

# A review of Myanmar fisheries legislation, with particular reference to freshwater fisheries legislation



**ENVIRONMENTALLY SUSTAINABLE FOOD SECURITY PROGRAMME (ESFSP)**

**A REVIEW OF MYANMAR FISHERIES LEGISLATION  
WITH PARTICULAR REFERENCE TO FRESHWATER FISHERIES LEGISLATION**

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## BACKGROUND

The fisheries sector in Myanmar, comprising the freshwater fisheries, marine capture fisheries and aquaculture, plays a very important role in the economy of the country and provides an important source of food security for the people of Myanmar.<sup>1</sup> Presently, the freshwater capture sector is by far the most important economically and socially. The Food and Agriculture Organization (FAO) of the United Nations estimates that about 7.98 million persons are directly employed in the fisheries sector (including aquaculture) and an additional 2.5 million people indirectly employed in the sector.<sup>2</sup> In 2004, the total value of fish imported by Myanmar was US\$1.3 million while the total value of its fish exports was US\$4319 million.<sup>3</sup>

The Department of Fisheries, under the Ministry of Livestock Breeding and Fisheries, is responsible for the management of the fisheries resources of Myanmar. The Department of Fisheries is guided by six policy objectives; namely:

- Conservation and rehabilitation of the fishery resources;
- Promotion of fisheries research and surveys;
- Collection and compilation of fishery statistics and information;
- Provision of fisheries extension services;
- Supervision of the fishery sector; and
- Ensuring sustainability of fishery resources.

Following Cyclone *Nargis* in May 2008 which caused severe damage to parts of Myanmar, the Government of Italy made financial contribution through FAO to support short-term livelihood recovery activities in the Ayeyarwady Delta of Myanmar and for the medium-term food security needs of Myanmar. The *Sustainable Small Scale Fisheries and Aquaculture Livelihoods in Coastal Mangrove Ecosystems* (GCP/MYA/010/ITA) project was one of three projects included in the *Environmentally Sustainable Food Security Programme* (ESFSP). The aim of the *Sustainable Small Scale Fisheries and Aquaculture Livelihoods in Coastal Mangrove Ecosystems* project is to promote and undertake pilot level implementation of practices for the co-management of fisheries in a demarcated management area in the Ayeyarwady Delta, comprising 13 villages, and with particular emphasis on coastal mangrove eco-systems. Through a number of stakeholder consultations, meetings and workshops, a co-management model has been developed and agreed within the project site for implementation on pilot basis.

The Ayeyarwady Delta which comprises the pilot site for the project once supported half of the mangrove forests in Myanmar. A major issue facing the implementation of the ESFSP relates to the competing demands on the mangrove ecosystem in the Ayeyarwady Delta. Several years of pressure on the mangrove forests, including demand for firewood and charcoal, hunting mangrove animals, conversion of mangrove areas for rice and shrimp farming and destructive fishing practices such as excessive fishing efforts, have significantly reduced the productivity of the mangrove forest areas.

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<sup>1</sup> FAO, Fishery Country Profile: Myanmar, 2006.

<sup>2</sup> FAO, Fishery Country Profile: Myanmar, 2006.

<sup>3</sup> Ibid.

Specifically in relation to fisheries, there are now clear signs of serious depletion in the Delta. The observed volume fish landings are declining and there is a reduction in the size of species caught.<sup>4</sup>

One of the activities of the ESFSP to address the problem of conservation of fisheries resources in the mangrove areas is the “formulation and promotion of better co-management practices and sustainable utilisation guidance for mangrove ecosystems.”<sup>5</sup> However, implementation of co-management in the pilot areas for the project, and in Myanmar as a whole, is not supported by the existing fisheries and related legal framework. An additional complicating issue that has arisen is the substantial overlap and contradictions between the fresh water fisheries legislation and legislation dealing with forestry and wildlife conservation in the mangrove areas. Additionally, enforcement of existing legislation is weak.

The factors listed above have given rise to the need to undertake an evaluation of the legal framework underpinning forestry and fisheries legislation, including co-management arrangements and enforcement challenges to inform proposals for change.<sup>6</sup> The Terms of Reference (TOR) for the review is attached to this Report as **Appendix 1**.

The international legal consultant undertook a 6-days mission to Yangon, Myanmar from 29<sup>th</sup> October to 5<sup>th</sup> November 2011 to collect and review relevant legislation. U Maung Maung Lwin, Project Manager (Fisheries) ESFSP who was the immediate contact point provided relevant documentation to the consultant. U Htun Thina, Legal Officer at the Department of Fisheries assisted the consultant to gather the necessary legal information and to analyse them. Meetings were also held with senior officials from the Department of Fisheries and the Forestry Department. The list of officials consulted during the mission is attached to this Report as **Appendix 2**. The rest of this Report presents the details of the legal reviews undertaken and the findings and recommendations by the consultant.

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<sup>4</sup> GCP/MYA/010/ITA Progress Report, September 2011, page.1.

<sup>5</sup> Ibid. page 2.

<sup>6</sup> Ibid. page 3.



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## 1 SUMMARY OF FINDINGS AND RECOMMENDATIONS

This Report examines four key aspects of the Freshwater Water Fisheries Law of the Union of Myanmar in the context of the *Sustainable Small Scale Fisheries and Aquaculture Livelihoods in Coastal Mangrove Ecosystems* project (GCP/MYA/010/ITA), which is being implemented by FAO as one of three projects included in the *Environmentally Sustainable Food Security Programme* (ESFSP). The broad areas covered in the Report are:

- General gaps in the *Freshwater Fisheries Law* and modifications required to modernize the legislation.
- Modifications required of the *Freshwater Fisheries Law* to accommodate the autonomy of the States and Regions under the new (2008) Constitution of the Union of Myanmar.
- Contradictions and inconsistencies between the *Freshwater Fisheries Law* on one hand and the *Forest Law* and the *Nature Conservation Law* on the other.
- The scope of the *Freshwater Fisheries Law* to accommodate proposals for co-management in parts of the freshwater fisheries area under the GCP/MYA/010/ITA project.
- Gaps in the *Freshwater Fisheries Law* in terms of monitoring, control and surveillance.

### 1.1 General Gaps in the Freshwater Fisheries Law and Modifications Required to Modernize the Legislation

The *Freshwater Fisheries Law*, promulgated on 4 March 1991, is the primary legislation in the Union of Myanmar which governs the freshwater fisheries, the most significant fisheries sector in the Union. The *Freshwater Fisheries Law* which has its origins dating back to the early 1900s, was designed primarily to provide a framework for commercial exploitation of the fisheries. The specific objectives of the law are spelt out in Chapter II, Section 3 of the Law as follows:

- to further develop the fisheries;
- to prevent the extinction of fish;
- to safeguard and prevent the destruction of freshwater fisheries waters;
- to obtain duties and fees payable to the State;
- to manage the fisheries and to take action in accordance with the Law.

In broad terms, a number of gaps have been identified in the *Freshwater Fisheries Law* which require rectification. These are summarised below:

### 1.2 Responsible Fishing Practices

Although the *Freshwater Fisheries Law* was promulgated in 1991, it carried with it history dating back to the early 19th century. In particular, the Law was designed primarily to provide a framework for commercial exploitation of the fisheries and has very few modern responsible fisheries principles such as conservation and social considerations as its objectives.

### **1.2.1 Recommendation on Responsible Fishing Practices**

The Report recommends that consideration should be given to remedying these gaps by the incorporation of modern principles of responsible fisheries as enshrined in FAO Code of Conduct for Responsible Fisheries and the Technical Guidelines supporting the Code's implementation. In particular, management objectives in the *Freshwater Fisheries Law* should include the livelihood aspects of the fisher population which strikes a balance between the social needs of the resource users and the needs for conservation. The key principles to be considered for incorporation in a revised *Freshwater Fisheries Law* to modernise it include:

- Long term conservation and sustainable use for present and future generations.
- Protection and rehabilitation of critical habitats, in particular mangroves, nursery and spawning areas.
- Prevention of overfishing and excess fishing capacity to ensure that fishing effort is commensurate with the productive capacity of the resources.
- Application of the precautionary approach, i.e the absence of adequate scientific information should not be used as a reason for postponing actions.
- Recognition and protection of the rights of fishers and fishworkers, particularly those engaged in artisanal small-scale fisheries.
- Recognition of the right to a just livelihood as well as preferential access, where appropriate, traditional fishing grounds must be respected.
- Management measures should not only ensure the conservation of target species but also species belonging to the same ecosystem.
- Consultation and effective participation of all stakeholders.
- Effective framework for monitoring, control and surveillance.

### **1.3 Lack of Detailed Implementing Regulations**

The *Freshwater Fisheries Law* only provides a basic framework, with the day-to-day management details to be filled in through subordinate legislation. Since 1992, only one set of Procedure, the *Fresh Water Fisheries Procedure*, was issued in July 1999. The content of the Procedure largely covers procedures for application for the various categories of licenses, rights of lessees and licences and financial matters.

#### **1.3.1 Recommendation on Lack of Detailed Implementing Regulations**

To ensure effective an up-to date implementation of the *Freshwater Fisheries Law*, it is recommended that urgent consideration be given to developing detailed regulations through Procedures and Notifications on regular basis.

### **1.4 Accommodating the Autonomy of the States and Regions**

As a result of the new *2008 Constitution of the Union of Myanmar*, responsibility or the management of the freshwater fisheries is now exclusively within the legislative competence of the States and Regions. Consequently, any modification of the *Freshwater Fisheries Law* would have to be done through the State/Region legislature. This devolution of management responsibility to the States and Regions is a relatively new experiment in Myanmar, and it is not clear at this stage how the new Constitutional provisions will operate in practice. Particularly given that the States and regions generally lack the expertise and resources to effectively manage the fisheries on their own, it is

important for the implementing legislative framework to clearly define the respective roles of the Union Government and the States and Regions.

#### **1.4.1 Recommendation on Accommodating the Autonomy of the States and Regions**

It is recommended that a comprehensive review of the *Freshwater Fisheries Law* be undertaken. The timing for such a review would seem to be right. It is the understanding of the consultant that presently, the Department of Fisheries has commenced a revision of the *Freshwater Fisheries Law* to be re-enacted by the Regions and States. Such a revision should address all the issues identified in this Report, including establishing a framework for clear partnership between the Department of Fisheries and the States/Regions in respect of conservation and management, licensing and monitoring, control and surveillance.

#### **1.5 Contradictions and Inconsistencies between the Freshwater Fisheries Law, and the Forest Law and the Nature Conservation Law**

Analysis of the *Freshwater Fisheries Law* against the *Forest Law* and the *Nature Conservation Law* reveals four serious levels of contradictions and ambiguities. These relate to (a) Area of Application; (b) Species; (c) Jurisdiction/Management; and (d) Offences and Penalties. These contradictions and overlaps are partly a product of history and would need to be remedied as matter of urgency because of their impact on the sustainability of the freshwater fisheries and their habits.

##### **1.5.1 Recommendations on Contradictions and Inconsistencies between the Freshwater Fisheries Law and the Forest Law and the Nature Conservation Law**

The Report proposes a number of recommendations for consideration to address the contradictions/ambiguities between *Forest Law* and *Freshwater Fisheries Law* and the *Wildlife and Conservation of Natural Areas Law*.

##### ***Need for comprehensive National Policy Framework***

There is the urgent need for the development of a comprehensive national freshwater and mangrove resources and conservation policy framework. One of the reasons why these legislative overlaps and ambiguities have persisted for the past several years has been the absence of a comprehensive, overarching and integrated resource management policy in Myanmar. This gap has resulted in the resource management and the supporting legislative framework being based highly sectoral approaches. Within this framework, there is no mandate or incentive for any agency, on its own, to initiate reform. There is a general awareness of the issues in Myanmar, but they are considered too complex and a very sensitive to be addressed at the inter-departmental level. A comprehensive policy on freshwater and mangrove forest resources should establish common principles, against which sectoral legislative review would be undertaken.

##### ***Legislative Review/Amendment***

The root cause of the overlap between the *Freshwater Fisheries Law* on one hand and the *Forest Law* and the *Protection of Wildlife and Conservation of Natural Areas Law* on the other hand, is that all three laws are equally valid individually and there is no hierarchy amongst them. A possible approach is to consider legislative review by amending either the *Freshwater Fisheries Law* or the *Forest Law* and the *Wildlife and Conservation of Natural Areas Law* to avoid any conflict. In practice,

this option is not as easy it seems because it will require agreement by two separate Ministries. Currently, there appears to be no incentive on the part of both Departments to amend their respective legislation in the absence of integrated national policy noted above. Thus, whilst ultimately legislative change to align the three pieces of legislation within a common policy framework will be required, the starting point must be policy development as noted above.

### ***Inter-Agency Cooperation***

There is a lot that can be achieved through inter-agency dialogue, in the absence of national policy mandate. The *Freshwater Fisheries Law* and the *Forest Law* actually have some inbuilt provisions which can be used to foster cooperation between the Department of Fisheries and the Forest Department. It is recommended that pending the development of a comprehensive national policy and the necessary legislative changes, the relevant Departments make every effort to cooperate and coordinate their respective management practices to ensure the sustainable utilisation of the mangrove forests and their habitats.

### ***Introduction of Co-management***

Effective implementation of existing sectoral legislation requires policing and enforcement, which is currently problematic. Ultimately, it would seem that the implementation of some form of co-management approaches in the fishery (as discussed below) will provide a much longer and sustainable solution. This will promote better identification of the user groups with the resource and ultimately a better conservation and compliance attitude.

## **1.6 Implementing Co-Management under the Freshwater Fisheries Law**

Implementation of co-management arrangements (also referred to variously as participatory management, community-based management, or collaborative management) is now universally recognised as a necessary prerequisite for a sustainable coastal and inshore fisheries management. An essential requirement for a successful co-management framework is establishing a legal framework for it through some form of legislation. Based on analysis of the *Constitution of the Union of Myanmar* and relevant legislation, the Report finds that there is currently no direct legal basis for the implementation of co-management in the freshwater fisheries as envisaged under the ESFSP.

The Report suggests that what is urgently required is creating “legal space” for the implementation of co-management. The Report examines two broad issues to address. The first is how to legally establish the co-management units and the second is the legal recognition of such groups as co-management units. The Report canvasses two broad options for consideration: (a) revision of the *Freshwater Fisheries Law*; and (b) use of Procedures/Orders and Directives under the *Freshwater Fisheries Law*.

### **1.6.1 Recommendations on Co-Management**

Based on the evaluation above on co-management, the following Recommendations are being proposed for consideration.

## **1.6.2 Pilot Approach**

Given that co-management is completely new to managing fisheries in Myanmar, a cautious staged approach to its introduction is recommended. This staged approach will require that the thirteen Village Societies established under the ESFSP be used on pilot basis, rather than a nation-wide introduction of the co-management approach. A demonstrated success of the pilot groups will promote the eventual national adoption over time.

## **1.6.3 Initial Implementation through Directives**

Given the likely delay in revising the *Freshwater Fisheries Law* to introduce co-management, it is recommended that:

- In the short to medium term Directives under Section 57 of the *Freshwater Fisheries Law* be utilised to implement co-management arrangements in the freshwater fisheries.
- To expedite the process, it will be crucial that the content of the Directive on co-management is drafted by the ESFSP Programme Team, in consultation with the Department of Fisheries.
- The ESFSP Programme Team commences discussions with the Department of Fisheries as a matter of priority to start developing draft Directives to enable the establishment of co-management groups, taking into account the relevant legal elements identified above.

## **1.6.4 Staged Approach**

It is recommended that a cautious staged approach to the introduction of co-management be adopted, using the thirteen Village Societies established under the ESFSP rather than a nation-wide introduction of the co-management approach. A demonstrated success of the pilot groups will promote the eventual national adoption over time.

## **1.7 Effective Monitoring, Control and Surveillance**

Effective monitoring, compliance and enforcement (MCS) measures the success of any fisheries management objectives. A number non-compliance challenges are prevalent in the freshwater fisheries in Myanmar, evidenced by the continued use of illegal gears, mesh sizes and fishing techniques; fishing in restricted areas and reserves. Some of these non-compliance challenges are caused by general management and resource constraints, but some of them are the result of gaps in the *Freshwater Fisheries Law* itself.

### **1.7.1 Recommendations on MCS**

#### **1.5.1.1 Reconsideration of the Unregulated Fishing Implements**

A major factor in the increase in non-compliance in the freshwater fisheries would appear to be the large number of unregulated fishing gears (implements) under the *Freshwater Fisheries Law* as a result of the exemption granted by the Director-General for 15 fishing implements under the *Freshwater Fisheries Law*. It would also appear that much of the non-compliance issues, and certainly the root cause of the conflict between the *Freshwater Fisheries Law* and the *Forest Law*, is the result of the impact of these unregulated implements in the mangrove forests. It is highly recommended that to improve the compliance framework for the freshwater fisheries, consideration should be given to regulating these implements in one way or the other.

### ***Review of Penalties***

The penalties under the *Freshwater Fisheries Law* were prescribed in 1991 and have not been reviewed in twenty years. Currently, the monetary penalties under the *Freshwater Fisheries Law* range from as low as 3,000 Kyats(about 4 USD) to 30,000 Kyats(40 USD). Judicial practice has compensated for the relatively low monetary fines by imposing both monetary and the maximum imprisonment term. In combination, penalties under the Law could become excessive in some cases, particularly given the fact that most of the offenders tend to be the very poor in the rural communities. The monetary penalties under the *Freshwater Fisheries Law* are certainly out of date and require revision. The proposal to introduce co-management arrangements in the freshwater fisheries is further factor which will necessitate a reconsideration of the penalties under the Law. It is recommended that a thorough review of the penalties under the *Freshwater Fisheries Law* be undertaken as part of the general review and modernization.

### ***Institutional Framework for MCS***

There is no institutional structure built into the *Freshwater Fisheries Law* to support MCS. The consequence of this is that there is a lack of adequate human and technical resources devoted to MCS efforts. It is recommended that the overall, effectiveness of the legal system to handle fisheries issues should be improved. Establishment of a dedicated element within the legal system for fisheries MCS and very familiar with the complexity of fish legislation should be considered. Fines imposed for violations of the fisheries legislation must reflect the severity of the impact of the infringement on resources, support voluntary compliance and act as a deterrent.

## 2 REVIEW OF FISHERIES LEGISLATION

The TOR calls for a review of the fisheries laws of Myanmar with particular reference to the *Freshwater Fisheries Law*. In all six pieces of legislation constitute the Myanmar fisheries laws. These are:

- Law relating to the Fishing Rights of Foreign Fishing 1989;
- Law amending the law relating to the Fishing Rights of foreign Fishing Vessels 1993;
- Law relating to Aquaculture 1989;
- Myanmar Marine Fisheries Law 1990;
- Law amending the Myanmar Marine Fisheries Law 1993;
- Freshwater Fisheries Law 1991;

The scope of the TOR needs to be seen in the context of the overall objectives of the programme. Accordingly, this Report will focus on freshwater fisheries and will not analyse the *Law Relating to Fishing Rights of Foreign Fishing Vessels 1989* and its amendments, the *Law Relating to Aquaculture 1989* and the *Myanmar Marine Fisheries Law 1990*, beyond a summary of these laws as part of the general picture on fisheries management in Myanmar. A summary of the rest of the fisheries laws is presented in **Appendix 3** for general background information. In terms of other laws, the Report will also concentrate specifically on the Forest Law and the Protection of Wildlife and Conservation of Natural Areas Law 1994 primarily because these are two main areas where problems are being encountered.

### 2.1 Brief History of Fisheries Legislation in Myanmar

Fisheries have always been an important sector in Myanmar not the least because of its extensive fisheries resources – both inland and marine. It is thus not a surprise that fisheries legislation has a long history in Myanmar. The first consolidated rules governing fisheries was enacted in 1875, with the passage of the *Fishery Act (Act VII of 1875)*. Prior to the *Fishery Act of 1875*, there were rules promulgated in 1864 and 1872 governing fishery administration, whose main purpose was for revenue generation.<sup>7</sup>

In 1905, the *Fishery Act (Act III of 1905)* was enacted to repeal the earlier law. The 1905 law, however, only applied to Lower Myanmar, until 1912, when application of the *Fishery Act of 1905* Act was extended to Upper Myanmar.<sup>8</sup> There were provisions in the *Fishery Act of 1905* which specifically dealt with the “protection of fisheries” in Sections 11 to 14. Section 11, for instance, categorically prohibits the “use of any dynamite or other explosive substance in any fishery with intent thereby to destroy or facilitate the catching of fish” (Section 11, Burma Fishery Act (1905)). There were also corresponding penalties for violations under the Act contained in Sections 15 to 26.

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<sup>7</sup> Khint Aung and Khin Maung Oo, Fisheries in the Union of Myanmar, Report of a Regional Workshop on Fisheries Monitoring, Control and Surveillance, Kuala Lumpur and Kuala Terengganu, Malaysia, 29 June - 3 July 1998, p. 45.

<sup>8</sup> Ibid.



However, the focus of the legislation was largely on improving fishery revenue and little was done to modernise the fisheries industry.<sup>9</sup>

In 1911, in order to implement the provisions of the *Fishery Act of 1905*, new Rules, referred to *Fishery Rule 1911*, were promulgated and provided for, among others, “definition, classification and delimitation of the fisheries. The 1911 Rules also provided for disposal of fishing rights in leasable fisheries.

The *Fisheries Act of 1905* was amended by later pieces of legislation, including: the *Burma Act VI (1909)*, *Burma Act VIII (1928)*, *Burma Act V (1934)*, the *Government of Burma (Adaptation of Laws) Order (1937)*, and the *Burma Laws (Adaptation) Act (1940)*, *Burma Act XXVII (1940)*. Since the 1940s, no additional new laws were enacted until the late 1980s and early 1990s when six pieces of fisheries legislation, referred to above, were passed.

## 2.2 The Freshwater Fisheries Law 1991

The *Freshwater Fisheries Law*, promulgated on 4 March 1991, was designed primarily to provide a framework for commercial exploitation of the fisheries. The specific objectives of the *Freshwater Fisheries Law* are spelt out in Chapter II, Section 3 of the Law as follows:

- to further develop the fisheries;
- to prevent the extinction of fish;
- to safeguard and prevent the destruction of freshwater fisheries waters;
- to obtain duties and fees payable to the State;
- to manage the fisheries and to take action in accordance with the Law.

Chapter 1, Title and Definitions, is mainly devoted to the definition of the scope and the extent of the Act. The definition of “Freshwater Fisheries Waters” under the law includes:

- 1) waters, pond, course river, stream and lake which is of a permanent or *temporary nature* and in which fish live and thrive and which is situated within the inland boundary along the sea coast of Myanmar;
- 2) leasable fishery, reserved fishery, fisheries waters in which rights of fishery are permitted under a licence, reservoirs, waters in an area belonging to any Government department, *inland tidal places*, waters on an island, crocodile nets and turtle banks in which turtles and crocodiles lay their eggs and brackish waters; and
- 3) waters on the inland side of the straight line drawn from one extreme end of one hank to the extreme end of the other hank of the river mouths and creek mouths contiguous to the sea are freshwater fisheries waters (section 2(e), *Freshwater Fisheries Law*).

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<sup>9</sup> Khint Aung and Khin Maung Oo, *Fisheries in the Union of Myanmar*, Report of a Regional Workshop on Fisheries Monitoring, Control and Surveillance, Kuala Lumpur and Kuala Terengganu, Malaysia, 29 June - 3 July 1998, pp. 45 -46.

“Fish” is defined as “all aquatic organisms living the whole or a part of their life cycles in the water, their spawns, larvae fry's and seeds. This definition includes aquatic plants, their seedlings and seeds,” (Section 2(f)) is similar to the definition in Marine Fisheries Law (Section 2(g)), the Law Relating to Aquaculture (Section 2(e), and the Law Relating to the Fishing Rights to Foreign Fishing Vessels (Section 2(o)).

The *Freshwater Fisheries Law* defines “Fishery” as “carrying out operations relating to fish for the purpose of systematic management, production on a commercial scale, conservation and for development,” including “operations such as fishing, collecting, aquaculturing, exploring, research, stocking, propagating, processing, transporting, storing and marketing” (Section 2(g)). This definition is similar to the definition of “fishery” in the Marine Fisheries Law (Section 2(h)), the Law relating to Aquaculture (Section 2(f)), and the the Law Relating to the Fishing rights to Foreign Fishing Vessels (Section 2(p)).

“Fishing” is defined as the “catching, collecting, attracting, pursuing, stupefying and killing of fish,” including “works in support of and preparatory to fishing operations” (Section 2(i)). This definition is similar to the definition of “fishing” in Marine Fisheries Law (Section 2(i)), and the Law Relating to the Fishing rights to Foreign Fishing Vessels (Section 2(q)).

A “*Fishing Vessel*” under the *Freshwater Fisheries Law* refers to “any vessel engaged in fishing,” including “vessels carrying out fishing operation and crafts in support of the fishing vessel” (<sup>1</sup> Section 2(j)). This definition is similar to the definition of “fishing vessel” in Marine Fisheries Law (Section 2(n)), and the Law Relating to the Fishing rights to Foreign Fishing Vessels (Section 2(j)).

In summary, there are five major classifications of the freshwater fisheries under the *Freshwater Fisheries Law*:

- **Leasable Fisheries:** Those fisheries in which fishing rights with regard to the area, species, fishing gear and fishing periods are granted under a lease by through public auction. The area subject to a leasable fishery is called an “Inn<sup>10</sup>”. The usual practice is to grant the leases on annual basis, with validity from 1 April to 31 March the following year. The lease periods can be extended for indefinite periods. The “Procedures” issued under the *Freshwater Fisheries Law* prescribe detail rules for the leasable fishery.
- **Tender Licence Fisheries:** Tender license fisheries are those in which fishing rights are permitted through what is called “floating tenders” in relation to specific fishing grounds. There are three types of such tenders: (a) legal tenders (valid from 1 April to 31 March then following year); (b) ‘sea-shore tenders” (valid from 16 October to 15 October the following year) and (c) “forest tenders” (valid from 16 June to 15 June the following year).
- **Implement License Fisheries:** The fisheries in which fishing rights are permitted through the grant of “fishing implement” (gear) licenses. These licenses are issued on annual basis from 1 April to 31 March the following year. The licenses are specific to the township in which they are issued, except in areas of lease fisheries, tender license fisheries or in reserved fisheries.

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<sup>10</sup> Inn lessees hire labourers both men and women, the men fish (collection and maintenance of traps and weirs) within the Inn and the women conserve the catches (fresh fish on ice for export, small less commercially important fish are salted and dried or made into fish paste or fish sauce). I am grateful to the information provided by Mr. Robert Lee, FAO for this explanation.

- **Non-license Fisheries:** These are the fisheries not requiring permission from the Department of Fisheries. Currently, fifteen implements have been exempted from the licensing framework.<sup>11</sup>
- **Reserved Fisheries:** These are the fisheries in which fishing operations are prohibited from time to time or in which fishing rights are granted subject to conditions in order to prevent extinction of fish or to propagate fish.

Chapter 3 focuses on the application procedures for a lease or a licence and the issuance thereof. The law requires a *lease* to operate a fishery in any leasable fishery through purchase under a system of competitive bidding in an auction (Section 4). In order to operate a fishery in any freshwater fisheries waters other than a leasable fishery, a *fishing implement licence fee* is required or in the case of a floated tender by obtaining a licence after submitting a sealed tender price (Section 5).

Chapter 4 is on the application to operate a fishery in foreign currency. The Minister may grant a lease or a tender licence to *a foreigner residing abroad* who is desirous of operating a fishery in foreign currency, or any person or any organization desirous of operating with foreign capital in accordance with the Union of Myanmar Foreign Investment Law (Section 10).

Chapter 5 is on payment of fishery rent, tender fee and licence fee and Chapter 6 enumerates the duties and rights of the licence and leaseholders.

Chapter 7 enumerates the powers of the Minister of the Ministry of Livestock and Fisheries, in respect of the permission to operate a fishery, when necessary in the interest of the State:

- 1) granting permission to operate a fishery in any freshwater fisheries waters under a lease or a tender licence;
- 2) suspending, revoking or cancelling any lease or tender licence;
- 3) passing any other reasonable order (Section 20).

In addition, the Minister has the power to *exempt* any fishery from any provision of the Law (Section 21).

Chapter 8 defines the duties and powers of the Director General. The duties of the Director General are to:

- 1) manage and supervise the fisheries in order to implement the objectives of the Law;
- 2) determine the rates of licence fee according to the type of fishing implement;
- 3) determine the prohibited species of fish, size, fishing season, place, fishing implement and method of fishing; and
- 4) determine the duties and powers of the Officers-in -charge of the Department (Section 22).

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<sup>11</sup> These includes: Hand line (Let Htun), Pole and line (GineHtauk), Pole and line (Tai HtaungNgaHmyar), Long line (NgaHmyarTann), Floating line (Bu Hmaw), Portable Cast net (Let PyitCon), Man push net (Yin Toon), Lift net (GawPike), Small Fish trap (HmyoneNge), Large fish trap (HmyoneGyi), Drop door trap (Toke), Fishing with Luring leaf (Dasaung/Fat htoe), Fish Basket (Saung), Spear (Suu, Hmain), Artificial Fish Holes (Gote/Htoo)

The powers of the Director General include to:

- 1) permit payment by instalment of fishery rent in respect of leasable fisheries in remote areas and determining the instalment period and rates;
- 2) classify, alter or cancel fisheries waters in which a leasable fishery, reserved fishery or a fishery permitted to be operated under a licence is permitted;
- 3) direct the grant of lease to be continued with a limit on the term to a person who has purchased by auction any leasable fishery, if there is sufficient reason;
- 4) if it is found that any lease or tender licence has been obtained in an improper manner, cancel such lease or tender licence (Section 23).

In relation to violations of the provisions of the law, the Director General has powers to:

- 1) suspend, revoke or cancel the lease or tender licence;
- 2) confiscate, dispose of or administer as may be appropriate the fishing vessel, fishing implements, fish and other exhibits;
- 3) return to the person who has obtained permission to operate the fishery or to the owner, on furnishing sufficient security, the fishing vessel and fishing implements or permitting the resumption of the operation;
- 4) permit the person who has obtained permission to operate the fishery or the owner to redeem the fishing vessel and fishing implements on payment of appropriate fine;
- 5) cause the proceeds of the sale and the fines to be deposited in the bank (Section 24).

The grounds for invalidation of a permission to operate a fishery are specified in Chapter 9 and these include:

- 1) expiry of the term permitted;
- 2) revocation or cancellation of the lease, tender licence or fishing implement licence;
- 3) determination by the Officer-in -charge of the Department, on investigation, that the fishery has been abandoned;
- 4) surrender of the lease, tender licence or fishing implement licence by the person who has been permitted to operate a fishery when he desires to discontinue his operation (Section 30).

Chapter 12 lists the prohibited acts under the Law. These include:

- 1) Operating a fishery without a lease, licence or permission (Section 33);
- 2) Commission of any of the following in any freshwater fisheries waters:
  - a. catching fish or causing mischief with explosive substance, poison, chemicals and dangerous material of a like nature;
  - b. catching fish by a prohibited method and fishing implement;
  - c. catching fish of a prohibited species and size;
  - d. catching fish during a prohibited period and at a prohibited place (Section 34)..
- 3) Failing to pay within the prescribed period fishery rent, tender fee, licence fee and fines due, without the permission of the Department, after purchasing by fishery auction or after being granted tender licence (Section 35).
- 4) Erecting, constructing place, maintaining any obstruction such as a dam, bank or weir in a freshwater fisheries waters without the permission of the Department (Section 36).

- 5) Violating any condition contained in a lease, tender licence or fishing implement licence by a person who has obtained permission to operate a fishery (Section 37).
- 6) Committing any of the following within the boundary of a fishery or fishery creek:
  - a. cutting undergrowth or setting on fire habitat of fish;
  - b. impairing the natural condition of a fishery so as to disrupt the flow of water in the main fishery (Section 38).
- 7) Cultivating agricultural crops within the boundary of a fishery creek (Section 39).
- 8) Harassment of fish and other aquatic organisms or pollution of the water in a freshwater fisheries waters (Section 40).
- 9) Altering the quality of water, volume of water or the water-course in a leasable fishery, reserved fishery and creeks contiguous thereto or in water-courses (Section 41).

Chapter 13 defines the corresponding penalties for violations of the Law, as follows:

- 1) For violating Section 33:
  - a. for operating a fishery without a fishing implement licence – maximum fine of Kyats 5,000 or maximum imprisonment of 6 months or both;
  - b. for operating a fishery without a lease or a tender licence – maximum fine of Kyats 20,000 or with maximum imprisonment of 2 years or both (Section 42).
- 2) For violating Sections 35, 36, 38, 39 40 or 41: Maximum fine of Kyats 10,000 or maximum imprisonment term of 1 year or both (Section 43).
- 3) For violating Section 37:
  - a. for violation of any condition of the fishing implement licence – maximum fine of Kyats 3,000 or maximum imprisonment term of 3 months or both;
  - b. for violation of any condition of the lease or tender licence – maximum fine of Kyats 1,000 or with maximum imprisonment term of 1 year or both (Section 44).
- 4) For violating Section 34: Maximum fine of Kyats 30,000 or maximum imprisonment term of 3 years or both (Section 45).

## **2.3 Shortcomings and Contradictions in the Freshwater Fisheries Law**

The *Freshwater Fisheries Law* was enacted in 1991, twenty years ago, and many of its provisions simply carry forward the philosophy from the 1905 and earlier fisheries legislation noted above. Consequently, many of the objectives and provisions of the law are out of date and require revision to take fisheries management in Myanmar into the 21<sup>st</sup> century. The major shortcomings in the *Freshwater Fisheries Law* that require reconsideration are identified below.

### **2.3.1 Absence of Responsible Fisheries Principles**

Conservation and sustainable use are not driving objectives of the *Freshwater Fisheries Law*, but development and revenue. In fact, very few modern responsible fisheries principles are specified as objectives of the *Freshwater Fisheries Law*. Further, the accompanying procedures and Directives also focus largely on licensing procedures. Since the enactment of the *Freshwater Fisheries Law*, the international community has developed a number international instruments and Guidelines which should be reflected in fisheries legislation. Of particular relevance are the FAO Code of Conduct for Responsible Fisheries (CCRF) and the FAO Technical Guidelines for Responsible Fisheries No 6 on

Inland Fisheries and Supplement 1 (Rehabilitation of Inland Waters for Fisheries). Staples and Funge-Smith<sup>12</sup> provide an excellent summary of these principles, presented in Box 1 below.

### 2.3.2 Lack of Up-to-date Implementing Regulations

The *Freshwater Fisheries Law* only provides a basic framework, with the detailed management rules to be filled in through subordinate legislation. To this effect, section 57 of the *Freshwater Fisheries Law* empowers the Ministry of Livestock Breeding and Fisheries to issue Procedures, Directives, Notices/Notification and Orders to implement the Law.

Procedures are rules which prescribe some conduct and require Cabinet approval. Orders are administrative instructions applying within the Department. Directives are instructions to the public or Departmental personnel to undertake specific actions. Orders and Directives can be issued by the Director-General and do not require Cabinet approval.

For the purpose of this analysis, the relevant subordinate legislation is the Procedure to give effect to the *Freshwater Fisheries Law*. Since 1992, only one set of Procedure, the Fresh Water Fisheries Procedure, was issued in July 1999. The content of the Procedure largely covers application for the various categories of licenses, rights of lessees and licensees and financial matters.

#### Box 1: Summary of Responsible Fisheries Principles

- Fisheries management should maintain fishery resources *for present and future generations*.
- States should prevent overfishing and excess fishing capacity to ensure that fishing effort is *commensurate with the productive capacity* of the resources.
- Conservation and management measures should be *based on the best scientific evidence* (environmental, social and economic) available, also *taking into account traditional knowledge*.
- The *precautionary approach* should be applied – the absence of adequate scientific information *should not be used as a reason for postponing actions*.
- The *rights of fishers and fishworkers should be protected*, particularly those engaged in *artisanal small-scale fisheries*.
- The right to a just livelihood as well as preferential access, where appropriate, to traditional fishing grounds must be respected.
- Management measures should not only ensure the conservation of target species but also species belonging to the same ecosystem.
- States should facilitate consultation and effective participation of all stakeholders.
- All critical habitats, such as wetlands, mangroves, reefs, lagoons, nursery and spawning areas, should be protected and rehabilitated.
- States should ensure that their fishery interests are taken into account in the multiple uses of the coastal zones and are integrated into coastal area management.
- States should establish effective procedures to undertake appropriate environmental assessment and monitoring with the aim of minimizing adverse ecological changes and related economic and social consequences.

Source: Staples and Funge-Smith, 2009

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<sup>12</sup> Ecosystem approach to fisheries and aquaculture: Implementing the FAO Code of Conduct for Responsible Fisheries, FAO, Bangkok, 2009, pp3-4.

Since 1999, additional individual Notifications were also issued to prohibit specific fishing gear or methods. These include:

- Prohibition on catching, killing, selling, buying, transporting, storing, possessing of fish migrating to spawn
- Reserved fisheries (Mainmahla Sanctuary) No.3/93);
- Explosives (No. 4/2003);
- Fish smothering (No.4/2003);
- Electric short circuiting (No.1/2005);
- Toxic materials (No. 1/2005);
- Electric short circuiting by battery (No. 10/2005);

To ensure effective an up-to date implementation of the *Freshwater Fisheries Law*, it is important that detailed regulations through Procedures and Notifications are developed on regular basis.

### **2.3.3 Need to Review Penalties**

The penalties under the Freshwater Fisheries Law were instituted in 1991 and have not been reviewed in 20 years. These penalties would have been considered very high in 1991, but this may no longer be the case in current value. It is understood that judicial practice has compensated for the relatively low monetary fines by imposing both monetary and the maximum imprisonment term. In combination, penalties under the Law could become excessive in some cases, particularly given the fact that most of the offenders tend to be the very poor in the rural communities.

This is compounded by the provision in Section 47 of the Law relating to repeat offenders: "If a person convicted of any offence under this Law commits the same offence again, he shall be punished with twice the quantum of punishment prescribed."

The proposal to introduce co-management arrangements in the freshwater fisheries is also another factor which will necessitate a reconsideration of the penalties under the Law.

### 3 ENHANCED AUTHONOMY OF THE REGIONS AND STATES

This TOR of this review also require the “Identification necessary and desirable modifications to the existing fisheries laws and regulations in view of the enhanced autonomy of the Regions under the new Constitution.”

#### 3.1 Constitutional Division of Responsibility

Under Section 49 of the 2008 Constitution, Myanmar is divided into the Union Territory<sup>13</sup> and seven States and seven Regions, formerly called Divisions. Regions are predominantly Bamar (that is, mainly inhabited by the dominant ethnic group)<sup>14</sup>. States, in essence, are regions which are home to particular ethnic minorities<sup>15</sup>. The administrative divisions are further subdivided into districts, which are further subdivided into townships, wards, and villages.

The Union legislature, called the *Pyidaungsu Hluttaw*, is bicameral and made up of two houses. The Upper House or House of Nationalities (*Amyotha Hluttaw*) is composed by 224 seats of which 168 are directly elected and 56 are appointed by the Armed Forces. The Lower House or House of Representatives (*Pyithu Hluttaw*) is made up of 440-seats of which 330 are directly elected and 110 are appointed by the Armed Forces.

Article 188 of the 2008 Constitution stipulates the division of legislative authority between the Union Government and the Regions and States as follows: “The Region or State Hluttaw (Parliament) shall have the right to enact laws for the entire or any part of the Region or State related to matters prescribed in Schedule Two of the Region or State Hluttaw Legislative List.” Under Schedule One, all matters relating to marine fisheries fall under the legislative competence of the *Pyidaungsu Hluttaw*. Schedule Two identifies agriculture and livestock breeding, including freshwater fisheries, as falling within the legislative competence of the Regions and States.

It follows from the operation of Schedules One and Two of the 2008 Constitution that the *Law Relating to Fishing Rights of Foreign Fishing Vessels 1989*, the *Law Relating to Aquaculture 1989* and the *Myanmar Marine Fisheries Law 1990* come under the legislative competence of the Union legislature (*Pyidaungsu Hluttaw*), whilst the *Law Relating to Freshwater Fisheries* comes under the legislative competence of the States and Regions.

#### 3.2 Procedure for Legislative Review

As result of the 2008 Constitution, freshwater fisheries management issues are now exclusively within the legislative competence of the States and Regions. Consequently, any modification of the law would have to be done through the State/Region legislature. It is therefore necessary to clearly understand the different procedures for the development and adoption of legislation at the Union level and at the State and Region levels.

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<sup>13</sup> Nay Pyi Taw. Under Section 50 (a) of the Constitution, Nay Pyi Taw., the capital of the Union comes under the direct Administration of the President.

<sup>14</sup> Sagaing Region, Taninthayi Region, Bago Region, Magway Region, Mandalay Region, Yangon Region and Ayeyawady Region.

<sup>15</sup> Kachin State, Kayah State, Kayin State, Chin State, Mon State, Rakhine State and Shan State.



### 3.2.1 Union Law Procedure

The procedure for the development and adoption of Union laws commence with a draft legislation prepared by the Relevant Department. This draft is then submitted to the Office of Attorney-General for review. Following the review, the draft is submitted to the Presidential Legal Advisory Committee for further review and revision. The revised draft is submitted to the Union Constitutional Court for assessment of the draft's constitutionality. The revised draft is then transmitted to the joint Upper/Lower Houses of the Union Legislature (*Pyidaungsu Hluttaw*) for further consideration. The draft is then examined by the Upper/Lower House Law Committee (*Putwel Oopadae Se Sit Ye Committee*) before it is submitted to the President for accent.

### 3.2.2 State/Region Legislative Procedure

At the State/Regional level, legislation is proposed by the relevant Department and then submitted to the State/Region Division of the Office of Attorney-General for review. Following review, the bill is submitted to the Bills Committee of the State or Region and finally submitted to the State or Region Parliament (*Hluttaw*) for passage.

## 3.3 Necessary Modifications Required to Enhance Autonomy of the Regions/States

As demonstrated earlier, the *Freshwater Fisheries Law* requires revision and modernization. New management objectives must be clearly articulated and must include the following principles for responsible fisheries:

- Long term conservation and sustainable use for present and future generations.
- Protection and rehabilitation of critical habitats, in particular mangroves, nursery and spawning areas.
- Prevention of overfishing and excess fishing capacity to ensure that fishing effort is commensurate with the productive capacity of the resources.
- Application of the precautionary approach – the absence of adequate scientific information should not be used as a reason for postponing actions.
- Recognition and protection of the rights of fishers and fishworkers, particularly those engaged in artisanal small-scale fisheries.
- Recognition of the right to a just livelihood as well as preferential access, where appropriate, to traditional fishing grounds must be respected.
- Management measures should not only ensure the conservation of target species but also species belonging to the same ecosystem.
- Consultation and effective participation of all stakeholders.
- Effective framework for monitoring, control and surveillance.

It is understood that there are currently a number of efforts to modernize the fisheries sector generally and fisheries legislation in Myanmar. The timing for a comprehensive review of the *Freshwater Fisheries Law* would seem to be right. It is the understanding of the consultant during discussions with officials from the Department of Fisheries that already, revised drafts of the *Law Relating to Fishing Rights of Foreign Fishing Vessels 1989*, the *Law Relating to Aquaculture 1989* and the *Myanmar Marine Fisheries Law 1990* are under preparation to be submitted to the Office of the Union Attorney-General for promulgation.

Similarly, the Department of Fisheries has commenced a revision of the *Freshwater Fisheries Law* to be re-enacted by the Regions and States. This process will involve the Department of Fisheries

recommending revisions to State and Region governments on habitat protection and co-management arrangements. However, even if State and Region Governments re-enact the *Freshwater Fisheries Law*, the Department of Fisheries will continue to have responsibility of the implementation and enforcement of the law. The expectation is that revision of the *Freshwater Fisheries Law* will be completed by 2012.<sup>16</sup>

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<sup>16</sup> Discussion with U Htun Thiha, Law Officer Department of Fisheries on 2 November 2011

## 4 CONTRADICTIONS BETWEEN THE FRESHWATER FISHERIES LAW AND OTHER LAWS

The TOR of the review require identification of contradictions or ambiguities between the fisheries regulations on one hand and those of environment, wildlife etc on the other. Operation of the *Freshwater Fisheries Law* interfaces mainly with two other pieces of legislation; namely: *Forest Law 1992* and the *Wildlife and Conservation of Natural Areas Law 1994*. A detailed summary of these two pieces of legislation is provided in **Appendix 4**. The analysis in this section will be in three parts. The first part will focus on ambiguities and contradictions between the *Freshwater Fisheries Law* and the *Forest Law*. The second part will present ambiguities between the *Freshwater Fisheries Law* and the *Wildlife and Conservation of Natural Areas Law*. The third part will present options for resolving the ambiguities identified.

### 4.1 The Forest Law 1992

The Forest Law applies to all “forest land”, defined in Section 2(e) of the Law as “land including reserved forest and protected public forest.” In practice, a large number of reserve forests are mangrove areas which are also included in the definition of freshwater fisheries areas under the *Freshwater Fisheries Law* and constitute important habitats for freshwater and brackish fish species which are also regulated under the *Freshwater Fisheries Law*.

The broad objectives of the *Forestry Law* are stated in Section 3 of the Law as follows:

- to implement the forestry policy of the Government;
- to implement the environmental conservation policy of the Government;
- to promote the sector of public co-operation in implementing the forestry policy and the environmental conservation policy of the Government;
- to develop the economy of the State, to contribute towards the food, clothing and shelter needs of the public and for perpetual enjoyment of benefits by conservation and protection of forests;
- to carry out in accordance with international agreements relating to conservation of forests and conservation of environment;
- to prevent the dangers of destruction of forest and bio-diversity, outbreak of fires, infestation of insects and occurrence of plant disease;
- to carry out simultaneously conservation of natural forests and establishment of forest plantations;
- to contribute towards the fuel requirement of the country.

To achieve its objectives, Section 4 of the *Forest Law* allows the Minister responsible for forestry to, with the approval of the Government, to declare different categories of reserved forest, including watershed or catchment protection reserved forest. Outside reserve forests, Section 5 of the *Forest Law* empowers the Minister to, with the approval of the Government, declare any forest land as protected public forest, for the a number of purposes, including protection of water and soil; conservation of mangrove forests; conservation of environment and bio-diversity; and conservation for sustainable production.

Section 40 of the *Forest Law* creates a number of offences under the law. For the purpose of this Report, these offences include (a) trespassing and encroaching in a reserved forest; (b) causing damage to a water-course, poisoning the water, using chemicals or explosives in the water in a reserved forest; and (c) catching animals, hunting or fishing in a reserved forest. The penalty for these offences are, on conviction, a maximum fine of *Kyatts* 5000 (about US\$ 6 in present day value)<sup>17</sup> or imprisonment for a maximum term of 6 months or both a fine and imprisonment.

#### **4.1.1 Interaction between Forestry Law and Freshwater Fisheries Law**

Analysis of the *Forest Law* and the *Freshwater Fisheries Law* reveals four levels of contradictions and ambiguities. These relate to (a) Area of Application; (b) Species; (c) Jurisdiction/Management; and (d) Offences and Penalties.

##### ***Area of Application***

A considerable amount of forest areas in Myanmar are mangrove areas reserved under the *Forestry Law*. These areas are also defined as freshwater fishing areas under the *Freshwater Fisheries Law*.

The *Freshwater Fisheries Law* applies to freshwater fisheries areas defined in Section 2(e) to include all water bodies, whether permanent or seasonal, water in all areas even belonging to any Government department, including brackish water and river mouths and creek mouths contiguous to the sea. Under the *Forest Law*, “forestry land” is in Section 2(e) is defined as “land including reserved forest and protected public forest.” At the same time, all the mangrove reserved forests under the *Forest Law* are also defined as freshwater fishing areas under the *Freshwater Fisheries Law*. Mangrove reserved forests are scattered throughout delta areas Myanmar, but the three regions of major concentration, based on multi-temporal analysis of satellite data, are Ayeyarwady, Rakhine and Tanintharyi regions.<sup>18</sup>

Mangrove forests provide important habitats for freshwater and brackish fish species. A significant number of fish species regulated under the *Freshwater Fisheries Law* are known to live in mangrove forests. Recent studies<sup>19</sup> in one mangrove reserve forest have identified 62 species of fin fish, 5 species of crustaceans and 5 species of mollusc within mangrove forest reserves. Over the past decade or so, there has been a dramatic increase in fishing effort within such reserve forest areas, resulting in substantial deterioration in the quality and vitality of such mangrove areas<sup>20</sup>. The identified fisheries activities in the mangrove reserve forests include: (a) river mouth fence fishing; (b) use of fishing nets with very small mesh size; (c) catching of gravid fish and crabs; and (d) trapping of juvenile crabs.<sup>21</sup>

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<sup>17</sup> Based on exchange rate of US\$1=788 kyats

<sup>18</sup> Win Myint & Deiva Oswin Stanley, *The Mangrove Vegetation of Wubaik Reserved Forest*, FAO, Myanmar, April 2011, p.1.

<sup>19</sup> Soe K, M & Stanley D. O, *Fishery Resources of the Wunbaik Reserved Mangrove Forest*, FAO, Myanmar, April 2011.

<sup>20</sup> Other identified causes of deterioration include human settlement, clearing of mangrove forests for paddy farms, use of mangroves for timber, firewood and as construction materials (Discussion with Deiva Oswin Stanley, FAO Consultant for the “Sustainable Community-based Mangrove Management in Wunbaik Forests: TCP/MYA/3204” project on 3 November 2011).

<sup>21</sup> Khin Maung Soe and Daiva Oswin Stanley in relation to the Wunbaik Reserve Mangrove Forest,(Fishery Resources of the Wunbaik Reserved Mangrove Forest, FAO, Myanmar 2011)

### ***Species/Product Overlap***

There is also some level of conflict between the *Freshwater Fisheries Law* and the *Forest Law* in terms of species covered under the respective definitions.

The *Freshwater Fisheries Law* applies to fish defined as “all aquatic organisms living the whole or part of their life cycles in the water, their spawns, larvae, fry and seeds. Fish also includes “aquatic plants, their seedlings and seeds” (Section 2(f)).

Under the *Forest Law*, “forest produce” is defined in Section 2(e) to include “trees, leaves, flowers and fruits grown on or found in forest land or land at the disposal of the Government and their by-products, wild animals and insects, their parts and their by-products. This definition will also include fish species in mangrove forests which are regulated under the *Freshwater Fisheries Law*.”

Within the exclusive context of the *Freshwater Fisheries Law*, the broad definition of fish, seem to operate well. However, overlaps become evident when looked at in the context of forestry in relation to mangrove forests which lie in the transitional zone between freshwater and marine water.

### ***Jurisdiction/Management***

Freshwater fisheries are managed by the Department of Fisheries under the Ministry of Livestock Breeding and Fisheries whilst forests come under the Department of Forestry which operates within the Ministry of Environmental Conservation and Forestry. It is clear from the spatial and species point of view above that two Ministries and two Departments both have jurisdiction over some aspects of freshwater fisheries.

Consistent with the objectives of the *Freshwater Fisheries Law* in Section 2, the Department of Fisheries has power to permit fishing activities throughout the freshwater fisheries areas. As noted earlier, these fishing activities are regulated through several mechanisms such as competitive bidding, leases and licenses. With the exception of “reserved fishery” under Section 23 of the *Freshwater Fisheries Law*, fishing is permitted throughout the fresh water fisheries waters. Section 2 (e) of the *Freshwater Fisheries Law* defines ‘reserved fishery’ as “fisheries waters in which fishing operations are prohibited from time to time or in which fishing operation are prohibited subject to stipulations by the Department, in order to prevent the extinction of fish and to propagate the same.” The only time this power has been used was in 1993 pursuant to Notification No. 3/93 in respect of freshwater fisheries in Ayeyarwaddy.

Forestry areas which are not reserved are available for exploitation for forestry products for commercial purposes, subject to the grant of permit. Under Section 4 of the *Forest Law*, the Minister may, with the approval of the Government, declare different categories of reserved forest, including watershed or catchment protection reserved forest, environment and bio-diversity conservation reserved forest; and other categories of reserved forest.

Under the *Forest Law*, mangrove forests are not reserved, but protected public forests, pursuant to Section 5 of the law. Protected public forests are situated outside reserved forests where the Minister may specify limits on land. Beyond this the distinction between reserved forest and protected public forest is not clear.

Whilst reserved and protected areas may be declared under both the Freshwater Fishery Law and the Forestry Law, their objectives and the procedures to be followed are totally different. “Reserved areas” under the *Freshwater Fisheries Law* do not necessarily prohibit exploitative activities, whilst exploitative activities are totally prohibited in “reserved forests” under the *Forest Law*. Given that all mangrove forests are protected under the *Forest Law*, but not reserved under the *Freshwater Fisheries Law*, this can cause some confusion among the fishing community and result in increase non-compliance with the prohibitions under the *Forest Law*.

Another issue worth pointing out relates to the different procedure under the two laws for the declaration of reserved areas. Under Section 23(b) of the Fresh Water Fisheries Law, the power to declare an area as a reserve fishery area is largely conferred on the Director –General, although in practice the Director-General exercises this power in consultation with the Minister. There is also no prescribed consultation process for declaring a reserved area under the *Freshwater Fisheries Law*. The only example to date was the 1993 declaration which was done through Notification which was circulated only after promulgation.<sup>22</sup>

In contrast, under Section 4 of the *Forest Law*, the power to declare a forest area as reserved forest is given to the Minister, with approval of the Government.

From the above comparison, two practical implications arise. First, under the *Forest Law*, fishing or hunting are not permitted in reserved forests. The situation is not very clear with regard to protected public forest which covers most of the mangrove areas. Second, under the *Freshwater Fisheries Law*, the Department of Fisheries can grant license or lease to operate in all freshwater fishing areas.

The problem of jurisdictional overlap and contradiction seem to relate to freshwater fishing activities which do not require a license. Under Section 22(b) of the *Freshwater Fisheries Law*, the Director-General has power to determining the rates of licence fee according to the type of fishing implement. In exercising this power, the Director-General has exempted some 15 fishing implements (gears) from obtaining licenses, resulting in these gears being unregulated.<sup>23</sup> What this means is that any of these 15 unregulated implements can lawfully be used in any open fishery in the freshwater fisheries, including the mangrove forests which are protected public forests or possibly reserved under the *Forest Law*.

Socially, the issue seems to be more complex than it appears. Generally the users of these implements are the poorer members of the community who cannot afford to buy leases or pay license fees under the *Freshwater Fisheries Law*. Thus, from a social equity perspective, the decision by the Director-General to exempt these implements from the licensing requirements under the law may understandable. However, in practice, it has resulted in unintended conservation consequences.

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<sup>22</sup> The recipients included: Office of the Chairman, State Peace and Development Council (former Government); Office of the State Peace Development Council; all Ministers; North-West Command; Chairman, Ayeyarwaddy Division Peace and Development Council; Forest Department

<sup>23</sup> These implements include: Hand line (Let Htun); Pole and line (GineHtauk); Pole and line (Tai HtaungNgaHmyar); Long line (NgaHmyarTann); Floating line (Bu Hmaw); Portable Cast net (Let PyitCon); Man push net (Yin Toon); Lift net (GawPike); Small Fish trap (HmyoneNge); Large fish trap (HmyoneGyi); Drop door trap (Toke); Fishing with Luring leaf (Dasaung/Fat htoe); Fish Basket(Saung); Spear (Suu, Hmain); Artificial Fish Holes(Gote/Htoo).

## **Offences and Penalties**

Another area of inconsistency and contradiction between the *Freshwater Fisheries Law* and *Forest Law* is in relation to offences and penalties.

Offences under the *Freshwater Fisheries Law* relate to operating without a permit or licence, use of prohibited fishing gear and substances, catching prohibited species, catching fish during a prohibited period, destruction of fish habitat, impairing the natural conditions of fish, cultivation of agricultural crops within the boundary of a fishery creek, harassment of fish, pollution of fresh water (although pollution is not defined). Penalties for the above offences range from Kyats 10000 to 50000 or imprisonment for between 3 months to 3 years.

In contrast, offences under the *Forest Law* relating to reserved forests include: trespassing and encroaching in a reserved forest; causing damage to a water-course, poisoning the water, using chemicals or explosives in the water in a reserved forest; catching animals, hunting or fishing in a reserved forest (Section 40). Penalties for the above offence are a fine of Kyats 5,000 or with imprisonment not exceeding 6 months or with both. Interestingly, the *Forest Law* does not prescribe any offences for protected forests under Section 6 of the law. This is either an omission or it may be that in practice protected public forests are simply a category of reserved forests.

### **4.2 The Protection of Wildlife and Conservation of Natural Areas Law 1994**

Another area of legislative conflict and overlap is between the *Protection of Wildlife and Conservation of Natural Areas Law 1994* and *Freshwater Fisheries Law*.

The objectives of the Protection of Wildlife and Conservation of Natural Areas Law are:

- to implement the Government policy for wildlife protection;
- to implement the Government policy for natural areas conservation;
- to carry out in accordance with the International Conventions acceded by the State in respect of the protection and
- conservation of wildlife, ecosystems and migratory birds;
- to protect endangered species of wildlife and their natural habitats;
- to contribute for the development of research on natural science;
- to protect wildlife by the establishment of zoological gardens and botanical gardens.

To achieve these objectives the *Wildlife and Conservation of Natural Areas Law* established a multi-agency committee under Section 4, comprising the Minister responsible for forestry as Chairman, representatives from the relevant Government Departments and Government organizations, and relevant luminaries and experts necessary.

Section 2 of the *Wildlife and Conservation of Natural Areas Law* defines “wildlife” as “the wild animals and wild plants in their natural habitats.” Wild animal” is defined to mean “naturally bred animals, birds, insects, aquatic animals and their spawns, larvae, fry and seeds in their natural habitats”; and “wild plant” is defined to mean “trees, shrubs, climbers, bamboos, canes, orchids, fungus, aquatic plants and their seeds growing in their natural habitats.”

Protection is afforded to wildlife as defined in Section 2 of the *Wildlife Law* through the declaration of several categories of natural areas under Section 7 of the *Wildlife Law*. These categories include: (a) Scientific Reserve; (b) National Park; (d) Marine National Park; (e) Nature Reserve; (f) Wildlife

Sanctuary; (g) Geo-physically Significant Reserve; and (h) other Nature Reserve determined by the Minister.

Wildlife in any of the above natural areas is classified under three categories in accordance with Section 15 of the *Wildlife Law*. These include (a) completely protected species of wild animals (b) protected species of wild animals; (c) seasonally protected species of wild animals.

Wildlife seasonally protected cannot be harvested during specified seasons or periods. For Example, Forest Department Notification Number 583/1994 prohibits the taking of two species, hog deer and barking deer from June 15 to 31 September every year.<sup>24</sup> However, no freshwater species have yet been included in the seasonally protected species category.

A large number of freshwater species are, however, protected under the completely protected category. These include: Irrawaddy dolphin (*Orcaella brevirostris*); the Common Otter (*Lutra lutra*), the smooth coated Indian otter (*Lutra perspicillata*); the small clawed otter (*Aonyx cinerea*), (e) crocodile (*Garviallis gangeticus*).

Section 37 of the *Wildlife and Conservation of Natural Areas Law* makes it an offence for any person (a) to kill, hunt or wound a completely protected wild animal without permission, possess, sell, transport or transfer such wild animal or any part thereof without permission; or (b) export without the recommendation of the Director General a completely protected wild animal or a protected wild plant or any part thereof. The penalty for violating Section 37 is imprisonment for a term which may extend to 7 years or with fine which may extend to Kyatts 50,000 or with both.

#### **4.2.1 Summary of Relationship between Freshwater Fisheries Law and Wild Life Law**

The relationship between the *Freshwater Fisheries Law* and the *Wildlife and Conservation of Natural Areas Law* can be summarised as follows:

- A species may be protected under the *Wildlife and Conservation of Natural Areas Law* but harvested under the *Freshwater Fisheries Law*. The problem seems to be the lack of regulation of a large number of fishing implements under the *Freshwater Fisheries Law*.
- Under the Department of Fisheries Notification No.2/92, the catching, selling, transporting, storing, processing, buying, distributing or fish migrating to spawn, fish in the months of May, June and July, larva, female fish full with egg without the permission of the Department of Fisheries. Fishermen who accidentally catch any of the protected are required to release them immediately. However, this would appear to be an independent fishery management measure which is unrelated to the concept of seasonally protected species under the *Wildlife Law*.
- Under Section 34 of *Freshwater Fisheries Law*, it is an offence for any person to catch fish during a prohibited period and at a prohibited place. It is not clear whether this prohibition also applied to species protected under the *Wildlife and Conservation of*

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<sup>24</sup> Thirteen other species are protected from 15 March to 30<sup>th</sup> September ever year. These are: patridge/francolin, quails, lora, leaf birds, doves, common moorhen, purple swamphen, bulbul, robins, chats, paradie flycatcher, cuckoo bird, nightjars, drongos



Natural Areas Law because the two laws do not establish relationship between them in so far as protected species are concerned.

- It is noteworthy that the penalties under both laws are different. Under Section 45 of the *Freshwater Fisheries Law*, the penalty for violating Section 34 is fine which may extend to Kyatts 30,000 or imprisonment for a term which may extend to 3 years or with both. However, under Section 37 of the *Wildlife and Conservation of Natural Areas Law*, the penalty for violating the prohibitions on protected species is imprisonment for a term which may extend to 7 years or with fine which may extend to Kyatts 50,000 or with both.

### **4.3 Resolving the Contradictions/Ambiguities**

Although resolution of the issues associated with the overlaps between the *Freshwater Fisheries Law* on the one hand and the *Forest Law* and the *Wildlife and Conservation of Natural Areas Law* is a complex one, the timing for such a discussion seems to be very good for two reasons.

- First there is a national discussion currently taking place in Myanmar in relation to fashioning a new policy and legal framework for resource management rights and responsibilities between the Union Government and the States and Regions in line with the 2008 Constitution.
- Second, there is a general awareness that failure to address these issues will result in further depletion of freshwater and mangrove forest resources, to the detriment of the biodiversity of Myanmar and the food security of its people.

The following options are proposed for consideration to address the contradictions/ambiguities between *Forest Law* and *Freshwater Fisheries Law* and the *Wildlife and Conservation of Natural Areas Law*.

#### **4.3.1 Need for comprehensive National Policy Framework**

The first option proposed is the need for the development of a comprehensive national policy framework. There is a general awareness of the issues in Myanmar, but they are considered too complex and a very sensitive to be addressed at the inter-departmental level. One of the reasons why these legislative overlaps and ambiguities have persisted for the past 20 years has been the absence of a comprehensive, overarching and integrated resource management policy in Myanmar. The result has been that resource management and the legislative framework supporting it has been based highly sectoral approach. Within this framework, there is no mandate or incentive for any agency, on its own, to initiate reform.

#### **4.3.2 Legislative Review/Amendment**

The root cause of the overlap between the *Freshwater Fisheries Law* and the *Forest Law* is that all three laws are equally valid individually and there is no hierarchy amongst them. A possible approach is to consider legislative review by amending either the *Freshwater Fisheries Law* or the *Forest Law* and the *Wildlife and Conservation of Natural Areas Law* to avoid conflict.. In practice, this option is not as easy it seems because it will require agreement by two separate Ministries. Currently, there appears to be no incentive in both Departments to amend their respective legislation in the absence of integrated national policy noted above. Thus, whilst ultimately

legislative change to align the three pieces of legislation with a common policy framework will be required, the starting point must be policy development as noted above. Such a comprehensive policy on freshwater and mangrove forest resources should establish common principles, against which sectoral legislative review would be undertaken.

#### **4.3.3 Inter-Agency Cooperation**

There is a lot that can be achieved through inter-agency dialogue, in the absence of national policy mandate. The *Freshwater Fisheries Law* and the *Forest Law* actually have some inbuilt provisions which can be used to foster cooperation between the Department of Fisheries and the Forest Department.

Article 83 of the Freshwater Fisheries Procedure requires that where the Department of Fisheries grants a lease, tender or fishing implement license for fresh water fisheries in an area under is also under the jurisdiction of another Government Department or organization:

- The Department of Fisheries shall obtain the remarks from the Government Department or organization concerned;
- Conditions set out by the other Government Department or organization shall be incorporated into the lease grant and tender licence.

In theory, this provision ensures harmonization between the Department of Fisheries and other Departments. This also means that for all freshwater fisheries subject to permit, lease or tender, there should be no conflict between the *Freshwater Fisheries Law* and the *Forest Law*.

Similarly, section 6 of the *Forest Law* specifies detailed procedure to be followed by the Minister in declaring an area a reserved forest. Under Section 6, the Minister shall:

- before constituting a reserved forest or declaring a protected public forest, declare in the manner prescribed that it is proposed to constitute any land a reserved forest or to prescribe any land a protected public forest;
- in respect of constituting a reserved forest appoint a Forest Settlement Officer to inquire into and determine in the manner prescribed the affected rights of the public on the relevant land and to carry out demarcation of the reserved forest
- in respect of specifying a protected public forest delegate the Director-General to inquire into and determine in the manner prescribed the affected rights of the public which may arise under the prohibitions contained in the declaration;
- publish a notification constituting a reserved forest after consideration of the report submitted through the Director-General by the Forest Settlement Officer after carrying out in accordance with sub-section b of the Section; and
- publish a notification determining a protected public forest after consideration of the report submitted by the Director-General after carrying out in accordance with sub-section c.

#### **4.3.4 Other Proposed Solutions**

Khin Maung Soe and Daiva Oswin Stanley<sup>25</sup> in relation to the Wunbaik Reserve mangrove Forest, suggest a number of solutions to minimise conflict between the *Freshwater Fisheries Law* and the *Forest Law* and to protect the health of the mangrove systems and consequently the fish stocks. The suggested solutions include:

- Strict enforcement of the forestry legislation;
- Maintain a user register and photo identity card system to keep track of resource use within the reserve forest;
- Prohibit commercial fishing inside the reserve forest in accordance with the Forestry Law;
- Specify the types of fishing gear and craft permitted to be used in the reserve forest
- Licensing of fishers to fish in the reserve forest;
- Declaration of a total allowable catch from reserve mangrove forests
- Strict regulation of creek mouth fishing;
- Enforce prohibition on use of destructive fishing practices such as use of poisons, dynamite, electric shocks;
- Declaration and enforcement of conservation holidays (no fishing days) during spawning periods;
- Enforce ban on collection, breeding and fattening of crab for export and the collection of soft shell crab for commercial purposes; and establish crab breeding centres outside the mangrove reserve forests.

#### **4.3.5 Co-management**

These proposed solutions will require effective policing and enforcement, which is currently problematic. Ultimately, it would seem that the implementation of some form of co-management approaches in the fishery will provide a much longer and sustainable solution. This will promote better identification of the user groups with the resource and ultimately a better conservation and compliance attitude. As shown in Section 8 below, both the literature and experience elsewhere has shown the utility of co-management approaches in resolving fisheries non-compliance issues by communities similar to what is prevailing in Myanmar.

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<sup>25</sup> Fishery Resources of the Wunbaik Reserved Mangrove Forest, FAO 2011, pp.82-83.

## 5 FRAMEWORK FOR FISHERIES CO-MANAGEMENT

The TOR also required the Expert to “identify desirable modifications to the fisheries laws and regulations for enhanced participation of resource users in the management of the resources (co-management).” Addressing this TOR requires establishing the contextual framework for co-management in fisheries management generally before an assessment is made of the adequacy or otherwise of the existing legal framework in Myanmar to incorporate co-management principles.

### 5.1 Concept of Co-management

Co-management, also referred to variously as participatory management, community-based management, collaborative management, etc, refers to fisheries management arrangements “whereby villages or other communal groupings are the primary partners and principal initiators of management action for the...fisheries in a specified locality.”<sup>26</sup> More recently, Kurien summarises this as “a partnership accord between the interest groups involved in the fisheries sector to negotiate a trustworthy process of sharing the rights and authority for responsible stewardship of fishery resources.”<sup>27</sup> Irrespective of terminology used such participatory arrangements will have varying degrees of intervention by the government and may include delegation or transfer of some management responsibility to resources users with technical advice or assistance of government. The form of partnership depends on the desired long-term fisheries management objectives to be achieved, but these objectives must be established at the onset.

The promotion of co-management in fisheries recognizes of the truism that “the underlying causes of fisheries resource over-exploitation and coastal environmental degradation are often of social, economic, institutional and/or political origins. The primary concerns of fisheries management, therefore, should address the relationship of fisheries resources to human welfare and the conservation of the resources for use by future generations. That is, the main focus of fisheries management should be people, not fish per se. Policy interventions, if they are to bring about lasting solutions, must address these concerns.”<sup>28</sup>

The benefits of co-management arrangements in fisheries include:

- greater reliability and accuracy of data and information;
- more suitable and effective regulations;
- enhanced acceptability of and compliance with management measures;
- reduction in enforcement costs;
- reduction in conflicts; and

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<sup>26</sup> Section 3.3 of FAO Fisheries Technical Guidelines for Responsible Fisheries on Fisheries Management, No. 4, Rome, 1997. See also definition of co-management by Abdullah, Kuperan and Pomeroy, *Transaction Costs and Fisheries Co-Management, Fisheries Co-Management - A Worldwide Collaborative Research Project: <http://www.co-management.org/>* and Fikret Berkes, Robin Mahon, Patrick McConney, Richard Pollnac, and Robert Pomeroy, *Managing Small-Scale Fisheries – Alternative Directions and Methods*.

<sup>27</sup> John Kurien Negotiation Fisheries Co-management in Aceh Province, Indonesia, FAO, 2010, p6.

<sup>28</sup> Robert S. Pomeroy, “Community-based and co-management institutions for sustainable coastal fisheries management in Southeast Asia”, *Ocean and Coastal Management*, vol. 27, No. 3, p.143.

- strengthening of commitment to and participation by stakeholders (FAO 1997)

The imperatives for fisheries co-management also arise from the lack of capacity in fisheries agencies to successfully regulate what goes on in widely dispersed fishing ground under their jurisdiction. Indeed, “the delegation of fisheries management and allocation of decisions to the local level may be more effective than the management efforts which distant, under-staffed and under-funded national government fisheries agencies can provide.”<sup>29</sup>

In summary, fisheries co-management arrangements, properly implemented, offer innovative solutions to fisheries management to address some of the inadequacies of modern fisheries governance.<sup>30</sup> As King and Fa’asili point out:

“Despite concerns over declining fish stocks, government actions and national laws to protect fish stocks are rarely successful. This is due to many factors, including poor enforcement regimes and particularly the lack of community involvement. Fishing communities are often repositories of valuable traditional knowledge concerning fish stocks, and have a high level of awareness of the ...environment... In addition, many subsistence fishers in tropical regions live in discrete communities that have some degree of control, either legal or traditional, over adjacent waters. Together, these factors provide an excellent basis to encourage and motivate communities to manage their own marine resources.”<sup>31</sup>

## 5.2 Creating Legal Space<sup>32</sup> for Fisheries Co-Management

A necessary prerequisite for a successful co-management framework is establishing a legal framework for it. Co-management frameworks can be grounded on a combination of four legal basis:<sup>33</sup> (a) the Constitution; (b) customary tenure; (c) legislation and policy and (d) judicial decisions.<sup>34</sup> Irrespective of the legal basis for co-management in a particular situation, it is important that formal legal recognition is implemented through some form of legislation. The legal framework supporting fisheries co-management must be developed within a socio-economic context by taking into account, among other things, relationships between customary laws and practices (if any) on fisheries, and the political and social circumstances in existence. Based on Kuemlangan<sup>35</sup> the following can be identified as the core checklist for the legal framework underpinning a co-management framework:

- Elaboration of basic principles relating to co-management which are not in conflict with the fundamental national laws;

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<sup>29</sup> Robert S. Pomeroy, Community-based and co-management institutions for sustainable coastal fisheries management in Southeast Asia, *Ocean and Coastal Management*, vol. 27, No. 3, p.144

<sup>30</sup> Viswanathan, K.K et al; *Fisheries Co-management Policy Brief: Findings from a World Study*, Danida, IFM and World Fish Centre, 2003, p.5

<sup>31</sup> King M and Fa’asili U, Network of small, community-owned Village Fish Reserves in Samoa, <http://www.spc.int/coastfish/News/Trad/11/1.htm>

<sup>32</sup> The phrase is borrowed from Blaise Kuemlangan, “Creating Legal Space for Community-based Fisheries and Customary Marine Tenure in the Pacific: Issues and Opportunities,” *FAO/Fish Code Review No. 7*, FAO, Rome 2004.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid

- Capability of existing inside the larger legal framework and be linked with sovereign authority, which is the State;
- Clear identification of the group, unit or ‘community;’
- Clear definition of “community boundaries;”
- Provision for site-specific delegation of some management responsibility, either on an indefinite basis or for a definite period to the “community”;
- Clear definition of the powers given to designate co- management units with clear rule-making ability;
- Establishment of clear rules by which the “community” can interact with the government institutions;
- Security of tenure and protection of the resources being managed by the group from trespass and the criminal behaviour of outsiders (exclusive fishing rights within the borders of each community/village);
- Clear articulation in the compliance framework of the different roles and functions of the various co-management units, including enforcement functions.
- Enforceability of any community management rules; and
- Removal of conflict between the fisheries legislation and other legislation.

### **5.3 Fisheries Co-management in Myanmar**

This part of the Report examines the current legal framework in Myanmar to ascertain the extent to which it creates the “legal space” for co-management arrangements capable of being applied in the freshwater fisheries.

#### **5.3.1 The Constitution of Myanmar**

Article 37 of the 2008 Constitution of Myanmar provides that the Union “is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union”. It is a Constitutional responsibility of the Union to “enact necessary law to supervise extraction and utilization of State owned natural resources by economic force” and to permit citizens right to private property in accordance with the law. The Constitution does not specifically provide for the establishment of co-management groups or the transfer of State resources to individual user groups. At the same time however, the Constitution does not prohibit the establishment of such co-management arrangements.

#### **5.3.2 Legislative and Policy Framework**

There is no specific legislation in Myanmar which provides for fisheries co-management. In recent times, however, particularly following activities undertaken under the ESFS, there have been substantial discussions on co-management arrangements Myanmar, resulting in a growing acceptance of the need to introduce some form of co-management approaches to managing some aspect of the freshwater fisheries in Myanmar.

The clearest policy statement to-date on co-management is the speech given by the Deputy Minister for the Ministry of Livestock Breeding and Fisheries, H.E U Khin Maung, Aye to the ESFSP Tripartite Mission Meeting on 28<sup>th</sup> October 2011, the relevant parts of which are reproduced below.

“Most important, the transfer of the holding of tender lots for stow-nest from individuals from outside the project area to the Village Fisheries Societies (VFS) with their executive Fisheries

Management Committees established by the Project is a remarkable development, which can be credited to the ideas and work of the ESFSP and it is the first time that the management responsibility for fisheries has been transferred to local communities in Myanmar. We also acknowledge that through the project, Village Fisheries Management Committees (VFMCs), Fishing Gear Groups (FGGs), Post Harvest Fisheries Groups (PHFGs) and other Community based Organizations (CBOs) have been established for the management of local resources.”

“Through the ESFP work, the local communities themselves will have the power to decide on certain aspects of the exploitation of the resources on which they depend and this is an important step towards the co-management of resources. For instance, the tender lots may also generate significant income to the newly established societies, if properly managed.”

“In this regard, the Union Ministry of Livestock and Fisheries, would like to develop a revised fishing right policy to be applied all over Myanmar and the work conducted under the GCP/MYA/010/ITA is extremely important to pilot co-management of fisheries resources, once the rights have been transferred.”

### **5.3.3 Judicial Decisions**

There are no records of any judicial decisions by the courts in Myanmar which recognise the existence of fisheries co-management.

## **5.4 The Forestry Example**

Community involvement in the management of forest areas is well established under the *Forest Law* and the accompanying Communities Forestry Instructions issued by the Department of Forestry. The Instructions cover a range of issues, including:

- Areas where community forest can be established;
- Areas permitted for the establishment of community forest;
- Application for the establishment of community forests;
- Allotment of land for the establishment of community forest;
- Duration of land lease for the establishment of community forest;
- Preparation of community forest management plans;
- Certificate for the establishment of community forest;
- Assistance of the Forest Department;
- Responsibilities and duties of the user’s group;
- Prohibitions;
- Exploitation of forest products from community forest;
- Funds;
- Price setting;
- Permission for transportation of forest products from the community forest; and
- Offences and penalties.

The forestry experience in Myanmar can provide a useful model for the development and implementation of co-management arrangements in the freshwater fisheries sector.

#### **5.4.1 Application of Forestry Model to Freshwater Fisheries**

As demonstrated under 2.1 above, there are several methods in which access to the fresh water fisheries is granted by the Department of Fisheries. Two of these methods include leases and tender licenses. It is possible the lease and tender fisheries methods can be used for "modern" co-management arrangements. For example, traditional rights for small-scale fishers and catch quotas could be built into the agreements to covering leases and tender leases.

#### **5.5 The Emerging Fisheries Co-Management Model in Myanmar**

To date, the ESFS experience is the only attempt to develop a fisheries co-management framework in Myanmar. The framework that has emerged from the various workshops and reports under the Project can be summarised as follows:

- The unit of management comprises fishers at community or village levels, through the establishment of Village Fisheries Societies in eleven village areas. The membership the Village Fisheries Societies will comprise all full time and part time fishers owning fishery assets, including those engaged in post-harvest activities. The management structure underpinning the Village Fisheries Societies will be an executive committee called the Village Fisheries Management Committee.
- Negotiations have been carried out with the Department of Fisheries to transfer sixteen tenders in the project area to the Village Fisheries Societies. These tender areas will be clearly demarcated by the Department of Fisheries and declared as "Special Management Areas" under the Freshwater Fisheries Procedures;
- Each Village Fisheries Society will have exclusive right to the fisheries resources within the demarcated boundaries, including internal creeks and areas for shore-based fisheries as fence-net and beach seine net. Fishers from outside a co-management area will be permitted to fish in the area provided they comply with the management rules in place.
- Within each of the co-management areas, all the existing laws, procedures and directives of the Department of Fisheries will continue to apply. In addition, additional management rules and measures will be developed by the Village Fisheries Society for the "Special Management Areas" they are co-managing" in the form of Fishery Management Plans;
- Responsibility for enforcement within each "Special Management Area" will continue to be the responsibility of the Department of Fisheries in cooperation with the Police Force; however, the village communities will be expected to cooperate in surveillance activities.
- Model by-laws for the Village Fisheries Societies have been developed and are under discussion. The by-laws cover issues such as membership details, procedures for meetings, accounts of the societies and administrative framework. The plan is to forward these by-laws to the Department of Fisheries when they are completed.



### **5.5.1 Evaluation of the Proposed Co-management Model**

The elements of the proposed co-management model in the project area contain all the necessary legal elements for the establishment of co-management arrangements. As noted above, there is currently no legal framework to support the establishment of the proposed co-management model. What is required, therefore, is creating “legal space” for its implementation. There are two broad issues to address. The first is how to legally establish the co-management units and the second is the legal recognition of such groups as co-management units.

## **5.6 Creating Legal Space for the Co-management Groups**

### **5.6.1 Establishment of the Co-management Groups**

The first legal consideration is how to give legal recognition to the co-management groups. The model proposes to establish the fisheries co-management associations through articles of association called bye-laws. This is a very sound approach which will clearly identify the co-management groups. The practical issue to determine is under which law the societies should be formed. There would seem to be only one option, utilising one of two pathways.

In Myanmar, all private organisations or associations must be approved under the Law Relating Forming Organizations 1988 to function lawfully. This law prescribes the procedures and conditions for the establishment and operation of private organizations. Because of the absence of any traditionally recognised groups or units for the purpose of fisheries co-management, it follows that any such co-management groups established will need to comply with the Law Relating Forming Organizations.

Section 2 of the Law Relating Forming Organizations defines an organization very broadly to include “an association, society, union, party, committee, federation, group of associations, front, club and similar organization that is formed with a group of people for an objective or a programme either with or without a particular name”. Under Section 3, all organizations coming under the scope of the legislation are required to obtain permission from the Ministry of Home Affairs. Under Section 6, the penalty for non-compliance with the registration requirements is imprisonment for a term not exceeding five years.

It is understood that application for Registration under the Law Relating Forming Organizations may take over one year (in some cases more than 5 years) to be approved. To speed up the process of registration, an alternative pathway is to submit the applications through the Department of Fisheries, rather than direct application to the Ministry of Home Affairs. This procedure to utilise Department of Fisheries pathway is summarised below:

- Names and details of the groups established submitted to the Director-General of the Department of Fisheries;
- Director-General transmits details to the Regional/District /Township of the Department of Fisheries;
- Application is sent to the District Administration;
- From the District Administration, the application is sent to Regional Administration;
- Report submitted to the Chief Minister of the Region; and
- Application endorsed and submitted to the Minister of Home Affairs

## 5.6.2 Giving Legal Effect to the Co-management Associations

The second legal consideration is how to enable the co-management groups to function and interact with the fisheries resources. There are two options to consider, namely (a) revision of the *Freshwater Fisheries Law* and (b) use of Orders/Directives/Rules under the *Freshwater Fisheries Law*

### ***Revision of the Freshwater Fisheries Law***

As noted above, there are no provisions in the *Freshwater Fisheries Law* recognising co-management arrangements in Myanmar. One option is to revise or amend the *Freshwater Fisheries Law* by inserting appropriate principles recognising co-management groups and enabling their operations.

From discussions undertaken by the consultant with the Department of Fisheries during the Mission to Myanmar, it would appear that implementing co-management through formal revision or amendment of the *Freshwater Fisheries Law* will take some time as it will need support from the State and Regional Governments who are not currently actively engaged in the policy debate.

### ***Use of Procedures/Orders and Directives under the Freshwater Fisheries Law***

The *Freshwater Fisheries Law* is a framework law, leaving implementation details and procedures to be developed by the Ministry under Section 57. Given the likely delay in revising the *Freshwater Fisheries Law* to introduce co-management, a short to medium term approach would be to utilise Directives under Section 57 of the *Freshwater Fisheries Law* to implement co-management arrangements in the freshwater fisheries. This approach is consistent with the objectives of the law and the powers granted to the Director-General under the law and can be done without going through the complex and lengthy process of amending the *Freshwater Fisheries Law*. The legal reasoning to support the use of Directives to implement co-management arrangements is as follows:

- Section 3 of the *Freshwater Fisheries Law* outlines the objectives of the law as: (a) to further develop the fisheries; (b) to prevent the extinction of fish; (c) to safeguard and prevent the destruction of freshwater fisheries waters;(d) to obtain duties and fees payable to the State; and (e) to manage the fisheries and to take action in accordance with the law.
- Further, Section 22 of the *Freshwater Fisheries Law* outlines the duties of the Director General to include: (a) managing and supervising the fisheries in order to implement the objectives contained in Section 3; (b) determining the rates of licence fee according to the type of fishing implement; (c) determining the prohibited species of fish, size, fishing season, place, fishing implement and method of fishing; and (d) determining the duties and powers of the Officers-in -charge of the Department.
- The above provisions of the *Freshwater Fisheries Law* are supplemented by Article 69 of the Procedure issued under the *Freshwater Fisheries Law*.<sup>36</sup> Article 69 empowers the Director-General to, among other things, (a) promote fish stock production; to prevent destruction of the fisheries and promote fisheries management; to prevent habitat and environmental destruction and prevent pollution of the freshwater fisheries waters.

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<sup>36</sup> 1999 Procedure

- In summary, the combined effect of Sections 3 and 22 of the *Freshwater Fisheries Law* and Article 69 of the Procedure provide sufficient legal powers to the Director-General to implement co-management arrangements in the freshwater fisheries.

### **Content of Directives**

To expedite the process, it is important that the content of the Directive on co-management is drafted by the ESFSP Team, in consultation with the Department of Fisheries. At the time of writing this Report, a draft Co-Management Plan has been developed. At this stage, it would seem premature and counter-productive to develop a draft content of such Directives until the Co-management Plans is agreed. It is important to emphasise the point that any Directives to give effect to the Co-management Plans would need to be owned by the Department of Fisheries. It is therefore important that the content of the Co-management Plans and any Directives that give effect to them are thoroughly discussed with the Department from the start. The most that can be stated at this stage is to flag some of the key issues, based on the co-management legal checklist presented under 5.2 above, that need to be included in the Directive.

## **5.7 Suggested Approach**

Based on the evaluation above on co-management, the following Recommendations are being proposed for consideration.

### **5.7.1 Pilot Approach**

Given that co-management is completely new to managing fisheries in Myanmar, a cautious staged approach to its introduction is recommended. This staged approach will require that initially, the Village Societies established under the ESFSP be used on pilot basis, rather than a nation-wide introduction of the co-management approach. A demonstrated success of the pilot groups will promote the eventual national adoption over time.

### **5.7.2 Initial Implementation through Directives**

Given the likely delay in revising the *Freshwater Fisheries Law* to introduce co-management, it is recommended that:

- In the short to medium term Directives under Section 57 of the *Freshwater Fisheries Law* be utilised to implement co-management arrangements in the freshwater fisheries.
- To expedite the process, it will be crucial that the content of the Directive on co-management is drafted by the ESFSP Team, in consultation with the Department of Fisheries.
- The ESFSP Team would need to commence discussions with the Department of Fisheries as a matter of priority to start developing draft Directives to enable the establishment of co-management groups.

### **5.7.3 Staged Approach**

It is recommended that a cautious staged approach to the introduction of co-management be adopted, using the Village Societies established under the ESFSP rather than a nation-wide introduction of the co-management approach. A demonstrated success of the pilot groups will promote the eventual national adoption over time.

## 6 MONITORING, CONTROL AND SURVEILLANCE

The TOR also requires the review to: “Identify desirable modifications to the fisheries laws and regulations for improved monitoring, compliance and enforcement.”

### 6.1 Concept and Role of MCS

Effective monitoring, compliance and enforcement (MCS) measures are fundamental for the success of any fisheries management objectives. Traditionally, the term MCS has been associated with deterrence, principally law enforcement especially through boarding and inspections. Currently however, MCS is viewed differently and has two aspects: (i) preventative MCS; and (ii) deterrent MCS, both providing information to support the design and implementation of fisheries management plans. MCS is, thus, integral to higher level activities such as integrated fisheries management and the higher level resources management as a whole.

Following the definitions outlined by a review of the Food and Agriculture Organization (FAO) in 1994 MCS can be defined as follows:

- Monitoring – “the continuous requirement for the measurement of fishing effort characteristics and resource yield”
- Control – “the regulatory conditions under which the exploitation of the resources may be conducted”
- Surveillance – “the degree and types of observations required to maintain compliance with the regulatory controls imposed on fishing activities”.

In terms of best practice, FAO suggests States designing and implementing MCS in the 21<sup>st</sup> century should have a framework with key elements. The relevant elements

- A set of general principles to guide the MCS framework (examples of such general principles include: the relationship between costs and benefits; the balance between compliance and deterrence activities; the balance between technology and human resources; the balance between participatory and compulsory approaches; equity and transparency; absence of corruption in the MCS and enforcement process);
- A clear and enforceable legal framework;
- An institutional framework for co-ordinated and cohesive MCS operations;
- A clear set of operations and tools for planning and execution of the MCS;
- An information management framework;
- Comprehensive multi-level human resource training and development at all levels of the system;
- Periodic evaluation and analysis of the operation of the system.

### 6.2 MCS under the Freshwater Fisheries Law

The legal framework is by no means the only component of an effective MCS system, however it constitutes the control element in the definition of MCS. This control element establishes and agrees the regulatory conditions under which harvesting activity can proceed in accordance with the

productivity of the resources. It involves the specification of the terms and conditions under which resources can be harvested. These specifications are normally contained in national fisheries legislation. For maximum effect, legislation should clearly define the institutional framework within which MCS is implemented, the management measures being implemented and the requirements, prohibitions that will be enforced and sanctions to be imposed for non-compliance. Fundamentally, there should be a regular review and update of the legal framework.

### **6.2.1 The Institutional Framework**

The Department of Fisheries under the Ministry of Livestock Breeding and Fisheries is the primary agency responsible for the management and development of Myanmar's fisheries resources. However, the law does not assign any specific functions to the Department of Fisheries. Rather, all the functions are assigned to either the Minister responsible for Fisheries and the Director-General of the Department of Fisheries.

The main powers of the Minister include:

- Approving recommendations from the Director-General to grant a lease or a tender licence (sections 10 and 20(a));
- Suspending, revoking or cancelling any lease or tender licence (section 10(b));
- passing any other reasonable order (section 20(c));
- Granting exemptions to any fishery from any provision of the Law (section 21(a));
- determining the amount of refund which the Director General, State, Divisional or Township Zone Officer-in charge is entitled to make (section 21(b));
- Giving a decision on applications for refund of amounts which are beyond the pecuniary limit of the Director General and the State, Divisional or Township Zone Officer-in – charge (section 28); and
- Hearing appeals from the decisions of the Director-General concerning a lease or a tender licence to the value of over Kyatts 300,000 (section 32(d));

The day-to-day administration of the *Freshwater Fisheries Law* is entrusted to the Director General whose core functions are spelt out in sections 22, 23 and 24 of the law as follows:

- Managing and supervising the fisheries in order to implement the objectives contained in Section 3;
- Determining the rates of licence fee according to the type of fishing implement;
- Determining the prohibited species of fish, size, fishing season, place, fishing implement and method of fishing;
- Determining the duties and powers of the Officers-in -charge of the Department;
- Permitting payment by instalment of fishery rent in respect of leasable fisheries in remote areas and determining the instalment period and rates;
- Classifying, altering or cancelling fisheries waters in which a leasable fishery, reserved fishery or a fishery permitted to be operated under a licence is permitted;
- Directing the grant of lease to be continued with a limit on the term to a person who has purchased by auction any leasable fishery, if there is sufficient reason;
- Cancelling any lease or tender or licence which has been obtained in an improper manner;
- Confiscating, disposing of or administering fishing vessel, fishing implements, fish and other exhibits;

- Returning to the person who has obtained permission to operate the fishery or to the owner, on furnishing sufficient security, the fishing vessel and fishing implements or permitting the resumption of the operation;
- Permitting the person who has obtained permission to operate the fishery or the owner to redeem the fishing vessel and fishing implements on payment of appropriate fine; and
- Causing the proceeds of the sale and the fines to be deposited in the bank.

### **6.2.2 Compliance Framework**

Chapter 12 of the *Freshwater Fisheries Law* (sections 33-41) outlines the prohibited acts under the Law. These include:

- Operating a fishery without a lease, licence or permission (catching fish or causing mischief with explosive substance, poison, chemicals and dangerous material of a like nature; catching fish by a prohibited method and fishing implement; catching fish of a prohibited species and size; catching fish during a prohibited period and at a prohibited place).
- Failing to pay within the prescribed period fishery rent, tender fee, licence fee and fines due, without the permission of the Department, after purchasing by fishery auction or after being granted tender licence.
- Erecting, constructing place, maintaining any obstruction such as a dam, bank or weir in a freshwater fisheries waters without the permission of the Department.
- Violating any condition contained in a lease, tender licence or fishing implement licence by a person who has obtained permission to operate a fishery.
- Committing any of the following within the boundary of a fishery or fishery creek (cutting undergrowth or setting on fire habitat of fish; impairing the natural condition of a fishery so as to disrupt the flow of water in the main fishery).
- Cultivating agricultural crops within the boundary of a fishery creek.
- Harassment of fish and other aquatic organisms or pollution of the water in freshwater fisheries waters.
- Altering the quality of water, volume of water or the water-course in a leasable fishery, reserved fishery and creeks contiguous thereto or in water-courses.

Chapter 13 (sections 42-47) defines the corresponding penalties for violations of the Law. The following penalties in Box 2 below currently apply in accordance with Part XIII (Sections 42-47) of the *Freshwater Fisheries Law*.

## Box 2: Fisheries Penalties

| Offence   | Penalty   |
|---|---|
| Operating a fishery without licence   | 5000 Kyatts or maximum of 6 months imprisonment or both |
| Operating a fishery without a lease or tender   | 20000 Kyatts or maximum of 2 years imprisonment or both |
| Cutting undergrowth, setting fish habitat on fire, impairing the natural condition of a fishery which results in the disruption of flow of water in the fishery, cultivating agricultural crops within the boundary of a fishery creek, harassment of fish and other aquatic organisms, pollution of the fresh water fisheries waters, altering the quality of water, volume of water or the water course in a leasable fishery, reserved fishery and creeks contiguous thereto or in waters courses. | 1000 Kyatts or maximum of 1 year imprisonment or both.  |
| Violations of conditions attached to fishing implement licence  | 3000 Kyatts or maximum of 3 months imprisonment         |
| Violations of conditions attached to lease or tender licence  | 10000 Kyatts or maximum of 1 year imprisonment or both  |
| Use of explosives, chemicals and dangerous materials, catching fish by prohibited method or gear, catching prohibited species or size, catching fish during prohibited period or in a prohibited place  | 30000 Kyatts maximum of 3 years imprisonment or both.   |

### 6.3 Gaps in the Legal for MCS and Suggestions for improvement

A number of non-compliance issues are prevalent in the freshwater fisheries in Myanmar, evidenced by the continued use of illegal gears, mesh sizes and fishing techniques; fishing in restricted areas and reserves. The institutional response to this situation over the years has been the promulgation of a series of Notifications under the *Freshwater Fisheries Law*.<sup>37</sup> Some of these non-compliance problems would seem to be the result of gaps in the *Freshwater Fisheries Law* itself. Some of the key gaps are identified below, followed by some recommendations on how to remedy them.

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<sup>37</sup> Examples include: Use of Explosives (No. 4/2003); Fish smothering (No.4/2003); Electric short circuiting (No.1/2005); Toxic materials and substances (No.1/2005); Electric short circuiting by battery (No.10/2005); Prohibition on catching, killing, selling, buying, transporting, storing, possessing of fish migrating to spawn, fish larvae, female fish full of eggs during May-July (No.2/92).

### 6.3.1 Unregulated Fishing Implements

A major factor in the increase in non-compliance would appear to be the large number of unregulated fishing gears (implements) under the Freshwater Fisheries Law. As noted earlier, the Director-General has exempted 15 fishing implements from obtaining licenses under the *Freshwater Fisheries Law*.<sup>38</sup> It would appear that much of the non-compliance issues and certainly the root cause of the conflict between the *Freshwater Fisheries Law* and the *Forest Law*, is the result of the impact of these unregulated implements in the mangrove forests. To improve the compliance framework for the freshwater fisheries, consideration should be given to regulating these implements in one way or the other.

### 6.3.2 Level of Monetary Penalties

The penalties under the *Freshwater Fisheries Law* were instituted in 1991 and have not been reviewed in twenty years. As can be seen from Box 3 above, the monetary penalties under the law range from 1000 Kyats (12 United States Dollars in current value), to 5000 Kyats (60 United States Dollars). These monetary penalties are certainly out of date and require revision.

A complicating factor which makes it necessary to review the penalties is that judicial practice seems to have developed to compensate for the relatively low monetary fines by imposing both monetary and the maximum imprisonment term selectively. This has resulted in the combined fine and imprisonment becoming excessive in some cases, particularly given the fact that most of the offenders tend to be the very poor in the rural communities. This is compounded by the provision in Section 47 relating to repeat offenders which provides: "If a person convicted of any offence under this Law commits the same offence again, he shall be punished with twice the quantum of punishment prescribed." The proposal to introduce co-management arrangements in some parts of the freshwater fisheries will necessitate a reconsideration of the penalties under the *Freshwater Fisheries Law*.

### 6.3.3 Legal Institutional Framework

There is no institutional structure built into the *Freshwater Fisheries Law* to support MCS. The consequence of this is that there is lack of adequate human and technical resources devoted to MCS efforts such as community awareness MCS activities. Overall, effectiveness of legal system to handle fisheries issues will need to be improved. A dedicated element within the legal system for fisheries MCS and very familiar with the complexity of fish legislation will need to be considered. Fines imposed for violations of the law must reflect the severity of the impact of the infringement on resources, support voluntary compliance and act as a deterrence.

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<sup>38</sup> These include: These includes: Hand line (Let Htun), Pole and line (GineHtauk), Pole and line (Tai HtaungNgaHmyar), Long line (NgaHmyarTann), Floating line (Bu Hmaw), Portable Cast net (Let PyitCon), Man push net (Yin Toon), Lift net (GawPike), Small Fish trap (HmyoneNge), Large fish trap (HmyoneGyi), Drop door trap (Toke), Fishing with Luring leaf (Dasaung/Fat htoe), Fish Basket(Saung), Spear (Suu, Hmain), Artificial Fish Holes(Gote/Htoo)



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## Appendix 1: Summary of Fisheries Laws of Myanmar

### Law relating to Aquaculture (1989)

The Law relating to Aquaculture was promulgated on 7 September 1989. This law is divided into the following 10 chapters, with 39 sections.

Chapter 1 is on Title and Definition. The Law defines “*Fish*” to refer to “all aquatic organisms living the whole of or a part of their life cycles in the water; their eggs, larvae and fingerlings,” including “aquatic plants, their seedlings and seeds.” “*Fishery*” is defined as “carrying out operations relating to fishes for the purpose of systematic management, commercial production, conservation and for development” including “operations such as fishing, collecting, aquaculturing, exploration, research, stocking, propagation, processing, transporting, storing and marketing.” “*Aquaculture*” is defined as the propagation of fish species, breeding of fish through different stages of growth in natural or artificial waters by various breeding techniques.

Under the Law on Aquaculture, the definition of “*Fisheries Waters*” refers to “waters, pond, course, river, stream and lake which is of a permanent or *temporary nature* and in which fishes live and thrive.” There are two types of Fisheries Waters:

- (1) *Leased Fisheries Waters* which refers to fisheries waters situated within the areas leased by the Department under prescribed conditions for the fisheries enterprise;
- (2) *Reserved Fisheries Waters* which refers to fisheries waters in which the Department has permitted the fisheries enterprise with restrictions, in order to prevent the extinction of fish species and to propagate the same.

Under the Law, a *lease* is required to carry out aquaculture in aquaculture land, fisheries waters, or in reserved fisheries waters, and after obtaining a lease, a *licence* is required to carry out aquaculture. A *licence* is also required to hatch fish for sale or breed fish for display on a commercial scale. The application for lease and licence are made with the Department of Fisheries, which also prescribes the term of the lease or licence, and lease rent, licence fee and late fee.

People who carry on aquaculture “for personal consumption in a pond where water surface does not exceed 25 feet by 50 feet in dimension” are *exempt* from applying for a licence.

Chapter 3 is on the Payment of Duties and Fees. The holder of a lease or licence is required to pay lease rent or licence fee to the Department, except for the following operations:

- 1) aquaculture operations carried out by the Department, works of research relating to aquaculture or extended development works; and
- 2) works of research relating to aquaculture carried out with the approval of the Department.

Chapter 4 defines the powers of the Department and the Director General. The Department has the power to demarcate and reserve lands for aquaculture from agricultural and waste lands, which shall be administered as lands for aquaculture by the Department. The Director General has the power to issue an order permitting the *import and export of live fish*, which requires *prior approval* from the Department under Section 35.

The Department may *lease the lands for aquaculture for a period not exceeding ten years* at a time to persons desirous to breed fish under the following conditions:

- 1) at least 75% of the leased acreage shall be excavated and worked as acreage for fisheries ponds waters;
- 2) within 3 years of obtaining the lease, 50% of demarcated fisheries pond acreage shall be engaged in fisheries and the whole acreage of fisheries pond waters shall be engaged in aquaculture on the lapse of the 5-year term; otherwise acreage not excavated shall revert to the Department and the person shall have no right to claim for the refund of expenditure incurred on the land.

The Department may grant *a lease, not exceeding three years* at a time to a person desiring to use an aquaculture method other than the method for aquaculture by excavating ponds, in the following fisheries waters:

- 1) fisheries waters unconnected with any Government Department;
- 2) reserved fisheries waters.

For lands other than land for aquaculture, the Department may grant a *licence* subject to the following conditions:

- 1) obtaining an *exemption order* for purpose of aquaculture, under the Land Nationalization Act, 1952;
- 2) obtaining *consent*, for the purpose of aquaculture, from any Government department concerned other than the Department, or a person holding any lease; and
- 3) agreeing to abide by the conditions prescribed by the Department.

Chapter 5 provides the following grounds for the *cancellation* of a lease or license:

- 1) on the expiry of the term;
- 2) on being revoked; and
- 3) on surrendering the lease or the license to the Department when the fish breeder does not desire to continue his enterprise.

Chapter 5 also provides for the revocation of the lease or the license by the Department if on finding after investigation that the fish breeder has ceased to continue to engage in the aquaculture enterprise.

Chapter 6 pertains to the duties of the Inspector.

Chapter 7 on appeals allows the decision or order made by the Director General under sections 18, 19, 20 or 22 of this Law, to be appealed with the Minister within 30 days on receipt of such decision or order, whose decision shall be final.

Chapter 8 defines the prohibited acts under the Law relating to Aquaculture, as follows:

- 1) breeding of fish without licence;
- 2) obstructing navigation and flowing of water or polluting the water within the fisheries water or abetting such acts;

- 3) importing live fish into the country and exporting live fish out of the country, without the prior permission of the Department; and
- 4) breeding of fish prohibited by the Department.
- 5) Holders of a license are prohibited from contravening any conditions prescribed by the Department and from transferring the fisheries pond without the prior permission of the Department.

The penalty for committing any of the first four offences above (Section 29 of the Law) is a maximum fine of Kyats 10,000 or maximum imprisonment of 1 year or both. The penalty for committing the last offence above (Section 30 of the Law) is a maximum fine of Kyats 5,000 or maximum imprisonment of 6 months or both. In both instances, the penalty includes the confiscation of exhibits, fishes and fisheries ponds relating to the offence. Commission of the same offence after conviction is punishable with twice the penalties prescribed.

### **Law relating to the Fishing rights to Foreign Fishing Vessels (1989)**

The *Law relating to the Fishing rights to Foreign Fishing Vessels* was enacted on 2 April 1989 and amended on 25 October 1993. It explicitly repeals the *Act Granting the Right to Exploit Deep-Sea Fishing Areas of the Union of Burma* (1954). The Law is divided into 11 chapters, with 57 sections.

Chapter 1, Title and Definitions, is mainly devoted to the definition of the scope and the extent of the Act. The Law defines “*Burmese Fisheries Waters*” as referring to the “exclusive economic zone, territorial sea, offshore, inshore and all inland brackish waters and fresh waters.” A “*Fishing Vessel*” is defined as “a vessel engaged in fishing and craft in support of the same,” which is similar to the definition of fishing vessel in the *Freshwater Fisheries Law*, and *Marine Fisheries Law*.

The definition of a “*Foreign Fishing Vessel*” as “a vessel belonging to a foreigner and which is registered in any foreign country,” is similar to the definition contained in the *Marine Fisheries Law*.

The Law defines a “*Fish*” to refer to “all aquatic organisms living the whole of or a part of their life cycles in the water, their eggs, larvae, frys and fingerlings,” including “aquatic plants, their seedlings and seeds.” This definition is similar to the definition of “fish” in the *Freshwater Fisheries Law*, and *Marine Fisheries Law*.

The Law defines a “*Fishery*” “means carrying out operations relating to fishes for the person of systematic management, commercial production and for development,” including “operations such as fishing, aquaculturing, exploration, research, stocking, propagation, processing, transport, storing and marketing.” This definition is similar to the definition of “fishery” in the *Freshwater Fisheries Law*, and *Marine Fisheries Law*.

The Law defines a “*Fishing*” to refer to “catching, collection, attracting, pursuing, stupefying and killing of fish,” including “works in support of and preparatory to fishing operations,” which is similar to the definition of “fishing” in the *Freshwater Fisheries Law*, and *Marine Fisheries Law*.

Chapter 3 defines the rights and duties of an entrepreneur. The duties of an entrepreneur are as follows:

- to pay, in the prescribed foreign currency the licence fee, fresh fish duty, security deposit, registration fee, late fee, other payments due and other charges;
- to comply with the regulations, by-laws and directions prescribed by the Department;



- to obtain the permission of the Director-General if he desires to conduct research relating to fishery in Burmese fisheries waters;
- to provide necessary services free of charge to persons who have been assigned the duty of conducting research on a foreign fishing vessel by the Department, and to observers and trainees;
- to submit to the Department a list of the names of the fishermen and crew who are Burmese citizens if they have been appointed on a foreign fishing vessel;
- to abide by the existing laws of Burma.

An entrepreneur has the following rights:

- the right to appoint agent who is capable of taking charge of the fishery;
- in exceptional circumstances, the right to apply for special permission of the Director-General if desirous of operating a fishery in other Burmese fisheries waters;
- the right to apply for permission of the Director-General if desirous of purchasing within the country articles and equipments relating to the fishery;
- the right to apply for permission of the Director-General for loading, unloading, processing and transferring the fish within the country;
- the right to repair a foreign fishing vessel at any internal port;
- the right to appeal to the Minister against the decision or order of the Director-General.

Chapter 4 defines the powers and duties of the Director General, which include:

- 1) Issue a licence;
- 2) Amend the licence in consultation with the entrepreneur;
- 3) Suspend, revoke, terminate or cancel the licence for breach of any condition stipulated in the licence;
- 4) Suspend, revoke, terminate or cancel any licence, in the interest of the State, and with the approval of the Minister;
- 5) Grant permission upon application of an entrepreneur to:
  - a. purchase within the country articles and equipment relating to the fishery;
  - b. load, unload, process and transfer the fish within the country;
  - c. grant a fishery in other Burmese fisheries waters, in exceptional circumstances;
- 6) Confiscate, dispose and administer as may be deemed necessary of the foreign fishing vessel, fishing implements, fishes and other articles and money;
- 7) Return to the entrepreneur or the owner, on furnishing sufficient security, the foreign fishing vessel and fishing implements and permitting the resumption of the fishery;
- 8) Allow the entrepreneur or the owner to redeem the foreign fishing vessel and fishing implements on payment of proper penalty;
- 9) Cause the proceeds of the sale and penalties to be deposited in the bank;

If the fishery is not commenced even after the completion of 3 months from the date of issue of the licence, the Director-General may either revoke the licence, or re-issue the licence, if appropriate. Where an entrepreneur transfers to any other person the licence which has been issued to him, the Director-General may forfeit the security deposit, revoke the licence, or enter the entrepreneur's name in the black list. Grant permission, with the approval of the Minister to an entrepreneur or a person to conduct research in Burmese fisheries waters other than the EEZ.

Chapter 5 defines the duties and powers of the Inspector, which include the following:

- 1) inspecting fishing vessel and fishing implements, fishes, and fishery, within the area, assigned to him or anywhere within the Burmese fisheries waters specifically assigned by the Minister or the Director-General;
- 2) stopping, boarding, accompanying, inspecting and searching any fishing vessel in the Burmese fisheries waters without a warrant;
- 3) demanding, examining and copying the licence, registration certificate log-book and other papers which are kept on the foreign fishing vessel;
- 4) interrogating, and directing the Master, crew and fishermen as required;
- 5) seizing and taking action, in accordance with the procedure of any fishing vessel and materials found therein for contravening any provisions of this Law;
- 6) arresting and prosecuting any person who contravenes any provisions of this Law;
- 7) seizing any explosives, poison, chemicals and other things which are not permitted to be used in fishing;
- 8) bringing back into the Burmese fisheries waters after pursuing and seizing in accordance with the International Law, the foreign fishing vessel which contravenes any provisions of this Law;
- 9) depositing in the Bank the proceeds of the sale conducted in accordance with prescribed procedure of fishes and other material things which are subject to speedy decay;
- 10) other duties in connection with fishery, specially assigned by the Minister or the Director-General.

Chapter 6 enumerates the duties of the master of a foreign fishing vessel. Chapter 7 deals with the invalidity of licences. Chapter 8 deals with Appeals. It provides that the decision or order of the Director-General may be appealed to the Minister within 30 days of the receipt of such decision or order, who may confirm, set aside or alter the decision or order of the Director-General. The decision of the Minister shall be final.

Chapter 9 enumerates the prohibited acts under the Law, including:

- 1) foreign fishing vessel entering Burmese fisheries waters engaging in the fishery without a permit or a licence,.
- 2) foreign fishing vessel engaging in any of the following without a permission:
  - a. Loading, unloading, processing, and transferring of fish and fishing implements within the country;
  - b. Harassing, catching, killing, storing, transporting, processing, and transferring of fishes which the Department has prohibited;
  - c. Keeping on board the fishing vessel explosive substances, poisons, chemicals and other substances not permitted for use in fishing.
- 3) for the Master to fish in the fishing grounds, use fishing implements, and fish in the fishing period, unless permitted in the licence.
- 4) for a person to harass, assault, or hurt the Inspector while discharging his duties;
- 5) for a person to dispose of from aboard the fishing vessel living creatures or any material to cause pollution of the water media or to harass the fishes and other marine organisms;
- 6) for a person to conceal or without his permission, dispose of, fishes, fishing implement, other material or money, while the Inspector is examining any fishery.

Chapter 10 prescribes the corresponding penalties for specific offenses under the Law. Please note that Sections 38 to 44 of this Law have been replaced by Section 3 of *Law amending the Law relating to the Fishing Rights of Foreign Fishing Vessels (1993)*.

Chapter 11 contains miscellaneous provisions. The Law creates the presumption that a foreign fishing vessel is deemed to be engaged in fishing unless its fishing implements are stored in a prescribed manner while traversing the exclusive economic zone or in the waters not permitted in the licence.

### **Law Amending the Law relating to the Fishing Rights of Foreign Fishing Vessels (1993)**

This Law, promulgated on 25 October 1993, amends the *Law relating to the Fishing Rights of Foreign Fishing Vessels*. It consists of four Sections. Section 2 contains new Section 35 A, to be inserted under Section 35 of the Law, within Chapter IX, which sets out specific prohibitions.

The new Section 35A, prohibits a public servant exercising any of the duties and powers entrusted under the basic Law to commit any of the following acts:

- a. replacing another person for the offender or concealing the offender without taking any action;
- b. causing to disappear, altering by wrongful means, substituting or misusing an exhibit involved.

Section 3 of the present Law replaces Sections 38 to 44 of the basic Law, which set forth offences and establish related penalties to be applied.

| <b>Provision</b> | <b>Provision violated</b> | <b>Penalty</b>  |
|------------------|---------------------------|---|
| Section 38(a)    | Section 31                | For the Master, imprisonment for a term which may extend from a minimum of 5 years to a maximum of 10 years and shall also be liable to fine which may extend from a minimum of Kyatts 200,000 to a maximum of Kyats 500,000. In default of payment of the fine shall entail imprisonment for a term which may extend from a minimum of 1 year to a maximum of 3 years.           |
| Section 38(b)    | Section 31                | For a member of the crew, imprisonment for a term which may extend from a minimum of 3 years to a maximum of 7 years and shall also be liable to a fine which may extend from a minimum of Kyatts 20,000 to a maximum of Kyats 50,000. In default of payment of the fine shall entail imprisonment for a term which may extend from a minimum of 6 months to a maximum of 1 year. |
| Section 39(a)    | Section 32(a) or (b)      | For the Master, fine which may extend from a minimum of Kyatts 100,000 to a maximum of Kyatts 300,000. In default of payment of the fine shall entail imprisonment for a term which may extend from a minimum of 1 year to a maximum of 3 years.  |
| Section 39(b)    | Section 32 (c)            | For the Master, imprisonment for a term which may extend from a minimum of 5 years to a maximum of 10 years and shall also be liable  |

|            |                          |  |
|------------|--------------------------|--|
|            |                          | to a fine which may extend from a minimum of Kyatts 200,000 to a maximum of Kyatts 500,000. In default of payment of the fine shall entail imprisonment for a term which may extend from a minimum of 1 year to a maximum of 3 years.  |
| Section 40 | Section 33               | For the Master, imprisonment for a term which may extend from a minimum of 2 years to a maximum of 5 years and shall also be liable to a fine which may extend from a minimum of Kyatts 50,000 to a maximum of Kyatts 200,000. In default of payment of the fine shall entail imprisonment for a term which may extend from a minimum of 1 year to a maximum of 2 years. |
| Section 41 | Section 34               | For the Master, fine which may extend from a minimum of Kyatts 50,000 to maximum of Kyatts 100,000. In default of payment of the fine shall entail imprisonment for a term which may extend from a minimum of 1 year to a maximum of 2 years.  |
| Section 42 | Section 35 or Section 36 | Imprisonment for a term which may extend to 3 years and shall also be liable to a fine which may extend from a minimum of Kyatts 50,000 to a maximum of Kyatts 100,000. In default of payment of the fine shall entail imprisonment for a term which may extend from a minimum of 1 year to a maximum of 2 years.  |
| Section 43 | Section 35 A             | Any public servant, imprisonment for a term which may extend to 7 years and may also be liable to a fine. In addition, the exhibits involved in the offence shall be confiscated.  |
| Section 44 | Section 37               | Any person, imprisonment for a term which may extend to 3 years and shall also be liable to a fine which may extend from a minimum of Kyatts 30,000 to a maximum of Kyatts 50,000. In default of payment of the fine shall entail imprisonment for a term which may extend from a minimum of 6 months to a maximum of 1 year.  |

Section 4 of this Law adds Section 55 A to the basic Law, dealing with proceedings that may be instituted against any public servant under Section 43 of the basic Law. In such event, the prior sanction of the Ministry shall be required.

### **Myanmar Marine Fisheries Law (1990)**

The *Myanma Marine Fisheries Law* was promulgated on 5 April 1990, and it was amended by the *Law Amending the Myanmar Marine Fisheries Law (1993)* on 28 October 1993. The Law is divided into 13 chapters and has 61 sections.

Chapter 1, Title and Definitions, is mainly devoted to the definition of the scope and the extent of the Act. The Myanmar Marine Fisheries Law defines “Myanma Marine Fisheries Waters” as referring to “the waters along the sea coast of Myanmar from the high tide mark toward the open sea, the waters on the seaside of the straight line drawn from one extreme end of one bank to the extreme end of the other bank of the river and creek mouths, the waters from the said high tide mark to the end of the Exclusive Economic Zone.”

The Law defines a “Fish” to refer to “all aquatic organisms living the whole of or a part of their life cycles in the water, their eggs, larvae, frys and fingerlings,” including “aquatic plants, their seedlings and seeds.” This definition is similar to the definition of “fish” in the *Freshwater Fisheries Law*, and Law relating to the Fishing rights to Foreign Fishing Vessels.

The Myanmar Marine Fisheries Law defines “Fishery” as “carrying out operations relating to fish for the purpose of systematic management, production on a commercial scale, conservation and for development,” including “operations such as fishing, collecting, aquaculturing, exploring, research, stocking, propagating, processing, transporting, storing and marketing.” This definition is similar to the definition of “fishery” in *Freshwater Fisheries Law*, Law relating to Aquaculture, and the Law Relating to the Fishing rights to Foreign Fishing Vessels.

The Law defines “Fishing” as the “catching, collecting, attracting, pursuing, stupefying and killing of fish,” including “works in support of and preparatory to fishing operations.” This definition is similar to the definition of “fishing” in *Freshwater Fisheries Law*, and the Law Relating to the Fishing rights to Foreign Fishing Vessels.

The Law distinguishes between “Inshore Fishery” and “Offshore Fishery”, the former carried out “carried out in the inshore area along the Myanmar coast as determined by the Director General as inshore fishery area,” while the latter is “carried out in the Myanmar Marine Fisheries Waters as determined by the Director General as offshore fishery area.”

A “Fishing Vessel” is defined as “a vessel engaged in fishing and craft in support of the same,” which is similar to the definition of fishing vessel in the *Freshwater Fisheries Law*, and Law Relating to the Fishing rights to Foreign Fishing Vessels. The law distinguishes between a “Local Fishing Vessel” which is “a fishing vessel belonging to any citizen and which is registered in the country, and a “Foreign Fishing Vessel” which is “a vessel belonging to a foreigner which is registered in any foreign country.” This definition is consistent with the Law Relating to the Fishing rights to Foreign Fishing Vessels.

The Law defines “Marine Products” to refer to “fishes obtained from the sea, aquatic organisms, their excreta, scales, bones, skins, *plants*, non-living things. This expression also includes marine turtle and eggs, crocodile and eggs, crab, ambergris, oyster shell, clam shell, mussel, coral, sea sponge, sea weed, moss, algae etc.”

Chapter 2, Applications for Licence, distinguishes between the following types of licences:

- licence for inshore fishery,
- licence for offshore fishery,
- licence for collecting marine products for sale,
- licence for commercial scale sport fishing, and
- licence for fishing under the Myanmar Foreign Investment Law or under joint venture.

Chapter 3 deals with payment of duties and fines. Chapter 4 is on the registration of fishing vessels carrying out offshore fishing and the registration to work as a fisherman. Chapter 5 sets down the rules in the determination of fishing grounds. It states that preferences shall be given to citizens in the fishing grounds located between the baselines and the coast, as declared in the territorial sea and Maritime Zones Law. Beyond the baselines, fishing rights shall be granted and fishing grounds determined for foreign fishing.

Chapter 6 focuses on the duties and rights of the licence holder.

Chapter 7 regulates the powers of the Fisheries Department and the Director-General. Among the powers of the Director General include:

- 1) Determine the following:
  - a. type of fishery, volume of business and duties and fees;
  - b. method of catching fish, period of fishing, species of fish permitted to catch, size of fish, fishing implement and fishing grounds;
  - c. licence conditions.
- 2) issue conditions, prohibitions, orders, and directives relating to fishery, for the purpose of carrying out the fishery systematically, for the conservation and protection of the fish;
- 3) Suspend, revoke, terminate or cancel any licence if there is reasonable ground or if it is necessary in the interest of the State. Revise the conditions and fishing grounds originally determined.
- 4) Notwithstanding anything contained in the existing laws, the Director General may, where action is taken for violation of any provisions of this Law, act as follows:
  - a. confiscating, disposing and administering as may be necessary the fishing vessel, fishing implement, fishes and other articles and money;
  - b. returning the fishing vessel or implement and permitting resumption of the operation, on the licence holder or the owner furnishing sufficient security;
  - c. allowing the licence holder or owner to redeem the fishing vessel and fishing implement, on payment of reasonable fine;
  - d. causing the proceeds of sale under sub-section a and the fines to be deposited in the bank.
- 5) Determine the duties and fees payable by the licence holder for both citizens foreigner;
- 6) Delegate his powers conferred under this Law, to any officer of the Department or any Officer-in-charge of the Department.

Chapter 8 defines the rights and duties of the Inspector in Section 30, as follows:

- inspecting the fishing vessel and fishing implement, fish and fishery within the area assigned to him, or anywhere within the Myanmar Marine Fisheries Waters specifically assigned by the Director General;
- stopping, boarding, accompanying, inspecting and searching any fishing vessel in the Myanma Marine Fisheries Waters without a warrant;
- requisitioning, examining and taking copies of the licence, registration certificate, ship's log-book and other papers required to be kept on the fishing vessel;
- interrogating, directing the master, crew and fishermen as may be necessary;
- in the case of violations of any of the prohibitions under this Law seizing the fishing vessel and materials found therein;
- arresting and prosecuting any person who violates any of the provisions of this Law;
- seizing explosive substances, poison, chemicals, and other things not permitted to be used in fishing;
- depositing in the bank after the proceeds of the sale of the fish and other things seized which are subject to speedy decay;

- while discharging his duties soliciting and taking the assistance of the People's Police Force, whenever required;
- carrying out duties, specifically assigned from time to time by the Director General relating to fishery.

Chapter 9 sets out the duties of the Master of the fishing vessel. Chapter 10 sets out the rules for appeals.

Chapter 11 lists down prohibited acts under the law, as follows:

- 1) No person shall without a licence, engage in offshore fishery;
- 2) The holder of the licence shall not violate any of the conditions contained in the licence.
- 3) The holder of the licence shall not transfer his licence.
- 4) No person shall engage in the industry with the licence obtained by way of transfer under section 36.
- 5) No person shall keep on board the fishing vessel, explosive substances, poisons, chemicals and such other dangerous substances not permitted for use in fishing.
- 6) No person shall dispose of living aquatic creatures or any material into the Myanmar Marine Fisheries Waters to cause pollution of water or to harass fishes and other marine organisms.
- 7) No person shall search for and collect any marine products without a licence.
- 8) No person shall establish a fishery on commercial scale for sport fishing in the Myanmar Marine Fisheries Waters without a licence.
- 9) No person shall harass, assault the Inspector while discharging his duties.
- 10) No person shall serve as fisherman on board a fishing vessel registered under this Law, without registering in the Department.

Chapter 12 covers Sections 44 to 50, prescribes the offences and corresponding penalties, which have been amended by *Law Amending the Myanmar Marine Fisheries Law (1993)*.

### **Law Amending the Myanmar Marine Fisheries Law (1993)**

This law, enacted on 28 October 1993, amends and supplements certain provisions of the *Marine Fisheries Law (1990)*. The Law inserted a new Section 42A and Section 59A to the *Marine Fisheries Law (1990)*. Section 42A, prohibits a public servant exercising any of the duties and powers conferred under the Law to commit any of the following:

- 1) replacing another person for the offender or concealing the offender without taking any action;
- 2) causing to disappear, altering by wrongful means, substituting or misusing an exhibit involved in an offence.

Section 59A provides that the prior sanction of the Ministry is required to institute legal proceedings against any public servant under Section 49.

This law also substituted new Sections 44 to 49 to the Myanmar Marine Fisheries Law, which mainly concern the prohibitions as well as offences and related penalties.

## Appendix 2: Summary of other Laws that Impact on the Freshwater Fisheries Law

### Forest Law (1992)

The *Forest Law* enacted on 3 November 1992, explicitly repeals the old *Forest Act of 1902*. The *Forest Law* is divided into 13 chapters, and has 58 sections. The *Forest Law* articulates a balanced approach of sustainable forestry through the utilization of forest resources to develop the economy by contributing towards the “food, clothing and shelter needs of the public” as well as the “fuel requirement of the country,” whilst emphasising environmental conservation. The *Forest Law* mentions that conservation of forests is to be carried out simultaneously with the “establishment of forest plantations” and “in accordance with international agreements.”

The Ministry of Forestry has promulgated the *Myanmar Forest Policy (1995)*, *Myanmar Forest Rules (1995)*, *Forest Working Plans (1996)* and *National Forestry Action Plan (1995)* to implement the *Forest Law*. In order to promote community participation in forest management and assist in reforestation efforts, the Forestry Department issued *Community Forestry Instruction (1995)*.

There are three categories of forests under the *Forest Law*:

- 1) Reserved Forests
- 2) Protected Public Forest
- 3) Un-classed Forests

In Myanmar, all three categories of forests belong to the State. The only forest areas not under State ownership are community forests owned by the local people with long-term lease permission from the Government.

There are five categories of reserved forests under the *Forest Law*:

- 1) commercial reserved forest
- 2) local supply reserved forest
- 3) watershed or catchment protection reserved forest
- 4) environment and bio-diversity conservation reserved forest
- 5) other categories of reserved forest.

Under the *Forest Law*, the Minister may, with the approval of the Government, declare as protected public forest outside reserved forests for the purpose of *conserving mangrove forests*.

Chapter 4 of the *Forest Law* specifies the functions and responsibilities of the Forest Department. The Forest Department implements the forestry policy and the plans of the Government relating to conservation of water, soil, biodiversity and environment. It manages forest lands, administers the Forestry Institute, inventories forest resources and carries out forest research.

The Director-General of the Forest Department, under Section 10 of Chapter 4, is tasked to draw two plans to carry out the forest and conservation work of the Department: (1) plan relating to the forest sector; and (2) plan relating to forest administration.



Under the *Forest Law*, the following requirements apply on “on forest land and forest covered land at the disposal of the Government”:

- 1) For “carrying out any development work or economic scheme” – “prior approval of the Forestry Ministry;
- 2) For “carrying out educational or research work or conducting a training course or a study” -- prior sanction of the Director-General or the Forest Officer empowered by him.

Chapter 5 covers the establishment of forest plantations. There are five kinds of forest plantation under the *Forest Law*: (1) commercial plantation; (2) industrial plantation; (3) environmental conservation plantation; (4) local supply plantation; and (5) village firewood plantation. The law allows for any person or organization to carry out cultivation and maintenance of forest plantations including entering into joint ventures; except for village-owned firewood plantations, which are to be cultivated by the villagers for their use.

Chapter 6 deals with the permit required for the extraction of forest produce. The general rule is that extraction of forest produce requires a permit from the Forest Department, except “if it is for domestic or agricultural or piscatorial use not on a commercial scale,” which may be conducted without a permit but the forest produce extracted must not exceed the stipulated quantity.

The permit for the extraction of forest produce is done through a system of competitive bidding if the extraction is on a commercial scale, except in the following instances:

- 1) where extraction of forest produce and sales in and outside the country are carried out as a State-owned enterprise;
- 2) where the Minister is empowered by the Government in respect of the extraction of forest produce;
- 3) where minor forest produce is permitted to be extracted on a commercial scale;
- 4) where forest produce to be used in the following works not on a commercial scale is permitted to be extracted for research and educational work or for work beneficial to the public or religious work.

The period for the permit for the extraction of forest produce on commercial scale, may extend for 1 year, when granted by the State/Divisional Forest Officer; from over 2 years to 4 year, when granted by the Director-General; and for a period of 5 years and above, when granted by the Minister. Permits may be extended for not for not more than 6 months at a time and not more than twice.

Chapter 7 covers the removal of forest produce, from one township to another within the country, which needs a *removal pass* from the Forest Officer empowered by the Director-General for this purpose, except in the following cases:

- 1) moving forest produce within the area permitted for extraction thereof;
- 2) moving minor forest produce not exceeding the prescribed quantity and not on a commercial scale; and
- 3) moving from one township to another in a City Development area.

The *Forest Law* requires that a person moving forest produce shall carry the removal pass together with him, and submit to the examination and assessment of royalty at the relevant revenue-station.

Chapter 8 and 9, deal with Disposal of Drift, Stranded and Waif Timber, and Establishment of Wood-Based Industry, respectively.

Chapter 10 prescribes the rules with respect to the search, arrest, seizure and disposal of exhibits, in relation to administrative actions instituted for violating provisions of the *Forest Law*. Section 34 covers violation of permits to extract forest produce while Section 35 covers movement of forest produce without removal pass.

Chapter 11 defines the procedures for appeal, as follows:

- 1) An order or decision of the Township Forest Officer may be appealed to the relevant District Forest Officer or State/Divisional Forest Officer within 30 days from the date of such order or decision;
- 2) An order or decision of the District Forest Officer or the State/Divisional Forest Officer may be appealed to the Director-General within 60 days from the date of such order or decision;
- 3) An order or decision of a Forest Settlement Officer or the Director-General may be appealed to the Minister within 60 days from the date of such order or decision, whose decision shall be final and conclusive.

Chapter 12 outlines the offences and penalties under the *Forest Law*. Some of the offenses under the Law, relevant for purposes of this Report, include:

- 1) causing damage to a water-course, poisoning the water, using chemicals or explosives in the water in a reserved forest;
- 2) catching animals, hunting or fishing in a reserved forest;
- 3) moving forest produce without submitting to examination at the revenue station;
- 4) extracting, moving, keeping in possession unlawfully any forest produce, except timber from teak and reserved tree, without a permit;
- 5) selling or utilizing non-commercial forest produce extracted for research and educational work or work beneficial to the public or religious work, without the prior permission of the person authorized to grant permission for extraction.

The penalty for the first three acts above, is payment of maximum fine of Kyats 5,000 or maximum imprisonment of 6 months, or both. The penalty for the last two acts, is payment of maximum fine of Kyats 10,000 or maximum imprisonment of 1 year, or both.

The *Forest Law* in Sections 45 and 46, also covers the offenses and penalties for violations of the law by any forest staff.

Chapter 13 covers miscellaneous provisions. Section 49 gives the Minister the power to “reduce, waive or exempt from payment of any royalty due,” in respect of:

- 1) forest produce permitted to be extracted under this Law; and
- 2) forest produce extracted for research and educational work or work beneficial to the public or religious work.

The *Forest Law* recognises reserved forests existing under the Forest Act (1902), which are also “deemed to be reserved forests constituted under this Law.” The same is true for rules, notifications, directives and circulars issued under the Forest Act (1902) which continue to be applicable under the

*Forest Law* in so far they are not inconsistent with the new Law and before the issuance of rules, procedures, notifications and directives under the new Law.

### **Wildlife and Conservation of Natural Areas Law (1994)**

The Wildlife and Conservation of Natural Areas Law is divided into 12 chapters, and composed of 48 sections. The Law specifically repeals the *Wild Life Protection Act (1936)*, which superseded the *Burma Wildlife Protection Act (1927)*.

The Law was promulgated in response to the country's obligations under the World Heritage Convention and the Convention on Biological Diversity, to which Myanmar is a State party. Myanmar is also a party to the Ramsar Convention on Wetlands, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). One of the objectives of the Wildlife and Conservation of Natural Areas Law is to carry out the country's obligations under international conventions with respect to the protection and conservation of wildlife, ecosystems and migratory birds.

The Law implements the Government's policies on protection of wildlife and conservation of natural areas. The Law seeks to protect endangered species of wildlife and their natural habitats by establishing zoological and botanical gardens.

Chapter 1 covers the Title and Definition. The Law defines "wildlife" as "wild animals and wild plants in their natural habitats." The Law's definition of "wild animals" includes "naturally bred animals, birds, insects, *aquatic animals* and their spawns, larvae, frys and seeds in their natural habitats."

Chapter 3 is on the formation, composition and duties and functions of the Committee for Protection of Wildlife and of Natural Areas.

There are seven (7) categories of natural areas under the Law, as follows:

- 1) Scientific Reserve
- 2) National Park
- 3) Marine National Park
- 4) Nature Reserve
- 5) Wildlife Sanctuary
- 6) Geo-physically Significant Reserve
- 7) Other Nature Reserve determined by the Minister

Among the functions and duties of the Forestry Department under the Law, include the "preservation of naturally bred creatures, their *habitats of coral reefs*, planktons, moss and algae and *wildlife breeding and inhabiting along the coast, in deltaic areas and their habitats* within the *Marine National park*, in order that they may exist in their natural state.

The Law gives the Director General, with the approval of the Minister, the following powers with respect to protected wildlife:

- 1) determine and declare endangered species of wild animal
- 2) determine and declare the endangered species of wild plants and their nature habitats thereof
- 3) lay down and carry out measures for the preservation of protected wildlife species

- 4) co-ordinate with the relevant department or organization if the wildlife which are to be determined for protection are under the administration of another Government department or Government organization.

The three (3) categories of endangered species of wild animals under the Law, determine their level of protection:

- 1) completely protected species of wild animals
- 2) normally protected species of wild animals
- 3) seasonally protected species of wild animals

The Director General may, with the approval of the Minister, issue two kinds of permits with respect to protected wildlife for purposes of scientific research:

- 1) permit for capture and possession of completely protected wild animals; and
- 2) permit for extraction, transportation and possession of protected wild plants.

The Law also gives the Director General the following powers, with respect to normally protected and seasonally protected wild animals:

- 1) declare the species of wild animal which can be raised on commercial basis, by issuing a permit for capture, farming or transfer.
- 2) allow them to be raised “as a hobby and as a traditional custom” by stipulating conditions;
- 3) recommend, with the approval of the Minister, for their export.

The Forest Officer assigned by the Director General may permit removal or transportation from one township to another of wild animal which is permitted to be hunted or to be raised on commercial basis or any part thereof.

Chapter on 6 on Hunting, gives the Director General the power to grant a *hunting licence*, by stipulating terms and conditions to a hunter to hunt wild animals except for wild animals inhabiting within a natural area and protected wild animals.

Chapter 7 covers the right to establish Zoological and Botanical Gardens. Chapter 8 is on the registration requirements for persons who possess as a souvenir or wearing as a traditional custom any part of a completely protected animal, before the Law comes into force, except if such was inherited under a traditional custom from a registered person.

Chapter 9 is on Taking Administrative Action. It lists the prohibited acts and corresponding penalties for prohibited acts within a natural area or within the zoological garden or botanical garden administered by the Government or towards which the Government has subscribed share capital.

The law gives a Forest Officer the power to pass an administrative order causing a fine which may extend to Kyats 10,000 to be paid, on a person who kills, hunts, wounds or raises a seasonally protected wild animal without permission during the close season; and to confiscate the products of a natural area or of the zoological garden or botanical garden which is administered by the Government or towards which the Government has subscribed share capital, and to dispose the confiscated products in the manner prescribed.

Chapter 10 on appeal provides that an administrative order passed by a Forest Officer may be appealed to the Director General within 30 days from the date of such order, whose decision shall be final and conclusive.

Chapter 11 defines the offenses and penalties under the Law. There are three categories of offenses and penalties under the Law, grouped according to seriousness of the offense and the severity of penalty imposed. The first category, which carries the penalty of imprisonment of up to 3 years or a maximum fine of Kyats 10,000 or both, covers the following acts:

- 1) hunting without a licence;
- 2) violation of any condition of the hunting licence;
- 3) raising without permission, for commercial purpose normally protected wild animals and seasonally protected wild animals;
- 4) causing water and air pollution, causing damage to a water-course or putting poison in the water in a natural area;
- 5) possessing or disposing of pollutants or mineral pollutants in a natural area; and
- 6) establishing and operating a zoological garden or a botanical garden without a licence.

The second category, which carries the penalty of imprisonment of up to 5 years or a maximum fine of Kyats 30,000 or both, covers the following acts:

- 1) killing, hunting or wounding a normally protected wild animal or seasonally protected wild animal without permission, possessing, selling, transporting or transferring such wild animal or any part thereof without permission;
- 2) extracting, collecting or destroying in any manner any kind of protected wild plants within the prescribed area without permission;
- 3) destroying ecosystem or any natural state in the natural area;
- 4) altering, removing, destroying or obliterating without permission. any boundary mark of a natural area or any boundary mark of a zoological garden or botanical garden administered by the Government or in which the Government has subscribed share capital.

The final category, which carries the penalty of imprisonment of up to 7 years or a maximum fine of Kyats 50,000 or both, covers the following acts:

- 1) killing, hunting or wounding a completely protected wild animal without permission, possessing, selling, transporting or transferring such wild animal or any part thereof without permission;
- 2) exporting without the recommendation of the Director General a completely protected wild animal or a protected wild plant or any part thereof.

In addition to the above penalties, the Convicting Court shall, in respect of any legal proceeding instituted under this Law, order the following:

- 1) order for the *payment of compensation* to the Forest Department for the value of the loss and damage caused by the offender;
- 2) *confiscate the wild animal, wild plants and parts thereof* involved in the commission of the offence and hand over the same to the Forest Department; and
- 3) order for the *confiscation of vehicles/ vessels, animals and other machinery and implements involved in the commission of the offence.*

Chapter 12 covers miscellaneous provisions. The Law recognises wildlife sanctuaries which have been declared under the *Wild Life Protection Act (1936)*, which are deemed to be wildlife sanctuaries determined as a natural area under this Law. The same is true for rules, notifications, orders, directives and circulars issued under the *Wild Life Protection Act (1936)*, which continue to be applicable under the Wildlife and Conservation of Natural Areas Law in so far they are not inconsistent with the new Law and before the issuance of rules, procedures, notifications and directives under the new Law.

## Appendix 3: Terms of Reference of the review

Under the general guidance of the FAO Representative in Myanmar, the technical oversight of the LTO of the FAO Regional Office for Asia and the Pacific (RAP), the direct supervision of the Chief Technical Advisor (ESFSP), the direct technical supervision of Chief, Development Law Service (LEGN), in close collaboration with ESFSP fisheries specialists, the incumbent will assist the Department of Fisheries (DOF) of the Ministry of Livestock and Fisheries in assessing the need of revising existing laws and regulations relevant to fisheries and will in particular:

- Identify ambiguities, contradictions, gaps, etc., in the existing fisheries laws and regulations with particular reference to the *Freshwater Fisheries Law*
- Identify necessary and desirable modifications to the existing fisheries laws and regulations in view of the enhanced autonomy of the Regions under the new Constitution
- Identify contradictions or ambiguities between the fisheries laws and regulations on one hand and those of environment, wildfire, forestry, etc., on the other
- Identify desirable modifications to the fisheries laws and regulations for enhanced participation of resource users in the management of the resources (co-management)
- Identify desirable modifications to the fisheries laws and regulations for improved monitoring, compliance and enforcement
- Make specific recommendations for improved legislation, with draft text as far as possible, on the basis of shortcomings and desirable improvements identified and discussions with authorities concerned
- Perform other related duties as requested by the CTA of the ESFSP.

Following discussions with the ESFSP staff and officials in the Department of Fisheries during the mission, it became necessary to clarify two aspects of the above TOR. The first relates to the scope of legislation to be reviewed; and the second relates to the requirement to provide draft provisions of legislation as far as possible.

### Scope of legislation to be reviewed

The TOR calls for a review of the fisheries laws of Myanmar with particular reference on the *Freshwater Fisheries Law*. In all six pieces of laws constitute the Myanmar fisheries laws. These are:

- Law relating to the Fishing Rights of Foreign Fishing 1989;
- Law amending the law relating to the Fishing Rights of foreign Fishing Vessels 1993;
- Law relating to Aquaculture 1989;
- Myanmar Marine Fisheries Law 1990;
- Law amending the Myanmar Marine Fisheries Law 1993;
- *Freshwater Fisheries Law* 1991;

The scope of the TOR needs to be seen in the context of the overall objectives of the programme. Following discussions with the ESFSP staff and the Department of Fisheries during the mission, it was agreed that the Report should focus on freshwater fisheries, particularly the relationship between the *Freshwater Fisheries Law* 1991 and its interactions and overlaps with other sectoral legislation, especially the *Forest Law* and the *Protection of Wildlife and Conservation of Natural Areas Law* 1994. According, this Report will not analyse the Law Relating to Fishing Rights of Foreign Fishing Vessels 1989 and its amendments, the Law Relating to Aquaculture 1989 and the Myanmar Marine Fisheries

Law 1990, beyond a summary of these laws as part of the general picture on fisheries management in Myanmar. Additionally, in terms of interaction with other laws, it was agreed that the Report should focus specifically on the *Forest Law* and the Protection of Wildlife and Conservation of Natural Areas Law 1994 primarily because these are two main areas where problems are being encountered.

### **Drafting of Legislative Provisions**

The TOR also calls for draft provisions to be provided where appropriate. Following discussions with ESFSP staff and senior officials at the Department of Fisheries during the mission, it became clear that many of the issues identified in the Report, particularly in relation to overlaps between the *Freshwater Fisheries Law* on one hand and the *Forest Law* and the Protection of Wildlife and Conservation of Natural Areas Law on the other hand have been around for a long time and remain sensitive issues. Some of the issues require high level policy resolution in the first instance before they are reflected in legislation. Accordingly, it was considered that a better approach to the Report will be to identify broad areas and issues that require reconsideration rather than provide prescriptive drafts at this stage. It also became apparent that some of the required legislative changes, from the narrow perspective of the *Freshwater Fisheries Law* can be implemented through existing legal mechanism (such as Orders and Procedures) under the *Freshwater Fisheries Law*, rather than through legislative amendment. In some cases, legislative amendment may be the long term goal, however such an approach will need to be undertaken progressively and conscious of the sensitivities surrounding the issues. The issues covered in this Report, should, therefore, be seen as work-in-progress. The approach taken in this Report is consistent with the discussion and understandings noted above. The Report has generally refrained from providing prescriptive draft text of legislation. Rather, necessary elements that will need to be reflected in legislation are identified.



## Appendix 4: Persons Met

### FAO Representation Myanmar

Mr. Giuseppe Romalli, FAOR ad interim and CTA of the Environmentally Food Security Programme (ESFSP)

Dr. Maung Mar, National Programme Coordinator, ESFSP

U Maung Maung Lwin, Project Manager GCP/MYA/010/ITA

Mr. Mr. H.L Mulepaty, Operation Specialist, ESFSP

U Kaung Myat Zaw, Water Field Assistant, ESFSP

U Thiha Swe, Information Specialist, ESFSP

U Nay Myo, M&E Specialist, ESFSP

Dr. Oswin Stanley, Integrated Mangrove Specialist, TCP/MYA/3204

### Department of Fisheries

U Kyaw Myo Win, Deputy Director General, Department of Fisheries (DOF)

U Khin Maung Win, Director , Revenue and Supervision Division (DOF)

U Tun Win, Director, Aquaculture Division (DOF)

U Khin Maung Soe, Deputy Director, Research and Development Division (DOF)

U Mya Than Htun, Assistant Director, Research and Development Division (DOF)

U Nyunt Win, Asst Director, International Relationship & Planning Section (DOF)

U Htun Thiha, Fisheries Legal Officer (DOF)

### Stakeholder Seminar (4/11/2011)

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