

FOREST TRENDS COMMENTS ON MYANMAR DRAFT FOREST RULES (2019) REGARDING CUSTOMARY LAND RIGHTS

FOREST POLICY TRADE AND FINANCE INITIATIVE | AUGUST 2019

By **Gabrielle Kissinger**

In May, 2019, the Myanmar Ministry of Natural Resources and Environmental Conservation (MONREC) released its Forest Law Draft Rules which elaborate on how the Forest Law of 2018¹ will be implemented. The MONREC Forest Department (FD) is conducting state and regional publication consultations in Summer and Fall 2019 before proceeding to national-level public consultations by September 2019, with all revisions expected to be completed by the end of 2019.

This brief summarizes Forest Trends' analysis and comments on key aspects of customary land rights under the current Draft Forest Law of 2019.² A review of the Rules from the perspective of sustainable forest management, timber legality, forest sector governance, oversight and accountability, and regulation of forest products would be a useful addition. Though necessary, these are outside the scope of this review.



An unstable basis for rulemaking

The management of Myanmar's forests should be based on a clear regulatory framework. This starts with the Policy, which sets broad objectives. The Law, passed by Parliament, should set the legal requirements to ensure the policy objectives are met. Rules are developed by the Ministry to ensure that the law is implemented, such as to regulate, prohibit, require or authorize particular activities, and set sanctions for non-compliance with the rules. Many countries strive for Rules to be as minimal as possible, and they are often developed based on a risk assessment regarding impediments to implementation. Thus, the Forest Rules must flow from the Forest Law of 2018, and in that regard, there are clear limits to the changes that could be made to the Rules at this time, without first amending the Forest Law of 2018.

Yet Forest Trends notes that the revised Forest Law of 2018 and thus the subsequent Draft Rules of 2019 conflict with the objectives of the National Land Use Policy of 2016 (NLUP) and the National Ceasefire Agreement (NCA) of 2015 and related Interim Arrangements. Additionally, they conflict with the



¹ Myanmar's 1994 Forest Law was amended in September 2018.

² Corresponding mostly to Chapter III of the new Forest Law and corresponding Chapter II of draft Rules (on Constitution of Reserved Forest and Declaration of Protected Public Forest) and other related Chapters. Outside the scope of this review are changes to Chapter IV (on Management of Forest Affairs/ Forest Management), and Chapters VII to XIV, which cover everything from removal of forest produce, to timber marking, fines and administrative procedures.

efforts to define how land and environmental issues in ethnic areas will be a part of the Union Peace Dialogue. The NLUP recognizes customary rights to land, and seeks to define processes for resolving conflicts at district levels. The NCA forbids forcible land confiscation in favor of land tenure security (§9). The Forest Law of 2018 does not address either. Thus, there are risks in proceeding with implementation of the Forest Law, and any subsequent Rules, if they are at odds with the NLUP and NCA.

Ideally, the drafting of the Land Use Law, intended to promulgate the NLUP, and currently in the hands of the Attorney General and President's Office, will provide a basis for revising all laws related to land—and forests—to be in accordance with the both the NLUP and the Land Law, as well as the terms of the NCA.

Three Points of Analysis with Recommendations

1. Alignment with NCA on community rights to land and decision-making

The Draft Rules are written as though they pertain to all areas within Myanmar, including ethnic areas, and there is no distinction made between NCA and non-NCA areas. Additionally, concerns raised in the revision of the Farmland Law and Vacant, Fallow, Virgin Land Law in 2018 are similarly applicable in the context of the Forest Law and related Rules. Among these concerns is that pursuing land designations and decision-making that does not recognize local community rights to land and decision-making runs counter to recognition of customary land rights, and the spirit of the NCA and the NLUP. Political parties under the United Nationalities Alliance have called for the formal recognition and protection of customary land tenure rights and related local customary land management practices of ethnic groups, whether or not existing land use is registered, recorded, or mapped (United Nationalities Alliance and its Partner Organizations, 2018). The Karen National Union (KNU) determined that the VFV Law violated the initial ceasefire between the government and the KNU in 2012, as well as the NCA (Thar, 2018).

● **RECOMMENDATION 1A** *Clearly state that the Rules do not apply to NCA areas, because Union Government Ministries intend to uphold NCA commitments, both in the interim arrangements and NCA meeting decisions, as well as bilateral ceasefire agreements mentioned in the NCA.*

The NCA states that the Union government shall coordinate with signatory Ethnic Armed Organizations on environmental conservation and in preserving and promoting ethnic culture. Should there be projects that have impacts on civilians living in ceasefire areas, planning shall be undertaken with communities in accordance with EITI standard procedures and coordinated with the relevant EAO (Article 25 in Chapter 6 of NCA). In accordance with this, Decision 25 provides clear instructions on the interpretation of the interim arrangements, explaining that they, “will include coordination on land and resources management as proposed by the EAOs.” This means that land management is included in the implementation of the NCA's interim arrangements and should not be acted on unilaterally by the government in ways that conflict with existing ethnic nationality administrations or interests (Gelbort, 2018).

2. Burden of Proof on Demonstrating Customary Land Rights in non-NCA Areas

For non-NCA areas, the burden of proof criteria for demonstrating customary land rights, and the ability of communities to provide input during the processes of constituting a reserved forest or declaring a protected public forest (referred to as Section 6 in the Forest Law) are areas that deserves critical attention.

The Draft Rules describe procedures for MONREC and the General Administration Department to designate or de-gazette Reserved Forest (RF) and Protected Public Forest (PPF). The steps place all burden of proof and diligence requirements on the local community, and within short timeframes. These timeframes are especially short in rural areas where historically, communities, households, and local administrative offices have had low understanding and capacity with official registration processes and paperwork, and some may still be in conflict or contain Internally Displaced People (IDPs). The Draft Rules do not define a process for how customary rights can be recognized prior to determinations on RF and PPF areas. Furthermore, the Rules state that if claims are not brought forward within the limited timeframes given in the Rules, it shall be assumed that there are no grievances or rights that need to be considered, which further disadvantages people, such as IDPs.

- **RECOMMENDATION 2A** *The make-up of the Scrutiny Body must be refined.*

At a minimum, the Scrutiny Body must include representatives from affected local communities, which should have equal voice as experts and GAD representatives (e.g. half of the maximum people allowed on the Scrutiny Body). Ideally, this would provide an adequate means for recognition of customary land tenure and rights.

- **RECOMMENDATION 2B** *The function, access to information, and power of the Scrutiny Body or Working Group is important.*

These should follow general FPIC ‘good practice’³ which includes adequate time to consult, and whether adequate consultation occurred. Currently, the Rules define 30 to 90 days for most major decisions. But this risks decisions being made to meet time commitments, rather than focusing on the quality of the decision, and whether adequate consultation occurred. This is untenable from a FPIC perspective.

Forest Trends recommends that the Ministry begin a process of information dissemination and selection of the Scrutiny Body at least 10 to 12 months out from any ruling. There must be time to assemble the Scrutiny Body, with fair timelines to post it publicly. Second, the process should reflect more reasonable timelines. While it may be more realistic to roll back timelines from 30 to 90 days to 90 to 180 days,⁴ the preferred approach would be to define, in the Rules, what criteria must be met before a decision can be made.

- **RECOMMENDATION 2C** *A Scrutiny Body or Working Group should also be established for any new designation of forest plantations, and private plantations, not just for Reserved Forest and Protected Public Forest.*

³ For an easy reference, see: <http://whatis.fpic.info/>

⁴ Such as in the following (Section 7a on page 4), “...forest settlement officer shall, within (90) days after his appointment, issue a declaration to claim if there is any grievances in the extraction right of forest-produce and land use right of the local people of the area where the reserved forest will be constituted. The persons desirous to claim right shall submit, claim within (180) days after the issue of the declaration.”

3. A more holistic approach to forest law reform

There are several issues that are not well defined in the Law itself, and thus Rules and Regulations (which must flow from the Policy and Law) are inherently limited.

- **RECOMMENDATION 3A** *Consider creating separate Rules, such that the Forest Rules of 2019 only cover one aspect of the Forest Law, while further consultation informs the next set of Rules.*

A solution in the meantime, until the Land Law is developed, may be for UGoM to officially accept that rather than producing one set of Rules for the entire Forest Law, that this Instruction is only to provide Rules to cover one aspect of the Forest Law, such as issues related to forest management, timber marking, removal of forest produce, fines, and administrative procedures. Thus, it may be possible to put issues pertaining to RF and PPF expansion, community forest, and public and private plantation expansion (all issues that have to do with customary and community rights), into separate Rule[s]. This would allow for the Rules to be written in a much more clear and coherent way.

- **RECOMMENDATION 3B** *Consideration should be given to keeping the Rules simpler (so there is clear direction given to the statutory decision-makers).*

It would be beneficial to create separate “instructions” to accompany the Rules that provide a more detailed explanation. Thus, less detail can be held in the Rules (but more specifics on the management objectives are necessary), and a separate set of Instructions can be defined later, after further public consultation.

References

Gelbort, J., 2018. Implementation of Burma’s Vacant, Fallow and Virgin Land Management Law: At Odds with the Nationwide Ceasefire Agreement and Peace Negotiations. Transnational Institute Commentary, found at: <https://www.tni.org/en/article/implementation-of-burmas-vacant-fallow-and-virgin-land-management-law>

Republic of the Union of Myanmar, 2016. National Land Use Policy.

Republic of the Union of Myanmar and Ethnic Armed Organizations, 2015. The Nationwide Ceasefire Agreement Between the Government of the Republic of the Union of Myanmar and the Ethnic Armed Organizations (15 October 2015)", available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/MM_151510_NCAAgreement.pdf

Thar, C., 2018. Armed ethnic KNU criticizes land law amendment. Myanmar Times, 17 December, 2018. Available at: <https://www.mmmtimes.com/news/armed-ethnic-knu-criticises-land-law-amendment.html>

United Nationalities Alliance and its Partner Organizations, 2018. “Joint Statement of the United Nationalities Alliance (UNA) and its Sister Organizations on the Vacant, Fallow & Virgin Land Management Law” (November 2018), available at: <https://www.facebook.com/UnitedNationalitiesAlliance/posts/1135254689975656>



With support from:



This document is funded by the Joint Peace Fund. The views expressed herein should not be taken, in any way, to reflect the official opinion of the Joint Peace Fund, and the Joint Peace Fund is not responsible for any use that may be made of the information it contains.