



# Legal Feasibility Analysis on Establishment of Biodiversity Trust Fund in Myanmar

24 August 2018

**ဇီဝမျိုးစုံမျိုးကွဲထိန်းသိမ်းရေးဆိုင်ရာရံပုံငွေတည်ထောင်ခြင်းဆိုင်ရာ  
ဥပဒေအကြံပြုချက်များ (အကျဉ်းချုပ်)**

၁။ ဇီဝမျိုးစုံမျိုးကွဲထိန်းသိမ်းရေးဆိုင်ရာရံပုံငွေ Biodiversity Trust Fund တည်ထောင်ရေးနှင့် ပတ်သက်၍ မြန်မာနိုင်ငံ၏ တည်ဆဲဥပဒေများအရ ဖြစ်နိုင်သော နည်းလမ်းများ၊ ပြည်တွင်း၌သာမက ပြည်ပတွင်လည်း ရံပုံငွေ/အဖွဲ့အစည်းတည်ထောင်ပြီး လှူဒါန်းငွေများအား လက်ခံနိုင်ရန်အတွက် အသင့်တော်ဆုံး နည်းလမ်းများကို ဥပဒေအကြံပေးရန် သားငှက်ထိန်းသိမ်းရေး အဖွဲ့ (WCS)က Baker and McKenzie Law Firm သို့ လုပ်ငန်းအပ်နှံခဲ့ပါသည်။ ယင်းတို့ထံမှ ဥပဒေအကြံပေးစာမူကြမ်းကို (Memo) ၂၄-၅-၂၀၁၈တွင် ကနဦး ပေးပို့လာပါသည်။ ယင်းကနဦး အကြံပေးချက် (၇ ) ချက်ပါဝင်ခဲ့ပါသည်။ ယင်းတို့ အနက် အလားအလာမရှိ သော (၃) ချက် ကို ပယ်လျက် အလားအလာရှိ သော (၄ ချက်)ကို အချက်အလက် ပိုမို ပြည့်စုံမှုရှိစေရေးအတွက် ပြန်လည် ပြင်ဆင်၊ ဖြည့်စွက် ရေးသားပေးရန် WCS မှ ပြောကြားခဲ့ရာ ၂၇-၆-၂၀၁၈ တွင် ပြင်ဆင်ရေးသား ထားသည့် အကြံပြုချက်များကို ပြန်လည် ပေးပို့လာပါသည်။

၂။ Baker and McKenzie Law Firm မှ ဇီဝမျိုးစုံမျိုးကွဲထိန်းသိမ်းရေးဆိုင်ရာ ရံပုံငွေ တည်ထောင်ခြင်းအတွက် ဥပဒေအကြံပြုချက်တွင် ဖော်ပြထားသည့် ဖြစ်နိုင်ချေရှိသော နည်းလမ်း (၄) မျိုး ပါဝင်ခဲ့ရာ ယင်းတို့ မှာ -

- (က) အာမခံချက်များဖြင့် ကန့်သတ်ထားသော ကုမ္ပဏီ (Company limited by guarantee)
- (ခ) မြန်မာပြည်တွင်း အစိုးရ မဟုတ် သော အဖွဲ့ အစည်း တည်ထောင်ခြင်း (Myanmar NGO)
- (ဂ) မှတ်ပုံတင်ထားသော ရံပုံငွေကို တတိယနိုင်ငံတစ်ခုတွင် တည်ထောင်ခြင်း (Registered Trust in Third Party Country) နှင့်
- (ဃ) ယုံကြည်အပ်နှံရေး ရံပုံငွေ/ဥပဒေအရ တည်ထောင်သော ရံပုံငွေ (Trust/Legislative Trust)

၃။ အာမခံများဖြင့် ကန့်သတ်ထားသောကုမ္ပဏီ (Company limited by guarantee) တစ်နည်းဆိုသော် အမြတ်အစွန်းအတွက် ဆောင်ရွက်ခြင်း မဟုတ်သော ကုမ္ပဏီ (Not for Profit Co.,) နည်းလမ်းကို ရွေးချယ်မည်ဆိုပါက ၁-၈-၂၀၁၈ တွင် စတင်အာဏာ သက်ဝင်ခဲ့သည့် မြန်မာနိုင်ငံကုမ္ပဏီများ ဥပဒေ(Myanmar Companies Law)အသစ်အရ တည်ထောင် ခွင့်ရှိပါသည်။ ထိုကုမ္ပဏီမျိုးကို တည်ထောင်မည်ဆိုပါက အားသာချက်မှာ ရင်းနှီးမြုပ်နှံမှုနှင့် ကုမ္ပဏီများ ညွှန်ကြားမှုဦးစီးဌာန (DICA)က ၂၀၁၈ ခုနှစ်၊ ဩဂုတ်လ (၁)ရက်နေ့မှ စတင် အသုံးပြုခဲ့သည့် နိုင်ငံတကာအဆင့်မီ Electronic Registry ကို အသုံးပြု နိုင်မည် ဖြစ်ပြီး ကုမ္ပဏီဆိုင်ရာ အချက်အလက်များကို သိရှိနိုင်ရန် စီစဉ်ဆောင်ရွက်ထားသဖြင့် ပွင့်လင်းမြင်သာ မှုရှိသည့်အတွက် နိုင်ငံတကာမှ အလှူရှင်များအနေဖြင့် ယုံကြည် စိတ်ချမှုရှိပါလိမ့်မည်။ DICA ၏ ၉-၇-၂၀၁၈တွင် ထုတ်ပြန်သော အမိန့်ကြော်ငြာစာအမှတ် ၅၈/၂၀၁၈အရ စီးပွားရေး အသင်း/အာမခံ များဖြင့် ကန့်သတ်ထားသောကုမ္ပဏီကို ပြည်ထောင်စုအဆင့်တွင် ဖွဲ့စည်းပါက အမှုဆောင် ဒါရိုက်တာ အဖွဲ့တွင် ပြည်နယ်နှင့် တိုင်းဒေသကြီး (၇)ခုထက် မနည်းသော ကိုယ်စားလှယ်များသည် အမှုဆောင်

ဒါရိုက်တာအဖြစ် ပါဝင်နိုင်သည် (သို့မဟုတ်) အမှုဆောင် ဒါရိုက်တာ အများစုသည်လည်း နိုင်ငံခြား သားများ ဖြစ်ခွင့်ရှိသည်။ WCS မှ စုံစမ်းချက်များအရ UMFCCI ကဲ့သို့ အခိုင်အမာ တည်ထောင်ထား သည့် အသင်းကြီးများပင် စီးပွားရေးအသင်း/ အာမခံများဖြင့် ကန့်သတ်ထားသောကုမ္ပဏီအဖြစ် DICA တွင် မှတ်ပုံတင်ရန် ဆောင်ရွက်လျက်ရှိကြောင်း သိရှိရ ပါသည်။

၄။ မြန်မာပြည်အတွင်း အစိုးရမဟုတ်သော အဖွဲ့အစည်း တည်ထောင်ခြင်း (Myanmar NGO) နည်းလမ်းကို ရွေးချယ်မည်ဆိုပါက အားသာချက်မှာ သစ်တောဦးစီးဌာန၏ ကူညီပံ့ပိုးမှုဖြင့် ဆောင်ရွက်ပါက ဆောလျင်စွာ တည်ထောင်နိုင်မည်ဖြစ်ပါသည်။ သို့ရာတွင် ခိုင်မာမှုနှင့် ပတ်သက်၍ အလှူရှင်များ အနေဖြင့် ယုံကြည်စိတ်ချမှု အားနည်းနိုင်ပါသည်။ ဤနည်းလမ်းကို ရေတိုကာလ အနေဖြင့် အသုံးပြုနိုင်ပါသည်။ နိုင်ငံတကာနှင့်ပြည်တွင်းအလှူရှင်များ၏ ယုံကြည်စိတ်ချမှု ရရှိနိုင် စေရန်အတွက် သီးခြားဥပဒေပြဋ္ဌာန်းလျက် ရံပုံငွေတည်ထောင်ခြင်း (Legislative Trust) နည်းလမ်းသည် အခိုင်မာဆုံးဖြစ်ပြီး အခြားသောနိုင်ငံများ (ဥပမာ မာဒါဂစကာနိုင်ငံ) တွင် ဆောင်ရွက် လျက် ရှိပါသည်။ ဤနည်းလမ်းကို အသုံးပြုရန် ဥပဒေ သီးခြား ရေးဆွဲရမည်ဖြစ်သဖြင့် အချိန် ယူရန် လိုအပ်သော်လည်း ရေရှည်ကာလအနေဖြင့် အသုံးပြုနိုင်ပါ သည်။

၅။ မှတ်ပုံတင်ထားသော ရံပုံငွေကို တတိယနိုင်ငံတစ်ခုတွင် တည်ထောင်ခြင်း နည်းလမ်း (Registered Trust in Third Party Country) ကို ရွေးချယ် မည်ဆိုပါက သင့်လျော်သည့်နိုင်ငံကို ရွေးချယ်တည်ထောင်နိုင်ပြီး မြန်မာနိုင်ငံတွင်း၌လည်း လုပ်ငန်းများ ဆောင်ရွက်ရန် အဖွဲ့အစည်း/ကုမ္ပဏီ ရှိရန် လိုမည်ဖြစ်ပါသည်။

၆။ ယုံကြည်အပ်နှံရေး ရံပုံငွေ (Trust Fund) နည်းလမ်းကို ရွေးချယ်မည်ဆိုပါက တည်ဆဲဥပဒေ များ ဖြစ်သည့် ၁၈၈၂ ခုနှစ် ယုံကြည်အပ်နှံရေး အက်ဥပဒေ၊ ၁၉၂၀ ခုနှစ် လှူဒါန်းခြင်းနှင့် ဘာသာရေး ရံပုံငွေများဆိုင်ရာ အက်ဥပဒေ၊ ၁၈၇၂ ခုနှစ် ပဋိညာဉ် အက်ဥပဒေများအရ မြန်မာနိုင်ငံ တွင် ယုံကြည်အပ်နှံရေး ရံပုံငွေ (Trust Fund) တည်ထောင်ရန် လွယ်ကူပါသည်။ ပဋိညာဉ် (စာချုပ်) သာ လိုအပ်ပါသည်။ သို့သော် ပဋိညာဉ်(စာချုပ်)တစ်ခုကိုသာ အားထား၍ တည်ထောင် ခြင်းဖြစ်ပြီး ယင်းနှင့် ပတ်သက်သည့် တည်ဆဲဥပဒေများမှာလည်း ခေတ်နှင့် လျော်ညီခြင်းမရှိသောကြောင့် ခိုင်မာမှု အားနည်းပါးသည်။

### Summary of Legal Feasibility on Establishment of Biodiversity Trust Fund

1. The Government of Myanmar, led by the Forest Department, had requested technical support from the Wildlife Conservation Society to establish an independent conservation trust fund that can support sustainable financing for biodiversity conservation. For this purpose, WCS sought the legal expertise of Baker and McKenzie (Myanmar Office), to explore potential legal options for establishing a Conservation Trust Fund in the country, registered either in Myanmar under appropriate statutes or registered outside the country, following Trust Law in another country but established to operate within Myanmar to meet identified conservation objectives.
2. A first (draft) memo was delivered to WCS by Baker and McKenzie on May 24, 2018 including 7 options among which after deliberation, the four most likely options were identified and WCS requested the Baker and McKenzie Myanmar Office to elaborate more on the four most likely options and a second memo was delivered on June 27, 2018. The four identified options are as follows:-
  - (a) Company Limited by guarantee (Not for profit company)
  - (b) Myanmar NGO
  - (c) Registered Trust in Third Part Country
  - (d) Trust/Legislative Trust
3. **Option one:** Company Limited by guarantee (Not for Profit company) is a new concept in Myanmar now available under the new Myanmar companies Law, 2017 which came into effect on August 1, 2018. Directorate of Investment and Company Administration (DICA) also commenced the use of an electronic registry from August 1, 2018 introducing an unprecedented, transparent and efficient modern system for corporate Governance. According to the new Myanmar companies Law, Business Associations/companies limited by guarantee may also register at DICA. It is learnt that well established and prominent business associations such as UMFCCI is also in the process of registering with this new system. According to DICA's Notification 58/2018 of July 9, 2018 Business Associations/ Company Limited by guarantee formed at the Union level, shall form Board of directors with representatives from at least 7 States and Regions (or) with a majority of Foreign Directors on the BOD, which is also a new concept introduced by the new Myanmar companies Law.
4. **Option two:** Establishing a Myanmar NGO, with the support of Forest Department could be a fast solution which could be used as a temporary solution. However a Myanmar NGO could not have a Foreign director (in the case of the Biodiversity Trust fund a donor) on the Executive Board.
5. A most recommended option was the Legislative Trust where the Trust would be established by a separate legislation and internationally, many well known Biodiversity Trusts have chosen this option i.e. Madagascar. However, the process of drafting and passing the legislation will need a certain amount of time, therefore this option could be paired with a more quicker temporary solution.

6. **Option three:** Registered Trust in Third Party Country is Establishing the fund outside Myanmar is possible, but will rely primarily on the regulations of the third party jurisdictions, but this will depend on the jurisdiction of choice. For actual activity in Myanmar, it would still require an entity to be present in Myanmar.
7. **The fourth option** is establishing a Trust Fund under the prevailing Trust Laws in Myanmar i.e. The Trusts Act, the Official Trustees Act. These Laws have not been part of the legislative reforms yet. As a trust is created by contract it will be important to draft an extensive and clearly worded trust deed if this option was chosen. The trust deed itself will be the primary instrument governing the operation of the trust. Trusts are currently not widely used in practice and there is no recent case law relating to the disbursement of trust property in the event of a dispute or insolvency of the trustee. Therefore there is some uncertainty around this option.

## Wildlife Conservation Society - Myanmar Structuring Options Update (July 2018)

Option		Previous comments	WCS requests	Final comments
<p><b>Company limited by guarantee</b></p> <p>The Companies Law 2017 allows for the establishment of companies limited by guarantee, but it is uncertain if any tax advantages can be gained from this structure.</p>	<p><b>Potential</b></p>	<p>Currently, it is not possible to establish a company limited by guarantee under the Companies Act 1914. However, upon implementation of the Companies Law 2017, companies limited by guarantee will be permitted.</p> <p>Companies limited by guarantee are a new legal concept in Myanmar, and the tax authority will not be familiar with the concept. While companies limited by guarantee are typically used for non-profit purposes in other countries, they will likely be subject to taxation as private limited companies in Myanmar.</p> <p>Companies limited by guarantee can establish offshore investment funds with the approval of the Central Bank of Myanmar.</p>	<p>Could you provide additional information in relation to TOR 3. Identify options to ensure that the funding entering the country and disbursed to entities in the country can be done so without the burden of taxes, the possible permissions it would need (i.e. Central Bank of Myanmar, Myanmar Taxation Department) and if it were not possible to be totally tax free, what taxes and the tax rates that could incur.</p>	<p>To the extent that funds are injected into the entity as working capital, they will not be immediately taxable. Tax will arise if:</p> <ul style="list-style-type: none"> <li>the WCS entity provides goods or services to another entity in Myanmar, which will result in corporate tax on the income generated, as well as commercial tax on the goods or services (although that will generally be passed through to the customer). The corporate tax rate is 25% on income; or</li> <li>the entity provides goods, services or licenses offshore, or receives goods, services or licenses from offshore (in which case withholding tax will be payable at various limits).</li> </ul> <p>The relevant tax rates will also depend on the jurisdiction of the shareholder holding company. Some jurisdictions, including Singapore and Thailand, have favourable investment treaties which result in lower (or no) tax liability on the injected capital for the entity.</p> <p>Tax liability may be offset if the entity is established in one of the Special Economic Zones, or if it holds a</p>

Option		Previous comments	WCS requests	Final comments
				<p>Myanmar Investment Commission Permit or Endorsement. It is unlikely that WCS will be entitled to obtain a Permit, however, the possibility remains to obtain an Endorsement which would entitled the entity (in certain circumstances) to tax reductions (in certain sectors). Please note that tax incentives are usually given for investments in underprivileged areas of Myanmar, or in areas where the Myanmar government is promoting investment.</p> <p>Relevantly, projects which require environmental or social impact assessments, or any project which "impacts the rights of 100 people", will be required to obtain a MIC Permit. We consider it possible that some WCS projects may trigger these thresholds.</p> <p>We can explain this process in greater detail if you are interested in pursuing this option.</p>
<p><b>Myanmar non-governmental organization</b></p> <p>Establishment of a wholly local non governmental organization may be the fastest, and simplest method of establishing a vehicle for funding</p>	<p><b>Potential</b></p>	<p>The establishment of a local non-governmental organization in Myanmar is quick, however it must be operated by Myanmar nationals, giving WCS limited oversight or control of the entity. These entities are given tax-exempt status on donations received and used for "donation purposes". While "donation purposes" is not defined, it is generally understood to mean</p>	<p>Could you provide additional information in relation to TOR 3. Identify options to ensure that the funding entering the country and disbursed to entities in the country can be done so without</p>	<p>As noted in our previous advice, only investments receive and used for "donation purposes" (ie, charitable purposes) will be tax exempt.</p> <p>To the extent that the NGO engages in for-profit activities, our response would be identical to that for a company limited by guarantee (including the potential tax avoidance mechanisms).</p>

Option		Previous comments	WCS requests	Final comments
protected areas in Myanmar.		<p>charitable activities. If the local non governmental organization generates income through for-profit activities, that income will be subject to tax.</p> <p>A Myanmar non-governmental organization can, in theory, establish an offshore investment fund with the approval of the Central Bank of Myanmar. However, this is untested, and it is unknown if such approval could be obtained.</p>	<p>the burden of taxes, the possible permissions it would need (i.e. Central Bank of Myanmar, Myanmar Taxation Department) and if it were not possible to be totally tax free, what taxes and the tax rates that could incur.</p>	<p>We do not consider that there would be any impediment to including an international consultant on the board of the NGO, however, this will likely be an advisory role rather than a formal voting position. We would need to explore the exact requirements of this set up under the new Myanmar Companies Law 2017 with the DICA post 1 August 2018.</p>
<p><b>Registered trust in a third party country</b></p> <p>Establishment of a trust in another jurisdiction, eg, Singapore, which would then make investment contributions into Myanmar.</p>	<b>Potential</b>	New option.	<p>The creation of a registered trust in a third-party country is of interest. Could you please provide additional information in relation to TOR 2. Undertake an analysis to determine an approach whereby the Fund would be created in a different country in the region where existing trust law permits such institutions to be</p>	<p>Establishing the fund outside Myanmar is possible, but will rely primarily on the regulation of the third party jurisdiction. We can provide advice in relation to the other jurisdiction, but this will depend on WCS' jurisdiction of choice.</p> <p>The actual investment activity in Myanmar would still require an entity present in Myanmar (ie, one of the other options that we have outlined previously). For the offshore trust to have control over the activities of the Myanmar entity, the trust would need to either have a shareholding (for a company) or an interest (for a trust or NGO, although as noted above an offshore entity can only have limited control over a local NGO) in the Myanmar entity.</p>



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			<p>created (e.g. Singapore). Identify the approach that would need to be taken to establish the Fund outside Myanmar while also creating a legal entity in the country to receive the Funds from the endowment and from donors to finance conservation. Identify how this would best be structured.</p>	<p>The offshore trust and local NGO would, however, work well to the extent that the purpose of the offshore trust is to make charitable donations for the purposes of social or environmental investment in Myanmar.</p>
<p><b>Trust / Legislative Trust</b></p> <p>The establishment of a trust is a simple process in Myanmar, and is generally a matter of contract.</p> <p>Establishing a legislative trust will likely provide the most robust mechanism by which to fund the</p>	<p><b>Likely</b></p>	<p>The establishment of a trust in Myanmar requires that the parties enter into a deed of trust, the trust property be transferred to the trust, and that the deed of trust be registered at the Registration of Deeds Office.</p> <p>A pre-established offshore investment fund could be transferred to a trust in Myanmar.</p> <p>The establishment of a legislative trust will provide the most robust mechanism for funding the conservation of protected areas.</p>	<p>There is too little information for either of these options to make any decisions. Additional information on examples previously discussed like the Shwedagon Trust inc. and the Daw Khin Kyi Foundation as well as the existing laws related to these types of organizations</p>	<p>As stated previously, there is relatively little complication in establishing a trust in Myanmar. Trust law in Myanmar is governed primarily by the terms of:</p> <ul style="list-style-type: none"> <li>• the Trust Act 1882 (<b>Trust Act</b>);</li> <li>• the Charitable and Religious Trusts Act 1920; and</li> <li>• the Contract Act 1872 (<b>Contract Act</b>).</li> </ul> <p>Myanmar trust law is primarily derived from the English common law at the time that the Trust Act was implemented. As such, establishing a trust in</p>

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conservation of protected areas.		<p>This mechanism could confer tax exempt status upon the trust.</p> <p>A legislative trust could be permitted to establish an offshore investment fund, if the legislation so provides. There is precedent for this in Myanmar.</p>	<p>would be of great interest. We would also request additional information in relation to TOR 3 Identify options to ensure that the funding entering the country and disbursed to entities in the country can be done so without the burden of taxes, the possible permissions it would need (i.e. Central Bank of Myanmar, Myanmar Taxation Department) and if it were not possible to be totally tax free, what taxes and the tax rates that could incur. And TOR 4 In developing the options paper, make recommendations consistent with the goal of maintaining the independence of the</p>	<p>Myanmar is very similar to establishing a trust in any common law jurisdiction.</p> <p>A trust can be created by any person competent to contract under Myanmar law for any lawful purpose. The purpose of a trust is lawful unless it is:</p> <ul style="list-style-type: none"> <li>• forbidden by law; or</li> <li>• is of such a nature that, if permitted, it would defeat the provisions of any law; or</li> <li>• is fraudulent; or</li> <li>• involves or implies injury to the person or property of another; or</li> <li>• the Court regards it as immoral or opposed to public policy.</li> </ul> <p>A trust is created when the author of the trust indicates with reasonable certainty by any words or acts:</p> <ul style="list-style-type: none"> <li>• an intention on his part to create thereby a trust;</li> <li>• the purpose of the trust;</li> <li>• the beneficiary of the trust; and</li> </ul>

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			<p>CTF, and its ability to operate effectively in Myanmar. For example, to maintain an independent board of trustees with the potential for a minority government membership, and/or potential for non-Myanmar nationals or representatives of international groups to be part of the board. The options should identify opportunities, challenges and any institutional risks for the various proposed alternatives.</p>	<ul style="list-style-type: none"> <li>the trust property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee.</li> </ul> <p>Notwithstanding that trusts are recognised under Myanmar law, they are not widely used in practice and there is no recent case law relating to the disbursement of trust property in the event of a dispute or insolvency of the trustee. As such, there is some uncertainty around precisely how the court may treat a trust, and in particular trust property, in the event of a default by the trust or the trustee.</p> <p>In order to maintain the independence of the trust, it will be important to draft an extensive and clearly worded trust deed. As a trust is a creature of contract, the trust deed itself will be the primary instrument governing the operation of the trust. Effective management of the trust will be delegated to the board of trustees, who will be responsible for co-ordinating the day-to-day activities of the trust, but will do so in accordance with the terms of the trust deed. As such, much of the governance aspects and restrictions that WCS wishes to impose on the trust to ensure its good governance and proper functioning will need to be thoroughly considered in the terms of the trust deed.</p>

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				<p>There are no specific tax regulations which relate only to trusts in Myanmar. Again, to the extent that the trust engages in for profit activities, it will be captured by all regulations relating to taxation of for profit activity in Myanmar.</p> <p>We agree that the establishment of a legislative trust is likely to be the most administratively onerous of the options available to WCS. We have, however, advised that it is the most robust mechanism for funding WCS projects in Myanmar for the following reasons:</p> <ul style="list-style-type: none"> <li>• once the trust is established, there are clear legislative rules around its operation which are not easily able to be amended;</li> <li>• by its very nature, a legislative trust ensures some level of government buy-in, as it requires government support and involvement from the beginning, meaning that it is likely to have the greatest impact; and</li> <li>• it provides clarity over a standard trust as there is existing precedent for legislative trusts in Myanmar, while basic trust law itself is not significantly developed (to the extent of</li> </ul>

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				other common law jurisdictions such as Singapore).