



June 2017

MYANMAR'S FORAY INTO DELIBERATIVE DEMOCRACY: CITIZEN PARTICIPATION IN RESOLVING HISTORICAL LAND GRABS

In May 2016, Myanmar's Vice President established a Central Land Grab Reinvestigation Committee to accelerate the resolution of land grab cases and ensure that affected civilians do not suffer further.¹ These committees are replicated at each administrative level and similar to their precursor mechanisms, but with one unique and important difference – they include “farmer’s representatives” at each administrative level from village tract to state/region level.² This 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. These non-governmental representatives, who are often members of civil society organizations (CSOs), serve two functions in these committees: they serve as advocates and conduits of information to the claimants, and in some instances they provide knowledge of local dynamics and history to the rest of the committee.

The inclusion of non-governmental representatives in these committees is a courageous step by the government and should be commended. Moreover, we recognize that government and non-government representatives serving on committees are doing so with limited additional budgetary or human resource support in addition to their regular full-time duties.

As with any new institution, there is room to grow. Namati and a coalition of non-governmental representatives serving on the Reinvestigation Committees offer this brief to reflect on the work of the committees one year on. It is hoped the brief will help strengthen the implementation of the Reinvestigation Committees, making them more responsive to the lived experience of ordinary Myanmar citizens trying to secure their land rights.

¹ Union of Myanmar President Office order letter number 14/2016 issued on 5th May 2016.

² There is no civil society or farmer’s representative at the Central Level Committee. The language of the notification says “farmer’s representative” and does not specify any further details. As such, this brief will refer to the individual filling this spot as a non-governmental representative, as in reality some are CSO staff with technical land experience and some are respected local farmers.

I. The NLD government demonstrated its commitment to resolving historical land disputes by creating the Farmland and Other Land Grab Reinvestigation Committee in one of its first acts of government.

During Myanmar's transition from a military to partially-democratic government under President U Thein Sein from 2010-2015, a Parliamentary Investigation Commission was established to study land grab claims and issued a series of reports and recommendations as to how justice for historical land dispossession should be restored to Myanmar's citizens. Thousands of land grab cases were reported to this commission; however, the commission's mandate was simply to investigate and advise the Central Land Use Management Committee.³ Parliament had no jurisdiction to render a verdict or binding decision on these cases. At the end of Thein Sein's government in March 2016, the Parliamentary Commission and Central Land Use Management Committee ended, leaving hundreds of uninvestigated and unresolved cases.⁴

Justice for farmers was a central part of the National League for Democracy's 2015 election manifesto.⁵ It gave hope to the farmers and communities affected by historical land grabs, especially those continuously trying to reclaim their land rights without success under the mechanisms available at the time. On May 5, 2016, only one month after the NLD formed a government, the President of the Union of Myanmar announced the Central Reinvestigation Committee, to be chaired by Second Vice President Henry Van Thio. The articulated purpose of the committee is to accelerate the resolution of land grab cases.⁶ The committee mechanism has three roles; to investigate cases, to resolve whether land should be returned or compensation paid, and to monitor the release and return of land to rightful owners. This order also stated that no further land acquisitions should be approved until all pending cases are resolved.

In June 2016, the Central Committee guided the respective state/region, district, township and village tract authorities to form Reinvestigation Committees at their respective levels⁷. At the sub-national levels seats were allotted for members of civil society organizations working on farmers' affairs, respected community elders and Members of Parliament (MPs) to work alongside the civil servants of respective departments within the committee.

II. Each member of the Reinvestigation Committee does not have equal bearing on the investigation and recommendations in a case.

Committees operating at each administrative level have different sets of responsibility.

The Central Committee generally provides oversight and establishes reinvestigation policy. The Secretary of the Committee is the Deputy Minister of Home Affairs: the Ministry responsible for Myanmar's civil service, which is controlled by a military-appointed minister. Though both the Minister and Deputy Minister of the Ministry of Home Affairs are in the Central Committee, there are no seats for civil society or community representatives or MPs.

³ Report of Central Land Use Management Committee mentioned on the News Lights of Myanmar Newspaper dated 17th March 2016.

⁴ *Ibid.*

⁵ 2015 Election Statement of National League for Democracy Party.

⁶ Union of Myanmar President Office order letter number 14/2016 issued on 5th May 2016..

⁷ Land grabbing reinvestigation Central committee order number 39/1-Committee-Land (Central)/2016 dated 9th June 2016.

The guidelines allow for the state/region level committees to form specialized groups that include members of the Regional, Township, and District Committees in order to investigate particularly complicated cases or those which affect a large number of farmers. Further details are not provided within the guidelines themselves.

In Magwe Region, such a special group has been formed under the leadership of the Regional-level CSO representative. This has allowed him to provide his expertise to lower levels more directly, and also to speed up the timeframe for resolving cases rather than having to wait for investigation reports to filter up to the regional level. The appointed group is directly involved in the investigations conducted by the committee.

The state/region level committees are led by the Chief Ministers of each state/region and have the mandate to resolve cases and monitor the return of land to the correct owners. In addition, the state/regional committee has to coordinate with the related government departments and institutions, and provide directions to the lower level re-investigation committees to accelerate the process of resolution.⁸ In reality, however, the

state/region level committees often defer decisions on sensitive (i.e. military) cases to the central level, even if a clear decision could be rendered based on the Committee's guidelines. This level is also meant to provide support to the lower-level committees. Generally, members of the committees at the state/region and district levels can be classified under four categories; 1) government department representatives; 2) military representatives; 3) MPs and 4) CSO and community representatives. This structure, excepting the military representative, is replicated at the district, township, and village tract levels. These committee levels take responsibility for investigating each case and making recommendations to higher level committees as to how they should be resolved.

Each category of members brings an important perspective and skillset to the committee.

Government ministry and department representatives and military representatives have better understanding of their department works and greater

"I could stand on behalf of community and farmers inside the committee and raise voice and true facts from the ground. I could also understand better what the challenges of the government staff are. Because of the friendly communication and mutual respect within the committee member, it is great to engage with them also for other matters... Though the relationship is good personally, I have to fight related to the cases when the government members only stand for government/military and not considering much for the beneficiary community." Non-governmental representative

access to information through their full-time positions in government. MPs and representatives from communities and CSOs have greater understanding of grass roots community conditions, as this is where their own work is focused. For example, they know the reality of land tenure history in the area (i.e. who owned which land); real land management practices by both government and community actors, and the level of adherence to the law⁹; They also have trust from the communities and experience explaining complicated procedures and rules in understandable terms.

Including each category of members:

- Creates checks and balances within the committee as government staff do not have sole ability to decide on land grab dispute cases.
- Provides opportunities among the members to better understand the situation of each side by meeting regularly or upon request as needed.

⁸ The instructions do not explicitly specify any one level as having the authority to make binding decisions about cases. However, on balance the instructions suggest that it is the Region/State level that has the most responsibility in finding solutions to these cases.

⁹ Historically many land laws were not enforced in Myanmar. As such, reviewing cases only with respect to written law may give a legally correct but unjust outcome. See for example: Streamlining Institutions to Restore Land and Justice to Farmers in Myanmar, Caitlin Pierce and Nwe Ni Soe, 2016.

- Farmers and CSO representatives have an opportunity to officially bring local context to land grabbing case resolution discussions and on-the-ground investigations.
- MPs have an opportunity to deliver the voice of respective communities to in the committees
- Creates opportunities for resolving smaller complaints through local negotiation

Non-governmental representatives face the following barriers to full participation in committee investigations and decision-making:

A) *Lack of access to official information like maps, acquisition records, etc.* While each individual committee has different dynamics and operates with some discretion,

“Even among the government department representatives, the Chairman and Secretary of the committees are influential within the committee as they have better access to information compare to other government officials from different departments and CSO reps.” CSO Representative

one consistent issue across committees is the lack of equal access to information between government and non-government members. Government committee members tend to have more access to information not as a function of their role on the committee, but due to their position as government employees. This can put non-governmental members at a disadvantage on specific cases and impede their ability to advise an appropriate resolution. They generally depend on their government counterparts to share relevant information with them.¹⁰

B) *The Secretary (always a government representative) is the first stop for deciding whether to investigate a case further.* The Secretary of the committee usually takes responsibility for vetting incoming complaints to ensure that they fall under the committee’s purview. Cases that pass this first level of scrutiny are then discussed within the committee on a monthly basis. If a case does not pass the Secretary’s scrutiny, it is either rejected or passed along to other relevant committees, such as the Farmland Management Committee. Comments and recommendations on the cases are given based on the agreement of a majority of committee members’ votes. The committee’s Chairperson and Secretary usually take charge of writing the case reports and also tend to influence other members’ recommendations during deliberations, especially when non-governmental representatives are not very strong.

“The Township Administrator [Chairperson of township level committee] has the most powerful role, because he controls everything.” Township CSO Representative

C) *Especially at the township level, ingrained power dynamics can limit non-governmental representatives’ voice.* Some non-governmental representatives are worried about demonstrating strong opposition to the Chairman at the township

level in particular, as this post is always held by the Township Administrator, who has influence over many parts of citizens’ lives outside of these committees. Some of this influence may be unintentional; given the authoritarian history of Myanmar; even some strong civil society actors are not experienced with opposing government opinion. These dynamics are slowly changing in Myanmar, but will take time.¹¹

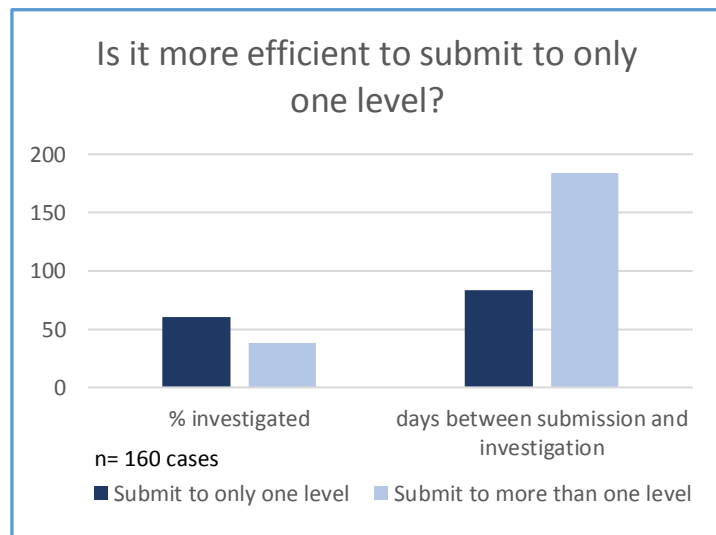
¹⁰ This is consistent with broader access to information issues in Myanmar. According to PEN’s 2017 scorecard for Myanmar, “Most ministries ignore requests for information or tell you to go somewhere else.”

¹¹ See for example: Documenting Myanmar’s Social Transformation: Insights from six rounds of research on livelihoods and social change in rural communities, World Bank, May 2017.

III. Despite efforts by the government to streamline the case review process; duplication, lack of transparency, and resource constraints continue to negatively compound each other.

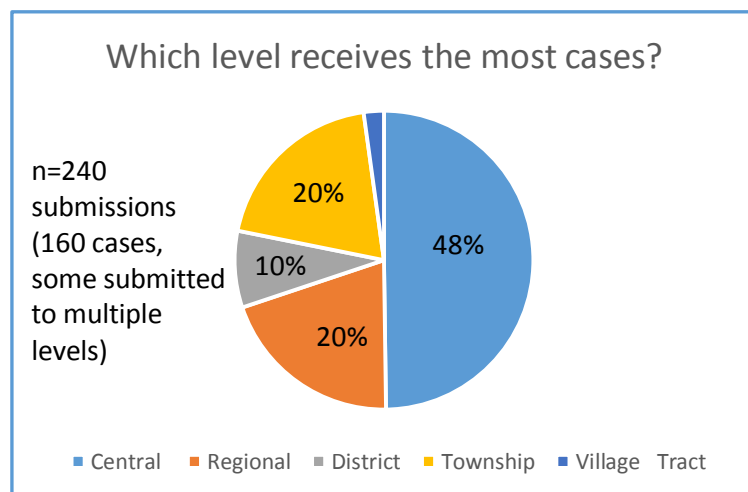
In addition to the insights of non-governmental representatives, this brief also draws on the quantitative data collected through each of Namati’s cases. Namati and our partners have assisted with 160 cases (involving 2,850 farmers and almost 15,000 acres) in the reinvestigation process across Bago, Sagaing, Shan, Rakhine, and Ayeyarwaddy. This data helps provide insight on how cases are moving through the system.

The overlapping institutional authority and multiple routes that a case can take towards investigation is covered in detail in the diagram on page 7. While it is positive that the government is open to receiving cases at all levels and it is better to have too many, rather than too few, routes into the system, it creates a cluttered system of review.



Lack of clear instructions for submitting claims and timelines for review lead to duplicated efforts.

A welcome development in the implementation of new committees vis-à-vis the previous mechanisms is that some members have published guidance in newspapers or on Facebook about what type of information claimants should include in their submissions. However, this has not been done in an official or systematic way. Complaints are currently accepted at any committee level. Farmers therefore don’t know whether their case is being reviewed, and so they try multiple approaches to be heard. Namati’s case data shows that cases are submitted to all levels, with over 50% of cases submitted to the central level; of these, almost half are submitted to the central level only. Currently, the Secretary of the committee that receives the complaint must sign and reply upon receipt, but progress of the cases is not systematically updated to the complainants. Namati’s case data suggests that in 52% of cases, farmers submit their claim to more than one level concurrently. This creates a situation where the committees are unnecessarily taxed. As one non-governmental committee member shared, “we often receive the same case from the level above and below us. Sometimes because the case is written differently, we only realize it is the same case after we read all the information completely.” This duplication of efforts and expenditure of extra human resources on



the same case may in part explain why the new Reinvestigation Committee mechanism has not yielded faster resolution of cases compared with previous mechanisms.

Committees can refer regular land disputes to other administrative mechanisms, but in practice the guidelines for doing so aren't clear.

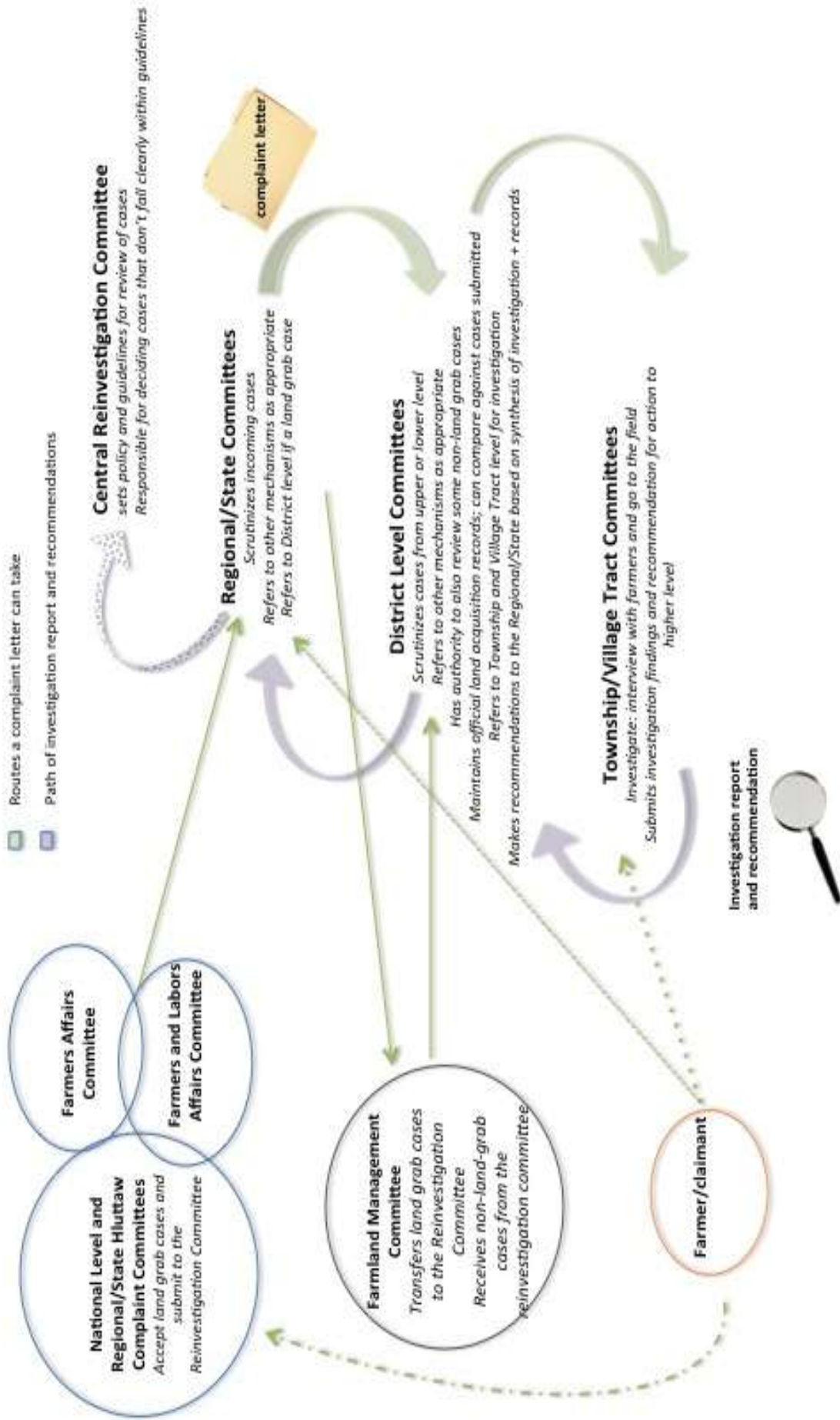
Committees can refer cases to other bodies tasked with dealing with non land-grab land disputes, and can also receive cases referred by these other administrative or Parliamentary committees. In practice, many of the referrals happen through individual connections between the committee members, rather than a formalized process. Supervision between the levels of committees is top-down rather than horizontal, making it difficult in some instances to decide which structure can best handle a particular case. Some non-governmental representatives suggest that having coordination meetings between the Reinvestigation Committees, Vacant Fallow Virgin Land working group, and Farmland Management Committees to discuss cases that fall into different mandates could be helpful to ensuring that all cases are addressed.”

Some Reinvestigation Committees have tried to reduce this duplication of effort by only investigating cases they receive from a higher level; but this means that cases they receive directly wait unresolved if not also submitted higher up the chain. Several Parliamentary Committees also refer cases they receive to the Reinvestigation mechanisms; these committees have responsibilities to protect the rights of farmers; propose any amendment/pepeal/enactment of laws or rules of the government departments that concern farmer and labor affairs; monitor the implementation of laws concerns; and review complaints. Of 160 cases that Namati and our paralegals have assisted in the Reinvestigation Committees, only five have been referred from a different governmental body; 50 cases had previously been submitted to other government mechanisms and had to be re-submitted directly by the claimant to these new Committees.

A lack of public-facing transparency leads to speculation and extra work for non-government representatives.

Committees are required to publish monthly lists of land that is released or not released; but are not required to provide reasons alongside the decisions. However, in reality, case progress is primarily reported only within the system up to the state/region level committee and is not officially shared with the public. Many claimants, have been trying to obtain justice for several decades; and are deeply invested in the details of their case. For many of them this is a question of a renewed livelihood: over 70% of farmers with whom Namati is working to navigate these committees do not have access to any other land. As such, farmers attempt to gain information about their case progression through personal connections, such as the non-governmental representatives known to them. Of the 160 cases in which community paralegals are currently assisting farmers to navigate the mechanism, it is unknown which level is currently reviewing the case in 11%. These cases map almost perfectly to geographies in which these paralegals have weaker relationships with government; where paralegals know the status of their clients' case, it is because they have sought that information, not because it has been volunteered by the committees. In most places, the committee does not have a separate office space or signboard, with meetings usually conducted at the General Administrative Office compound.¹² In that context, non-government

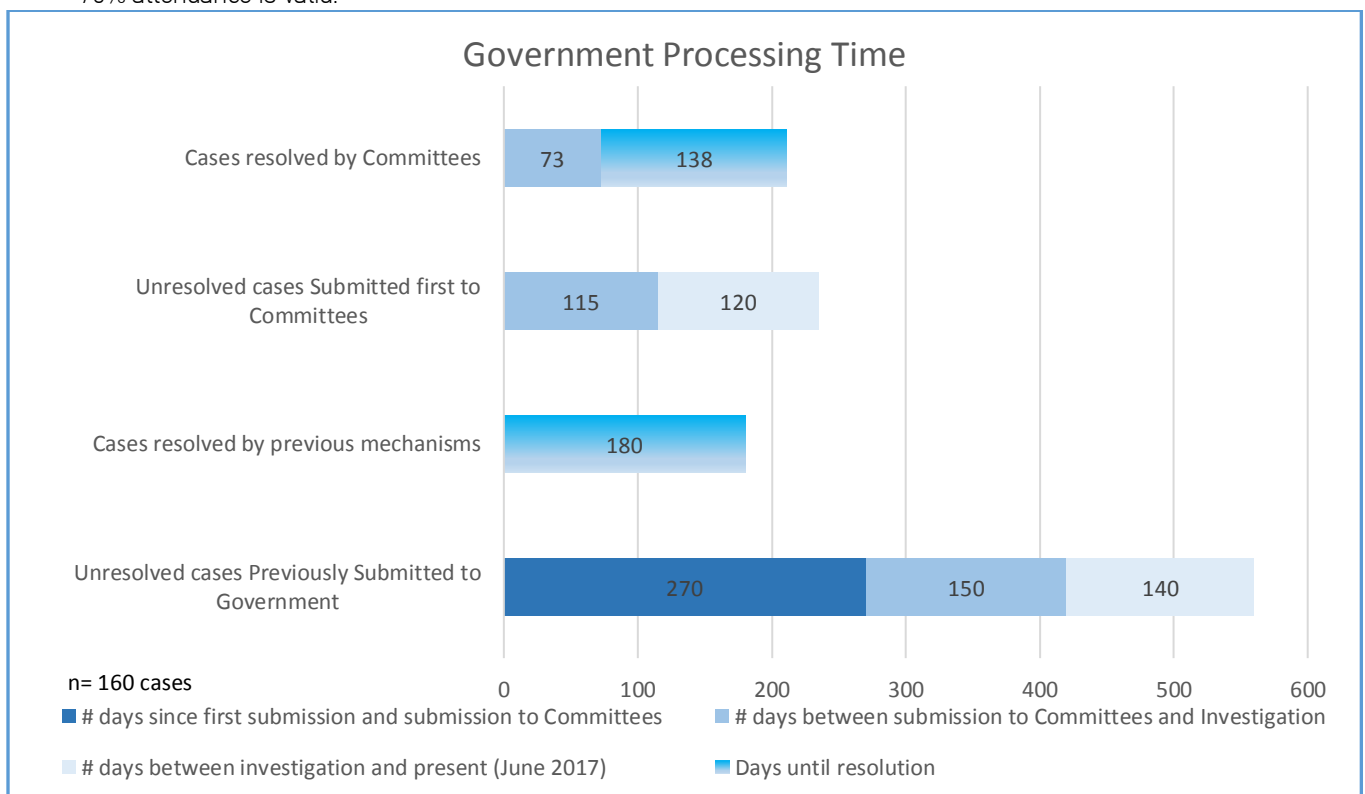
¹² In some areas, committee members received support for transportation, accommodation and refreshment for investigation visits but others (especially the non-governmental representatives) received no transportation support for investigations. The costs of the meetings and documentation are supported by the General Administrative Department.



approaches them to present their cases or follow-up on the progress of their submitted complaints.

Lack of dedicated resources makes it difficult for the Committees to meet deadlines.

Namati's data (see below) shows that for cases resolved before May 2016, processing took an average of 180 days; cases resolved through the Reinvestigation Committees are taking an average of 210 days to process. Unresolved cases at the time of data collection had been open an average of 235 days. This may be due in part to a steep learning curve at the time the new mechanism began operating; the time between investigation and resolution is only an average of two months.¹³ In practice, it can also be difficult for lower level committees to meet deadlines requested by their superiors. For example, in Bago a township asked for a Village Tract Committee to conduct an investigation and report back within two weeks, but the village tract level was unable to do so because a) committee members have responsibilities outside of their committee work; b) schedules do not always align to conduct the investigation; c) lack of resources means that after completing an investigation, the committee might need to wait several days for a computer to become available to type the report; d) final reports may be delayed by the need for the committee members to return to the office to sign them. The land grab reinvestigation cases are an extra responsibility for non-government and government members alike. In committee meetings it is difficult to get the attendance of all members, thus, some committees have decided 75% attendance is valid.



¹³ Institutional inefficiency is, of course, not the only cause of delay and multiple submissions of the same case; for example, some military land grab cases fail to move forward when the relevant military representative doesn't come to the investigation committee or refuses to support investigation into a particular case.

IV. Non-governmental representatives serve as experts on subject matter and local context to advise on land policy and history in order to help the committees render holistic recommendations for justice

There are currently over 75 active laws related to land governance in Myanmar.¹⁴ There are also several annulled laws that remain central to the history of cases currently under review. The Central Committee has set five guiding policies for handling land grabs cases; three policies related to military land grab cases; and eight procedures to scrutinize land grab cases¹⁵ and the return of released land to the individuals concerned.¹⁶ Understanding both the letter of the law and how it has been applied in practice is critical to analyzing claims. Aside from the Land Records Department, many government committee members in general do not have a strong grasp of land laws and in particular how they have been historically applied. For example, MPs and political parties feel compelled to support the work of these committees, as they are accountable to the public; however,

Decision-making, not investigation, is the problem.

Since May 2016, Namati has assisted with 61 cases involving a military grabber; 40 cases involving a government grabber; 21 cases involving a company; and 11 cases involving individuals.

Over 50% of these cases have been investigated (75% of government cases and 60% of cases involving the military) and it has only taken on average 4 months between the time of submitting a case to the committees and an investigation. However, fewer than 5% have been resolved i.e. land released, land returned, compensation paid, or client is informed that they will receive nothing. It is also plausible that these averages are higher than in the general case population, as the cases in this sample have the support of trained paralegals.

This 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.

the CSO representatives find that there is a steep learning curve of technical land issues and law for these elected officials.

Some committee members aren't able to give these cases serious attention as they have to conduct their regular business or work in parallel.

This makes it difficult to spare sufficient time or to request the additional information needed to understand a case. According to the 2008 Constitution, the responsibilities of the General Administration Department (GAD) can be categorized into four main tasks: tasks assigned by the President's Office and Union Government; functions entrusted by the Ministry of Home Affairs; principal duties and functions of the GAD; and tasks delegated by other sectors. The GAD's main objectives are: promoting rule of law; promoting community peace and tranquility; overseeing regional development; and serving the public interest. Land management is just one of the department's main responsibilities. Since the enactment of the 2012 Farmland law, the department has been playing an important role in the resolution of normal land disputes

¹⁴ Leckie, S. and E. Simperingham (2009) Housing, Land and Property Rights in Burma. Vol. 8. Geneva: Displacement Solutions and the HLP Institute. For a more in-depth discussion of the gaps and problems with this abundance of land laws, see, for example, "Are the odds for justice stacked against them? Challenges and opportunities to solving land claims by smallholder farmers in Myanmar," SiuSue Mark, May 2015; or "Streamlining Institutions to Restore Land and Justice to Farmers in Myanmar," Pierce and Soe, June 2016.

¹⁵ Land Grabbing Reinvestigation Central Committee order number 61/1-Committee-Land (Central)/2016 dated 10th June 2016; in April 2017 the Central Committee provided 8 additional points of guidance in an internal memo to the lower level committees as to how to decide compensation, return, and prioritization of cases.

¹⁶ Land Grabbing Reinvestigation Central Committee order number 66/1-Committee-Land (Central)/2016 dated 10th June 2016.

through the Farmland Management mechanism. The addition of Reinvestigation Committee responsibilities, which were added in 2016, was not accompanied by new resources. Yet these cases are complex and meant to be completed under an unrealistic timeframe. MPs also find it difficult to be present at the village tract and township level committee meetings.

Local expertise is particularly important, as the committees lack full guidance on how to assess cases.

Interviewees say that guidance instructions from the central level are improving, but there are so many nuances in each case that it can be difficult to reach a common understanding between all committee members. For example, the guidelines say nothing about the reason why land can be retained by the entity in currently in possession, but the reason most often given by ministries and the military who want to retain possession of land is that they are planning to use it for a “future project.” As with many land laws and policies in Myanmar, this is in part because the law and its application have not been consistent across the years. The best non-governmental representatives have spent their careers working for organizations focused on land issues. They also have broad networks of other land experts and connections with Farmers Unions, whom they can call on for additional subject matter or local expertise when needed. Critically this cohort has seen over the years how land law and its implementation has changed. They have knowledge not just of the law, but also of the realities of farmers on the ground and why, for example, a farmer might no longer have tax receipts or other supporting documents for a claim. The lack of clarity on guidelines can also serve as an excuse for lower level committees to defer recommendations on sensitive cases to the central level.¹⁷

¹⁷ Land Grabbing Reinvestigation Central committee order number 61/1-Committee-Land (Central)/2016 dated 10th June 2016 allows for cases that cannot be decided based on the provided recommendations to refer cases to the Central level for review and decision.

Non-government representatives help communities get one step closer to justice after 20 years

U Kyaw Lwin and 81 other farmers from Pyay Township lost their land as part of a confiscation by the Ministry of Agriculture in 1997 (total acquisition: 5291 acres). Due to a number of sales and mergers, their land is now held by Delicious Food Company, a Thai entity. Since then, some of the farmers have been given use rights to their land, but they can't apply for farm land registration; other farmers have been charged with trespassing while trying to use it. U Kyaw Lwin and the other 81 claimants have not had access to their land since 1997. They have been trying to claim their land ever since then. The Parliamentary Investigation Committee under the previous government investigated their case and recommended the land be returned, but no concrete action was taken.

On 29th September 2016, as soon as the Reinvestigation Committee in their region began, U Kyaw Lwin and his fellow farmers submitted a complaint letter over 294 acres to the Central Committee. They submitted parallel complaint letters with the support of a land rights paralegal; as they wanted to be sure their case was resolved. Six months later, the non-governmental representative from the Village Tract Land Grab Reinvestigation Committee received a phone call from a village tract clerk informing him that the investigation team from the township would come next day.

On 17th March 2017 the township investigation team visited as promised and met with some farmers; though the village tract representative tried to organize all of the affected farmers to meet with the team, only a few able to join due to the late notice given for the visit.

On 21st March 2017, the Township Reinvestigation Committee—which had received a concurrent complaint—organized a meeting with affected farmers and representatives from Delicious Company. The company signed a statement saying that it would release 155 of the 294 acres of acquired land under investigation. Due to complaints being filed at all levels, multiple additional rounds of investigation, reports, and instructions were given between March and May; all yielded the same finding that the land should be returned.

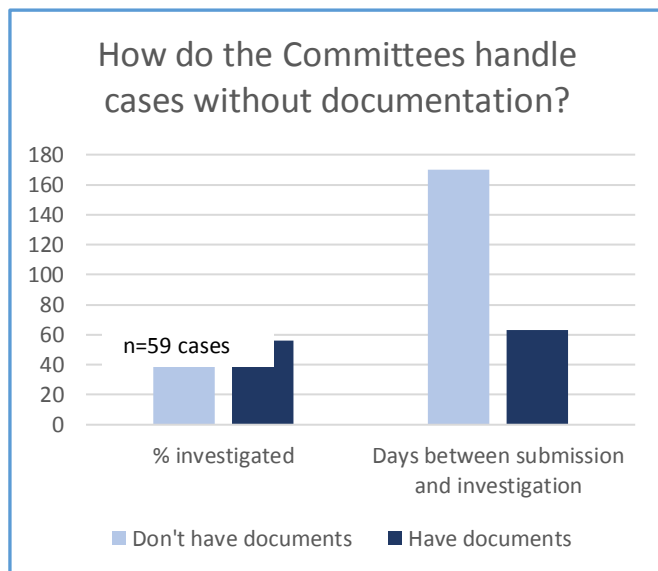
Finally after twenty years of unsuccessful attempts, the Reinvestigation Committee process was able to provide these farmers with a measure of justice.

The farmer's credit the non-government representatives from the village tract with their victory. The representatives worked closely with the township MP and the affected farmers throughout the process and made sure that the real facts and findings were reported with recommendations that made reference to Myanmar's laws and the Central Committee's guidelines. In two neighboring village tracts that were affected by the same 1997 acquisition, the farmers are still awaiting justice; their non-governmental representatives and MPs meet with the affected farmers at least twice per month to discuss the case; but no investigations have happened yet. The clients still do not have access to the land.

Claimants and non-governmental representatives alike want farmers' rights to be viewed from a holistic perspective, not just a legalistic one.

Committees can refer cases to other bodies tasked with dealing with non-land-grab land disputes, and can also receive cases referred by these other administrative or parliamentary committees; however, in practice the guidelines for doing so aren't clear. In practice, many of the referrals happen through individual connections between the committee members, rather than a formalized process. Supervision between committee levels is top-down rather than horizontal, making it difficult in some instances to decide which structure can best handle a particular case.

Some non-governmental representatives have indicated that they prefer to try to resolve cases within the Reinvestigation Committee structure, even if the case could be referred elsewhere, because this structure is the only one that involves non-governmental personnel in investigating and recommending outcomes for cases. As such they have more confidence in the Reinvestigation Committees delivering justice. Anecdotally some were optimistic at the time the committees were formed that by incorporating ground-level investigations, this structure would be better able to address the complex history of land in Myanmar, especially in particular instances in which farmers do not currently have any legal documents for their land.



"This case is too complicated to understand. Can you have your paralegals investigate?" Chair of a District Level Reinvestigation Committee in Saqainq Region

Thus far, the jury is still out on whether committees are better equipped than their predecessors to handle cases in which claimants do not have legal documents. While they are investigating an equal percentage of cases with and without documents, those that have documents are being investigated almost three times faster; this is similar to evidence on the speed of previous mechanisms for these cases.¹⁸

Some non-governmental representatives suggest that having coordination meetings between the Reinvestigation Committees, the Vacant Fallow Virgin Land Working Group, and Farmland Management Committees, to discuss cases that fall into different mandates could be helpful in ensuring that all cases are addressed. This would also allow a non-governmental representative to offer perspective and expertise across these different bodies.

¹⁸ Evidence is not enough to secure land rights in Myanmar, Caitlin Pierce and Nyi Nyi Htwe, January 2016.

V. Given the important and multi-faceted role that non-governmental representatives serve on these committees, their selection process is troubling.

Each committee was established in a slightly different manner and within a slightly different time frame. In some parts of the country, for example Kachin, civil society actors working on land have (as of the time of writing) not

In some instances, selection was inclusive and participatory

“The Village Tract Administrator told us that we needed to select one representative who speaks Shan, one Lahu, and one who speaks Akah to join the Committee. That way farmers who don’t speak Burmese would have someone who could help them. The person we chose had to have some Burmese skills, some high school, and be a village head. The village heads all decided together who would be the representative for each group.” Village Tract Representative for Shan speakers

“On 20th August 2016, I was told to join the township committee through the NLD Youth chair. The MP also called my phone to inform me about it. Five days before that I was informed by 88 Generation saying that my name was proposed either in the district committee or township committee. I noticed the formation of village committees too; the village administrators were invited to the township administrator office and asked to propose names. We were asked to review if someone is a true representative of farmers, but we don’t know everyone in every village, so it is hard to do.” – CSO Representative from a Township Reinvestigation Committee

yet been informed of the functioning or even existence of Reinvestigation Committees; however, in Myitkinia, a government committee member claims to have already resolved 50% of the cases received. There has been a lot of pressure to establish committees and resolve cases quickly, and no guidance was given on the types of expertise or experience “farmer’s representatives” on these committees should have.¹⁹ Regions were also left to develop their own criteria for selecting members; for example in Sagaing and Bago Regions, district and township committees were instructed that they should choose non-governmental representatives in consultation with MPs; others were told that representatives should come from various political party backgrounds.

Generally the selection of non-governmental members of the committees falls into several categories:

- a. *Asked by an MP:* Several representatives report having been asked by MPs to participate in the committees; some of these individuals are part of CSOs, and others are members of political parties.
- b. *Influenced by vested interests:* Reports from several committees reveal that the “farmers’ representative” slot has been filled by businessmen with land grab claims against them, or former local officials who are now no longer part of the government. The potential conflicts of interest are obvious. In other instances, it seems that highly qualified members of civil society were intentionally excluded. In Eastern Shan, for example, one well-respected civil society leader who has over five years working with farmers on land rights issues and speaks several local languages in addition to Burmese was nominated by a Township Administrator to serve on a committee. However, his nomination was over-ruled at the District level, and instead a member of a Shan cultural organization—with no experience on land rights—was appointed to the committee instead.
- c. *Self-nominated:* Some CSO staff with long experience working with farmers on land grab disputes volunteered themselves to the local GAD or MPs to be involved in the committees and were accepted.

¹⁹ The letter announcing the Reinvestigation Committees was accompanied by a statement that all land grab disputes would be resolved within six months from that time (May 2016); Union of Myanmar President Office order letter number 14/2016 issued on 5th May 2016.

The dynamics between CSOs involved in the committee and those who aren't are still developing; for the most part, actors on both sides report the relationships remain positive.

Recommendations

For government

I. Formalize more opportunities for non-governmental actors to advise the mechanism.

I(a). In townships with greatest need, a seat should be made available in the township committee for a CSO land expert in addition to a farmers' representative. A CSO expert has knowledge of land law, the history of land grabs in the area, and more familiarity with government processes. The farmer's representative may have limited legal understanding and less experience interacting and debating with government officials, but they have even closer relationships to the claimants. "Greatest need" can be determined by using reports from the previous Parliamentary Investigation Commission to map the number of claims in each township and identify clusters of unresolved cases. However, numbers only tell part of the story. A consultant could interview existing committees at the state/region level for their impressions on where the "hotspot" townships are; townships with extra seats should be a combination of where the most complaints appear to exist, and also where complaints are having a significant, negative impact on communities.

I(b). Each state/region should have a dedicated independent team of non-governmental experts that can be deployed to investigate complicated cases. This team need not be full-time members of the committee, but rather it should investigate cases which are complicated or involve a large number of acres and/or affected individuals at the request of the regional/state level committees.

I(c). The Central Committee should actively engage civil society experts in the development of any new policies or guidelines related to the reinvestigation mechanism. This could include civil society representatives who sit on subnational committees or members of leading national civil society groups.

II. A non-government representative should be made Secretary of each committee at the subnational levels. The Chairman shall remain a member of GAD, respecting the limitations of the 2008 Constitution. However, having both leaders of the Committees come from government dilutes the voice and influence of nongovernmental representatives, especially in the first scrutinization step. This is important in order to bring diverse perspectives to the leadership of the committee, as well as to ensure that technical expertise has a voice in the leadership. So far, both seats have been held by government employees. The Secretary should continue to be involved with leadership of the Committee, scrutinizing cases, and working closely with the Chairman on drafting reports. The Secretary can also play a role in increasing communication between the Committee levels.

III. When a seat for a non-governmental representative becomes open, objective criteria should be used to choose a replacement.

Terms should also be limited to one parliamentary term. Appendix I provides suggested criteria.

IV. Improve access to information for non-governmental representatives on the Committees.

Some committee members already have access to such information due to their primary job status; thus far information is not shared equally amongst committee members. Even if this is not intentional, it leads to asymmetry of information. Guidance for information collection should be provided, including instructions from

the Vice President that all committee members share case-related information with other members equally; no committee member should treat as proprietary relevant information coming from their own home agency if it has a bearing on a case under review.

V. Publish information each quarter on the stage of investigation for each case, as well as detailed reports on big cases (i.e. many affected farmers or over 100 acres).

Openness and transparency are critical elements of a responsive government. They are also critical to building public faith in this mechanism and to the government's commitment to justice, especially after such a fraught history. While the guidelines instruct the committees to release monthly reports, in practice this is not happening—possibly because it is too frequent. This could be done through regular press conferences or committee websites with updated information of each of the committees' members, and updates with contacts for queries. Information published should include:

- Case number and status for each case;
- An explanation must be provided for any case that has not progressed for three months;
- Implementation of decisions to release land and to whom it was released, such that village level non-governmental representatives can verify.

An annual report should also be published by the Central Committee, as was done by the previous Parliamentary Investigation Committee.

VI. Township level and higher levels need to have dedicated office space and a scheduled day each week for office hours, where clients can go and inquire about their case.

The committee office should be set with an official sign board, creating a space for the committee members to study the cases and allowing community/clients to get information of their case progress updates and present evidence when necessary.

VII. Implement a more robust process of investigation:

In unclear cases, the village tract investigation team should go to the field, informing the claimants one week in advance of their visit. Claimants should also be invited to testify in front of the committee in unclear cases. In complicated cases, members of the regional/state level committee should be part of the field-level investigation, as is permitted under the guidelines.

VIII. Guidance should be given for complainants on how to submit cases and how to follow up on a case. Thus far such public guidance has been provided by reinvestigation committees only on an ad-hoc basis. Due to a lack of awareness of what information to provide or how long each step of an investigation should take, claimants submit multiple or incomplete files, which leads to confusion in the system. Each state/region should issue the following guidance via websites, Facebook²⁰, and newspapers:

- All complaints should be submitted initially to the state/region level. This will allow straightforward processing and for the state/region level to return a unique case code to each client in a self-addressed envelope
- What information to include in their submission and an optional template. The template needs to remain optional due to literacy limitations of some claimants, but can be a helpful guide for others;
- A timeline should be provided about the average amount of time that it will take between receipt of a complaint to investigation and decision. Claimants should be encouraged to follow-up with the committees only once those timelines are exceeded;

²⁰ Namati does not endorse any companies or service providers, but offers this specific recommendation in light of the role that Facebook plays as a major communication technology in Myanmar.

- A follow-up channel (phone number, office, mail, or email address) where claimants can submit a request for information on their case progress using a unique case number assigned to each case.
- The committees should also share their priorities for case review with the public.²¹

For donors and civil society:

I. Call for a systematic mapping and classification of disputes, linked to a central database, which would also track status of disputes (updated as disputes are resolved).

This could be done on tablets with a simple GIS location referencing system.

II. Support training and capacity development for the region/state level special CSO teams and township-level Committees.

III. Organize opportunities to share good practice and lessons learned among committee members in different areas.

There is little communication between levels of the committee, or across states and regions. This is a lost opportunity for sharing challenges and approaches to overcome systemic barriers and ensure justice is delivered. At a minimum, all committee members should have the contact information of at least one member in the higher and lower committees of their area.

IV. Monitor cases and reporting, verify on the ground, and inform the Central Committee if not done well.

²¹ For example, in April 2017 the Central Committee shared internal instructions with the lower level Committees, detailing eight new guidelines for the review of cases. One guideline emphasized that cases of confiscation prior to 1988 would be de-prioritized and set-aside for now. This is important to share with the public, as the committees currently have cases under review from that time period, and claimants are awaiting decisions.

Appendix I: Proposed criteria for selection of non-government representatives

General Guidelines for future selection or replacement of non-governmental members

- Genuine farmer's representatives should be in the committee. Criteria for their selection should be laid out and shared widely.
- Regional government should better collaborate with local CSOs and work to ensure that proper selection is made at every level.
- Current CSO representatives should be temporary and replaced by a farmer acting as farmer's representative when possible.
- In addition to the farmer's representative at the local level, local land issue expert organizations should be given their own seats rather than taking the seats of farmers.
- Farmer's representatives should be elected. The expert CSO seat may be appointed.

Suggestion of criteria for selection of future farmer's representatives

- Must be a farmer.
- Have farm land and understand the nature of farming.
- Have a fair understanding of land related laws.
- Be acceptable and trusted by other farmers and the local community.
- Be willing and able to dedicate sufficient time to committee activities.
- Not having any ongoing land disputes.
- Must be living in the area.
- If the representative is a member of any organization or union, that body must support the appointment.
- Minimum education level should be middle school graduate

Suggestion of criteria for selection of a future land expert representative

- Individual/member of a well-recognized CSO or Farmer's Union.
- Have 3 to 5 years of experience working on land issues.
- Have good understanding of land related laws.
- Able to share time for the committee activities with good will.
- Able to explain laws, rules and procedures and capable of discussing these in the committee.
- Be of good character, attitude and morality
- Not involved in land grabbing activities in the past

Methodology

This brief relies on qualitative and quantitative research. The majority of the information was gathered through participatory action research with non-governmental committee representatives. A series of bilateral interviews with representatives in different levels of reinvestigation committees was conducted, focused at the Township level and higher. We also convened CSO representatives and also some non-representative CSO members from 7 out of 13 states/regions for a two-day workshop. This was an opportunity for vibrant discussion, debate, and generation of shared recommendations. Interviews with clients of the new committee rounded out perspectives on the functioning of the committees and in particular of the non-governmental representatives.

The quantitative data set analyzed for this brief was compiled by Namati's network of paralegals between August 2013 and May 2017, and based on land issues they handled in their role as community paralegals. These community paralegals are present in a limited number of townships in each state and division in which Namati works, and take on cases as requested by clients. As such, this dataset does not benefit from either full coverage or randomization. It should not be considered comprehensive or representative of all issues related to land rights in Myanmar. Rather, it provides a snapshot of people who are actively trying to make use of Myanmar's laws, and contains qualitative and quantitative information for almost 4,000 land cases. Namati has assisted 160 cases work their way through the new reinvestigation Committees, which involves almost 15,000 acres of land and over 2,000 farmers. The paralegals documented over six-dozen data points for each case. They are also intimately aware of the qualitative information surrounding each case, the community members involved, and the bureaucratic processes, as they work full time as community paralegals.

Acknowledgements

Ye Yint Htun and Caitlin Pierce of Namati led the research and production of this brief; but its knowledge and recommendations are a collaborative effort of CSO representatives from Ayeyarwaddy, Kachin, Tanintharyi, Magwe, Sagaing, Bago, and Yangon. In particular, the following individuals were instrumental in this brief: U Aung Kyaw Kyaw (CSO Representative from the Magwe Regional Reinvestigation Committee); U Shi Thu Aung (CSO Representative from the Ayeyarwaddy Regional Reinvestigation Committee); U Nay Tun (CSO Representative from Pyay District Reinvestigation Committee); U Kyaw Khaing (CSO Representative from the Shwe Bo District Reinvestigation Committee in Sagaing Region); U Myint Naing (Human Rights Watch and Defense, Ayeyarwaddy); U Tin Soe Htay (Green Peasant Institute, Ayeyarwaddy); U Han Wa (Kachin State Farmers Association, Kachin State); Daw Naw Christin (Tanintharyi Friends, Tanintharyi); U Kyaw Thet Win (CSO Representative from Kalay District Reinvestigation Committee, Sagaing Region); and U Myo Thant (Yangon Region). The authors would also like to thank Sung Chin Par and Vivek Meru for their additional inputs and contributions to this research. The authors can be reached at yeyinth@namati.org and caitlinpierce@namati.org.

About Namati

Namati is an international NGO focused on legal empowerment. In a world where 4 billion people live outside the protection of the law, Namati is dedicated to putting the law in people's hands. Namati is building a movement of grassroots legal advocates, also known as "community paralegals", who work with communities to bridge the gap between the written law and its practical application in everyday life. Namati has worked with over 40,000 active clients in eight countries to protect community lands, enforce environmental law, and secure basic rights to healthcare and citizenship. Namati draws on that grassroots experience to seek large-scale

structural reforms in the law itself and in the institutions through which law is applied. Namati also convenes the Global Legal Empowerment Network, which has over 4,000 individual and 1,000 organization members, all dedicated to legal empowerment.

Namati established a program and office in Myanmar in early 2013, with an exclusive focus on land rights (registration, reclassification, and land grabs). Since then, the Myanmar Program has grown to a network of 61 paralegals in seven States/Regions. Our current partners are: Civil and Political Rights Campaign Group, Upper Chindwin Youth Network, Thanlwin Thitsar, Green Peasant Institute, Share Mercy, Human Rights Watch and Defense, and Land Core Group.



Namati gratefully acknowledges the support and funding of the Bureau of Democracy, Human Rights, and Labor (DRL) of the United States Department of State in the preparation and printing of this policy brief.