFVL can be made to the Central Committee. Appeals of administrative decisions by Management Committees or the CCMVFVL cannot be made to an independent body or a GoRUM court.

The VFVML includes two circumstances where CCMVFV personnel are required to negotiate to resolve disputes over allocation of VFVL.¹² They both involve situations where the CCMVFV may have or has misallocated land that has historically or is currently being used by farmers who can demonstrate some form of valid use-right.

The 2018 amendment to the VFVLM and a subsequent notification by Central Committee in October of that year requires that anyone using VFVL land must register it by March 2019 and receive permission to continue using it. If farmers register their land, they will lose their historical and customary land rights in exchange for a 30-year use permit. If farmers do not register

the land and continue to use it, they risk eviction, imprisonment for two years and/or a 500,000 Myanmar Kyats fine. There is concern among farmers, many of whom will not have registered their land by the deadline, that implementation of the terms in the amendment will facilitate land grabbing by powerful parties and significant displacement of customary land users. If the terms of the amendment are enforced there will be a significant increase in land disputes and conflicts. The CCMVFVL will need timely and effective interventions to resolve them

11. Parties eligible to apply for a use-right for VFVL include: (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; (f) Investors who make foreign investments to carry out the businesses of mutual benefit with investors of Myanmar citizen in accordance with the Myanmar Investment; (g) The government, governmental organizations and Non-governmental organizations that are responsible to work for the landless citizens, smallholder farmers or resettlement and rehabilitation tasks. Law Amending the Vacant, Fallow and Virgin Lands Management Law, Chapter III Right to Cultivate or Utilize Vacant, Fallow and Virgin Lands, 5-a.
12. The CCMVFVL is required to negotiate under two circumstances: 1. "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"; or 2 "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". Notification No. 1/2012, Vacant, Fallow and Virgin Lands Management Rules.⁵² UN Habitat unofficial translation.



LAND CONFISCATION DISPUTES

Disputes over land confiscation by government institutions, companies and other powerful parties are common in Myanmar. As noted above, many disputes over village land, including some involving confiscation by villagers, can often be settled by local village leaders, elders or village committees. Others, however, over land confiscated by the military (Tatmadaw), government ministries or departments, private companies or other powerful parties are generally far beyond the authority and capacity of local leaders or communities to resolve.

Central Committee for Rescrutinizing Confiscated Farmlands and Other Lands (CCRCFOL)

In 2016 the GoRUM established by Presidential Orders the CCRCFOL at the Union-level and subsidiary Reinvestigating Committees (RCs) at Region and State, District and Township-levels.¹³ 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.”¹⁴

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. To date, there are no representatives of civil society on the Central Committee.

Region and State RCs are chaired by Chief Ministers of Regions or States. Government members are representatives of ministries and departments at that level concerned with land issues. Representatives of the Tatmadaw are also members.

District and Township RCs are chaired by GAD Administrators. RC members are from government departments from each of these levels. 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. In spite of CCRCFOL efforts to establish RCs at all Township and VT levels, there have been difficulties in implementing its directives.¹⁵

Parties with grievances over confiscation of land, can apply to any level of RC to intervene and address their concern. Like the two other GoRUM bodies with mandates to address land disputes, CCRCFOL grievance resolution procedures consist of a sequence of investigations and development of conclusions and recommendations by subsidiary RCs. If a subsidiary RC believes it has authority to make a recommendation or decision for involved parties on a grievance, it may do so. In the vast majority of cases, however, recommendations are forwarded by RCs to either a Region or State RC or the Central Committee for a final determination. Depending on the amount of land in question, either a Region or State or the Central Committee is authorized to make a final and binding decision.

Conclusions reached by RCs below the Region, State or Central-levels, which are unsatisfactory to one or more parties, can be appealed to upper-level RCs. Appeals, however, like those for the CABF and the CCMFVL are administrative and conducted by upper-level officials serving in the CCRCFOL. Decisions by the CCRCFOL and its RCs, or their judgements on appeals, are not appealable to an independent body or a GoRUM court.

13. Union of Myanmar President Office order letter No. 14/2016 issued on 5th May 2016.

14. Ibid.

15. 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 7th, 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.” “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/>. 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. 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).

CDR APPROACHES AND PROCEDURES

Collaborative Dispute Resolution encompasses a number of procedures that facilitate voluntary engagement of parties with a common problem, or that are involved in a dispute or grievance, to cooperate and discover or develop mutually acceptable agreements that settle their differences. Procedures generally involve face-to-face interactions between disputing parties, improvements in their communications and engagement in dialogue that results in some form of negotiated agreement or acceptance of a recommendation or decision by a third party. Procedures in Box 1: CDR Dispute Resolution Procedures, illustrates the range of kinds of processes available to disputants to collaboratively resolve their disputes or grievances.

Box 1: Collaborative Dispute Resolution Dispute Resolution Procedures

1

Conflict or dispute coaching

A process used by third parties to improve the capacity of one or more parties to a dispute to engage in resolution activities.

2

Communications procedures and skills

Methods used by parties to a dispute or third parties to enhance listening and speaking skills, ask appropriate types of questions, and issues and interests to be addressed.

3

Situation assessments/conflict or dispute analysis and strategy design procedures

Processes used by parties to a dispute or third parties to gather relevant information, increase understanding of disputants' issues and interests, interpersonal or intergroup dynamics, procedures that are or could be used to manage and resolve differences, potential options for resolution and strategies to move parties toward agreements.



4

Convening

Procedures conducted by a third party, or under certain circumstances by a party that is involved in a dispute, to conduct a situation assessment/conflict or dispute analysis and bring parties together to talk and address a dispute or grievance.



5

Facilitation

A third party process in which an acceptable individual or group provides process assistance to design and conduct a meeting. Possible functions and goals for meetings may include establishing or building relationships, gathering or sharing information, promoting greater understanding or determining ways forward to resolve an issue.

6

Fact-finding

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

7

Joint fact-finding

A process in which a dispute is investigated by committee or team composed of parties, both decision-makers and experts, from all “sides” and commonly external experts. The procedure involves a joint effort to reach a common understanding of facts related to the case and areas of potential or actual agreement.

8

Mediation

A third-party process in which a mutually acceptable individual or group helps involved parties in dispute or that are involved in a grievance to conduct productive negotiations and reach voluntary agreements.

9

Conciliation

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

10

Arbitration

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

WHY CONSIDER USING CDR: POTENTIAL BENEFITS FOR USERS AND DISPUTE RESOLUTION MECHANISMS AND THEIR PERSONNEL

CDR approaches and procedures can result in significant benefits for parties involved in land disputes – whether farmers and their families, government institutions and their personnel or company managers and staff. Use of CDR commonly results in:

■ Increased involvement of key and other concerned parties.

Because CDR procedures are less formal than administrative adjudicative processes, more people are often able to participate. Additionally, women and youth commonly feel more comfortable participating if the dispute or grievance resolution process is less formal.

■ Early, rapid and timely resolutions of disputes and grievances.

The GoRUM has committed on multiple occasions to the timely resolution of disputes and grievances, especially those that involve land confiscation. Given the complexity of cases and personnel and resources requirements to settle cases, the government has been unable to achieve its goal within its announced timelines. When CDR is used shortly after disputes occur or grievances are filed, they can often be satisfactorily settled in a timelier manner than if they have to go through a multi-level administrative investigation and adjudicatory decision-making process.

■ Greater opportunities for users to directly influence the dispute or grievance resolution process and outcomes.

Rather than having a decision made by a third party, CDR procedures involve dialogue, deliberation and joint problem-solving resulting in all parties having more direct control over both procedures and outcomes.

■ Lower transaction costs.

Using CDR frequently results in lower costs for all parties. For disputants, CDR generally requires fewer trips to the venue where a dispute or grievance is being processed to provide or obtain information; less time spent in a resolution process than is commonly required in a multi-level administrative procedure; fewer days away from regular work and less lost income; and fewer transportation, food and lodging expenses.

A significant lower transaction costs for government officials when disputes or grievances are handled and settled using CDR include less time required of upper-level officials – who are parties or administrators or members of committees providing resolution assistance – to directly engage in settlement activities. All that may be required of them is to review outcomes of CDR processes, and determine if they are acceptable, and congruent with



national laws and international standards. Additionally, there may be fewer time-consuming appeals as earlier decisions using CDR will have been accepted by all parties.

■ **Customized outcomes that better meet parties' interests.**

Opportunities for parties to a dispute or grievance to interact, directly share information and jointly explore their concerns often results in more customized solutions that accommodate and address diverse interests. CDR procedures often provide a more sophisticated resolution process and outcomes than those that rely exclusively on administrative reviews and decisions.

■ **Lower possibility or effectiveness of bribes or corruption.**

In CDR, because the intermediary, if one is used, is accepted or approved by all disputants or grievants, is not a decision-maker unless all parties authorize him or her to play this role, and final decisions on outcomes rest with the participants, bribes and corruption are less likely to occur or be successful.

■ **Lowered tensions between the GoRUM and members of the public over unresolved land disputes and grievances.**

Delays in processing and resolving land disputes and grievances have often resulted in protests and escalation of clashes between GoRUM law enforcement officials and members of the public. More efficient and timely resolution of land disputes and grievances using CDR can demonstrate the government's resolve to settle cases, lower the potential for physical harm to protestors and law enforcement officials and can help foster more peaceful conditions and relationships in communities and villages where contested land is located.



■ CONDITIONS THAT PROMOTE SUCCESS OF CDR

CDR approaches and procedures are not appropriate for the resolution of all land disputes or grievances. There are, however, a number of conditions, which if present, indicate that CDR should be considered, used and will likely be successful.

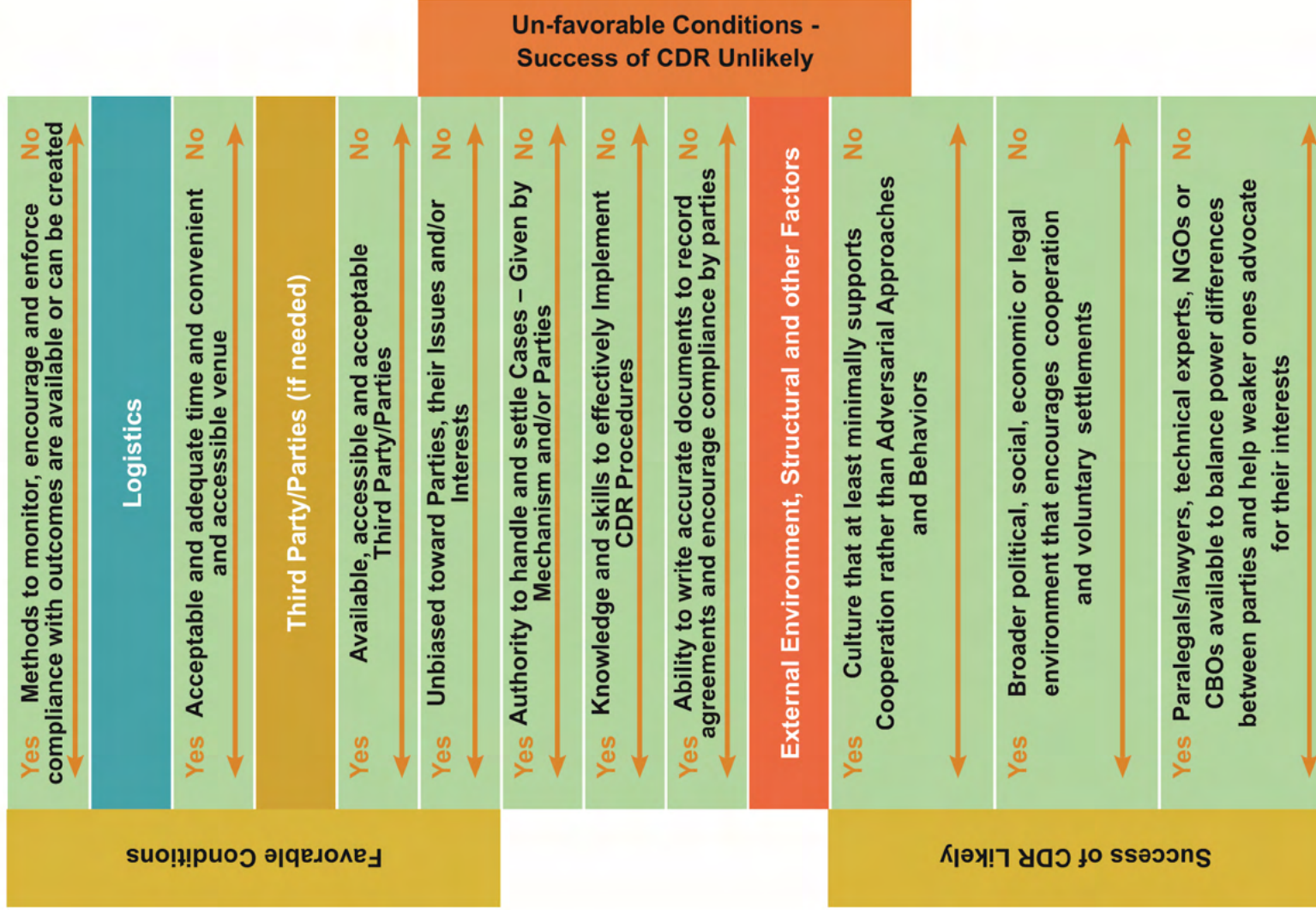
Table 1: Continuums of Conditions that promote Successful Use and Outcomes of CDR, presents some of the most important conditions that make CDR either more or less viable as a dispute resolution process and successful in helping parties resolve disputes or grievances. Each condition is on a continuum. The more a condition trends toward the left-side of the table, the more likely it will support the success of CDR. The more the condition trends toward the right side of the table, the less likely CDR will be successful.

Table 1: A Continuum of Conditions that Promote Successful Use and Outcomes CDR

Parties		
Yes	Identifiable and Accessible	No
Yes	Willing to try CDR	No
Yes	Organized and have capacity to engage in CDR	No
Yes	Possession of or obtainable accurate information and compelling evidence	No
Yes	Capacity to effectively advocate for their interests	No
Yes	Sources of effective Power and Influence and willingness to exercise it	No
Parties (Continued)		
Yes	Authority to Reach Agreements	No
Procedures		
Yes	Availability of appropriate and effective CDR procedures	No
Yes	Willingness to use an Interest-Based Negotiation (IBN) process	No
Issues, Interests, Options and Outcomes		
Yes	Satisfaction of parties' interests not mutually exclusive	No
Yes	CDR processes and resulting agreements likely be most effective procedures and satisfactory outcomes in comparison to alternatives (no-settlement, potentially unfavorable third-party decision, etc.)	No

Favorable Conditions **Success of CDR Likely**

Un-favorable Conditions - Success of CDR Unlikely



AVENUES FOR INCORPORATING CDR IN MYANMAR'S DISPUTE RESOLUTION MECHANISMS

Customary Dispute Resolution Mechanisms

Approaches and procedures used in customary dispute resolution vary by community and village. Some emphasize joint collaborative problem-solving – such as informal talks between or among disputants without or with informal help by members of villages, commonly termed “justice facilitators”; formal negotiations; or mediation by a customary leader or village committee. Others primarily rely on local leaders or committees providing recommendations for settlements or making decisions using customary arbitration. (The latter involves the use of customary processes and established community traditions, norms and practices as methods and standards to reach decisions.) Regardless of procedures, the goal of customary dispute resolution is to help disputants reach consensus agreements that all parties can voluntarily accept, “live with” or, at a minimum, will not oppose.

Many customary dispute resolution processes are similar, if not identical to CDR approaches and procedures, the majority of which also endeavor to help disputants reach consensus agreements. For this reason, it should be feasible to introduce CDR methods to enhance processes currently being used in villages and communities and to add new ones where there are gaps. When introducing and implementing CDR, however, care should be taken to stress that third parties need to be unbiased in their relationships to parties and their issues and interests. They should also avoid applying local norms that may discriminate against women, minorities or other vulnerable parties.





Administrative Dispute and Grievance Resolution Mechanisms for Land Allocation, Use and Confiscation

As noted earlier the dispute and grievance resolution mechanisms and procedures of the CABF, CCMVFVL and CCRCFOL and their subsidiary bodies or committees principally rely on administrative investigations and decision-making rather than collaborative dispute resolution. There are relatively few places in any of the administrative procedures where parties to a dispute or grievance can be or are directly involved in dialogue and deliberation to resolve their differences. This does not, however, mean that there are not potential opportunities for incorporation of CDR in these mechanisms. Described below are a number of places where CDR could be introduced, implemented and institutionalized in the GoRUM's land dispute and grievance resolution mechanisms.

Central Administrative Body of the Farmland (CABF)

VTAs and ABsF at the Village Tract level have authority to accept disputes over farmland issues that have not been resolved at the village-level. Because VTAs and their committees are members of local villages, knowledgeable about customary dispute resolution practices and are structurally located between villages and Township Authorities, many of which utilize administrative decision-making, VTAs frequently use a blend of customary and administrative dispute resolution processes. Because of the similarities between many customary and CDR processes, work with VTAs and Village Tract ABsF should be a major focus for future CDR programming and capacity building.

Township Authorities (TAs) ABsF commonly receive cases that have not been settled at the Village Tract level or that are brought directly to them by parties who have documents they believe prove their use-rights. Some TAs, because of their personal preference and desire to foster peaceful relations in the townships they administer, use collaborative processes. For this reason, CDR approaches and procedures should be introduced to TAs and Township ABsF to enhance practices that some TAs are already using and encourage others to use them. Use of CDR at the Township-level can help promote early resolution of some disputes and result in significant savings of transactional costs.

Above the township-level, CDR can be used at almost any stage of appeals, from District to Region or State ABsF, if the CABF and involved parties are amenable. Administrators at these levels should be introduced to potentially useful CDR procedures including convening, joint fact-finding, negotiation, meeting facilitation, mediation, conciliation, and processes for making interest-based and rights compatible recommendations or decisions.

Central Committee for Management of Vacant, Fallow and Virgin Land (CCMVFL)

As noted earlier, the CCMVFL is the only GoRUM land dispute mechanism specifically mandated to use a CDR procedure, negotiation, to settle disputes between parties when land historically occupied by villagers

for a long period of time has been designated by the CMVFVL as VFVL and allocated to another party. There are, however, three other places in CCMVFVL procedures for VFVL allocation and implementation where CDR might effectively be used as either a “prevention” or “intervention”:

1

During initial investigations of applications for VFVL conducted by Township Administrators, DALMS and other land related departments;

2

In subsequent investigations conducted by Special Boards established by the Central Committee and Region or State-level Management Committee when requests for land allocations are contested or there is more than one applicant for the same parcel of land; and

3

When differences arise between the CCMVFV and land-use permittees over the latter’s compliance with terms and conditions of their permits. CDR procedures most relevant for these times in the CCMVFVL process are situation assessments, convening, facilitation, joint factfinding, negotiation and facilitation; potentially mediation and conciliation and procedures for making interest-based and rights compatible recommendations or decisions; and monitoring and voluntary compliance procedures.

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Use of CDR in the initial investigation for VFVL allocation can potentially help prevent serious future disputes – such as claims of mis-allocation, refusal of current occupants to vacate VFVL allocated to others or the seizure of land by customary users who do not believe their rights have been recognized. The direct engagement of concerned parties to develop consensus agreements on appropriate outcomes of land applications can often prevent future problems.

Township Administrators, when conducting investigations can enlarge the number of participants involved and engage parties with different views and interests in joint-fact finding. Township Administrators can either serve as facilitators of the process, designate a member of their staff or another person from an involved department or appoint an independent third party.

If it appears that parties' interests might be reconcilable, the person serving as the facilitator may, with the concurrence of involved parties, shift their role to that of either a mediator or conciliator and assist then to try and reach an amicable accord. If parties reach an agreement, and the Township Administrator concurs, he can report the outcome to the appropriate upper-level Committee for appropriate action.

If there is no agreement, and the Township Administrator has served as the intermediary, he or she should recuse him or herself and not make a recommendation on the land allocation question and report only the lack of agreement to the appropriate upper-level committee of the CCMVFL. This result will trigger the formation of a Special Board by the CCMVFVL and Region or State Committee to conduct another investigation and make a recommendation back to the initiating Committees.

If, however, mediation or conciliation was conducted either by a designee of the Township Administrator or an independent mediator, and the Administrator has only observed the process, he or she may use the information used in joint factfinding, mediation or conciliation and make a recommendation to an upper-level committee on how the application should be handled.

Joint factfinding, mediation and conciliation can also be used to address disputes related to use-right holders' compliance with their land-use permits. Third-party assistance can be provided either by mutually acceptable member of a Management Committee, one or more members of a Separate Board formed by the CCMVFVL to inspect cases and matters relating to rights to work on and utilize VFVL granted by the Naypyidaw Council or respective Region or State. Mediation and conciliation can strive to find solutions that result in voluntary compliance with use-right terms and conditions as an alternative to enforcement actions.

Central Committee for Rescrutinization of Confiscated Farmland and Other Lands (CCRCFOL) and its subsidiary Rescrutinization Committees (RCs)

The Presidential Orders establishing CCRCFOL in 2016, mandates the Central Committee to establish subsidiary Rescrutinization Committees at Region or State, District, Township and Village Tract levels. The initial filing of a grievance by a party who claims their land has been illegally confiscated is often to a Village Tract Rescrutinization Committee, if it exists or is operational, although claims can be filed with any, or simultaneously to multiple levels of RCs. RCs at the Village Tract level rarely have authority to settle these kinds of cases unless the claim is very small. Grievances are usually forwarded to the Township RC to begin processing.

Like the subsidiary bodies of the ABF and CCMFVL, RCs at the township and district levels conduct investigations, draw conclusions and make recommendations to upper level RCs or Region, State or Central Committees. It is during or immediately after initial investigations that CDR procedures can be most helpful. Similar procedures as those proposed for investigations of applications of VFVL conducted by Township offices can be used to engage claimants, respondents and other knowledgeable parties in seeking mutually acceptable settlement of grievances.

If RCs and concerned parties can reach an agreement on the merit of a claim through joint factfinding, the chair of the RC or and independent third party, can provide mediation or conciliation assistance to help parties reach agreements on whether or not the land will be returned, alternative land provided or what amount or form of compensation will be paid. Joint factfinding, mediation or conciliation can also be used by upper-level RCs or Region or State Committees as methods to handle appeals.




RECOMMENDATIONS AND WAYS FORWARD

CDR approaches and procedures are clearly feasible as methods to resolve disputes and grievances over land issues. It is possible to introduce, implement and institutionalize them in existing customary and statutory administrative dispute and grievance resolution mechanisms. To achieve this outcome, key actors should consider the following actions:

The Government should:

- Instruct the Union Coordination Body for Rule of Law Centres and Justice Sector Affairs to draft proposals for changes in national policies and laws to authorize and encourage the use of CDR to resolve land disputes and grievances.
- Amend the FL and VFVLMML to allow use of CDR to resolve disputes over allocation and use of farmland and VFVL and to settle disputes over compliance of use-right holders with the terms and conditions in their permits.
- Revise the Presidential Order that establishes the CCRCFOL to authorize and encourage the use of CDR to assist in the resolution of grievances and claims over illegally confiscated land.
- Revise the National Land Policy to include, authorize and encourage the use of CDR to assist in the resolution of land disputes and grievances over land allocation, use and illegal confiscation.
- Develop and promulgate new guidance and rules for the operation of the CABF, CCMVFVL, CCRCFOL and their subsidiary bodies and committees that will allow them use CDR as part of their land dispute and grievance resolution mechanisms.
- Open access to and support CDR training of GoRUM administrative personnel – from the GAD, ministries, departments, VTAs and their respective committees – involved in resolving land disputes and grievances.
- Continue to support training in CDR for GAD officers who attend the Institute for Development Administration (IDA) who in the future will be appointed Deputy Township Administrators and be involved in land dispute and grievance resolution.


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- Establish an independent, neutral and impartial governmental body empowered to review and adjudicate decisions and outcomes of appeals made by the CABF, CCMVFVL and CCRCFOL. The body should have the authority and capacity to enforce its decisions. The presence of this body will help ensure the legitimacy, fairness, and transparency of administrative decision-making and that their conclusions comply with national laws, international human rights standards and “best practices” for government institutions providing dispute and grievance resolution assistance.

Donors should:

- Encourage the GoRUM to implement changes in policies, laws, Presidential Orders, guidance and rules described above and respond to requests for technical assistance and funding to support these initiatives.
- Provide sustained funding for INGOs, NGOs and CSOs with expertise and capacities to provide both direct CDR services and capacity building for government personnel and members of civil society.
- Provide sustained funding for INGOs, NGOs and CSOs with capacities to provide legal and technical assistance to civil society parties involved in land disputes or grievances so they can participate in CDR initiatives on a more equal footing with powerful parties.

Civil Society – INGOs, NGOs and CSOs – should:

- Expand provision of CDR training for VTAs, Township Administrators and their committees as these individuals and bodies are generally the entry point where many disputes or grievances are filed and can potentially be resolved.
- Expand informational training on CDR for government officials, bodies and committees involved in land issues at District, Region and State-levels to help build support for the processes and enable them to resolve appeals.

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- Provide direct CDR services, when feasible and acceptable to involved parties, to assist them to effectively utilize the procedures and reach agreements.
 - Provide legal and technical assistance to civil society parties involved in land disputes or grievances to help balance power differences between parties and enable them to participate more effectively in CDR processes.



